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FINANCIAL REFORM'S INTERNATIONALISM

David Zaring[*]

ABSTRACT

Financial reform has rebalanced the power of international engagement, reducing the role of the President and his diplomats, and increasing that of Congress and independent agencies. In so doing, the reforms have readjusted a balance that many believe was skewed by the government's response to the financial crisis. The international policy of financial reform has doctrinal implications as well: Congress has supplemented traditional international law with an endorsement of international regulatory cooperation. Because of this supplementation, the things that customary international law used to do—in particular enabling international cooperation and creating innovation in human rights—are now being done by financial regulators wielding the power of informal agreements. The privileging of regulatory cooperation, and the entry into human rights through financial regulation, is evidenced by the so-called Conflict Minerals and Resource Extraction Rules that Congress has directed the Securities and Exchange Commission to promulgate.

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INTRODUCTION

Financial reform has driven many changes in American governance, and it was compelled in turn, in President Obama's view, by an inability, before and during the financial crisis, to respond to "the speed, scope, and sophistication of a 21st century global economy."[1]

So while the recalibration of financial regulation has contained multitudes—in 2010, a supercommittee of federal officials was established to monitor the financial sector,[2] a financial consumer protection agency was created,[3] and banks were precluded from trying to make money in the capital markets on their own accounts,[4] among many other regulatory efforts[5]—its potentially most dramatic reform may prove to be the American government's cautious, but wide-ranging, embrace of a reformed global regime to regulate international finance.

The regime moves the equilibrium of the separation of powers in foreign affairs towards Congress, rectifying, at least somewhat, a balance that many

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[1] Barack Obama, U.S. President, Remarks by the President on 21st Century Financial Regulatory Reform (June 17, 2009), http://www.whitehouse.gov/the_press_office/Remarks-of-the-President-on-Regulatory-Reform/.

[2] *See* 12 U.S.C. §§ 5322–5333 (2012) (authorizing the Financial Stability Oversight Council). This committee has been named the Financial Stability Oversight Council (FSOC). For a scholarly evaluation of the FSOC, see Adam J. Levitin, *In Defense of Bailouts*, 99 GEO. L.J. 435, 475–76 (2011) ("FSOC is charged with identifying risks to the financial stability of the United States."). For a discussion of the way its members might interact, see Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1148–49 (2012).

[3] *See* 12 U.S.C. §§ 5491–5603 (creating the Consumer Finance Protection Bureau (CFPB)). The agency became a reality after a lengthy campaign by liberals, led by a law professor who in 2013 became a senator after the establishment of the agency in 2010. As Rachel Barkow has explained, "Professor Elizabeth Warren advocated for the creation of such an agency in 2007, and the financial meltdown that followed provided the political impetus to turn the idea into reality." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 72 (2010). For a review of the authorizing statute of the CFPB, see Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 921–23 (2011).

[4] This is the so-called Volcker Rule, which prohibits banks from creating proprietary trading desks, on which the banks might risk their own capital; it was passed in 2010 as part of the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010. *See* DAVID H. CARPENTER & M. MAUREEN MURPHY, CONG. RESEARCH SERV., R43440, THE VOLCKER RULE: A LEGAL ANALYSIS 1 & n.1 (2014). Late in 2013, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the FDIC, the SEC, and the CFTC finalized the regulations designed to implement the rule. *Id.*; 12 C.F.R. § 44 (2015) (Office of the Comptroller of the Currency); *id.* § 75 (CFTC); *id.* § 248 (Board of Governors of the Federal Reserve System); *id.* § 255 (SEC); *id.* § 351 (FDIC).

[5] For a comprehensive doctrinal overview, see CCH, DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: LAW, EXPLANATION AND ANALYSIS (2010).

thought was upended during the response to the financial crisis. It also uses the informal way that financial regulatory standards spread across the globe to do the work that customary international law used to do. This Article explores the implications of these reforms and ultimately endorses them; the question is whether they will spread to other areas of regulatory internationalism. The struggle to keep up with the ever-globalizing economy suggests that they might.

The Dodd–Frank Wall Street Reform and Consumer Protection Act[6] (hereinafter "Dodd–Frank")—the signature domestic statute, passed in 2010, and implemented slowly ever since—is the centerpiece of the reform of the oversight of the financial system. It is the statute that gave regulators new powers to oversee and, if necessary, close large and interconnected banks. It also extended government oversight to the derivatives markets and created a new agency to protect consumers, among other things. As such, it is arguably one of the two most important statutes passed during the Obama Administration.[7]

Dodd–Frank and the agencies charged with implementing it have taken international steps as well; in particular, by embracing "soft law."[8] Soft law—often, although not exclusively, agreements between regulators in two or more countries—does not create formal legal obligations, but nonetheless contains substantive commitments that the parties are expected to take seriously.[9]

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6 *See* Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd–Frank Act] (codified in scattered sections of the U.S. Code).

7 *See, e.g.*, Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 587 (2011) (noting the "substantive regulatory import of the ACA and Dodd-Frank" while making a case that the budget stimulus was also critical).

8 For a well-known definition of the terms, see Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 445 (2000) (explaining how soft law negotiation facilitates compromise and "provides for flexibility in implementation, helping states deal with the domestic political and economic consequences of an agreement and thus increasing the efficiency with which it is carried out").

9 Some scholars use the term "soft law" more broadly—for example, to encompass the decisions of international human rights committees or standards promulgated by non-governmental organizations. *See, e.g.*, David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 834 (2012) (discussing "soft law" in the international human rights law context); Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1, 39 (2012) (discussing the role of nonstate actors and "soft law" in the production of international environmental law). Conversely, some scholars use terms like "political commitments" to refer to the kinds of agreements that may be described as "soft law". *See, e.g.*, Duncan B. Hollis & Joshua J. Newcomer, *"Political" Commitments and the Constitution*, 49 VA. J. INT'L L. 507, 516–24 (2009) (defining "political commitment" as "a nonlegally binding agreement between two or more nation-states in which the parties intend to establish commitments of an exclusively political or moral nature").

Because it involves regulators rather than diplomats, soft law broadens the set of American actors who make foreign policy.[10]

In an era where Congress has started to take an assertive role in foreign affairs—by, for example, inviting a foreign head of state to address it without presidential consultation or approval[11]—financial reform exemplifies another way that Congress can play a role. Congress can make delegations to regulators, and in particular to regulators more likely to be responsive to it, instead of the President.[12] While scholars like Eric Posner and Adrian Vermeule have argued that international relations, particularly in the wake of a crisis, inevitably empower the Executive Branch, financial reform shows how Congress can limit the power of these actors in post-crisis reform legislation, partly by empowering the regulators more responsive to it than to the Executive.[13] This rebalancing is the critical domestic implication of financial reform's internationalism.

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[10] The foreign affairs role is usually thought to belong, almost exclusively, to the President and his Secretary of State. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) (discussing the executive branch's primacy in foreign affairs); *see also* Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1014–15, 1018 (2013) (describing the aggressive defenses made of presidential authority over foreign relations).

[11] Congress controversially invited the prime minister of Israel to address it without consulting the President. *See* Peter Baker, *In Congress, Netanyahu Faults 'Bad Deal' on Iran Nuclear Program*, N.Y. TIMES (Mar. 3, 2015), http://www.nytimes.com/2015/03/04/world/middleeast/netanyahu-congress-iran-israel-speech.html ("Democrats blamed Mr. Netanyahu and Speaker John A. Boehner for arranging the event without consulting the White House in an effort to undercut the president . . . .").

[12] *See* Mike Lillis, *Pelosi Warns Netanyahu: Speech to Congress Will Hurt Iran Talks*, HILL (Jan. 28, 2015, 8:09 PM), http://thehill.com/homenews/house/231097-pelosi-warns-netanyahu-speech-to-congress-could-undermine-iran-talks (noting that the "invitation [was] extended without consulting Democratic leaders in Congress or the White House"); Peter Spiro, *Is Netanyahu's Invite Unconstitutional*, OPINIO JURIS (Jan. 22, 2015, 8:18 AM), http://opiniojuris.org/2015/01/22/boehners-netanyahu-invite-unconstitutional.

[13] *See* ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 4, 30 (2010) (emphasizing the role of the executive in times of crisis). For further discussion of the authors' thesis, see also Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, *in* THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND CONSPIRACY 55, 57–58 (Mark Tushnet ed., 2005); Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613 (2009). This claim of deference by the legislature and the judiciary hearkens back to some of the judicial modesty literature praised by scholars and judges such as Alexander Bickel and Learned Hand. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 69 (2d ed., Yale Univ. Press 1986) (1962) (arguing that courts ought to exercise judicial modesty in assessing the constitutionality of most sorts of government action); LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES, 1958, at 15 (1958). For a discussion and evaluation of Posner and Vermeule's claims in the context of financial regulation, see David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1407, 1415–17, 1481 (2014).

But that reform has an important implication for international law doctrine, as well. Soft law's partial dislodgment of treaties, driven by the difficulties—particularly in the United States—associated with negotiating and ratifying formal instruments, has been the subject of prior writing by Andrew Guzman and Kal Raustiala, among others.[14] In the wake of the financial crisis, there has been almost no effort, either globally, or in the United States, to create a formal International Financial Organization that might do the work that Congress has directed agencies to do in Dodd–Frank.[15] Treaties are the traditional approach to international governance, but they have been ignored by policymakers when it comes to the problems posed by the globalization of finance—a development that has come to be expected by scholars.[16] The relationship between regulatory cooperation and the treaty has been well documented.[17]

Less studied is the way that soft law has displaced functions of customary international law, the other traditional way to make international rules. Specifically, financial reform is displacing two customary international law functions.

First, the new approach to financial regulation has sought to facilitate conversation among international actors and provide them with a platform for greater international cooperation. In doing so, it has replaced the "rules of the road" function of custom. As Senator Jon Kyl, diplomat Douglas Feith, and John Fonte have said, "Americans can benefit from international cooperation that is rooted in countries' widespread acceptance of useful rules of the

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[14] *See* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1880 (2002) ("[S]oft law remains largely outside the theoretical framework of international legal scholars."); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 587–92 (2005) [hereinafter Raustiala, *Form and Substance*]. Often, the authorizing of agencies to either do deals with or set examples for their foreign counterparts has been described as choice against formal international organizations like the International Monetary Fund or the World Trade Organization, which were created by complex multilateral treaties. *See, e.g.*, Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 588 n.41 (2005) [hereinafter Guzman, *Design*] (noting that "the choice of form (i.e., treaty v. soft law) can be traded off against the substance of an agreement"); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 3, 29 (2002).

[15] Maura Reynolds, *Cautious Steps on Economy*, L.A. TIMES (Nov. 14, 2008), http://articles.latimes.com/2008/nov/14/world/fg-summit14 ("French President Nicolas Sarkozy . . . called for a 'second Bretton Woods' conference to remake international financial organizations."). *But see* Douglas W. Arner, Michael A. Panton & Paul Lejot, *Central Banks and Central Bank Cooperation in the Global Financial System*, 23 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 1 (2010) (suggesting that such a treaty will be prohibitively difficult to conclude).

[16] *See* David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 683 (2012).

[17] *See, e.g.*, Raustiala, *Form and Substance*, *supra* note 14.

road."[18] Those rules of the road used to be set by customary international law doctrines, such as diplomatic immunity, state responsibility, and others that served to facilitate international cooperation, without requiring substantive commitments. In finance now, it is informal cooperation that is creating the institutions for agreement. Soft law networks of regulators now set the critical terms of domestic financial reform regulation, and international summits by heads of state and finance ministers are the places where the fruits and agendas of that cooperation are set and reviewed.

Second, it has been used as the vehicle for creating innovations in human rights. Human rights innovations have been a second, if controversial, function of customary international law. But financial reform in America includes new human rights commitment set not by claims of custom but by regulatory example meant to be adopted by the rest of the world. In particular, Dodd–Frank requires one of America's financial regulators, the Securities and Exchange Commission (SEC), to privilege international human rights values in a novel way.[19] Its Conflict Minerals Rule requires manufacturers who use resources extracted from war-torn Central Africa to disclose that use, or to disclose the steps taken to ensure that they are not using African resources, in an effort to reduce the funding for civil conflict in the region.[20] Dodd–Frank's Resource Extraction Rule, a transparency measure, requires extractive industries such as mining and oil companies to disclose every payment made to a government in a country in which they do extractive business.[21] Both are controversial—Roberta Romano has argued that they will impose "considerable costs . . . which could well be in a multiple of billions of dollars," despite having "no connection to the financial crisis, the ostensible focus of the legislation."[22] Others have wondered why the United States would

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[18] Jon Kyl, Douglas Feith & John Fonte, *The War of Law: How New International Law Undermines Democratic Sovereignty*, FOREIGN AFF., July–Aug. 2013, at 115, 125, http://www.foreignaffairs.com/articles/139459/jon-kyl-douglas-j-feith-and-john-fonte/the-war-of-law.

[19] Virginia Harper Ho, *Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 COLUM. J. TRANSNAT'L L. 113, 116 (2013) (observing "corporations are increasingly being held to account for the human rights impact of their operations").

[20] 15 U.S.C. § 78m(p) (2012); Conflict Minerals, 17 C.F.R. §§ 240.13p-1, 249b.400 (2015).

[21] 15 U.S.C. § 78m(q).

[22] Roberta Romano, *Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation*, 43 HOFSTRA L. REV. 25, 61 & n.131, 62 n.132 (2014). The National Association of Manufacturers agreed, and filed suit against the rule, partly for this reason. *See* Opening Brief of Petitioners at 1, Nat'l Ass'n of Mfrs. v. SEC, 956 F. Supp. 2d 43 (D.D.C. 2013) (No. 12-1422) (challenging the Conflict Minerals rule on the grounds that "the rule will impose staggering costs on American businesses").

begin a global human rights campaign without requiring other countries to adopt the same rules as a matter of formal law.[23]

This function of financial reform's internationalism offers evidence of a shift away from using traditional international law and international diplomacy and towards technocratic, soft law decisions driven by agency agreements and regulations.[24] It is a different kind of international governance, but there is no doubt that it has captured the attention of American policymakers.

The changes in the domestic balance of powers in foreign affairs and in the international relevance of customary international law are intertwined. Public international law used to very much be the province of the executive, and turning to different means to effectuate international governance opens gaps for other actors—in this case, financial regulators—to fill.[25] The reliance on regulators disempowers the diplomats who, in part, made foreign policy by engaging with the traditional ways that customary international law offered a path for evolution of the international legal system. The turn away from custom and the empowerment of independent agencies that are the critical components of financial reform's internationalism are, in many ways, two sides of one coin that Congress has cashed in an effort to change the balance of power between the branches of government in foreign affairs.

Before proceeding with the argument, and the specifics of how financial reform achieves these goals, some caveats are in order: None of this means that the President has been entirely dispossessed in foreign affairs, and the existence of a soft law alternative to hard international law does not mean that hard international law has no role. Treaties, though hard to ratify, will continue to be negotiated. Even customary international law will continue to facilitate the work of diplomats who wish to fill in the interstices between treaty regimes

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23 *See, e.g.*, Allison M. Blake, Note, *SEC Cannot Cleanse the Electronics Industry Alone: "Blood Minerals" Mandatory Disclosure Legislation Effective Only If Applied Across the Board*, 39 J. CORP. L. 395, 410 (2014) (the Conflict Minerals Rule "will not sufficiently address humanitarian concerns unless other countries pass similar rules"); Thea Reilkoff, Note, *Legislating Corporate Social Responsibility: Expanding Social Disclosure Through the Resource Extraction Disclosure Rule*, 98 MINN. L. REV. 2435, 2438 (2014) (suggesting that the Resource Extraction Rule will only work "as part of the growing international movement for transparency in the extraction industry").

24 At the same time, the so-called soft nature of the sort of cooperation authorized by Dodd–Frank has become something seemingly more than voluntary. International law operates by consensus, and financial regulation has adopted that paradigm. Hard international economic law has also embraced various principles, like national treatment and most-favored-nation policies. *See* Zaring, *supra* note 16. Financial regulation has embraced those as well, and has become predictable, elaborated, and organized. *Id.*

25 *See infra* Part III.B.1.

without relying on regulators to do so. And the agency-driven model of international governance will never supplant the central role of the President in foreign affairs; rather, it will build international institutions that supplement the high politics of, say, conflicts with Russia and the War on Terror in areas that may have more import but less heft on the evening news. Finally, although Congress in Dodd–Frank empowered independent agencies more responsive to it than to the President, the President sets the tone for these agencies by supervising the networks both domestically, through the Financial Stability Oversight Council (FSOC), and internationally through the Group of Twenty (G20) and the Financial Stability Board.

Part I is the first evidentiary portion of the Article; it engages in a close inquiry into the nature of the regulatory cooperation required in financial reform. Part II is a second evidentiary portion; it looks at two provisions of Dodd–Frank—the Conflict Minerals Rule and the Resource Extraction Rule—and argues that they represent a new way that the United States may go about the discovery and propagation of new human rights. Both of these Parts delve into the depths of the doctrine, but, then, the ability to do so with an understanding of the doctrine's implications is one of the comparative advantages of legal scholarship. Part III contrasts financial reform's internationalism with customary international law. It shows how soft law is increasingly supplanting custom as regulatory governance welcomes a viable alternative to law created through diplomatic interaction. Part III also considers how the choice of soft law has changed the traditional calibration of the separation of powers in foreign affairs. Finally, it briefly considers the role of ethics in regulating international corporate conduct. A brief conclusion follows.

I. FINANCIAL REFORM THROUGH INTERNATIONAL COOPERATION

Financial reform in the wake of the financial crisis was meant to transform the financial sector into something safer and sounder; Congress concluded that the best way to ensure the stability of American finance would be to address stability more globally, and accordingly addressed the global financial system numerous times in the statute.[26]

[26] As Stephen Park has observed, "The risks resulting from regulatory gaps caused by antiquated domestic regimes and inadequate international coordination were exposed in unprecedented ways during the financial crisis and its aftermath. The Dodd–Frank Act can be viewed as a direct response." Stephen Kim Park, *Guarding the Guardians: The Case for Regulating State-Owned Financial Entities in Global Finance*, 16 U. PA. J. BUS. L. 739, 745 (2014); *see also* Arthur W.S. Duff & David Zaring, *New Paradigms and Familiar*

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

First, Dodd–Frank relies on transgovernmental relationships between regulators to solve global problems. In some cases it requires, in other cases it authorizes, American financial supervisors to work with their foreign counterparts to develop standards meant to ensure the safety of the financial system. In this way, the statute pursues international regulatory cooperation in lieu of other mechanisms for creating workable cross-border systems of governance meant to ensure financial stability in the United States. The treaty, for example, is eschewed. Nor did Congress suggest that the regulatory cooperation it authorized was in any way obligated by customary international law.[27] Instead, financial reform marks an effort to solve the global aspects of financial instability through coordination enforced and enabled by soft law.

Regulatory cooperation is not the only way that financial reform seeks to reform international norms. It also, through the so-called Conflict Minerals and Resource Extraction Rules, represents an effort by Congress—acting through a regulator engaged in the sort of soft law cooperation elsewhere encouraged through the statute—to set an example and join or start a movement that may, in the end, form the basis of claims about new obligations related to human rights.

This section recounts financial reform's cooperation impetus, and the next one covers its more tendentious moves to facilitate global transparency and anti-conflict norms. Part III makes the case that customary international law used to play a role that soft law is now handling, and analyzes the separation of powers implications of the move.

A. *Authorizing Cooperation*

Portions of Dodd–Frank are premised on the supposition that it is difficult for domestic regulators to do a good job of monitoring the safety and soundness of institutions that operate in many different jurisdictions by only

Tools in the New Derivatives Regulation, 81 GEO. WASH. L. REV. 677, 701 (2013) (describing the derivatives provisions of Dodd–Frank as reflecting a "commitment to international cooperation").

[27] But few American statutes do these days—something that was not always the case. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 449 (2011) (discussing how the "First Congress . . . enacted several statutory provisions—including the ATS—in order to comply with the United States' obligations under the law of nations to redress violations by its citizens").

focusing on their activities in one of those jurisdictions—the United States. This supposition is not entirely new; financial regulators have been pursuing common approaches to supervision with their foreign counterparts since the 1970s.[28] The International Lending Supervision Act of 1983 explicitly required banking regulators to "consult with the banking supervisory authorities of other countries to reach understandings aimed at achieving the adoption of effective and consistent supervisory policies and practices with respect to international lending."[29] However, these cooperative initiatives have been, in large part, initiated of the regulators' own accord, rather than at the behest of Congress or the State Department. Dodd–Frank provides a degree of congressional imprimatur on the global regulatory project—a sorely needed one, in the view of some—on an increasingly important form of governance.[30]

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

What follows will cover the specific invitations to regulatory cooperation that appear in the statute—it will be exhaustive, as the invitations focus on particular parts of financial regulation where international cooperation is thought to be particularly important. Because these areas are worth understanding, readers will hopefully tolerate a trip into some of the details of the statute. Those less interested in the details than in the implications may wish to skip this subsection and move on to the next, more evaluative one.

1. Required Cooperation

Dodd–Frank imposes international consultation requirements on five different agencies, in more than five different issue-areas—the Treasury Department, the Federal Reserve, the Commodities Futures Trading

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28 *See* Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193 (2008) (discussing the interdependent nature of the international financial system); David Zaring, *Rulemaking and Adjudication in International Law*, 46 COLUM. J. TRANSNAT'L. L. 563, 570–78 (2008) (using this sort of regulatory cooperation as an example of how global administrative law can develop).

29 12 U.S.C. § 3901(b) (2012).

30 *See* David Zaring, *Free Trade Through Regulation*, 89 S. CAL. L. REV. (forthcoming May 2016) (manuscript at Part IV) (on file with author).

Commission (CFTC), and the SEC, all of which are members of the committee of agencies charged with broadly ensuring financial stability and are tasked with coordination obligations. So is that committee of agencies itself. Their obligations range from identifying particularly risky international institutions and dangerous derivatives transactions, coordinating insurance and accounting standards, and dealing with international bankruptcies.

Two examples of required coordination illustrate what Congress means when it insists on interaction with foreign regulators. First, the statute created a systemic risk regulator, or a regulator tasked with identifying serious threats to the stability of the financial sector.[31] That regulator, really a committee of agencies chaired by the Treasury Department, was dubbed the FSOC and was charged with "identify[ing] risks to the financial stability of the United States . . . promot[ing] market discipline . . . and respond[ing] to emerging threats to the stability of the United States financial system."[32]

Risks to the financial stability of the United States can come from abroad, just as well-run and safe foreign firms can promote market discipline when they compete with American firms. Accordingly, the FSOC has pledged to "work actively with our international counterparts."[33] It is required to "monitor . . . international financial regulatory proposals and developments" and coordinate with foreign regulators to reduce systemic risk, a broad authorization to pursue global approaches.[34] The authorization from Congress in this case, as in others, notably does not offer guidance as to how the FSOC might do this monitoring and coordination, though it does limit the subject matter of the cooperation.

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31 Some would say that because the financial sector is so intertwined with the economy, this systemic regulator is really concerned with threats to the economy itself. *See* Saule T. Omarova, *Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation*, 37 J. CORP. L. 621, 624 n.7 (2012) (suggesting that the systemic regulator's "role is to provide a unifying regulatory perspective on systemic risk"). As a statutory matter, the systemic risk regulator is concerned with, among other things, "identify[ing] risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies." 12 U.S.C. § 5322(a)(1)(A).

32 *Id.* § 5322(a)(1).

33 *Oversight of the Financial Stability Oversight Council: Hearing Before the Subcomm. on Oversight and Investigations of H. Comm. on Financial Services*, 112th Cong. app. 86 (2011) (prepared statement of J. Nellie Liang, Director, Office of Financial Stability Policy and Research) (observing that it is "important that U.S. financial reforms be implemented in coordination with international efforts to establish consistent and complementary standards and to ensure effective oversight of internationally active firms and markets").

34 12 U.S.C. § 5322(a).

The FSOC can also designate foreign banks that do business in the United States as institutions that are "systemically important"—that is, banks whose failure would pose substantial risks for the American financial sector.[35] If designated, all such banks are subject to additional supervision by American bank regulators, and may be subject to special rules imposed by the FSOC in light of their significance to the economy.[36] Under § 113(f) of Dodd–Frank, however, the agency may, in an emergency, subject a foreign institution to its supervision if it finds that the collapse of the institution would threaten American financial stability.[37] In doing so, it is obligated to consult with "the appropriate home country supervisor, if any."[38] In this way, the especially attentive regulation of very large foreign financial institutions doing business in the United States is a power granted to the FSOC, but it is one that must be exercised in the context of consultation with the foreign regulator responsible for supervising the bank in its home country.

The requirement of consultation appears in a number of other parts of the statute. Another example of this sort of cooperation lies in the way the statute creates a new regime to regulate previously unregulated swap markets. Many observers of the financial crisis have credited the risks posed by complex derivatives—or, to slightly oversimplify, and use the language of Dodd–Frank, "swaps"[39]—as one of the reasons for the collapse of certain key intermediaries.[40]

Much of the risky swaps activity happened outside of the United States. The American International Group, for example, wrote insufficiently hedged credit default swaps—that is, insurance that certain companies would not default on their debts—for seemingly any other financial institution that asked,

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35 *Id.* § 5462(9).

36 *Id.* § 5323.

37 Dodd–Frank Act, Pub. L. No. 111-203, § 113(f), 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5323(f)(1)).

38 12 U.S.C. § 5323(f)(3).

39 15 U.S.C. § 8301.

40 *See, e.g.*, Zachary J. Gubler, *The Financial Innovation Process: Theory and Application*, 36 DEL. J. CORP. L. 55, 87 (2011) ("OTC derivatives . . . are thought to have exacerbated the crisis . . . ."); Steven L. Schwarcz, *Regulating Complexity in Financial Markets*, 87 WASH. U. L. REV. 211 (2009) (noting the ways in which complex derivatives and securitization practices contributed to the financial crisis); Schwarcz, *supra* note 28 (noting the role of derivatives in the international financial system). *But see* René M. Stulz, *Financial Derivatives: Lessons from the Subprime Crisis*, MILKEN INST. REV., Jan. 2009, at 58, 58–60 (blaming the financial crisis on the housing bubble).

and collapsed when those insurance bets went awry.[41] It did so, however, through a London-based subsidiary, AIG Financial Products.[42] Other foreign financial institutions took positions on swaps—for example, on derivatives that referenced American mortgages—that lost substantial value during the crisis, putting those institutions at risk, and in some cases, requiring a bailout.[43]

Congress accordingly concluded that the swaps market was both too unregulated and too international to be excised from regulatory oversight; Dodd–Frank extended the jurisdiction of American regulators to swaps. Moreover, it made that regulation international. In establishing a new regime to regulate credit default, currency, and other swaps, the two agencies charged with implementing American oversight over the swaps, the SEC and the CFTC, are required to engage in international cooperation. Along with the prudential regulators, they "*shall* consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps."[44]

In this way, Congress placed international cooperation at the forefront of the new swaps regime. Moreover, Dodd–Frank defines swaps quite broadly, to include a large enough variety of derivatives that the SEC and CFTC have both exempted certain kinds of financial contracts from the coverage of the term in rulemakings implementing the statute by regulation, making the required international cooperation an important component of a broad new regulatory approach.[45] The requirement of consultation thus broadly reaches into the more bespoke and esoteric areas of the financial markets. Of course, it did so because those areas hypertrophied in the run-up to the financial crisis, and

41 Jerome A. Madden, *A Weapon of Mass Destruction Strikes: Credit Default Swaps Bring Down AIG and Lehman Brothers*, BUS. L. BRIEF, Fall 2008, at 15, 16–18 (2008); Vidya Ram *AIG Blames Its London Office*, FORBES (Mar. 13, 2009, 1:25 PM), http://www.forbes.com/2009/03/13/aig-london-losses-markets-equity-insurance.html. "In 2008, AIG was the largest originator of CDSs and had CDS contracts on its books with a notional value (the face amount of the insured debt) of approximately $440 billion." Madden, *supra*, at 16.

42 Madden, *supra* note 41, at 16.

43 Various European banks, for example, invested in housing related derivatives during the crisis in a way that put their solvency at risk. Daniel Slifkin, *The Changing Landscape of Securities Litigation*, ASPATORE, 2014 WL 1245074, at *3 (2014) (observing that "[f]oreign banks that purchased mortgage-backed securities from U.S.-based financial institutions or were purportedly assigned claims involving mortgage-backed securities have also filed a number of large securities claims in recent years").

44 15 U.S.C. § 8325(a) (2012) (emphasis added).

45 Dodd–Frank Act § 723, 7 U.S.C. § 2(h); *id.* § 763, 15 U.S.C. § 78c-3; Adam J. Levitin, *Response: The Tenuous Case for Derivatives Clearinghouses*, 101 GEO. L.J. 445, 447 n.5 (2013) ("The U.S. Securities and Exchange Commission (SEC) and the U.S. Commodity Futures Trading Commission (CFTC) are empowered to exempt certain types of swaps from the clearing requirement.").

ground to a halt in the midst of it, challenging the solvency of firms that funded themselves by taking substantial positions on the derivatives.[46]

In dealing with systemic risk, Dodd–Frank imposes similar duties on other regulators and, with regard to the White House, an authorization. The statute requires the Treasury Secretary to "regularly consult with the financial regulatory entities and other appropriate organizations of foreign governments or international organizations on matters relating to systemic risk to the international financial system."[47] It also requires that the Board of Governors of the Federal Reserve System and the Secretary of the Treasury "consult with their foreign counterparts and through appropriate multilateral organizations to encourage comprehensive and robust prudential supervision and regulation for all highly leveraged and interconnected financial companies."[48]

The Federal Reserve is also required to look to international soft law when it prescribes risk management rules for banks—that is, the rules that govern *how* banks assess the riskiness of the positions they take in the financial markets. The statute imposes a duty that "the Board of Governors [of the Federal Reserve] . . . shall prescribe risk management standards, taking into consideration relevant international standards and existing prudential requirements."[49]

2. *Permitted Cooperation*

Otherwise, the statute takes an authorized, but not required, approach to regulatory cooperation. For example, the FSOC is authorized to consult with appropriate foreign authorities when dealing with foreign entities and cross border activities and markets.[50] The statute authorizes, and, as we have seen,

46 *See, e.g.*, Zachary J. Gubler, *The Financial Innovation Process: Theory and Application*, 36 DEL. J. CORP. L. 55, 60–61 (2011) ("Many believe the mismanagement of counterparty risk in the OTC derivatives market played an important contributing role in the financial crisis."); Mark J. Roe, *The Derivatives Market's Payment Priorities as Financial Crisis Accelerator*, 63 STAN. L. REV. 539, 543 (2011) (discussing the size and reasons for failures of the derivatives and overnight repo markets, which he attributes to the preference they enjoy in bankruptcy).

47 12 U.S.C. § 5373(b).

48 *Id.* § 5373(c). For a discussion, see Eric C. Chaffee, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: A Failed Vision for Increasing Consumer Protection and Heightening Corporate Responsibility in International Financial Transactions*, 60 AM. U. L. REV. 1431, 1450 (2011) (reasoning that "[a]lthough the mandates of section 175 are vague, Congress's acknowledgement of the need for international coordination is admirable").

49 12 U.S.C. § 5464(a)(1).

50 *Id.* § 5373(b).

sometimes requires, international policy coordination on the part of the FSOC, the Federal Reserve, and the Treasury Secretary on matters of systemic risk.[51] The Act also allows the President or his designates to "coordinate through all available international policy channels, similar policies as those found in United States law relating to limiting the scope, nature, size, scale, concentration, and interconnectedness of financial companies, in order to protect financial stability and the global economy."[52]

The statute requires consultation on international standards for swaps but takes a more casual view regarding the exchange of information about swaps positions and markets; the SEC and CFTC "may agree to such information-sharing arrangements as may be deemed to be necessary or appropriate in the public interest."[53] In this way, the agencies are granted the power to share information about the positions and risks posed by the institutions they regulate with foreign regulators who may worry about how those positions would affect their own banks, if those banks are doing business with the American banks, or with the branches of the American institutions on foreign soil.

The newly created Federal Insurance Office, based in the Treasury Department, has been authorized "to coordinate Federal efforts and develop Federal policy on prudential aspects of international insurance matters."[54]

Nor are these the only areas of consultation. In the case of the new swaps regime, authorizations to coordinate exist for reporting on the swaps market,[55] regulating the retention of data over what has happened in those markets,[56] setting up swaps clearinghouses and supervisors of the same.[57]

A similar authorization is given to the Public Company Accounting Oversight Board—the government body that regulates accounting firms, in the statute.[58] It is given the right to share information about foreign auditors with

[51] *Id.* § 5373.
[52] *Id.* § 5373(a).
[53] 15 U.S.C. § 8325(a).
[54] 31 U.S.C. § 313(c)(1)(E).
[55] 7 U.S.C. § 2(a)(14)(B)(ii).
[56] *Id.* § 24a.
[57] 15 U.S.C. § 78q-1.
[58] *See id.* § 7215(b)(5)(C). "[A]ll information . . . that relates to a public accounting firm that a foreign government has empowered a foreign auditor oversight authority to inspect . . . may, at the discretion of the Board, be made available to the foreign auditor oversight authority, if . . . the Board finds that it is necessary to accomplish the purposes of this Act or to protect investors . . . ." *Id.*

the foreign authorities regulating those auditors—presumably in a way that enables the foreign authority to take steps to ensure that the auditing firm is maintaining appropriately high standards.

These authorizations are designed to offer the legitimacy of a congressional imprimatur to agency activity that has been quite vigorously pursued before Dodd–Frank but has been notably lacking in that authorization.[59]

3. *Studying Cooperation*

Finally, agencies have been required to study international regulatory cooperation in Dodd–Frank. Study requirements are replete in Dodd–Frank; there are seventy studies mandated by the statute.[60] Study requirements works as prompts for regulation. They also reflect a degree of legislative ambivalence on the issue for study (or, just as possibly, internal disagreement). At any rate, the presumption of a study is that the regulator has the authority to regulate in any particular area, but that it may not choose to do so; studies work as congressional suggestions that the regulator consider doing so.

Studying the possibilities of international financial regulation reflects this sort of modest congressional guidance. For example, studies, rather than rules, have marked Dodd–Frank's explicit statement about the vexing problem of the failure of a cross-border bank. No one doubts that the rules for taking globally important financial institutions through a so-called "cross-border resolution" process are imperfect; the disaster of the bankruptcy of Lehman Brothers, where creditors rushed to courthouses across the globe, exemplifies the concern.[61]

The complications posed by simply sorting out who ought to be in charge of a global bankruptcy have made the effort to create an international process to "resolve," or quickly take over failing financial firms, a high priority for representatives of the G20 major economies.

59 David Zaring, *Sovereignty Mismatch and the New Administrative State*, 91 WASH. U. L. REV. 59, 61–67 (2013).

60 *Regulatory Tracker*, DAVIS POLK, http://www.davispolk.com/dodd-frank/regulatory-tracker/ (last visited Mar. 1, 2016).

61 For a discussion of the issues, see Jonathan Macey, *Are Any Creditors "Particularly Deserving"?: On the Enduring Attraction of the Ring-Fence Approach to Cross-Border Insolvencies of Financial Institutions*, 31 YALE J. ON REG. 695, 702–05, 709–11 (2014).

But the FSOC has been told only to study international bankruptcy processes.[62] The comptroller general has been instructed to do the same.[63] The statute stopped short of authorizing cooperation about cross-border bankruptcy.[64] But by permitting the study of the area by the FSOC, at least, Congress has suggested that the council may have the power to do more than research.

The new swaps regime requires studies about the descriptions on financial derivatives by the SEC and CFTC, which "shall coordinate the study with international financial institutions and regulators as appropriate and practical."[65]

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

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

B. *Evaluating Cooperation*

Dodd–Frank's authorization of international regulatory cooperation uses soft law to do what customary international law used to do through doctrines like state responsibility and diplomatic immunity—create institutions and mechanisms designed to further international rules of cooperation without imposing particular substantive requirements on that cooperation.[66] It is increasingly apparent that soft law is the sort of law preferred by the international community when it comes to financial regulation. This may be

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62 Dodd–Frank Act, Pub. L. No. 111-203, § 217, 124 Stat. 1376, 1519–20 (2010).

63 12 U.S.C. § 5382(f) (2012).

64 Possibly because there's some doubt as to whether the bankruptcy regime should be worked out through a treaty or through regulatory cooperation. *See, e.g.*, Pierre-Hugues Verdier, *The Political Economy of International Financial Regulation*, 88 IND. L.J. 1405, 1454 (2013) (evincing some skepticism about the possibility that international regulatory cooperation on this issue but noting that "the absence of agreement on cross-border resolution also undermines coordinated cross-border supervision by dissociating supervisory responsibility from financial responsibility").

65 15 U.S.C. § 8307(b)(3).

66 *See infra* Part III.A.

because it is effective, but it may also reflect dissatisfaction with the alternatives to soft law, and some caution about the promise of a stringent international regime.

That soft law may be the future of cross-border cooperation more generally may be seen in the way it has been embraced not just by financial regulators, or now by Congress, but also by the world's heads of state. The endorsement of international regulatory cooperation in financial reform meets some of the informal commitments made by the President in the wake of the financial crisis. In the wake of that collapse, the so-called G20—a gathering of the heads of state of twenty of the world's largest economies—was reinvigorated, with an eye to devising a collective strategy to prevent similar crises from happing in the future.[67]

The G20 called for international regulatory coordination at the Pittsburgh Summit that was the third meeting after the onset of the financial crisis.[68] It announced at the conclusion of its 2009 London Summit that its membership "agree[d] to establish the much greater consistency and systematic cooperation between countries, and the framework of internationally agreed high standards, that a global financial system requires."[69]

But this commitment to a cooperative international regime comes with some implicit cautions. Dodd–Frank does not broadly authorize all forms of cooperation by all regulators on any issue area; instead it picks spots. I have elsewhere argued that soft law is an increasingly institutionalized and effective mechanism of international governance—one that in financial regulation, at least, is not clearly inferior to any more formal alternative.[70] But there is no question that it does permit American regulators the flexibility to *reject*

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67 "In response to the global financial crisis, the governments of the Group of Twenty (G-20) began focusing on greater coordination of their regulatory and supervisory activities, and they called for a number of measures aimed at creating an institutional structure for overseeing financial markets across borders." Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 436 n.95 (2011).

68 Group of Twenty [G20], *Leaders' Statement: The Pittsburgh Summit* (Sept. 24–25, 2009), http://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf (noting the importance of coordinated international efforts in addressing the financial crisis); *The Group of 20: The Premier Forum for International Economic Cooperation*, GLOBAL AFF. CAN., http://www.international.gc.ca/g20/index.aspx?lang=eng (last modified Dec. 8, 2015).

69 G20, *G20 London Summit: Official Communique* (Apr. 2, 2009), http://eu-un.europa.eu/articles/fr/article_8622_fr.htm.

70 *See* David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 683 (2012).

international cooperation, provided that they do so only after consulting their foreign counterparts and monitoring its potential.

Finally, there are some notable silences with regard to international regulatory cooperation that permeate the statute. Two of the principal goals of the legislation—to create a new system for overseeing risky financial institutions and to bring derivatives into the fold as a regulated industry—are marbled with requirements to try to develop a coordinated international approach, as well as permissions to do so. Other, more modest efforts, have their bows to international regulatory cooperation as well. But financial reform has other goals that do not encourage international cooperation. Some of the other signature aspects of reform—the Volcker Rule,[71] the swaps-pushout rule,[72] the creation of a new agency to protect consumers who enter the financial marketplace[73]—mark uniquely American innovations in financial supervision; there is no effort in these cases to coordinate with foreign counterparts who do not share these agendas.

II. FINANCIAL REFORM'S EMBRACE OF HUMAN RIGHTS

Financial reform does not only permit, or in some cases require, American financial regulators to cooperate with their foreign counterparts. It also requires one regulator to pursue two kinds of values that reflect American commitments to human rights. A commitment to human rights is not ordinarily thought to be a central part of the remit of financial regulation, so these bows to human rights values might be considered new and perhaps exceptionally so.[74]

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

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71 Dodd–Frank Act, Pub. L. No. 111-203, § 619, 124 Stat. 1376, 1620 (2010) (codified at 12 U.S.C. § 1851 (2012)). The statute is called the "Volcker Rule" because former Federal Reserve Board Chairman Paul Volcker strongly supported the law. For a discussion, see John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 974 n.336 (2015).

72 For an analysis of the swaps-pushout rule by a former SEC commissioner, see Annette L. Nazareth, *Dodd-Frank Act Finalizes Swap Pushout Rule*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 7, 2010), https://corpgov.law.harvard.edu/2010/07/07/dodd-frank-act-finalizes-swap-pushout-rule/.

73 12 U.S.C § 5491(a).

74 Indeed, Dodd–Frank also includes a protection for mine workers. 15 U.S.C. § 78m-2 ("Reporting Requirements Regarding Coal or Other Mine Safety").

The first human rights value lies in the requirement of reporting by those firms that use minerals extracted from the Democratic Republic of the Congo or countries bordering it.[75] These countries have been beset by civil war and there appears to have been a concern on the part of Congress that American companies were prolonging the war by paying for minerals extracted and sold by the factions party to the conflict.[76]

As for the extractive industries requirement, publicly traded companies must report all payments to governments in their disclosure statements, an embodiment of an anticorruption principal that is a hotly contested issue of customary international law.[77] The requirement builds on the American interest—perhaps it might be considered to be an obsession—with incorruptible governance, an interest reflected in Congress's delegation of anti-bribery responsibilities to the SEC under the Foreign Corrupt Practices Act of 1977.[78] That statute was accompanied by a relatively successful campaign to spread similar rules among OECD member countries.[79]

Resource extraction payment rules are also spreading across borders, but in this case, it is not the United States that has led the charge; the rules have their origins in a campaign created by a British non-governmental organization. The American embrace of a principle that was gaining steam elsewhere—through an agency rule, rather than the efforts of diplomats—marks a turn towards building human rights principles through soft law.[80]

In both cases, the SEC has been tasked with issuing rules requiring the disclosure of the making of resource extraction payments or the use of conflict minerals. The SEC's new international duties mark a shift for an agency that used to ignore the world beyond the country's borders, which coincided with a presumption that the American capital markets were the only markets that mattered for the American investors the agency protects.[81] The SEC has been

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[75] 15 U.S.C. § 78m(p).

[76] There have been efforts in the past by different senators to address the issue through legislation: for example, the Congo Conflict Minerals Act of 2009. *See infra* notes 98–102, and accompanying text.

[77] For the full text of this portion of the statute, see 15 U.S.C. § 78m(q).

[78] Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

[79] Members of the OECD, as well as others, have adopted the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. *Bribery in International Business*, ORG. FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm (last visited Apr. 7, 2016).

[80] *See infra* Part II.A.1.

[81] Though, to be sure, ever since Congress gave the agency powers in the Foreign Corrupt Practices Act to sanction American firms that bribe foreign government officials, the SEC has been taking a stand in favor of

slower than other financial regulation to embrace international regulatory cooperation.[82] But financial reform has made it a leading edge in human rights protection, whether it wants to be or not.

The Conflict Minerals and Resource Extraction Rules of Dodd–Frank are an accordingly fascinating development. In precisely the subject area in which soft law seems to be taking hold—financial regulation more broadly, and securities regulation in particular—the United States has adopted a new effort that is designed in part to promote something that in the past might have been left to customary international law.[83]

In what follows, I again delve into the weeds of the Conflict Minerals and Resource Extraction Rules. In the final part of this Article, I make the case that these rules represent a new form of international rulemaking, one that is capable of supplanting more traditional types of international law.

A. The Conflict Minerals Rule

The campaign against the use of conflict minerals in American products has been used by Congress as a chance to make symbolic statements about human rights. It is easy to overstate the substance of the rule, though its novelty makes it a particularly innovative aspect of financial reform. That Congress is doing so in the context of the dry requirements of securities filings is new, as is the effort to require companies to monitor their own supply chains. As we will see, the scope of this sort of monitoring has alarmed corporate America as much as any initiative contained in financial reform.

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the American approach to honest government. *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (discussing the creation in 2010 of the SEC's Foreign Corrupt Practices Act Unit and noting that FCPA enforcement "continues to be a high priority area for the SEC"). Though it was not ever thus. *See* Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences*, 7 N.Y.U. J. L. & BUS. 247, 257 (2010) ("The SEC's concern with questionable foreign payments was not primarily motivated by bribery as an independent matter, but rather the extent to which bribe payments poisoned corporate disclosures and, more broadly, U.S. capital markets.").

[82] David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547, 565–69 (2005) (discussing international harmonization in securities regulation).

[83] Moreover, of course, it did so through the mechanism of a duly-enacted statute authorizing and charging an agency to pursue human rights-related values.

1. The Rule's Requirements

Congress has demanded in Dodd–Frank that public company filings involved in manufacturing include disclosures about the use of a very small number of ingredients extracted from a conflict-ridden part of Africa. The legislature concluded, in the preamble to the statutory authorization to the rule, that "the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein."[84] The legislation is meant to discourage support for rebel groups in the Congo, who appeared after the central government of that country collapsed following the death of its longtime dictator Mobuto Sese Seko in the last decade.[85]

The legislation requires disclosure by some companies about the use of some minerals in their manufacturing processes. But it did not act comprehensively. The provision covers only four minerals, and then only if mined in one of ten southern African countries.[86] So-called blood diamonds are not included, even though most people probably think of them when they think of conflict minerals (an unrelated statute covers those in a rather different way).[87] Nor are other precious stones. Oil is a mineral that has inspired plenty of conflict as well, including in southern Africa, but it is not on the list.

Firms that actually mine the minerals are not covered by the law either; it applies only to manufacturers.[88] And even manufacturers are not prohibited from using any of the minerals on the list; Congress only required disclosure and not a ban on the use of conflict minerals.[89] Publicly traded companies must "disclose annually, beginning with the [publicly traded company's] first full fiscal year that begins after the date of promulgation of such regulations,

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[84] Dodd–Frank Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 1376, 2213 (2010).

[85] Ibrahim Sajalieu Bah, Ricardo Silva & Edna Udobong, *Africa*, 44 INT'L LAW. 577, 583 (2010) ("Formerly known as Zaire, the Democratic Republic of Congo plunged into civil war after the death of its longtime dictator, Mobutu Seseseko. Eastern Congo has been the hardest-hit region, as various rebel factions battle each other and government forces for control of the mineral-rich nation.").

[86] 15 U.S.C. § 78m(p) (2012); Dodd–Frank Act § 1502(e)(4) (codified as amended in 15 U.S.C. § 78m note).

[87] Blood diamonds are largely addressed under the Clean Diamond Trade Act, Pub. L. No. 108-19, 117 Stat. 631 (2003) (codified at 19 U.S.C. §§ 3901–3913).

[88] 15 U.S.C. § 78m(p).

[89] *Id.* § 78m(p)(2).

whether conflict minerals that are necessary . . . [for manufacturing] did originate in the Democratic Republic of the Congo or an adjoining country."[90]

The Conflict Minerals Rule, whatever its limits, is not without its burdens.[91] Companies that use the minerals covered by the statutes must report on the diligence taken on source and chain of custody of the minerals.[92] Firms must provide for an independent private sector audit of its report, in accordance with SEC rules and Comptroller General standards.[93] The report must include a description of, among other things, the facilities used to process the minerals, the country of origin of the minerals, and efforts to determine location of origin of the minerals.[94] And the companies cannot simply presume that the minerals used come from somewhere else; they are to "conduct an inquiry regarding the origin of its conflict minerals that is reasonably designed to determine whether any of its conflict minerals originated in the Covered Countries . . . and must perform the inquiry in good faith."[95] Companies that make inadequate disclosures could be sued by shareholders or the SEC for violations of the fraud rules that accompany financial disclosures.[96]

The report will be made publicly available to all. Ultimately, if the facts require, the report must include a statement that the products of the firm are "not DRC conflict free," although the legality of requiring companies to make such a statement has been controversial.[97]

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90 15 U.S.C. § 78m(p).

91 For a comprehensive account of these burdens, and an argument that they were lower than expected, albeit not low enough to particularly justify the rule, see Jeff Schwartz, *The Conflict Minerals Experiment*, 6 HARV. BUS. L. REV. (forthcoming 2016) (manuscript at 32), http://ssrn.com/abstract=2548267 ("Given the perfunctory effort and unexpectedly small number of filers, the true costs of compliance were likely far less than critics warned."). *But see* David M. Lynn, *The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. BUS. & TECH. L. 327, 330–31 (2011) (noting that issuers will "likely incur significant compliance costs in the development of the newly-required [sic] information, with potentially only marginal benefits to investors").

92 Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (to be codified at 17 C.F.R. pt. 240 and 249b).

93 The SEC interpreted the purpose of this audit as follows: "[I]nvestors and other users will have some assurance from an independent third party that the issuer's due diligence framework, as set forth in the Conflict Minerals Report, is designed in conformity with the relevant nationally or internationally recognized due diligence framework." *Id.*

94 15 U.S.C. § 78m(p). For a detailed description of the requirements, see Conflict Minerals, 17 C.F.R. §§ 240.13p-1, 249b.400 (2015).

95 Conflict Minerals, Exchange Act Release No. 34-67716, at 387 (Nov. 13, 2012), http://www.sec.gov/rules/final/2012/34-67716.pdf.

96 Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (to be codified at 17 C.F.R. pt. 240 and 249b).

97 Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 371 (D.C. Cir. 2014) ("The label 'conflict free' is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups."), *overruled by* Am. Meat

2. *The International Context*

Critically, the Conflict Minerals Rule is not just a rule for America. It also represents an effort to develop a common approach internationally.[98] Congress has played a leading role in deterring firms from using Congolese conflict minerals, a role it has shared with the United Nations.[99] The rule is thus the sort of claim about human rights that used to be left to international law; it neglects that option in favor of delegation to an agency, through a domestic statute, paired with an international campaign to join it.

Congress was the first body to consider acting against conflict minerals. When it appeared that Congolese rebels financed their efforts through mineral extraction, three senators, Sam Brownback (R–Kan.), Dick Durbin (D–Ill.), and Russ Feingold (D–Wis.) introduced a number of bills over the course of the four years preceding the adoption of the rules in Dodd–Frank—beginning with Senate Bill 2125, the Democratic Republic of Congo Relief Security and Democracy Promotion Act of 2006.[100] The 109th Congress bill was joined by others in the 110th and 111th Congress as well, before finally being enacted as a part of Dodd–Frank.[101]

In 2008, the United Nations joined Congress. In that year, the U.N. Security Council issued Resolution 1857. That resolution encouraged U.N. member states "to take measures as they deem appropriate to ensure that importers processing industries and consumers of Congolese mineral products under their jurisdiction exercise due diligence on their suppliers and on the origin of the minerals they purchase."[102] A U.N. Group of Experts on the Democratic Republic of Congo stated in 2008 that

> individuals and entities buying mineral output from areas of the eastern part of the Democratic Republic of Congo with a strong rebel

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Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (acknowledging "the possibility that some required factual disclosures could be so one-sided or incomplete that they would not qualify as 'factual and uncontroversial'" (quoting Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 958 (D.C. Cir. 2013))).

[98] As some commentators have requested. *See* Allison M. Blake, *SEC Cannot Cleanse the Electronics Industry Alone: "Blood Minerals" Mandatory Disclosure Legislation Effective Only If Applied Across the Board*, 39 J. CORP. L. 395, 410 (2014) (asserting that the conflict minerals rule "will not sufficiently address humanitarian concerns unless other countries pass similar rules").

[99] *See* S.C. Res. 1857, ¶ 15 (Dec. 22, 2008); S.C. Res. 1376, ¶ 8 (Nov. 9, 2001).

[100] S. 2125, 109th Cong. (later enacted in Pub. L. No. 109-456 (Dec. 22, 2006)).

[101] *See* Congo Conflict Minerals Act of 2009, S. 891, 111th Cong. (2009); Conflict Coltan and Cassiterite Act of 2008, S. 3058, 110th Cong. (2008); *see also* S.A. 2707, 111th Cong. (2009) (a bill similar to S. 891).

[102] S.C. Res. 1857, *supra* note 99, ¶ 15. The UN Security Council denounced the use of natural resources to prolong Congolese conflict in 2001. S.C. Res. 1376, *supra* note 99, ¶ 8.

> presence are violating the sanctions regime when they do not exercise the due diligence to ensure that their mineral purchases do not provide assistance to illegal armed groups.[103]

That group had announced concerns that large corporations were sourcing their requirements through the purchase of conflict minerals even earlier.

American financial reform has been a catalyst, although the UN has played its part. Since 2010, other countries have begun to implement the conflict minerals rules patterned off the American initiative—and in all cases involving the exact same four minerals sourced in the same part of the world, of which Congress directed the SEC to mandate disclosures.[104]

As Galit Sarfaty has concluded, the Conflict Minerals Rule "has been driving global norms."[105] In 2010, the parties to the International Conference on the Great Lakes Region, which included most of the countries designated in Dodd–Frank, issued a Lusaka Declaration, observing that there were "endemic conflicts and persistent insecurity caused by armed groups in the Great Lakes Region financed through the illegal exploitation of natural resources and trade in minerals, in particular Gold, Colombo-Tantalite, Wolframite and Cassiterite," and accordingly required supply chain management measures to be taken by extractors of these minerals.[106] In February 2012, after the passage of Dodd–Frank, the Congo suspended two minerals companies for failing to engage in this required supply chain monitoring.[107]

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103 *See* S. 891, § 2.

104 For a discussion, see Ved P. Nanda, *Conflict Minerals and International Business: United States and International Responses*, 20 ILSA J. INT'L & COMP. L. 285, 299 (2014) ("Dodd-Frank, Section 1502 has indeed been a catalyst to international efforts addressing conflict minerals issues.").

105 Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VA. J. INT'L L. 97, 108 (2014); *see also* Jamie Darin Prenkert & Scott J. Shackelford, *Business, Human Rights, and the Promise of Polycentricity*, 47 VAND. J. TRANSNAT'L L. 451, 483–87 (2014) (discussing national and international initiatives to limit the use of conflict minerals).

106 Int'l Conference on the Great Lakes Region, *Lusaka Declaration of the ICGLR Special Summit to Fight Illegal Exploitation of Natural Resources in the Great Lakes Region* (2010), http://www.oecd.org/corporate/mne/47143500.pdf. The interest in the issue started in 2006, when the ICGLR vowed "to put in place regional rules and mechanisms for combating the illegal exploitation of natural resources which constitute a violation of the States' right of permanent sovereignty over their natural resources." Int'l Conference on the Great Lakes Region, *The Pact on Security, Stability and Development for the Great Lakes Region* art. 9 (Dec. 2006), http://www.icglr.org/images/Pact%20ICGLR%20Amended%2020122.pdf (amended Nov. 2012).

107 Press Release, Global Witness, Congo Government Enforces Law to Curb Conflict Mineral Trade (May 21, 2012), http://www.globalwitness.org/sites/default/files/library/Congo_government_enforces_law_to_curb_conflict_minerals_trade.pdf.

Initiatives that parallel Dodd–Frank, all specifying that the term "conflict minerals" means the four covered by the American statute, have been introduced in Canada,[108] Australia,[109] Hong Kong,[110] and the European Union.[111]

China has also issued supply chain transparency guidance,[112] and one of the rule sponsors declared on the floor of the Senate that "other nations are following close behind."[113] The result is that "the Congress has emerged as a world leader on conflict minerals reporting."[114] A timeline marking the introduction of conflict minerals rules around the world shows that the United States was a leader in introducing laws designed to address the conflict minerals problem.

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108 Conflict Minerals Act, H.C. C-486, 41st Parl. (2013) (Can.), http://www.parl.gc.ca/housepublications/publication.aspx? language=e&mode=1&docid=6062040&file=4.

109 Austl. Dep't of Foreign Aff. & Trade, *Due Diligence Guidelines for the Responsible Supply Chain of Minerals from Red Flag Locations to Mitigate the Risk of Providing Direct or Indirect Support for Conflict in the Eastern Part of the Democratic Republic of the Congo* (Jan. 31, 2014), http://www.dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/congo/Pages/due-diligence-guidelines-for-the-responsible-supply-chain-of-minerals-from-red-flag-locations-to-mitigate-the-risk-of-provi.aspx.

110 H.K. Stock Exch., *Amendments to the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited* (2010), http://www.hkex.com.hk/eng/rulesreg/listrules/mbrulesup/Documents/mb96_miner.pdf (Chapter 18: Equity Securities, Mineral Companies).

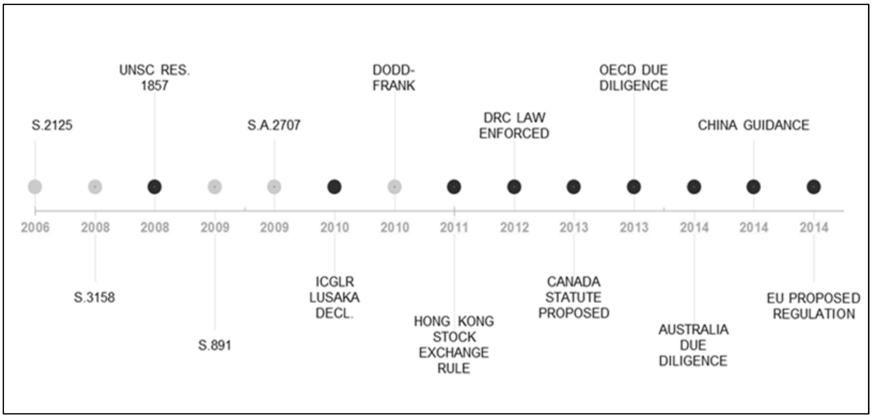
111 *Proposal For a Regulation of the European Parliament and of the Council Setting up a Union System for Supply Chain Due Diligence Self-Certification of Responsible Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating in Conflict Affected and High-Risk Areas*, COM (2014) 111 final (Mar. 5, 2014), http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152227.pdf.

112 The Chinese conflict minerals proposed rule has been issued by a state-affiliated body, the China Chamber of Commerce of Minerals, Metals and Chemicals Importers and Exporters. It offers guidance on conflict products generally, but suggests that the guidance was inspired by the conflict minerals rules elsewhere and the OECD guidance. China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, Guideline for Social Responsibility in Outbound Mining Investments 11 n.7, 12 n.8 (Mar. 6, 2014), http://www.chinacsrproject.org/Uploads/Events/%7B3F0A35CF-0801-447A-A0F0-DC355CFDE8B2%7D_Draft_Guidance_PublicConsultation_ENG_20140310.pdf (draft guidance).

113 160 CONG. REC. S6,189–01 (daily ed. Nov. 20, 2014) (statement of Sen. Durbin).

114 *Id.*

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



A map shows how the United States has catalyzed a spread in the rules which has recently reached Europe and China, meaning that the three largest consumers of the minerals have signed on to some degree of supply chain controls.

Figure 2: Date Conflict Minerals Rule Proposed

Private companies as yet uncovered by this emerging global welter of rules have also started to commit themselves to supply chain due diligence. The promise by the Malaysia Smelting Corporation, the second-largest tin producer in the world, that it "will not trade in cassiterite that directly or indirectly finances or benefits armed groups in the DRC and/or adjoining countries," exemplifies this change.[115]

3. *Conclusion*

Through the Conflict Minerals Rule, the United States has turned to an agency engaged in the development of soft rules designed to harmonize global securities rules to do something similar in the name of the human rights of the Congolese.[116] The Conflict Minerals Rule is in fundamental part an effort to spread particular mechanisms for the implementation of human rights values—in this case, by reporting by large, internationally minded corporations—across not just American firms but firms the world over.

Given its limitations, the Conflict Minerals Rule is probably best understood as an experiment,[117] based on the suspicion that American companies that use these minerals are helping to fund dissident groups interested in continuing a series of civil wars in and around the Democratic Republic of the Congo.

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

It is a somewhat limited ambition, and one that is duplicated with the Resource Extraction Rule. But the caution inherent in the method chosen to address human rights depredation in Africa should not detract from the innovations. The agency chosen to pursue this rule is relatively insulated from

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115 *MSC Policy on Conflict Minerals*, MALAY. SMELTING CORP. BERHAD, http://www.msmelt.com/abt_policy.htm (last visited Mar. 2, 2016).

116 Although, to be sure, the Conflict Minerals Rule has its critics. *See, e.g.*, Sudarsan Raghavan, *In Congo, Unintended Harm from a U.S. Law*, WASH. POST, Dec. 1, 2014, at A1 ("The legislation, signed by President Obama four years ago, set off a chain of events that has propelled millions of miners and their families deeper into poverty.").

117 Indeed, some research on the rule characterizes it precisely this way. *See* Schwartz, *supra note* 91 (manuscript at 32).

presidential control, and the human rights being vindicated are not realized through a traditional international law mechanism. Instead, the approach is to delegate international norm enforcement to domestic agencies, and to encourage other countries to empower their own domestic regulators to do the same thing.

B. The Resource Extraction Rule

Dodd–Frank also requires the disclosure of all payments to governments in exchange for resource extraction of a broad swath of minerals by publicly listed energy and mining companies.[118] Telling the world just how much money foreign governments receive for those mineral rights is supposed to serve two functions. It is meant to ensure the citizens of foreign countries will better be able to monitor their governments to see if their country's resources are being used corruptly.[119] It also is meant to deter firms from making questionable payments to governments.[120]

This rule looks not just to the SEC to enforce human rights, but also to the accountants, lawyers, and other gatekeepers who are supposed to monitor corporate compliance, handle filings, and assess the internal controls of publicly traded firms, and to bring them into this effort as well.

In adopting the Resource Extraction Rule, Congress signed the SEC up for a global campaign, the so-called Extractive Industries Transparency Initiative (EITI), organized by a non-governmental organization based in Britain, to create a level global playing field with regard to resource extraction transparency.[121] The United States's commitment to publicizing resource extraction payments is only the second example of an OECD member signing on to a rule that has heretofore largely been adopted by resource-rich, but per capita poor, countries. As of January 2014, forty-nine countries have either started or implemented the process of enacting transparency rules for resource extraction payments.[122] As Figure 3 shows, it is the poorest countries that adopted the EITI earliest and have steadily continued to do so; the United

118 15 U.S.C. § 78m(q) (2012).

119 Press Release, SEC, SEC Proposes Rules for Resource Extraction Issuers Under Dodd–Frank Act (Dec. 11, 2015), https://www.sec.gov/news/pressrelease/2015-277.html.

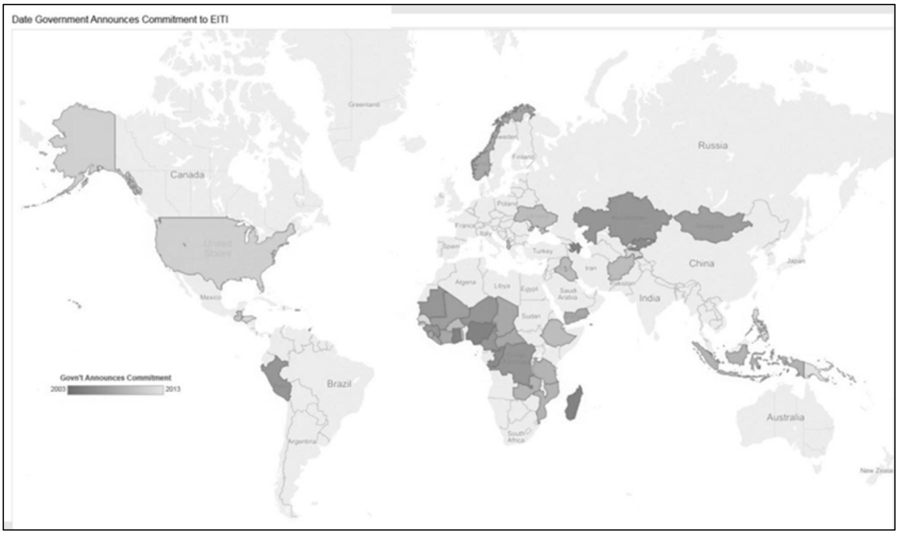
120 *Id.*

121 EITI, FACT SHEET (Dec. 4, 2015), https://eiti.org/files/document/EITI_Factsheet_EN.pdf; *What is the EITI?*, EITI, https://eiti.org/eiti (last visited Mar. 2, 2016); *History of EITI*, EITI, https://eiti.org/eiti/history (last visited Feb. 6, 2016).

122 *EITI Countries*, EITI, https://eiti.org/countries (last visited Mar. 2, 2016).

States is a comparative Johnny-come lately, and Norway, the other wealthy complier, was not in the first tranche of countries to do so.

Figure 3: Date Government Announces Commitment to EITI



As a matter of law, the Resource Extraction Rule requires the SEC to

> require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals.[123]

It covers payments made to governments for exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals or any acquisition of a license for such activity.[124] As with the Conflict Minerals Rule, the Resource Extraction Rule requires a publicly available report on payments made to any foreign authority on this issue, with

123 15 U.S.C. § 78m(q)(2)(A).

124 "Under the final rules, 'processing' includes field processing activities, such as the processing of gas to extract liquid hydrocarbons" but does not "include refining or smelting . . . [as] refining and smelting are not specifically listed in Section 13(q)." Conflict Minerals, Exchange Act Release No. 34-67717, 104 SEC Docket 1796 (Nov. 13, 2012).

the exception of so called de minimis payments or any payment (or series of related payments), equal to or exceeding $100,000 during the most recent fiscal year.[125]

Controversially, there is no exemption from the disclosure requirements, not even where foreign law prohibits the disclosure, or when confidentiality provisions in the contract to purchase the resources so provide.[126]

The rule reaches broadly in other ways. It does not only require disclosure by those issuers engaged in the commercial development of oil, natural gas, or minerals; publicly traded companies must also disclose payments made by a subsidiary or another entity controlled by the company.[127] The types of payments that must be disclosed include taxes, royalties, fees, production entitlements, bonuses, dividends, and infrastructure improvements.[128] It is meant to be an inclusive, rather than limited, list. Because of this very broad reach, among other reasons, the first iteration of the rule was withdrawn after an adverse ruling by a federal court regarding the findings made to support the breadth of the disclosure requirements.[129]

But the flexibility of the agency to depart from congressional instruction is limited; Congress provided that "the Commission shall issue final rules that require each resource extraction issuer" to report on their payments, as opposed to letting the agency decide whether to require such disclosure after its own consideration of the issue.[130] It arguably ties the agency's hands.

Like the Conflict Minerals Rule, the Resource Extraction Rule is embedded in an international effort. Unlike conflict minerals, however, the United States is a follower, rather than a leader, in the area. The statute itself bows to the

125 *See id.* at 14.

126 As the D.C. Circuit suggested, this aspect of the rule could amount to quite a confiscation. Am. Petrol. Inst. v. SEC, 714 F.3d 1329, 1332 (D.C. Cir. 2013) ("[A]ssuming that four countries—Angola, Cameroon, China, and Qatar—prohibit the disclosure of payment information, the Commission estimated that resource extraction issuers operating in those countries could lose over $12.5 billion if forced to sell their assets.").

127 *See* Press Release, *supra* note 119.

128 *Fact Sheet: Disclosing Payments by Issuers Engaged in Resource Extraction*, SEC, http://www.sec.gov/News/Article/Detail/Article/1365171492584 (last updated July 29, 2014).

129 *See* Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5 (D.D.C. 2013).

130 15 U.S.C. § 78m(q)(2)(A) (2012) (setting forth disclosure requirements for conflict resources).

EITI.[131] This cross-border initiative originated in the United Kingdom. As EITI has explained, the organization is responsible for a

> global Standard to promote openness and accountable management of natural resources. It seeks to strengthen government and company systems, inform public debate, and enhance trust. In each implementing country it is supported by a coalition of governments, companies and civil society working together.[132]

In that sense, the Resource Extraction Rule reflects a cross-border human rights initiative that is meant to develop civil society. And the EITI's role in devising the content of the rule is hardly hidden; it is referenced as the basis of American action in the statute.[133] As the sponsors of the Resource Extraction Rule indicated, "The U.S. needs to take a leadership position in regard to the Extractive Industries Transparency Initiative."[134]

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131 "To the extent practicable, the rules . . . shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals." *Id.* § 78m(q)(2)(E). The Final Rule specifically says in footnote 581 that

> the final rules are generally consistent with the EITI, except where the language of Section 13(q) clearly deviates from the EITI. In these instances, the final rules generally track the statute because, on these specific points, we believe the statutory language demonstrates that Congress intended the final rules to go beyond what is required by the EITI. In this regard, we view the reporting regime mandated by Section 13(q) as being complementary to, rather than duplicative of, host country transparency initiatives implemented under the EITI.

Conflict Minerals, Exchange Act Release No. 34-67717, at 161 n.581 (Nov. 13, 2012), http://www.sec.gov/rules/final/2012/34-67716.pdf.

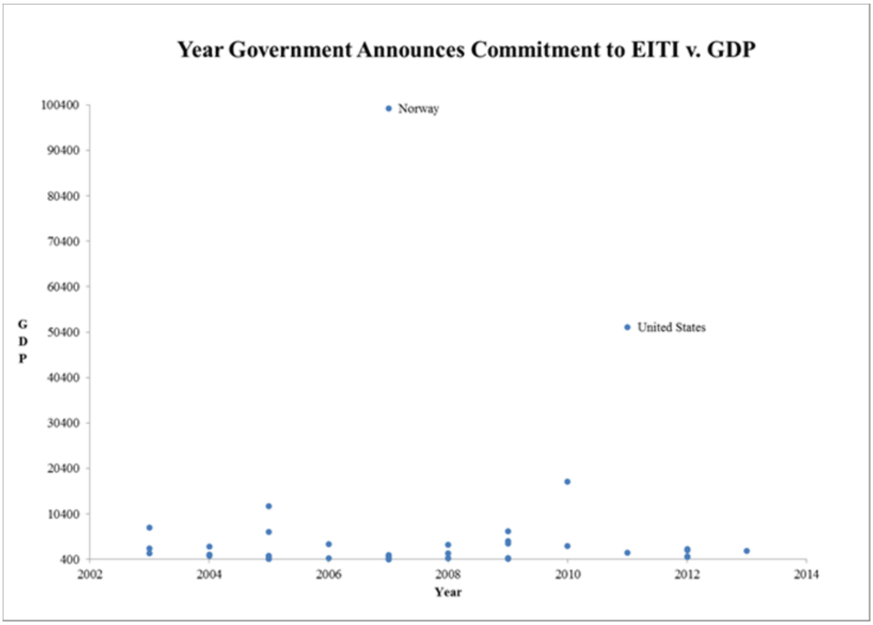
132 *What is the EITI?*, EITI, https://eiti.org/eiti (last visited Mar. 28, 2016).

133 "The new EU and US rules therefore complement, rather than replace, the EITI." David Laurence, David Gilmore & Rebecca Major, *"Publish What You Pay,"* LEXOLOGY (June 5, 2013), http://www.lexology.com/library/detail.aspx?g=366b840f-2bab-4d4a-9791-a96ee39f7f62.

134 156 CONG. REC. S3,815 (daily ed. May 17, 2010) (statement of Sen. Benjamin Cardin).

The American adoption of the EITI might be seen as an effort to encourage developed countries to adopt transparency principles designed to help developing countries avoid corruption. Indeed, it is, as we have observed, only the second wealthy country to commit to the initiative; but, as the conflict minerals timeline suggests, its adoption of the rule will likely be joined by other wealthy countries in the future.[135] Figure 4 illustrates the degree to which the United States and Norway represent wealthy outliers—and comparatively late adopters—in the EITI movement.

Figure 4: EITI Countries: Time and Income



To be sure, the American endorsement of this global value is modest. Only publicly traded resource firms need worry about the resource extraction rule;

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135 The spread of transparency soft law norms has been a feature of the current era, with Transparency International a soft law success, and other transparency initiatives important providers of standards in global governance. For analyses, see Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1525–26, 1525 n.130 (2006) (discussing the advantage of global anti-corruption norms, such as those offered by Transparency International); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 901 (2006) (describing, albeit with some skepticism, the way transparency norms have been adopted by organizations bullish on the way it would help build "relations to the wider global community").

private companies need not report.[136] No one is banned from making high payments to foreign governments, with little control over how that money is spent. The only sanction for such payments, assuming they are adequately disclosed, is the potential for shame if the payments look unwarranted or directed to unappealing parts of the foreign government ruling over the resource in question.[137]

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

C. Evaluating Human Rights by Rule

Despite a degree of caution by Congress, the Conflict Minerals and Resource Extraction Rules are an almost unprecedented effort to task an American agency with the transmission of new efforts that can only be characterized as designed to improve human rights. The SEC has engaged in international relations before, but rarely in the service of human rights.[138] Instead, its work has largely been efforts at international regulatory cooperation, or the controversial extraterritorial application of American securities laws.[139]

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136 15 U.S.C. 78m(q)(1)(D) ("[T]he term 'resource extraction issuer' means an issuer that [] is required to file an annual report with the [SEC].").

137 But, to be sure, this sort of shaming is hardly uncommon in both international and in corporate law. *See, e.g.*, David A. Skeel, Jr., *Shaming in Corporate Law,* 149 U. PA. L. REV. 1811 (2001) (discussing the phenomenon); Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 309 & n.178 (2011) (analyzing shaming in the human-rights context).

138 It is a veteran of securities regulatory cooperation, which is principally done through the International Organization of Securities Commissions (IOSCO). The SEC was a charter member of the organization, and has played an active role since its founding in 1984. The regulatory cooperation pursued by IOSCO has been limited, but securities regulators have agreed on some basic principles of market supervision, and have agreed to assist one another by exchanging information that could help to prove up enforcement actions. For an analysis, see David Zaring, *supra* note 82, at 561–65.

139 For discussions of the SEC's extraterritorial reach, see A.C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105, 142 (2011) (analyzing Dodd–Frank's endorsement of some extraterritorial SEC activities); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2362 (1998) (criticizing the "ever-expanding extraterritorial reach of U.S. securities regulation").

It has, to be sure, campaigned to see some American anti-fraud innovations adopted by regulators in foreign countries. In particular, the agency has pushed anti-bribery laws that do work similar to that done by the Foreign Corrupt Practices Act;[140] the United Kingdom and other countries have obliged by passing their own laws, and the OECD has made the adoption of anti-bribery provisions as a condition of membership.[141] The United Kingdom has been particularly committed to the cause, enacting in 2013 a law even more restrictive than that enforced by the SEC.[142]

The SEC has also successfully persuaded most sophisticated economies to adopt rules against insider trading; an increasing number of these agencies are actually enforcing the rules, as Abraham Newman and David Bach have shown.[143]

The Conflict Minerals and Resource Extraction Rules look a little like those earlier campaigns against insider trading and bribery. But unlike the insider trading rules, both the Conflict Minerals and Resource Extraction Rules are principally designed to offer benefits to the citizens of foreign nations, rather than to investors in the United States. And unlike the anti-bribery rules, Dodd–Frank's human rights rules are more engaged with international governance. The Conflict Minerals Rule is meant to inspire other countries to join the United States in addressing, in a novel way, the problem of external funding of civil wars, while the Resource Extraction Rule explicitly is based on

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140 Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, *amended by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, *and* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 2, 112 Stat. 3302.

141 The OECD has explained that "[t]he 34 OECD member countries and seven non-member countries—Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia, and South Africa—have adopted this Convention." *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm (last visited Mar. 2, 2015). As Erik Chaffee has explained, the convention "requires countries ratifying it to implement laws criminalizing bribery of foreign officials." Eric C. Chaffee, *The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Corruption Laws in Preventing or Lessening Future Financial Crises*, 73 OHIO ST. L.J. 1283, 1292 (2012); *see* ORG. FOR ECON. CO-OPERATION & DEV., OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (2012), http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/40272933.pdf. For an analysis of the convention, see Joseph W. Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 J. CORP. L. 325, 339–40 (2013).

142 *See* Bribery Act 2010, c. 23 (U.K.); Jon Jordan, *The Need for A Comprehensive International Foreign Bribery Compliance Program, Covering A to Z, in an Expanding Global Anti-Bribery Environment*, 117 PENN ST. L. REV. 89, 96–97 (2012) (analyzing the British statute).

143 David Bach & Abraham L. Newman, *Transgovernmental Networks and Domestic Policy Convergence: Evidence from Insider Trading Regulation*, 64 INT'L ORG. 505, 520 (2010) (showing how these laws moved from the United States to the rest of the world).

an international good-governance effort that comes not from the United States but from Europe.

Regulatory cooperation on human rights issues now appears to be part of the mission of the SEC, and it is one that Congress could add to in the future. It is possible that action by government agencies, if done on the basis of *opinio juris* could amount to evidence of customary international law.

But these rules look more rooted in a different sort of governance. They use an agency elsewhere in the statute tasked with international regulatory cooperation. They hearken to a soft law initiative by a non-governmental organization, as well as to studies conducted by a U.N. agency. No treaty requires their promulgation, and customary international law has not, in the past, posed disclosure obligations on would-be bribers or funders of conflict.

Why has Congress required the SEC to intervene in the foreign activities of American companies? Karen Woody has argued that "[t]he regulation and enforcement of section 1502 [(the Conflict Minerals Rule)] falls well outside of the SEC's mandate" or expertise.[144] Jeffrey Schwartz largely agrees; in his view, "The basic approach—relying on companies to name and shame themselves when there are high costs and low benefits for doing so—is an inherently weak starting point."[145] Galit Sarfaty takes a different view; she has argued that "[s]ecurities law is an innovative strategy that has the potential to significantly further the movement for corporate accountability."[146] Sarfaty argues that the risks are consistent with the kind of things investors should care about, because "human rights risks are material for investors and there are long-term costs to companies for not reporting."[147] Both Sarfaty and Woody

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[144] Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315, 1320 (2012); *see also* Marcia Narine, *From Kansas to the Congo: Why Naming and Shaming Corporations Through the Dodd–Frank Act's Corporate Governance Disclosure Won't Solve a Human Rights Crisis*, 25 REGENT U. L. REV. 351, 362 (2012) ("If the government chooses to engage in future human rights governance legislation for businesses, the Dodd–Frank Act should not serve as the model."); Stephen Kim Park, *Targeted Social Transparency as Global Corporate Strategy*, 35 NW. J. INT'L L. & BUS. 87, 106–08, 125–37 (2014) (offering suggestions for the implementation of the conflict minerals provision that would improve their effectiveness); Celia R. Taylor, *Conflict Minerals and SEC Disclosure Regulation*, 2 HARV. BUS. L. REV. ONLINE 105, 106 (2012), http://www.hblr.org/wp-content/uploads/2012/01/Taylor-Conflict-Minerals.pdf ("The rules that the SEC has currently proposed are overly draconian, and strict enforcement of them will put the SEC into the position of dictating not only rules of corporate governance by indirectly dictating daily corporate operation themselves . . . .").

[145] Schwartz, *supra* note 91, at 35.

[146] Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VA. J. INT'L L. 97, 101 (2013); Woody, *supra* note 144, at 1327.

[147] Sarfaty, *supra* note 146, at 101.

are worried about American exceptionalism; Sarfaty recommends "international regulatory convergence to relieve possible damage to a company's competitive advantage due to increased costs associated with social disclosure."[148]

Congress was worried about this too. The sponsors of the Resource Extraction Rule presented the amendment with the statement that they "encourage the President to work with members of the G8 and the G20 to promote similar disclosures through their exchanges and their jurisdictions."[149]

III. ASSESSING FINANCIAL REFORM'S INTERNATIONALISM

This section first reflects on the way that regulatory cooperation and the tasking of agencies to pursue global values has supplanted a particular kind of international law—customary international law. It then turns to the domestic implications of financial reform, which changes the actors of international governance and also pushes for ethical standards for American companies that have international connections.

A. The Death of Custom?

Customary international law—the unwritten rules that are meant to bind states but that have never been memorialized through an international agreement—has turned into doctrine that is both exceedingly controversial and totally stymied. American courts, led by the Supreme Court, approach it with suspicion.[150] Many scholars have argued that it is not really law, and certainly

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148 *Id.* at 102.

149 156 CONG. REC. S8,318 (2010).

150 A case brought alleging customary international law violations led the Supreme Court to conclude that the jurisdictional vehicle for the cases bars any "case seeking relief for violations of the law of nations occurring outside the United States." Kiobel v. Royal Dutch Petrol. Co., 133 S. Ct. 1659, 1669 (2013); *see also* United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1252 (11th Cir. 2012) ("[C]ustomary international law is, by its nature, difficult to determine . . . ."); Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1015 (7th Cir. 2011) ("[C]ustomary international law—as the term itself implies—is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source. All of these characteristics give the body of customary international law a 'soft, indeterminate character.'" (quoting Flores v. S. Peru Copper Corp., 414 F.3d 233, 247–48 (2d Cir. 2003))); Sampson v. Fed. Republic of Ger., 250 F.3d 1145, 1156 (7th Cir. 2001) (worrying that certain uses of "customary international law . . . would allow for a major, open-ended expansion of our jurisdiction into an area with substantial impact on the United States' foreign relations" and should therefore be avoided).

not justiciable law;[151] others think that it is nothing more than the bidding of powerful states encompassed in a charade of lawfulness.[152]

Soft law cooperation through agencies has increasingly taken on the responsibilities that used to be handled through customary international law, as defining it and applying it has become more difficult. It does so in particular in those areas where regulators hold sway. Customary international law may still guide diplomats, but in those areas where agencies set American policy, one can see how regulatory cooperation through soft law will hold more and more sway in these growing aspects of international governance.

One sort of custom has drawn particular suspicion—the sort that features claims about emerging international rules regarding matters of import, but also of controversy, such as the protection of human rights or the environment.[153] These rules might be termed "positive rights" rules, because they purport to afford international legal entitlements to people, or, occasionally, non-persons, that previously did not enjoy them.

They are always controversial. Unwritten custom has been cited as a reason to permit anticipatory offensive intervention in a case where a state is suspected of fostering international terrorism, despite the vociferous objections of members of the Security Council to such a doctrine; this claim underlaid the

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151 *See, e.g.*, Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 902 (2007) (arguing that "federal common law relating to CIL be grounded in, conform to, and not exceed the contours of what the political branches have authorized"); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 671 (1986) ("[C]ustomary international law has not traditionally been applied by American courts, nor should it be. . . . [M]y analysis suggests the need for a broader revision of the traditional status of customary international law."); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 44–48 (1995) (arguing that applying customary international law in federal courts is inconsistent with constitutional values).

152 *See, e.g.*, Michael Byers, *The Shifting Foundations of International Law: A Decade of Forceful Measures Against Iraq*, 13 EUR. J. INT'L L. 21, 32 (2002) ("[P]owerful states have always had a disproportionate influence on customary law-making . . . ."); Jan Klabbers, *The Curious Condition of Custom*, 8 INT'L LEGAL THEORY 29, 30–31 (2002) ("[C]ustomary international law is somewhat unbalanced, tilting too much in favour of a handful of traditionally powerful states and towards the views of international lawyers that live in the most powerful nations."); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1114 (1999) ("The content of CIL seems to track the interests of powerful nations.").

153 As Emily Kadens and Ernest Young have observed, "a model of adherence to settled practices may be antithetical to what human rights advocates hope to achieve." Emily Kadens & Ernest A. Young, *How Customary Is Customary International Law?*, 54 WM & MARY L. REV. 885, 914 (2013).

American invasion of Iraq in 2003.[154] It has formed the basis for a claim requiring the preservation of whales based on the notion of their right to life, despite the strong commitment of many states—and cultures within states, for that matter—not just to ignore whales, but to actively hunt them; these claims have launched a variety of performative activism by non-governmental organizations such as Greenpeace.[155] Some argue that customary international law has rendered the death penalty—a practice used by most nations—illegal under international law, a claim that the state of Texas has rejected out of hand.[156]

Suspicions of positive rights rules have led to skepticism about a second sort of custom, the one premised on the idea that the international legal system must include some principles that—even if they are not reduced to the terms of a duly executed treaty—can help make the international system work.[157] We might think of these rules as "cooperation facilitating" rules, and they should, in theory, be uncontroversial because their purpose is not to build a new architecture of rights with which all countries must comply, but rather only to provide the foundation on which further international cooperation might be constructed.

An example of this second kind of customary international law lies in the classic rules regarding diplomatic immunity.[158] Diplomatic immunity, under customary international law, requires that a "receiving State shall treat [a diplomat] with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."[159] The norms about the protections of ambassadors and consuls facilitated state-to-state interaction and created an

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154 *See* John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT'L L. REV. 283, 288, 301 (2003).

155 *See* Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21 (1991).

156 John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J. L. & SOC. POL'Y 195, 254 & n.425 (2009) (making this argument).

157 *See* Kadens & Young, *supra* note 153, at 887 ("[C]ustomary international law derives its appeal not only from a fear that it may be the only game in town but also from a widely held sense that it is, well, *customary*.").

158 *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 345–59 (3d ed. 1979).

159 This is the definition set forth in the Vienna Convention on Diplomatic Relations, which sought to reflect customary international law understandings of diplomatic immunity. *See* Vienna Convention on Diplomatic Relations art. 29, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; *see also* 767 Third Ave. Assocs. v. Permanent Mission, 988 F.2d 295, 299–300 (2d Cir. 1993) (describing the Vienna Convention on Diplomatic Relations as a codification of historical, customary practices of nations).

opportunity and modality for discourse, which in turn could lead to other, more specific forms of cooperation in more narrow issue-areas.

But diplomatic immunity is only one of a number of examples of cooperation-facilitating customary international law. The requirement that local remedies be exhausted prior to creating an international dispute has a conflict-mediating function (which, of course, the rules against harming diplomats also facilitate).[160] If national remedies were sufficient recourse for the citizens of one country harmed by the actions of another, there would be no need to make an international incident out of it. Relatedly, the rules of state responsibility were meant to clarify when acts could be attributed to states and, therefore, set the ground rules for violations of international law and offering rules of the road for when it could be invoked.[161]

The positive rights sort of customary international law, the sort involving bold claims about human rights, the environment, the laws of war, and so on, has been due for a reevaluation. The idea that there is a discoverable international legal doctrine, consisting of unwritten norms and requiring hotly disputed controversies to be resolved against the will of holdout countries in a particular way, has launched many an implausible campaign, either in the academy, or by law reformers. The problem with arguments that customary international law requires that whales be protected, that the death penalty be abolished, and that countries be permitted to attack potential terrorists wherever they may be found, is that a significant number, and in some cases a vast majority, of countries and the citizens in them disagree that these rights exist. These claims—often noble efforts—about the legal obligations of countries to protect values that many of them have never deigned to honor in practice, other than the possible practice of signing on to some nonbinding international statement that they have no intention of honoring at home, have always been a controversial, and ultimately destabilizing, claim about international law.[162]

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[160] Note, *The Alien Tort Statute, Forum Shopping, and the Exhaustion of Local Remedies Norm*, 121 HARV. L. REV. 2110, 2124 (2008) (assessing the role of the "CIL norm of exhaustion" in domestic law).

[161] *See, e.g.*, George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 553 (2005) (arguing that "the selection among multiple equilibria may also be understood as a separate coordination game"). The laws of the sea arguably had this function as well by creating common standards for figuring out where the sea begins, where states could exercise control over the sea, and where the delimitations of that control were meant to end. *See* Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 595, 600–01 n.134 (2002) (discussing the purpose of the International Convention on the Law of the Sea).

[162] The list of academic articles making broad claims about customary international law is a long one, and, to be sure, often these claims are unlikely to be adopted by an international tribunal. But to just take the right

These types of claims about custom have led many legal scholars and jurists to conclude that identifying customary international law and making claims about what is required is an exercise rooted more in hope than experience.[163] That in turn has led them to argue that while customary international law perhaps has produced some unobjectionable rules of the road in the past, it is no longer providing such a service. Joel Trachtman has proclaimed "the obsolescence of customary international law," given that most of these rules have been codified through a treaty in one way or another.[164] And the list of high profile critics of the current state of customary international law is long.[165]

To be sure, almost no one acts as if customary international law is a null set: if the United States was not able to rely on customary international law as a mechanism to give it an approach to treaty interpretation consistent with that set forth in the Vienna Convention on the Law of Treaties,[166] then it would have a difficult time concluding treaties of any sort.[167]

But the United States has been particularly skeptical about the controversial and tendentious efforts to push the doctrine beyond what state practice obviously permits.[168] Many American scholars have accordingly concluded

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to education—a right afforded only some of the world's citizens, and one that could be delivered through the private sector, see, for example, Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 616–22 (1992) (positing a right to state-supported education derived from customary international law); Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 HARV. BLACKLETTER J. 37, 59–60 (1994) ("International law . . . provides an additional basis for the claim that education is necessary to ensure effective participation in society.").

163 *See supra* notes 149–57 and accompanying text.

164 Joel Trachtman, The Obsolescence of Customary International Law (Oct. 21, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2512757.

165 *See supra* notes 149–57 and accompanying text.

166 While the United States is not a signatory to the Vienna Convention on the Law of Treaties, its diplomats have said that much of the treaty's provisions "constitute customary international law on the law of treaties." *Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Feb. 27, 2016).

167 Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 749 (2014) (describing the "cumbersome ratification processes that domestic law can require of traditional treaties"). The United States has also engaged in campaigns to change customary international law, as it did with the language in its Model Bilateral Investment Treaty (BIT). In the Model BIT, both parties sign on to language stating that "fair and equitable treatment and full protection and security" for investments is required by customary international law; this suggests that it takes the institution seriously enough to negotiate for claims about what it requires. 2012 U.S. Model Bilateral Investment Treaty, art. 5, ¶ 1, OFF. U.S. TRADE REPRES., https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

168 *See infra* note 174.

that customary international law should be viewed as a narrow category of law recognized by American courts only when Congress or the president adopts it as such,[169] if it even exists at all.[170]

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

As custom has calcified, soft law has exploded. Soft law is the general term used to refer to international governance efforts that do not meet the standards of binding obligation. The most interesting form of this soft law consists of the efforts by domestic agencies who have the power to enact binding rules at home to coordinate their activity with their foreign counterparts. This type of soft law has been used to set some of the most important standards in global finance, and also has made progress in areas of food safety,[171] competition law,[172] and other areas in which domestic consumers are affected by the globalized nature of the businesses that cater to them,[173] leaving regulators struggling to catch up unless they coordinate their efforts internationally.

The argument in this Article is that soft law is increasingly doing the things that custom used to do, both in providing the sorts of basic rules that makes global governance manageable, and, intriguingly, also providing the means for pursuing the sorts of human rights innovations that have made customary international law controversial. This is particularly the case in the contemporary practice of the United States, whose courts have increasingly stopped trying to discern and apply customary international law, but whose

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169 *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 870 (1997) (noting that "in the absence of federal political branch authorization, [customary international law] is not a source of federal law").

170 *See* J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000) (discussing how customary international law is not a legitimate source of international law).

171 Press Release, U.S. Food & Drug Admin., FDA Takes Steps to Help Ensure the Safety of Imported Food (July 26, 2013), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm362610.htm. The initiative was based on embrace of foreign regulatory supervision of some aspects of food chain for American consumers. *Id.* (announcing "global solutions to food safety so that whether you serve your family food grown locally or imported you can be confident that it is safe").

172 The International Competition Network (ICN) is comprised of antitrust regulators from around the world; it is a common example of a soft law network. For overviews of the ICN, see Eleanor M. Fox, *Linked-in: Antitrust and the Virtues of a Virtual Network*, 43 INT'L LAW. 151, 169 (2009) ("[T]he ICN's output may develop into soft law with some influence."); D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029, 1041 (2011) (describing the ICN as "a soft law institutional alternative").

173 Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 330 (2008) (noting the "conclusion of hundreds of multilateral soft-law instruments" to date).

agencies vindicate informal international norms with their new foreign policies.[174]

There are advantages to the ascent of soft law over custom. It is flexible and yet capable of precision, more so than customary international law, and soft law's problems—ones of legitimacy and, at least superficially, of compliance—are problems shared by customary international law. Soft law is more precise than customary international law in that it includes nonbinding agreements that can be quite specific, instead of claims reconciling various practices of states similar in degree, but not in particular. Soft law, made by agencies of their own initiative—and often concluded by international agreement before even being submitted to domestic notice and comment and judicial review—can look like an imperfect form of good governance.[175] But customary international law—evidenced by state practice but not necessarily by any sort of democratic process—is no easy remedy to the democracy deficit. And, as I have argued elsewhere, soft law is increasingly paired with more routinized administrative procedure.[176]

But there are other facets of the shift in emphasis that are also important. Soft law is being created by different parts of the government than is customary international law. That is, it is agencies, rather than trade and foreign relations diplomats familiar with international regulatory cooperation, who do the important work in regulatory soft law. Customary international law, and the American position on whether it applies or does not, is the province of the State Department.[177] If soft law is replacing calcified custom,

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174 "Advocates who have argued to American courts that customary international law trumps domestic norms report a 'blank stare phenomenon'—that is, extreme judicial skepticism about the domestic force of customary law." Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 383 (2002).

175 David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U. L. REV. 59, 63 (2013) (questioning whether "basic questions about whether notice and comment requirements are met if the important policymaking was done at the international level").

176 David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547, 579 (2005) ("[F]inancial regulatory cooperation has exhibited a notable impetus towards the proceduralization of its products.").

177 At least, this argument has been made by Philip Trimble. Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 730 (1986) ("[T]he United States government interaction with emerging customary international law may be limited to the State Department . . . ."). And possibly also by the courts secondarily, as the history of the Alien Tort Statute has suggested. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (holding that "courts may fashion domestic common law remedies to give effect to violations of customary international law").

the development marks a shift in the parts of the government that are creating and applying international rules.[178]

Financial reform illustrates the new centrality of soft law to American foreign policy. It is a centerpiece of American free trade efforts.[179] The Chamber of Commerce, for example, has come out in favor of the Executive Branch's efforts to promote international regulatory cooperation by its agencies.[180] The National Association of Manufacturers has endorsed the new effort to create multilateral trade agreements with partners in the European Union and across the Pacific.[181] For these business groups, a trade deal "is only worth doing if the regulatory side is covered," as former trade official Shaun Donnelly has said.[182] Indeed, much of these negotiations might be understood as an effort by American business, with the support of the government, to get European and Asian regulators to adopt American principles of notice and comment, as the efforts to create standardized administrative processes in the

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[178] If soft law is doing what custom used to do, is soft law becoming customary—that is binding—international law? It is of course possible that the transition from soft law to custom could occur. But it is worth noting the differences. Widespread agency practice could certainly exist in parallel, and just because that practice is coordinated by the agencies does not necessarily make it part of *opinio juris*. Soft law practitioners regularly declaim its legal bindingness, and there is, of course, no effort to ratify agency positions more broadly across other government organs. American securities regulators have persuaded their foreign counterparts, for example, to ban insider trading and to forbid corporate executives from paying bribes to foreign government officials. *See, e.g.*, Bach & Newman, *supra* note 43 (discussing the spread of insider trading rules); Stephen H. Willard & Bonnie H. Weinstein, *International Investment, Development, and Privatization*, 34 INT'L LAW. 485, 491–92 (2000) (discussing the spread of international anti-bribery initiatives); Lanny A. Breuer, Assistant Att'y Gen., U.S. Dep't of Justice, Speech at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2012), http://www.justice.gov/criminal/pr/speeches/2012/crmspeech-1211161.html ("[W]e in the United States are in a unique position to spread the gospel of anti-corruption, because there is no country that enforces its anti-bribery laws more vigorously than we do."). But no one has argued that these rules now amount to customary international law.

[179] Zaring, *supra* note 30.

[180] There is an entire segment of the Chamber of Commerce dedicated to the alignment of regulatory efforts across nations. *Global Regulatory Cooperation*, U.S. CHAMBER OF COMMERCE, https://www.uschamber.com/global-regulatory-cooperation (last visited Feb. 28, 2016).

[181] *Public Comments Concerning the Proposed Transatlantic Trade and Investment Partnership*, NAT'L ASS'N MFRS. (May 10, 2013), http://www.nam.org/Issues/Trade/NAM-Comments-on-the-Launch-of-U_S_-EU-Trade-Negotiations-(TTIP)/. *See generally IEAP-01 International Trade Policy*, NAT'L ASS'N MFRS., http://old.nam.org/Issues/Official-Policy-Positions/International-Economic-Affairs-Policy/IEAP-01-International-Trade-Policy.aspx (last visited Feb. 28, 2016) ("[T]he NAM also believes that bilateral and regional agreements have an important role in opening markets for American manufacturers.").

[182] *See Regulation—None of Our Business?*, CORP. EUR. OBSERVATORY (Dec. 16, 2013), http://corporateeurope.org/trade/2013/12/regulation-none-our-business.

Trans-Pacific Partnership and Transatlantic Trade and Investment Partnership attest.[183]

There are some things that soft law does not do well: It is not a paragon of administrative governance with regard to transparency and accountability.[184] In some cases, it is easy to ignore.[185] But compared to the development of customary international law, soft law's problems look more like features than like bugs.

Soft law's limitations are real, but other forms of international governance—especially customary international law—have always suffered from similar claims of weakness. Both it and soft law are difficult to enforce.[186] Customary international law has problems with legitimacy; part of the lack of legitimacy stems from the opaque nature of the source of the law.[187] That opacity is at least as limited as that of soft law.

To be sure, traditional international law has always been something to take seriously—more seriously than have its many critics.[188] Treaties are important, even if difficult to conclude, and there is still a role in foreign relations for customary international law. But in the new global governance era, American engagement abroad is likely not just to be driven through law or politics, but instead through different kinds of institutions. Financial reform exemplifies the way that informal arrangements can do the work that legal systems used to do. These institutions look legal, engage the attentions of lawyers, and write and enforce rules that look like the rules one would see in code of regulations.

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183 *"Long Way to Go" on Regulatory Cooperation Talks in TTIP—EU Official*, BORDERLEX (Feb. 17, 2015), http://www.borderlex.eu/long-way-go-regulatory-cooperation-talks-ttip-eu-official/ (discussing an EU official's statement that "Washington has also asked Europe to adopt the US system of 'notice and comment'").

184 Or at least many soft law institutions began that way, although they have since improved. *See* Zaring, *supra* note 16.

185 John C. Coffee, Jr., *Extraterritorial Financial Regulation: Why E.T. Can't Come Home*, 99 CORNELL L. REV. 1259, 1268 (2014) ("[B]ecause non-binding soft law is unenforceable, it is easier for an adversely affected nation to defect and ignore its prior commitments.").

186 "Customary international law is difficult to enforce and maintain." John Alton Duff, *UNCLOS and the New Deep Seabed Mining Regime: The Risks of Refuting the Treaty*, 19 SUFFOLK TRANSNAT'L L. REV. 1, 49 (1995).

187 *See* Trimble, *supra* note 151, at 716–17; *see also* Lucas Bento, *Toward an International Law of Piracy* Sui Generis*: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish*, 29 BERKELEY J. INT'L L. 399, 438 (2011) ("[T]here are legitimacy problems associated with relying on customary international law because there can be disagreement among states about what exactly the custom is, since custom is continually evolving and is not a codified body of law.").

188 *See supra* notes 135–37, 164–65 and accompanying text.

Their importance to American financial reform suggests that the distinctions between what law used to do and what governments can do now are only likely to blur further.

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

B. The Domestic Implications of Financial Reform's Internationalism

1. Dethroning the Sole Organ?

Financial reform also marks a change in the location of international policymaking within the American government, away from the President and diplomats, and toward Congress and regulators. The executive's importance in foreign policy will not be undone by statutes like Dodd–Frank, but these statutes do reflect a more pluralistic turn to the actors who matter in the conduct of foreign relations.[189]

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

In *United States v. Curtiss-Wright Export Corp.*, Justice George Sutherland described "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."[190] Although the legitimacy and reach of this power has been

[189] Dodd–Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code).

[190] 299 U.S. 304, 320 (1936) (citation omitted). Justice George Sutherland borrowed the term "sole organ" from a speech by John Marshall in the House of Representatives in 1800, *see id.* at 319, and it reflects a concept with roots in both international and constitutional law. *See* Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1012–15, 1029 (2013).

contested,[191] and I have elsewhere argued that the sole organ doctrine could be used in a way to bolster the position of agencies,[192] the emphasis of the doctrine used to be on the President. The idea was that the President's foreign affairs power matters for diplomatic interactions with other nations, given that the President's diplomatic sources, combined with the often "highly necessary" need for secrecy, left him better positioned than, say, Congress to conduct international negotiations.[193]

But Dodd–Frank is a creature of Congress. It allocates responsibility for international relations to agencies, and not the State Department. Moreover, most of its delegates are so-called independent agencies, meaning that the Executive Branch has limited control over them.[194]

The Federal Reserve, which is funded through its open market operations, rather than through budgets suggested by the President and voted on in Congress, is particularly insulated, and plays an important role in the implementation of Dodd–Frank.[195] It is perhaps the most independent of American agencies. The SEC and FDIC also enjoy freedom from the requirements of White House supervision. They are not obligated to obtain the approval of the White House's Office of Information and Regulatory Affairs before passing regulatory rules.[196] Their commissioners enjoy tenure absent cause for removal, and so are thought to be less susceptible to presidential control.[197] And, of course, it is these independent agencies that have been charged with responsibilities for international cooperation under Dodd–Frank,

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191 Harold Koh, for example, has criticized *Curtiss-Wright* and remarked that "[a]mong government attorneys, Justice Sutherland's lavish description of the president's powers is so often quoted that it has come to be known as the '"*Curtiss-Wright*, so I'm right" cite.'" HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 94 (1990).

192 Galbraith & Zaring, *supra* note 167.

193 *Curtiss-Wright Exp. Corp.*, 299 U.S. at 320–24 (citing historical sources for this proposition).

194 Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 723 n.230 (1989) (noting the difference between "agencies that are clearly within the Executive Branch, the top officials of which serve at the pleasure of the President" and "independent agencies, whose heads are insulated from direct presidential control by 'for cause' removal provisions").

195 David Zaring, *Law and Custom on the Federal Open Market Committee*, 78 LAW & CONTEMP. PROBS. 157, 173–74 (2015); *see* PAULINE SMALE, CONG. RESEARCH SERV., RS20826, STRUCTURE AND FUNCTIONS OF THE FEDERAL RESERVE SYSTEM 1 (2010) (discussing the factors that contribute to this independence).

196 *See* Richard J. Pierce, Jr., *Introduction to the OIRA 30th Anniversary Conference*, 63 ADMIN. L. REV. 1, 6 (2011) (discussing critics of this rule).

197 Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 984 (2008) (describing the SEC and the FDIC, among other agencies, as "led by appointees who serve fixed terms and typically can be removed by the President only for cause").

and are members of the FSOC.[198] Even the component of the Department of Treasury involved with bank supervision, an important component of Dodd–Frank, enjoys independence within the context of the Executive Branch.[199] The new agency created by Dodd–Frank, the Consumer Financial Protection Bureau, was made so starkly independent of executive oversight that some legal academics think it unconstitutionally divested from presidential control.[200]

The result is a delegation to a different breed of international policy makers. International regulatory cooperation is global governance done by regulators, rather than diplomats, and, at least in this case, by agencies as responsive, for the most part, to Congress as they are to the President. There may be some doctrinal advantages to this novel sort of delegation. Although the question is nuanced, it may be possible that the choice to make soft law rather than to pursue custom will engage courts more in reviewing soft law agreements, once enacted at home through ordinary administrative procedure, than they would be if diplomatic negations were the subject.

Why might Congress and independent agencies usurp the traditionally executive role in foreign policy? There will be some limits to this power to delegate away from the Executive. The D.C. Circuit has suggested that a multilateral treaty that could be amended through some post-ratification mechanism might be unconstitutional, and, of course, Congress could not simply delegate all lawmaking authority to the United Nations.[201] The

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198 *See* Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327, 330 (2013) ("The dominant paradigm in the U.S. financial regulatory apparatus has long centered on independent agencies like the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC), and the Securities and Exchange Commission (SEC).").

199 The OCC was made an independent agency by Dodd–Frank itself. For a discussion, see Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 555–56 (2012) (noting that "pursuant to [Dodd–Frank], OCC is classified as an independent agency"). To be sure, the Department of the Treasury, whose secretary is without doubt the President's man, plays an important role in both the statute and its international relations component.

200 *See, e.g.*, Thomas W. Merrill & Margaret L. Merrill, *Dodd–Frank Orderly Liquidation Authority: Too Big for the Constitution?*, 163 U. PA. L. REV. 165, 171 (2014) (characterizing the constitutional case against the CFPB as "surprisingly strong" and arguing that "[i]t would be far better to fix these [constitutional] problems now by appropriate legislative amendment"). A number of state attorneys general and others have filed suit on, among other things, this theory of unconstitutionality, albeit so far have been unable to establish standing and ripeness. *See* State Nat'l Bank of Big Spring v. Lew, 958 F. Supp. 2d 127, 165–66 (D.D.C. 2013), *aff'd in part, rev'd in part* 795 F.3d 48.

201 Nat. Res. Def. Council v. EPA, 464 F.3d 1, 8 (D.C. Cir. 2006) ("If the 'decisions' [further agreements made after the treaty was ratified] are 'law'—enforceable in federal court like statutes or legislative rules—

functional answer to the question might lie in the difficulties with doing foreign policy the way the Executive Branch used to do it, by creating treaties and by using the instruments of international law to the country's best advantage.

It is difficult to make international law that way. Congress has essentially ceased ratifying treaties, especially multilateral treaties that establish either human rights or global governance mechanisms.[202] Both it and the courts have approached customary international law with skepticism.[203] Customary international law is, if anything, just as hard to create, and subject to just as skeptical a reception. There is less functional reason to prefer presidential control when that control over foreign policy is not likely to lead to binding international commitments. In comparison to treaty negotiation and diplomatic statements about the requirement of law, the only semi-binding international commitment that can be made by agencies looks like an effective alternative.

Because soft law agreements constitute a lessened form of international commitment relative to treaties or executive agreements, they can be negotiated and renegotiated with greater ease and violated with lower reputational costs—and, therefore, they can potentially contain stronger substantive provisions.[204] In the human rights context, for example, the choice to make the Helsinki Accords—a Cold War-era document that included provisions related to the respect for freedom of conscience, thought, freedom, or belief—a soft law agreement, not only facilitated greater state acceptance

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then Congress either has delegated lawmaking authority to an international body or authorized amendments to a treaty without presidential signature or Senate ratification, in violation of Article II of the Constitution.").

202 With the possible exception of tax treaties, treaties with European Union countries harmonizing existing bilateral investment treaties with European Union law, and mutual legal assistance treaties. Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247, 275–76 (2012) ("[T]he Senate almost always advises and consents to these treaties. Of the fifty-one tax, extradition, MLAT, and EU harmonizing treaties mentioned above, the Senate has advised and consented to forty-nine . . . .").

203 *See supra* note 174.

204 *See* Abbott & Snidal, *supra* note 8, at 423 (arguing that soft law arrangements are often "preferable on [their] own terms" because they give states a way to protect their sovereignty, deal with uncertainty, and facilitate compromise); Guzman, *Design*, *supra* note 14, at 611 (noting that "soft law represents a choice by the parties to enter into a weaker form of commitment" and emphasizing the trade-off between the credibility of a state's commitments and the costs of a violation); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 582–83 (2005) (distinguishing between the concepts of "pledge" and "contract" and arguing that the preference for the contract form "often unduly weakens the substance and structure of multilateral agreements" because states will hedge against their own noncompliance by weakening the monitoring mechanisms or "watering down" commitments).

but also produced an agreement with clearer and more specific substantive provisions than those found in many hard law human rights treaties.[205]

Perhaps even more importantly, soft law agreements have the advantage of avoiding the cumbersome ratification processes that domestic law can require of traditional treaties.[206] In the United States, hard law agreements above a certain threshold of significance require strong support from the legislature: either the advice and consent of two-thirds of the Senate under the Treaty Clause of the Constitution or the approval of a majority of both Houses of Congress as a congressional–executive agreement.[207]

Kal Raustiala is one of a number of observers who has suggested that states turn to regulatory cooperation where the transaction costs of alternative legal approaches, such as treaties, are high.[208] And the costs of those alternatives grow ever higher. As Jacob Cogan has shown, formal treaty conclusion has become a rather demanding exercise: "Whereas once international law substantially deferred to states in the enactment and implementation of individual duties, it now specifies those duties more and more, and leaves less and less room for state discretion."[209]

Moreover, the delegation to agencies reflects a technocratic hope for international cooperation rather than an embrace of the political means of coordination that is practiced through the State Department. The President himself has recognized the importance of the foreign policy of regulators with an executive order encouraging the administrative regulators within the Executive Branch to engage in international regulatory cooperation wherever possible.[210]

International progress is difficult to make through diplomatic means. This might particularly be seen to be the case in human rights, where the prospects of the ratification of a big global convention on environmental rights, or

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205 *See* Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1840–41, 1840 n.30 (2002) (comparing the clear and detailed rules of the "soft law" Helsinki Accords with the "more ambiguous prescriptions" of the "hard law" International Covenant on Economic, Social and Cultural Rights).

206 Galbraith & Zaring, *supra* note 167, at 749 (describing the "cumbersome ratification processes that domestic law can require of traditional treaties").

207 *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 479, 584 (4th ed. 2011).

208 Kal Raustiala, *supra* note 14, at 51.

209 Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L L.J. 321, 370 (2011).

210 Promoting International Regulatory Cooperation, Exec. Order No. 13,609, 3 C.F.R. 255 (2012).

anything else, are remote.[211] Narrowly targeted campaigns to take modest steps towards those sorts of rights through the mechanisms of administrative law, however, are less challenging.[212]

The regulatory cooperative components of the Dodd–Frank statute reflect this. They are unabashedly technocratic, involving complicated aspects of financial market plumbing and safety and soundness calculations.[213] The human rights commitments evinced by the statute are modest steps made through technocratic allocations, rather than the sort of comprehensive human rights-based treaties that might, say, protect the rights of women or guarantee the fundamental privileges of childhood.[214] Instead they seek to further rights through something as bureaucratic as a disclosure regime imposed on companies that file public reports for the delectation of investors.[215]

There are some reasons for enthusiasm in the change in the actors that perform American engagement with foreign realms. The sole organ doctrine has been criticized as a license for executive overreach.[216] In an increasingly pluralistic world, faced with a vast array of problems, presuming that a country as diverse as the United States can channel its global engagement through one focal point may be nothing more than a fond hope.

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

Nonetheless, we have seen how Congress has authorized American agencies to cooperate with their foreign counterparts in different ways, and, in so doing, has created a chance for those agencies to build an international

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211 Catherine Jean Archibald, *Forbidden by the WTO? Discrimination Against a Product When Its Creation Causes Harm to the Environment or Animal Welfare*, 48 NAT. RESOURCES J. 15, 34 (2008) ("In fact, multilateral treaties are often extremely difficult to make."). For a discussion of the reasons the Copenhagen meetings designed to get a multilateral treaty on the books to address global warming, see Steven Ferrey, *Cubing the Kyoto Protocol: Post-Copenhagen Regulatory Reforms to Reset the Global Thermostat*, 28 UCLA J. ENVTL. L. & POL'Y 343 (2010).

212 *See, e.g.*, *Talking Foreign Policy: A Discussion on Cyber Warfare*, 47 CASE W. RES. J. INT'L L. 319, 339 (2015) (quoting an interview with Milena Sterio, who observed that "it would be extremely difficult and probably impossible as of now to negotiate a big multilateral treaty. But . . . maybe . . . soft law instruments" could serve as a substitute).

213 12 U.S.C. § 5371 (2012).

214 15 U.S.C. § 78m(p)–(q).

215 *Id.*

216 *See supra* note 181 and accompanying text.

architecture of regulatory cooperation. Moreover, Congress has not tied regulatory hands, at least not much, and not tried to solve this international governance problem by passing a domestic law, or encouraging the President to do the same on the international level.

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

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

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

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

The result may be a world where the search for *opinio juris* is no longer made, and rather agency-to-agency agreements set the standard for international cooperation. As these agreements increasingly cover the map, they can be evaluated on compliance, rather than on the reason for compliance. Agencies may lead multinational innovations in the granting of rights. And the oft-criticized compliance problems of customary international law will be replaced by the more observable questions posed by whether agencies are living up to their international agreements.

2. *Requiring Ethical Business*

As a domestic matter, the components of Dodd–Frank endorsing human rights have an implication beyond the separation of powers. They expand a role for the SEC: the ethical policeman of the international actions of publicly listed American corporations.

This role is not entirely new; that agency has been acting against foreign bribery since 1977.[217] And, at any rate, the Supreme Court has said that a "primary objective of the federal securities laws" entails the "promotion of 'a high standard of business ethics . . . in every facet of the securities industry.'"[218] Fraud itself—intentionally deceiving someone—is both the principal means of policing the securities markets and an ethically rich concept that turns on the duties owed to other people, not as market actors, but as those who place their trust in others, and accordingly deserve the special care of those others.

But even with these caveats in place, the SEC has traditionally focused on nonjudgmental, rather than judgmental, disclosure. The traditional federal approach has been to require publicly traded companies to make comprehensive admissions about their businesses and balance sheets, and let the public sort out whether it deems the business to be an upstanding one or not.[219] The traditional approach was one of process, not substance, and the SEC was not thought to be in the business of forbidding sharp-elbowed or morally dodgy firms from raising money from fully informed investors. It is

217 *See supra* note 78 and accompanying text.

218 Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 315 (1985) (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186–87 (1963)).

219 For example, see SEC v. Zandford, 535 U.S. 813, 819 (2002) (noting that the goal of the securities laws is "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry" (quoting Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 151 (1972))).

why scholars such as Hilary Sale could conclude that "the imposition of explicit, substantive federal corporate law upon the traditional private ordering model favored by state corporate regulators and judges" was a new development and primary contributor to the federalization of corporate law. It is also why state corporate law judges such as E. Norman Veasey believed that because federal law stopped at disclosure, developing the content of the ethical and fiduciary obligations imposed upon companies had been left to the states.[220]

But ethics requirements may now be said to be an increasingly important component of federal business regulation. Dodd–Frank builds on the Sarbanes–Oxley Act, passed in 2002, where Congress required publicly traded companies to adopt or disclose their codes of ethics, or explain why they did not have one.[221] It is consistent with the Federal Sentencing Guidelines, first promulgated in 2004, which require companies to create "compliance and ethics" programs, and to "otherwise promote an organizational culture that encourages 'ethical' conduct and a commitment to compliance with the law."[222]

Congress, in short, has in the last fifteen years consistently tried to increase the ethical standards imposed on publicly traded companies. The Conflict Minerals and Resource Extraction Rules are consistent with this emphasis, and they underscore the expectation that ethical obligations—in these cases rooted in an understanding of international human rights—are not simply something between shareholders and managers but something that applies more generally to the types of activities in which a business can engage.

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[220] E. Norman Veasey, *Corporate Governance and Ethics in a Post Enron/Worldcom Environment*, 72 U. CIN. L. REV. 731, 733 (2003). Veasey, the former chief justice of the Delaware Supreme Court, argues that "[f]ederal securities laws are traditionally designed to focus on financial disclosure that directly affects securities markets," whereas "[s]tate corporation law traditionally focuses on the internal affairs of corporations." *Id.*

[221] Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 406(a)–(b), 116 Stat. 745 (codified at 15 U.S.C. § 7264 (2012)); Usha Rodrigues & Mike Stegemoller, *Placebo Ethics: A Study in Securities Disclosure Arbitrage*, 96 VA. L. REV. 1, 5 (2010) ("Section 406 of the Sarbanes-Oxley Act of 2002 ('Sarbanes-Oxley' or 'SOX') requires companies to disclose their codes of ethics (or explain why they do not have them) . . . ." (footnote omitted)).

[222] U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (U.S. SENTENCING COMM'N 2015). For a discussion, see John Carney & Jenna Felz, *Executive Beware: The SEC Now Wants to Police Unethical Corporate Conduct*, FORBES (June 26, 2014), http://www.forbes.com/sites/janetnovack/2014/06/26/executive-beware-the-sec-now-wants-to-police-unethical-corporate-conduct/ (guest post with an introduction by Janet Novack).

Monitoring ethics in financial regulation is consistent with post-crisis statements by financial regulators that they view ethical business practices as a critical component of regulatory compliance. In 2014, William Dudley, the current head of the New York Federal Reserve Bank and a former investment banker himself, emphasized the view that regulated banks must act ethically if they hope to meet the requirements that their regulatory supervisors expect of them.[223] "There is evidence of deep-seated cultural and ethical failures at many large financial institutions," Dudley declared.[224] The New York Federal Reserve General Counsel has also posited that "a strong ethical culture will lead to better behavior."[225]

Is it possible to make ethical foreign business practices a regulatory requirement with any hope of clarity? After all, it is pretty unclear what "ethics" require of the banks regulated by the SEC's compatriot agency, the Federal Reserve. Ethics as a regulatory tool for financial institutions look, though they have never been carefully defined, as a principle, likely to make banks more likely to meet their regulatory obligations. It is also an acknowledgement that regulatory oversight cannot exist if the regulated industry is "working to rule"[226] or taking the perspective of the Holmesian bad man about the law.[227]

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223 William C. Dudley, President and Chief Exec. Officer of the Fed. Reserve Bank in N.Y., Address at the Global Economic Policy Forum of New York: Ending Too Big to Fail (Nov. 7, 2013), http://www.bis.org/review/r131108g.pdf.

224 *Id.*

225 Emily Glazer & Christina Rexrode, *As Regulators Focus on Culture, Wall Street Struggles to Define It*, WALL ST. J. (Feb. 1, 2015, 7:57 PM), http://www.wsj.com/articles/as-regulators-focus-on-culture-wall-street-struggles-to-define-it-1422838659 (quoting Thomas Baxter, general counsel of the Federal Reserve Bank of New York). In the same vein, the Comptroller of the Currency has said that "[i]t is not going to work if we approach it from a lawyerly standpoint . . . . It is more like a priest-penitent relationship." Peter Eavis, *Regulators Size Up Wall Street, with Worry*, N.Y. TIMES: DEALBOOK (Mar. 12, 2014, 8:51 PM), http://dealbook.nytimes.com/2014/03/12/questions-are-asked-of-rot-in-banking-culture/.

226 "In a 'work-to-rule' campaign, workers refuse to perform any tasks voluntarily or exercise any independent judgment and instead simply follow the letter of their employers' work rules." Craig Becker, *"Better Than a Strike": Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 355 n.23 (1994); *see also* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 90–91 (1998) (observing that working to rule is effective because "[i]n some areas, scrupulous compliance with the law is so burdensome and even disruptive that it occurs only as a form of protest").

227 *See* Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

Nonetheless, that agency has made the ethics of a bank not just a recommendation, but a component of deciding whether it is fit to do business. An ethical culture is one of the items on the checklist for evaluating whether a bank would survive an emergency—banks that have failed to establish codes of ethics may be deemed "undercapitalized," and forced to raise money or, ultimately, give up their charter to someone else.[228]

The Conflict Minerals and Resource Extraction Rules are not vague admonitions to "be ethical," or to have in place a "code of ethics," even if they are not always amenable to straightforward and documentable compliance. By no means has Congress suggested, or the SEC urged, a unspecified set of good business practices on companies doing business abroad, designed, perhaps to encourage reflection as much as anything else.[229]

But the sort of work being done from these rules are not like most disclosure requirements. One appellate court likened the Conflict Minerals Rules—compelling companies to declare that their products are "not DRC conflict free"—to a badge of dishonor.[230] It, in the court's view, "requires an issuer to tell consumers that its products are ethically tainted" and "to confess blood on its hands."[231] This sort of obligation is very different than the ordinary disclosure requirements imposed upon publicly traded companies, who do not need to attest to, say, how they treat their workers at home, or the nature of their interactions with the city and state governments in which they do business.

Ed Rock has influentially argued that in corporate law the Delaware judges make distinctions about corporate conduct based on a rather unstated set of ethical requirements. In his view, "Delaware courts generate in the first

[228] As the FDIC has explained in its handbook for managers subject to bank evaluations, banks must establish a set of policies and goals, and "[t]hese objectives and policies should, at a minimum, cover . . . internal routine and controls, audit programs, conflicts of interest, code of ethics, and personnel." FED. DEPOSIT INS. CORP., DSC RISK MANAGEMENT MANUAL OF EXAMINATION POLICIES § 4.1 (2015), https://www.fdic.gov/regulations/safety/manual/manual_examinations_full.pdf.

[229] Seana Shiffrin regards this as a virtue. Not entirely specified standards "serve moral and democratic deliberative purposes. Rather than applying a rule by rote, citizens must ask themselves, for example, whether they are treating one another fairly, whether they are acting in good faith, whether they are taking due care, whether they are behaving reasonably, and the like." Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1217 (2010).

[230] Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015) (quoting Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 373 (D.C. Cir. 2014), *overruled by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014)).

[231] *Id.* (quoting *Nat'l Ass'n of Mfrs.*, 748 F.3d at 371).

instance the legal standards of conduct (which influence the development of the social norms of directors, officers, and lawyers) largely through what can best be thought of as 'corporate law sermons.'"[232] When cases do not result in judgments against inappropriate behavior, judges might substitute tongue-lashings in court or in speeches.[233] These standards are often hard to articulate as a checklist, or a form of law amenable to encapsulation in a blackletter treatise, though they are rooted in corporate fiduciary obligations.

Some of the international provisions of Dodd–Frank suggest that, at least with regard to the way American businessmen conduct themselves abroad, Congress has started to specify areas of sunlight that are meant to shine particularly brightly on business practices of which it disapproves. In doing so, financial reform's internationalism is arguably acting like Delaware judges who criticize unethical business conduct more than they ban it; that, too, is a change in the focus of the regulation of business.

CONCLUSION

A complete picture of how international governance affects, and is affected by, American lawmaking emerges when major domestic regulatory initiatives are taken into account. Dodd–Frank is such a statute, and in it we see a bow to globalization and an effort to address that phenomenon through soft law techniques. Financial reform is premised on the idea that the American financial system cannot be made safer without engaging in the global context in which American finance operates.

It also serves as a new sort of vehicle for international rights, while rebalancing the relationship between the branches of American government in a way that removes power from the President, an accomplishment many believed was beyond the ken or power of Congress.

For these reasons, we may expect to see similar delegations by Congress in the wake of financial reform. The statute's relationship to international law, innovation in the structure of American foreign affairs responsibility, and even its commitment to ethics, may prove to be precedential, rather than unique.

[232] Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997). Rock thought that court statements addressing managerially led buy outs, rife with potential conflicts of interest and, ultimately, litigation, exemplified this sort of preaching. *Id.* at 1021–62.

[233] *Id.*