# Between a Rock and a Hard Place: The Unintended Consequences of the Conflict Minerals Rule

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## I. INTRODUCTION: THE CHALLENGES OF MAKING UNILATERAL CHOICES IN A MULTIPOLAR WORLD

Development is a perpetual drive by human beings to acquire resources. Yet these resources are often not confined by sovereign borders physically, legally, or economically. This can facilitate conflict, exacerbate inequality, and stunt economic growth—particularly in the least developed states. As national economic success has become increasingly interwoven with corporate success and the principles of free trade, the use of multilateral trade agreements and domestic regulations

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as tools for molding social and developmental policy has become more common. This has created a formidable divide between the interests of the few and the interests of the many. This Comment strives to find a balance between these competing interests by focusing on two recent decisions issued by the United States Court of Appeals for the District of Columbia regarding U.S. legislation requiring country-of-origin labeling.[1] It is important to note that while U.S. country-of-origin statutes are applied in an inherently domestic fashion, there exists substantial and far-reaching effects on economic and social development throughout the world, from our nearest continental neighbors, to a center of conflict and illegal trade in the Great Lakes region of Africa.

Part II of this Comment recalls the history of conflict and violence that has defined the Great Lakes region and sheds light on the role of minerals in the conflict. Part III outlines the arguments presented by the relevant legal bodies that have been influential on recent developments in multilateral trade and development. Part IV presents a thorough analysis of the implications of the two sides of debate on the central issue—whether U.S. statutes influencing international trade and development are feasible in an increasingly multipolar world faced with controversial issues of morality and responsibility—by focusing on a pivotal opportunity to prevent or continue disclosures of mineral sourcing from Africa.

## II. WHY MINERALS MATTER: THE STORY OF VIOLENT CONFLICT IN THE GREAT LAKES REGION AND THE IMPLEMENTATION OF THE CONFLICT MINERALS RULE

The Great Lakes region of Africa is one of the most resource-rich areas on the planet.[2] The region has extensive reserves of cobalt, copper, uranium, tin, gold, diamonds, cassiterite, tungsten, and tantalum, all of which are centered within specific areas in the region.[3] It is these minerals that tie the Great Lakes region to some of the most influential periods in human history. For example, the atomic bombs dropped on Hiroshima and Nagasaki contained uranium that originated from the Congo, and policy leaders overlooked the grave human rights violations described below in order to ensure its continued provision.[4] Global

1. These required labeling practices have been challenged under the First Amendment.

2. Laura Seay, *What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy* (Ctr. for Glob. Dev., Working Paper No. 284, 2012).

3. *Id.*

4. *Id.*

attention was again drawn to the Congo when prices for tantalum grew exponentially in the early twenty-first century, because tantalum provides a key component for electronics, including cell phones and gaming systems.[5] General figures estimated that the Congo is home to 80% of the world's coltan[6] reserves.[7] However, as the market for coltan became more competitive, the international market share of the resource became greatly exaggerated.[8] The reality is that the coltan reserves in the Congo actually fall around 9% of the world's reserves.[9] Yet the profits resulting from mining in the region account for "80% of the exports, 72% of the national budget, and 28% of the national GDP of the Congo."[10]

This high concentration of mineral resources has led to substantial exploitation of the region by outsiders. Particularly horrific was the colonial occupation of King Leopold II of Belgium, who enslaved the Congolese people.[11] His brutal rule, characterized by mass murder and amputations, resulted in a death toll of an estimated ten million.[12] Many scholars have directly connected his brutal colonization with the 1994 Rwandan genocide, which directly coincides with the violent ethnic conflict in the Congo today.[13] The atrocities that took place between the Hutus and the Tutsis in Rwanda spilled over into Congo, a neighboring country with similar ethnic divides, but significantly more Hutu clansmen.[14] Many Hutu, particularly those who had committed severe human rights violations, moved to the Congo.[15] A potent fusion of increased ethnic homogeneity and limited governance resulted in a tantalizing opportunity to exploit an abundant economic opportunity and, in turn, the artisanal miners living in the country.[16]

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5. *Id.*
6. "Coltan is the form of tantalum found in the Congo." *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. Aloys Tegera, Pole Institute, A Congolese Perspective on U.S. Conflict Minerals Legislation, Keynote Speech at the Roundtable on Conflict Minerals Legislation (May 26, 2011) *in* MAKEITFAIR, SOMO, REPORT ON ROUNDTABLE ON CONFLICT MINERALS LEGISLATION, 2011, at 8, 8.
11. Nicholas Webb et al., *Conflict Minerals & the Law*, 72 BENCH & B. MINN. 26, 27 (2012).
12. *Id.*; STEFAN WOLFF, ETHNIC CONFLICT: A GLOBAL PERSPECTIVE (2006).
13 Wolff, *supra* note 12.
14. *Id.*
15. *Id.*
16. *Id.*; *see also* Lauren Wolfe, *How Dodd-Frank Is Failing Congo*, FOREIGN POL'Y (Feb. 2, 2015), http://foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/.

There is an estimated $24 trillion worth of minerals in the Congolese soil and eight to ten million artisanal miners living in the Congo.[17] The region is still largely terrorized by military and rebel militias who have at times fought for control of mineral rich areas and mines in order to finance their greater missions.[18] By engaging in civilian-directed violence to insight fear, maintaining direct control of a significant portion of the mines, and illegally taxing the others, these groups have realized the vast profits available from the extraction of minerals.[19]

This series of occurrences led a group of concerned citizens to turn their focus to the Congo and to "effecting change" to their social and economic status.[20] Following the watchful eye of public interest groups, the United Nations and other international organizations began to also turn their focus towards the conflict in the region. These organizations promulgated several projects and directives, including General Assembly Resolution 55/56[21] and a USAID project that sought to work with the Congolese government to establish more transparency and legal fluidity in the mining sector in the Democratic Republic of the Congo (DRC).[22] However, these targeted projects received little international attention because other pertinent international issues, such as the humanitarian crisis in Darfur, were taking center stage.[23]

In 2007, with the foundation of The Enough Project ("Enough"), a U.S. based nonprofit, international attention once again returned to the Congo.[24] The objective of Enough was to mitigate and prevent citizen-focused violence in Africa, but as their research and efforts continued, the project changed course.[25] From 2009 on, the project focused on advocating for the message that "Western consumers' ownership of electronics like cell phones" is directly linked "to sexual and other forms of violence in the eastern D.R. Congo."[26] This advocacy strategy set in

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17. Seay, *supra* note 2.
18. *Id.*
19. *Id.*
20. *Id.*
21. G.A. Res. 55/56, ¶ 3 (Jan. 29, 2001).
22. *See* U.S. AGENCY FOR INT'L DEV., USAID COUNTRY PROFILE, PROPERTY RIGHTS AND RESOURCE GOVERNANCE, DEMOCRATIC REPUBLIC OF CONGO (Oct. 2010).
23. Seay, *supra* note 2.
24. *Id.*
25. *See Eastern Congo*, ENOUGH PROJECT, http://www.enoughproject.org/conflicts/eastern_congo (last visited Sept. 10, 2015); *see also* Seay, *supra* note 2.
26. Seay, *supra* note 2; *see also* John Prendergast, *Can You Hear Congo Now?*, ENOUGH PROJECT (Apr. 2009), http://www.enoughproject.org/files/Can%20Your%20Hear%20Congo%20Now.pdf.

motion the eventual adoption of the Dodd-Frank Wall Street Reform and Consumer Protection Act's (Dodd-Frank Act) Conflict Minerals Rule (Rule).[27]

Here, "[i]t is important to understand that the shift to a focus on conflict minerals galvanized grassroots activists on the conditions in the Congo and built a broad constituency around the situation in the eastern Congo."[28] This aim was effective because it made "grassroots activists feel as though they had a connection to the crisis and could make a difference."[29] This effort also culminated in collaborations between Enough and some major corporate partners who were interested in "being at the forefront of conflict minerals advocacy among multinational corporations."[30] By "ranking" the corporations on progress in conflict minerals trade, Enough secured its relationships with the foundational companies that then began to press for stricter conflict mineral regulation, alongside the nonprofit.[31]

Enough and other organizations then moved towards a legislative strategy, the failed first attempt being House Resolution 4128.[32] In 2010, Enough and its colleagues proved successful when the Dodd-Frank Act was passed with the added provisions 1502 and 1504.[33] Section 1504 of the Dodd-Frank Act "requires increased transparency from companies registered with the SEC to disclose how much they pay foreign governments for access to minerals, oil, and gas."[34] While this section certainly led to controversy, it did not nearly match the controversy surrounding Section 1502.

Section 1502 of the Dodd-Frank Act, also known as the Conflict Minerals Rule, "requires the SEC to publish disclosure rules concerning the use of certain minerals that originate in the Democratic Republic of

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27. Seay, *supra* note 2; *see also* Wolfe, *supra* note 16; Sudarsan Raghavan, *How a Well-Intentioned U.S. Law Left Congolese Miners Jobless*, WASH. POST (Nov. 30, 2014), https://www.washingtonpost.com/world/africa/how-a-well-intentioned-us-law-left-congolese-miners-jobless/2014/11/30/14b5924e-69d3-11e4-9fb4-a622dae742a2_story.html.

28. Seay, *supra* note 2.

29. *Id.*

30. *Id.* (specifically mentioning Hewlett-Packard, Motorola, Intel, Nokia, Microsoft, and Dell).

31. *Id.*

32. *Id.* H.R. 4128 was submitted to the floor by a Democratic Senator from Washington and supported by Enough's parent organization, the Center for American Progress, along with the Information Technology Industry Council, an industry lobby group. *Id.*

33. *Id.*; *see* Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-205, § 1502, 124 Stat. 1376, 2213 (codified at 15 U.S.C. § 78m note (2010)).

34. Seay, *supra* note 2.

Congo (DRC) or its adjoining countries."[35] The United States Securities and Exchange Commission (SEC) promulgated this rule through Rule 13p-1, which states:

> Every registrant that files reports with the Commission under the Sections 13(a) or 15(d) of the Exchange Act, having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that registrant to be manufactured, shall file a report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form.[36]

The Rule covers reporting companies that "manufacture" and "contract to manufacture" products to which conflict minerals are "necessary"[37] to the product. Should a company fit this category, they must publicly disclose their use of the mineral by filing a Form SD.[38] Next, they must determine whether the minerals originated in one of the Covered Countries or is from recycled or scrap sources, thus making a reasonable country of origin determination.[39] If the minerals are found to be from the DRC or one of its neighboring states, the company must submit a Conflict Minerals Report that describes the due diligence measures undertaken "on the source and chain of custody of its conflict minerals."[40] The statute requires that the company perform an "independent private sector audit"[41] of the Conflict Minerals Report if it is determined that the products originated from a Covered Country.[42] However, if the mineral location is deemed "DRC conflict undeterminable," the requirement stated to potentially violate the First Amendment to the United States Constitution, then the company must declare this as "having not been

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35. Client Bulletin, Bryan Cave LLP, SEC Issues Final "Conflict Minerals" Rule (Aug. 29, 2012), https://www.bryancave.com/images/content/1/8/v2/1832/CorpFiAlert8-29-12.pdf. These adjoining countries are also known as the "Covered Countries." *Id.*

36. Conflict Minerals Rule, 17 C.F.R. § 240.13p–1 (SEC 2012).

37. Cave *supra* note 35, at 4. The minerals must be necessary to the functionality or production of product. This is determined by considering whether a mineral is intentionally added to a product or component of a product and not naturally occurring, whether it is necessary to its use or function, or whether it is incorporated for purposes of decoration, and whether the primary purpose of the item is decorative or not. *Id.*

38. *Id.*

39. *Id.* at 5.

40. *Id.* at 6.

41. *Id.* at 5. This audit will be held to the existing government auditing standards and should be "in conformity with the criteria set forth in a nationally or internationally recognized due diligence framework (such as the OECD's 'Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas')." *Id.* at 8.

42. *Id.* at 5.; *see also* 17 C.F.R. § 240.13p–1 (2012).

found to be 'DRC conflict free,'" regardless of whether they have conclusively established this fact or not.[43]

After the implementation of "Loi Obama,"[44] the Congolese government reacted by shutting down all mining activity entirely at the outset, and then began a process to certify minerals originating from the Congo as conflict-free.[45] The process has been described as "unfolding at a glacial pace, marred by a lack of political will, corruption and bureaucratic and logistical delays."[46] In June 2014, the country had certified only twenty-five mining sites out of hundreds as conflict-free, and government agencies have had a difficult time validating any others due to a lack of functioning infrastructure, the massive size of the mines, and the overall insecurity of the region.[47]

## III. CONSCIENCE VS. CONVENIENCE: MEAT, MINERALS, AND THE FIRST AMENDMENT

Currently, there exist deep divides between financial aims and environmental and social policies, in both international agreements and domestic legislation. In particular, the domestic policies of the United States have often been criticized for their extraterritorial effect on foreign economic growth and global free trade.[48] Most recently, the United States has found itself fighting a slew of First Amendment cases surrounding compelled country-of-origin labelling. However, these cases have little to do with the framers' intended purpose of ensuring free communication between the people in order to guard all other rights and promote "knowledge of the comparative merits and demerits of the candidates for the public trust."[49] Now, the "First Amendment is being

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43. CAVE, *supra* note 35, at 8. Conversely, products that are found to be DRC conflict free, defined as "products that 'do not contain conflict minerals . . . that directly or indirectly finance or benefit armed groups' in the Covered Countries," are not required to provide information about the products, only to include a "description of the due diligences measures the issuer undertook and the private sector audit." *Id.* at 5. An armed group is defined as a "an armed group that is identified as perpetrators of serious human rights abuses in the annual Country Reports on Human Rights Practices under Sections 116(d) and 502(b) of the Foreign Assistance Act of 1961." Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-2013, § 1502(e)(3), 124 Stat. 1376, 2217-18 (codified at 15 U.S.C. § 78m note (2010)).

44. The Congolese people refer to the Conflict Minerals Rule as "Loi Obama," or "Obama's Law."

45. Raghavan, *supra* note 27.

46. *Id.*

47. *Id.*

48. *See, e.g.*, Certain Country of Origin Labeling Requirements, 7 U.S.C. § 1638 (2010).

49. Cass R. Sunstein, *Free Speech Inc.*, BLOOMBERGVIEW (Mar. 30, 2015), http://www.bloombergview.com/articles/2015-03-30/free-speech-inc-.

regularly invoked as a barrier" to regulatory regimes that intend "to ensure that consumers are informed."[50]

The debate formed around a series of international conflicts between the United States and its closest geographical neighbors over a 2009 statute, the Certain Country of Origin Labeling Requirements ("COOL Requirements"). The COOL Requirements "assign retailers an obligation to inform consumers of a [piece of meat's] country of origin."[51] This prompted the United States' two neighboring states, major suppliers of American meat and co-members of the World Trade Organization (WTO), to file a complaint with the Settlement Body of the WTO.[52] The body held in favor of Canada and Mexico at the outset, finding that the COOL Requirements were a violation of the WTO Agreement on Technical Barriers to Trade because the country of origin labeling requirement gave a disproportionate competitive advantage to American meat producers in the American market, and because this was the least costly way of complying with the requirements.[53]

Stateside, the affected meat manufacturers also challenged the COOL Requirements under the First Amendment.[54] In *American Meat Institute v. U.S. Department of Agriculture*, the court recognized that the WTO had held the COOL Requirements in violation of the treaty agreement, but found that the ruling was based on an "objection to the relative imprecision of the information required by the 2009 rule," which was corrected through an amendment to the requirements aimed at complying with the WTO expectations.[55] This analysis disregarded the fact that Canada successfully argued the 2013 rule is worse than the original rule because it is more restrictive and has a more significant effect on its meat producers. This was accepted under the Panel report, which concluded that the amended COOL Requirements actually increased the original COOL measures "detrimental impact on competitive opportunities" and this impact does not "stem exclusively from legitimate regulatory distinctions."[56]

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50. *Id.*

51. Am. Meat Inst. v. U.S. Dep't of Agric., 746 F.3d 1065, 1068 (D.C. Cir. 2014) *aff'd on reh'g*, 760 F.3d 18 (D.C. Cir. 2014).

52. *Id.* at 1069.

53. Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, 343, WTO Doc. WT/DS384/AB/R (June 29, 2012).

54. *Am. Meat*, 760 F.3d at 21.

55. *Id.*

56. Panel Report, *United States—Certain Country of Origin Labelling Requirements*, WTO Doc. WT/DS384/RW (Oct. 20, 2014).

This decision overruled the same court's decision in *National Association of Manufacturers v. SEC*, decided only months earlier.[57] In this case, the D.C. Circuit held that the SEC regulation requiring entities to disclose to the SEC and the public that their products had "not been found to be DRC conflict free" violated the First Amendment.[58] This regulation was implemented under the direction of the United States Congress through Dodd-Frank Act section 1502.[59] The Rule sought to encourage "transparency about commercial activities in foreign countries" by requiring "publically traded companies to report to the SEC whether they source conflict minerals from the Democratic Republic of the Congo or its neighbors."[60] The Rule "directed the SEC to impose additional reporting requirements on U.S. companies regarding their sources of conflict minerals" and modeled its requirements after the 2003 U.N. General Assembly Resolution that aimed to minimize the role of the private and public actors in allowing conflict diamonds to enter the global markets.[61]

The SEC promulgated the Rule by requiring companies who are considered issuers or producers of products that utilize conflict minerals[62] to submit annual reports to the agency and publish the same reports on

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57. Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014).

58. *Id.* at 373.

59. Dodd-Frank Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213 (codified at 18 U.S.C. § 78m (note) (2010)). The Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. Section § 78, is the amendment to the Securities Exchange Act of 1934 that was instituted after the 2008 collapse of the stock exchange and resultant discovery of misbehavior by major corporate actors in the United States and abroad. The Act aimed at increasing transparency and mitigating opportunity for self-serving behavior by major corporations by ensuring protection for whistleblowers and ensuring accountability for major corporate players in the face of financial crises or blowback. Included within this behemoth, 848-page act of Congress were the little publicized sections on conflict minerals. Marcus Beasdale, *Conflict Minerals: The Price of Precious*, NAT'L GEOGRAPHIC (Oct. 2013), http://htm.nationalgeographic.com/2013/10/conflict-minerals/gettleman-text.

60. *See* Seay, *supra* note 2.

61. Nicholas Webb, Sonja Peterson & Ellen J. Kennedy, *Conflict Minerals & the Law*, BENCH & BAR OF MINNESOTA (Jan. 15, 2015), http://www.mnbenchbar.com/2015/01/conflict-minerals-the-law/. This resolution required UN Member States to "urge their corporations not to purchase minerals that might be financing violence in the region." Seay, *supra* note 2. It also established the Kimberly Process Certification Scheme. *Id.*

62. Webb et al., *supra* note 11, at 1. Conflict Minerals are defined as columbite-tantalite (coltan), cassiterite, gold and wolframite, or any of their derivatives. 15 U.S.C. § 78m(p). The final rule refers to conflict minerals as "the identified minerals irrespective of their country of origin" and limited the minerals to the "3T derivatives"—tantalum, tin, and tungsten—"unless the Secretary of State determines that additional derivatives are financing conflict in the Covered Countries, in which case they will also be considered 'conflict minerals'; or any other minerals or derivatives determined by the Secretary of State to be financing conflict in the Covered Countries." CAVE, *supra* note 34, at 2 n.2; *see* Conflict Minerals Rule, 17 C.F.R. § 240.13p–1 (SEC, 2012).

the websites for public consumption.[63] These reports must contain supply side analysis evidencing due diligence and third-party verification in order to determine the origin of the mined minerals.[64] The regulation in question in *National Manufacturers* was whether or not the First Amendment rights of the companies were violated by requiring disclosure when a company is unable to confirm the origin of its mineral accumulation.[65]

The court's decision to overrule *National Manufacturers* in *American Meat* hinged on a unique interpretation of the Supreme Court's holding in *Zauderer v. Office of Disciplinary Counsel*.[66] In *Zauderer*, the Court held that commercial speech that is not false or deceptive or that does not concern unlawful activities may be restricted only in the service of a substantial governmental interest and only through means that directly advance that interest.[67] The D.C. Circuit in *American Meat* found that the *Zauderer* standard, which traditionally applied only to governmental interests in preventing consumer deception, should now also apply to other compelled commercial speech that constitutes a disclosure of "factual and uncontroversial information."[68] Immediately following this ruling, both the SEC and intervener Amnesty International filed supplementary briefs requesting the court review their judgment in *National Manufacturers*, hoping to compel a ruling that the *Zauderer* standard would apply because of the impact of the conflict mineral trade on human rights and economic development.[69] In contrast, the National Association of Manufacturers and other appellants have contested that the disclosure of origin of conflict minerals is in no way a factual or uncontroversial disclosure and should therefore not be subject to *Zauderer* review.[70] The case has been remanded back to the United States District Court for the District of Columbia "for review regarding whether

63. *See* Webb et al, *supra* note 11, at 1.

64. *Id.*

65. *See* Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014).

66. Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 20 (D.C. Cir. 2014). Traditionally, *Zauderer* has been read to be a less onerous test for First Amendment cases than the stringent governmental interest standard set forth in the Supreme Court's tangential First Amendment case, *Central Hudson*. However, the D.C. Circuit here interprets *Zauderer* as "an application of *Central Hudson*, where several of *Central Hudson*'s elements have already been established." *Id.* at 27.

67. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637-38 (1985).

68. *Id.*

69. Memorandum from Michael R. Littenberg et al., D.C. Circuit Panel Reaffirms Conflict Minerals Rule Decision, Schulte, Roth & Zabel, LLP Decision (21 No. 4 Westlaw Journal Derivatives 3).

70. *Id.*

the SEC's rules or the Dodd-Frank Act is the source of the free speech violation."[71]

After the holding in *National Manufacturers*, the SEC still expected country-of-origin disclosures for conflict minerals by the deadline, June 2, 2014.[72] The SEC issued a statement "noting that registrants must still file Form SD and any required Conflict Minerals Report by the . . . deadline to be deemed in compliance with the aspects of the conflict minerals rule that were upheld by the Court of Appeals."[73] The registrants were not required to comply with the portion of the disclosure that was held in violation of the First Amendment.[74] This statement also removed the requirement to have an audit performed, unless the company voluntarily describes its products as "DRC conflict free" in its Conflict Minerals Report.[75]

## IV. THE AFTERMATH OF GOOD INTENTIONS: WHEN UNILATERAL SOLUTIONS TRANSVERSE OPAQUE BORDERS

Should the D.C. Circuit hold that the Rule is subject to the *Zauderer* test for commercial disclosures, it is likely that the previous decision in *National Manufacturers* will be reinstated, and it could potentially lead to the bifurcation and disavowment of the Rule from the otherwise domestic Dodd-Frank Act.[76] However, if the court decides that it is not subject to *Zauderer* review, the Rule as promulgated under the statute could continue to be administered with the required disclosure intact. It seems likely that the former situation will come to pass, because there are two strong sides to the debate over the Dodd-Frank Act's regulation of conflict minerals in the DRC and the surrounding states. Regardless, both of these circumstances will have consequences for global trade and development, and particularly on human rights and economic stability in the Great Lakes region of Africa. Here, both sides of the debate and available alternatives to the Rule are analyzed, in hopes that the reader will be able to make their own decision on the matter at hand.

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71. *Disclosures Concerning Conflict Minerals*, *in* WGL HANDBOOK SEC ACCOUNTING & DISCLOSURES E7.7 (2015), Westlaw; *see also* Addendum.

72. *Id.*

73. *Id.*

74. *Id.* at 4.

75. *Id.*

76. *See id.*

### *A. Disclose It: A Clear Conscience Is Worth Its Weight in Gold*

Many lawmakers, activists, and concerned citizens feel that the Rule has proven itself effective in preventing gross human rights violations in the Great Lakes region.[77] They also believe that the Rule provides an economic incentive for international companies that utilize conflict minerals to act conscientiously in sourcing for those minerals.[78] Finally, they believe that by increasing transparency, the governments of Great Lake states will be able to more effectively prosecute warlords and conflict groups.[79]

Deeming the Rule the "most significant action"[80] taken towards improving rule of law in the Congo, many supporters of the Rule believe that it has had a "serious and successful impact in Congo."[81] Many of these supporters cite to the success of U.N. troops in retaking control of a key strategic city that was held by the rebel group, M23.[82] Some nonprofits have heralded progress in the region towards establishing better governance initiatives, including increasing accountability for states such as Burundi or Dubai, which are considered "conduits for Congolese conflict gold."[83] As previously noted, in 2012, the government of the DRC also "introduced domestic legislation requiring companies operating in the tin, tantalum, tungsten or gold mining sectors to carry out supply chain due diligence in line with OECD guidance."[84] Additionally, the International Conference on the Great Lakes region now mandates that the Organisation for Economic Co-Operation and Development (OECD) due diligence is a requirement of member countries' mining certification schemes.[85] However, these same groups note that there is a "gaping disconnect between public commitments made by the Congolese authorities to demilitarize the mining sector, and what is happening in the mines."[86]

Additionally, the "passage of the Dodd-Frank Act's conflict minerals provision spurred US-listed companies into action."[87]

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77. *See Conflict Minerals*, ENOUGH PROJECT, http://www.enoughproject.org/conflicts/eastern_congo/conflict-minerals (last updated 2015); *see also* Webb et al., *supra* note 11, at 2, 4.

78. *See* DISCLOSURES CONCERNING CONFLICT MINERALS, *supra* note 71.

79. *See generally Putting Principles into Practice*, GLOBAL WITNESS (May 2013), https://www.globalwitness.org/documents/12902/putting%20principles%20into%20practice.pdf.

80. Webb et al., *supra* note 11, at 2, 4.

81. *Id.* at 3.

82. *Id.* at 4.

83. *Putting Principles into Practice*, *supra* note 79, at 2.

84. *Id.* at 3.

85. *Id.*

86. *Id.*

87. *Id.* at 9 (noting that many firms still remain outside of the reach of the law).

Supporters correctly note that prior to the Rule's passage, "only a handful of companies . . . led efforts to establish industry-wide auditing systems to better weed out conflict minerals from their supply chains."[88] The Rule is credited as "necessary to bring in over 1000 companies that had previously made little or no effort" and has now "set up, joined, or improved systems designed to clean up supply chains and comply with Dodd-Frank's requirements."[89] The Rule created a "strong market incentive" by reducing the market for nontraceable minerals because the price of noncertified minerals is reported as 30-60% less than those that go through a sourcing program.[90]

Finally, the surrender of several Congolese Generals to American troops, and their subsequent prosecution at the International Criminal Court, of which the United States is not a member, is heralded as another success.[91] According to some, the Dodd-Frank Act also provides the "legal leverage to catalyze reform" in the domestic sectors of the region.[92] Enough credits the Rule with the "initial military restructuring" that has "removed armed actors from many mines"[93] and with the creation of the OECD Guidelines and other transparency systems.[94] They also have urged the United States to expand its efforts by sanctioning companies that are still found to be accepting conflict minerals.[95]

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88. *See* Webb et al., *supra* note 11, at 4.

89. *Id.*

90. *Id.* These sourcing programs include the OECD, International Conference on the Great Lakes Region Regional Certification Mechanism, and the Conflict-Free Smelter Program.

91. *Id.*

92. *See generally Conflict Minerals*, *supra* note 77.

93. Fidel Bafilemba et al., *The Impact of Dodd-Frank and Conflict Minerals Reforms on Eastern Congo's Conflict*, ENOUGH PROJECT 1 (June 2014), http://www.enoughproject.org/files/Enough%20Project%20-%20The%20Impact%20of%20Dodd-Frank%20and%20Conflict%20Minerals%20Reforms%20on%20Eastern%20Congo%E2%80%99s%20Conflict%2010June2014.pdf.

94. *Id.* at 3. It should be noted that the OECD Guidelines were in existence prior to the Dodd Frank Act's passage, reformed in 2012 and used as the framework behind the Rule. *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD, http://www.oecd.org/corporate/mne/mining.htm (last visited Nov. 10, 2015).

95. Bafilemba et al., *supra* note 93, at 4.

### *B. A Fundamental Misunderstanding: Going "Congo-Free" Rather than "Conflict-Free"*[96]

Those that oppose the Rule have a distinct take on the issue and believe that the boisterous voices of the well intentioned have over simplified the complicated issue that exists within the confines of the Great Lakes region.[97] Many activists, scholars, scientists, economists, and journalists across the globe have spoken out openly against the Rule because it "fundamentally misunderstands the relationship between minerals and conflict in the Congo."[98] There has been little positive economic benefit for U.S. companies that are governed by the Rule, and many believe that the SEC has failed to "show any benefits to investors, increased efficiencies for the marketplace or capital formation."[99] Finally, there is a lack of international cohesiveness that would make the Rule effective. This has led to unique challenges, as legal and development scholars and practitioners seek to find a solution to the human rights violations taking place overseas.

Perhaps the most obvious, albeit least morally driven, reason to disagree with the Rule in its current form is found in the difficulties that corporations will face in its implementation.[100] Despite the implementation period, the sheer magnitude of verifying responsible sourcing for some companies is unrealistic.[101] The cost is also prohibitively high, estimated to reach roughly $7.93 billion, "more than 100 times the SEC's estimated cost."[102] The cost was predicted to be so high because

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96. An Open Letter by 70 Signatories (Sept. 2014). This letter should not be confused with other open letters on the subject, including the European Union efforts to regulate conflict minerals. The letter addressed here can be found at https://ethuin.files.wordpress.com/2014/09/09092014-open-letter-final-and-list.pdf. It has been cited by both foreign policy journalist Lauren Wolfe, *supra* note 16, and in a response letter issued by Enough, http://enoughproject.org/reports/open-letter-dodd-frank-october-2014.

97. *See* Wolfe, *supra* note 16.

98. An Open Letter by 70 Signatories, *supra* note 96.

99. Sarah N. Lynch, *U.S. SEC To Hold Round-Table on Conflict Minerals*, REUTERS (Sept. 29, 2011), http://www.reuters.com/article/2011/09/29/sec-conflict-minerals-idAFS1E78S0R920110929.

100. Seay, *supra* note 2.

101. *Id.* A pertinent example here is the burden on producer Kraft Foods, who would have to verify sourcing through best practices with over 10,000 suppliers. *Id.*, *quoted in* Jesse Hamilton, *Kraft, GE Officials Say Conflict-Mineral Rule Will Burden Firms*, BLOOMBERG (Oct. 18, 2011), http://www.bloomberg.com/news/articles/2011-10-18/kraft-ge-officials-say-conflict-mineral-rule-will-burden-firms.

102. Seay, *supra* note 2; Chris Bayer & Elke de Buhr, *A Critical Analysis of the SEC and NAM Economic Impact Models and the Proposal of a 3rd Model in View of the Implementation of Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act*, TUL. U.L. SCH. PAYSON CTR. INT'L DEV. 3 (2011). This study also rejects the estimated cost by industry of $9—16 billion as being too high. *Id.*

"substantial traceability reforms would need to be implemented throughout the supply chain—from the mine to final product manufacturing—in order for disclosure to work."[103]

The Rule uses the public company reporting requirements to influence social policy extraterritorially, which may be considered outside its Congressional mandate.[104] Despite its efforts, the Rule has created a "de facto boycott on Congolese minerals given [the] uncertainty over regulation and the impossibility of tracing certain minerals."[105] This has forced many Congolese miners into unemployment and has significantly affected their livelihoods, all while retaining the same levels of violence and fear mongering that existed prior to the passing of the Rule.[106] The balance of trade is negatively affected as well, with "fear of attack even discourag[ing] responsible saving habits," as "to prevent cash being stolen by armed men or looters, gold miners [prefer] to spend their earnings immediately rather than to save them."[107] The miners cannot pay for their children to go to school, they cannot afford health care, and they certainly cannot afford goods and services that support the wider Congolese economy.[108] Therefore, the miners have changed occupations to one of the few options that remain for them—subsistence farming, militias, mining of gold, or other internationally frowned-upon activities.[109]

These other options are equally taxing on the quality of life. Subsistence farming is an unrealistic way to provide for families because it leaves little or nothing to be sold, removing the family from the wider market. The militias are perpetuating the violence that the Rule so desperately sought to remove, so participating in a militia rather than working as a miner does not accomplish the objective of mitigating human rights violations in the Congo. Finally, gold is not considered a conflict mineral, so consequently, the gold trade remains a lucrative industry for warlords and militias, as it is easy to smuggle and the return is high.[110]

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103. Bayer & de Buhr, *supra* note 102.

104. Cydney Posner, *House Republicans Pressure SEC To End Court Battle over Conflict Minerals Rule*, PUBCO@COOLEY BLOG (Mar. 3, 2015, 12:49 PM), http://cooleypubco.com/2015/03/03/house-republicans-pressure-sec-to-end-court-battle-over-conflict-minerals-rule/.

105. Seay, *supra* note 2.

106. *Id.*

107. *Putting Principles into Practice*, *supra* note 79, at 2.

108. *Id.*

109. Seay, *supra* note 2.

110. *Id.*

Additionally, governance trends in the region show that the Rule is having little impact on the conflict that exists underneath the surface of the mineral guise. Put aptly:

> Ultimately, however, this terrible conflict is rooted in the wholesale absence of basic governance, security and accountability in the DRC, which allows age-old ethnic tensions and conflicts over land to rage unabated. The DRC government and military are, at best, unable to protect their citizens and, at worst, are reportedly complicit in committing atrocities against them.[111]

A key component of regional stability between recognized sovereign governments is the facilitation of trade and mineral access between the states.[112] As the mines became less lucrative for nongovernmental militias, the Congolese have militarized the mines, ensuring control over the minerals in order to meet political expectations.[113] For certain, "[p]olitical inertia, combined with ongoing capacity issues within [regional] mining authorit[ies], mean that . . . cases [of violence, rape, and other war crimes] are not properly followed up."[114]

Furthermore, the heavily affected people of the Congo have not been consulted about their own fate. As local government and community stakeholders have been almost completely disregarded in the establishment of the Rule, leaving little consideration of the realities on the ground.[115] For example,

> setting up the required systems and procedures to regularly access and audit thousands of artisanal mining sites in isolated and hard-to reach locations spread across an area almost twice the size of France would be a challenge for any government. In the eastern DRC, where road infrastructure is poor to non-existent and state capacity desperately low, the enormity of the task is hard to overstate. But in demanding that companies prove the origin of minerals sourced in the eastern DRC or neighbouring countries before systems able to provide such proof have been put in place, conflict minerals activists and resultant legislation—in particular Section 1502 of the Dodd-Frank Act—inadvertently incentivize buyers on the international market to pull out of the region altogether and source their minerals elsewhere.[116]

Because the Rule in effect removes the main livelihood-supporting commodity for those powerless to effect change, many in the inter-

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111. *Id.* (quoting an e-mail correspondence with the Information Technology Industry Council's representative Rick Goss).

112. *Id.* (stating that key states include Rwanda, the Congo, and their neighbors).

113. *Id.*

114. *Putting Principles into Practice*, *supra* note 79, at 7.

115. An Open Letter by 70 Signatories, *supra* note 96.

116. *Id.*

national community believe that the Dodd-Frank Act should also have provided for assistance to the mining communities.[117] This is something that has not been realized. There is a stark lack of foreign presence in the country, particularly when compared to other, more lucrative regions of the world, such as the Middle East.[118]

The ban on untraceable conflict minerals has pushed many miners into the "margins of legality".[119] Providing traceability in the Great Lakes region is exceptionally challenging, where "[i]t is not an exaggeration to say that it is possible to bribe almost every border guard, customs official, and immigration authority in the region."[120] Additionally, the armed militias have not disbanded, simply returning through the "loopholes of transnational regulation."[121] In order to reap profit from minerals despite the Rule, they have turned to illegally trading other goods and to on-site mineral taxation "a few steps down the supply chain."[122] In fact, this may actually be a more lucrative and violent means of procuring mineral revenue, as the militias use citizens and family members to commit the violations, keeping themselves from suffering any marginal prosecutorial consequences of trafficking minerals.[123]

Those questioning the effectiveness of the Rule do not question that the illegal trade in minerals is an abject part of the conflict economy, funding the livelihoods of militias' members and their families.[124] Rather, they also assert that those in favor of the Rule have significantly misrepresented the role of minerals, because minerals are not the driver of the conflict.[125] Instead, tensions over inequality, ideological issues and the lack of governance over violent militia behavior are the reasons behind the conflict.[126] This causal/correlation error combined with misleading rhetoric has pointed legislators and public perception towards a solution that may not benefit the long-term development of the Congo and its surrounding states.[127]

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117. *Id.*; *see also* Wolfe, *supra* note 16.

118. *See* Seay, *supra* note 2; *see also* Wolfe, *supra* note 16. This takes into account previously approved USAID programs that would provide assistance to mining communities, as the direct causal correlation between the Rule and the aid does not exist.

119. An Open Letter by 70 Signatories, *supra* note 96.

120. Seay, *supra* note 2.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. For example, the activist group Enough has attributed the fall of a major militia group to the "success" of the Dodd-Frank Act; however, the truth of the matter is that the group never controlled mining territory. Wolfe, *supra* note 16. Some studies show that violence in the DRC

### *C. A Third Choice: Possible Alternatives to the Dodd-Frank Act's Conflict Minerals Rule*

The relationship between minerals and conflict is difficult even for experts in the field to understand, making the confusion over whether the Rule is helping easy to comprehend. Certainly, raising public awareness of the situation in the Congo is a step in the direction of mitigating conflict in the region. However, this push for conflict-free minerals is wrought with new problems and has made accessing formal markets even more difficult "mainly because of unreasonably high—and frankly counter-productive—compliance expectations."[128] The disclosure requirement is disparately hurtful to the economic interests of the Great Lakes region, particularly the Congo, and it does not change the demand for these minerals from consumers. "[T]here is a need for greater awareness among consumers and the mineral industry that responsible mineral also means sourcing responsibly from conflict areas and supporting artisanal miners in their efforts to meet the new demands of the market."[129]

First, the jumbled and ambiguous application of the Rule is likely to be more effective if implemented instead through the existing set of international regulations, creating a set of norms for the management of resources in conflict and postconflict states. Rather, this domestic regulation is subject to Constitutional protections and the legitimate governmental interest, furthering domestic economic stability. The international community has taken great strides towards creating traceability schemes through U.N. Resolutions,[130] OECD recommendations,[131] the Extractive Industry Transparency Initiative,[132] and local and regional government efforts that were coordinated through

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has actually increased since the implementation of the Rule, as rebel groups struggle to maintain their financial and military hold over parts of the country. Lauren Harrison, *Regulation, Aid, and the "Resource Curse,"* AIDDATA (June 18, 2013), http://aiddata.org/blog/dodd-frank-in-the-drc-regulation-aid-and-the-resource-curse.

128. Tyler Gillard, *Responsible Gold Also Means Supporting Livelihoods of Artisanal Miners*, OECD INSIGHTS (Mar. 24, 2015), http://oecdinsights.org/2015/03/24/responsible-gold-also-means-supporting-livelihoods-of-artisanal-miners/.

129. *Id.*

130. *See* G.A. Res. 55/56 (Jan. 21, 2001).

131. In 2010, the Organization for Economic Cooperation and Development created guidelines detailing the responsibilities inherent in performing due diligence on mineral supply chains in order to assist corporations and suppliers in their efforts to development company management systems, risk assessment and mitigation, and independent audits and public disclosure for minerals from conflict-affected and high-risk areas. *Putting Principles into Practice*, *supra* note 79, at 3.

132. *What is the EITI?*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, https://eiti.org/eiti (last visited Oct. 8, 2015).

the World Bank and other international organizations.[133] These efforts were "out of the public eye and intentionally low key" and worked closely with the local civil society members.[134] For example, the World Bank, whose project functions in conjunction with the Congolese government was set to be a highly effective and discreet means of rectifying the utilization of minerals to fund conflict.[135]

Conversely, there are limited unilateral directives; the European Union has not implemented a similarly cohesive internal regulation, albeit there exist the same international obligations, and have instituted a directive that governs conflict mineral importation in a different way.[136] "Standards like the OECD Due Diligence Guidance encourage companies to work with artisanal miners, without demanding perfection," but when used conjunctively with the Dodd-Frank Act provisions, the standards are overly burdensome on some corporations, and may be perceived as violative of the First Amendment.[137]

Additionally, the international community should continue striving for both domestic and international prosecution of war criminals throughout the Great Lakes region, as evidenced through the International Criminal Court trial of war criminals in the Congo.[138] While the United States has not yet ratified the treaty for the International Criminal Court, doing so would add global accountability for these war criminals.[139] The potential for international trials must be complemented by a strengthening of internal accountability measures that include all voices in the Congolese population and will allow Congolese leaders to take a formal role in the implementation process of transparency initiatives.[140] Further, transparency initiatives should be combined with investment programs and job creation measures to allowing corporations, nongovernmental organizations (NGOs), and other transparency initiatives to hire and involve Congolese miners and citizens to be an inherent part of the process.[141]

The well-intentioned Westerner can provide assistance as well through participation in and donations to international transparency

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133. Seay, *supra* note 2.

134. *Id.*

135. *Id.*

136. *See* European Commission Press Release IP/14/218, EU Proposes Responsible Trading Strategy for Minerals from Conflict Zones (Mar. 5, 2014).

137. Gillard, *supra* note 128.

138. *See, e.g.*, Prosecutor v. Lubagna, ICC-01/04-01/06A5, Judgment, Decision on Sentence, Decision on Reparations (Dec. 1, 2014), http://icc-cpi.int/iccdocs/doc/doc1876833.pdf.

139. Webb et al., *supra* note 11, at 3.

140. Seay, *supra* note 2.

141. *Id.*

initiatives such as the Extractive Industries Transparency Initiative and NGOs like the Global Witness, an organization reporting on best practices in the DRC. These efforts can be expanded through training opportunities in Rule of Law initiatives, such as the American Bar Association's current Rule of Law Initiative that has been operating in the Congo since 2008.[142] Additionally, NGOs such as Enough, who create lists of responsibly sourced companies, can help consumers make educated decisions when it comes to purchasing products that use minerals.[143]

Empowering local Congolese to increase "local ownership and oversight of the trade is essential to creating transparent and sustainable conflict-free supply chains."[144] More so, there is hope in localized whistle-blowing mechanisms, such as the Conflict-Free Tin Initiative, which is "based on a closed-pipe model whereby all players in the vertically-integrated supply chain are known."[145] This is also complimented by a "thirty-member strong multi-stakeholder *Comité de Surveillance et Anti-Corruption*," that monitors the tagging system.[146] Since this system was introduced, the quality and detail of reporting in the region has increased extensively.[147] Additionally, the Save Act Mine has established a telephone hotline that takes "anonymous calls to report suspicious mineral-related activity."[148] Finally, providing aid in the form of medical and psychological treatment for survivors of violent conflict can help change the dynamics of the conflict on the ground, giving Congolese citizens a second shot at combating violence, promoting community engagement, and increasing capacity development in localized NGOs.[149]

Given that it is unlikely that the conflict between these two views would lead to the Rule being seen as "factual and uncontroversial," the Rule will likely be held to the standard set forth in *American Meat*, which utilizes the same criteria.[150] For the consumer, not the company, to recognize that the product was not made in a conflict-free way, they

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142. *Rule of Law Initiative: Where We Work, Democratic Republic of Congo*, AM. BAR ASS'N, http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/democratic_republic_congo.html (2015).

143. *See Eastern Congo*, *supra* note 25.

144. *Putting Principles into Practice*, *supra* note 79, at 5.

145. *Id.* at 5.

146. *Id.*

147. *Id.*

148. *Id.* at 4.

149. Webb et al., *supra* note 11, at 3.

150. *See generally* Am. Meat Inst. v. U.S. Dep't of Agric., No. 13-5281, slip op. at 14 n.1 (D.C. Cir. Mar. 28, 2014).

would have to go to the producers' website and the supplier of that producer, read the report, and notate the disclosure. It is fair to say that many consumers in Western culture would not take the pains to do so. Therefore, the burden of the disclosure statement falls on the corporations that produce products that require sourced conflict minerals and the economy of the Congo. Under the first portion of the test as set forth in *American Meat*, this would lead to an adequate state interest being hard to prove.[151] It seems unlikely that the logic that applied in that case (that the disclosure was validated on the principle of protecting American producers of meat, preventing health and hygiene crises, and allowing consumers to make informed decisions) can be replicated here.[152]

More so, the regulatory technique must be proportional to the government's interest, which can be determined by testing whether or not the regulation directly advances the governmental interest and is narrowly tailored to serve that end.[153] Unlike *American Meat*, the disclosure here was not in furtherance of the goal of informing consumers of a particular product trait, because, as stated above, it would be rare for consumers to discover this.[154] This disclosure functions as a means of sanctioning companies who are unable to determine where the minerals in their products originated from, and thus are unable to inform consumers about a product attribute that would influence their health, wellbeing, or otherwise.[155] At any rate, "the government meets its burden of showing that the mandate advances its interest in making the 'purely factual and uncontroversial information' accessible to the recipients."[156]

As we have seen, the information at hand cannot, by any stretch of the imagination, be considered purely factual. Additionally, the measure will not likely be found to be proportionate because the "reasonable fit" required under *American Meat* should be considered disproportionate given the adverse impacts on U.S. business interests, free trade, and the

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151. Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d. 18, 23 (D.C. Cir. 2014).

152. *Id.*

153. *Id.* at 25.

154. *Id.* at 26 (noting where the court held that under *Zauderer*, there is no need to show that the measure is effective when the goal is to inform consumers about a particular product trait, i.e. the origin of meat).

155. This is advanced despite arguments to contrary that the Rule does advance the health and wellbeing of consumers by allowing them the opportunity to consciously choose products that are declared conflict free. Because of the convincing arguments presented, outlining the difficulties faced by the Congolese people even after the implementation of the disclosures, there is no conclusive evidence that the informed purchase of products by consumers will have any impact on the situation unfolding in the Democratic Republic of Congo.

156. 760 F.3d at 26.

well-being of the Congolese people the Rule seeks to assist.[157] Finally, *American Meat* reiterates that, although *Zauderer* is now authorized to apply to factual and uncontroversial disclosures outside of consumer deception, the test "does not leave the state 'free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views.'"[158]

## V. CONCLUSION

The Dodd-Frank Act's Conflict Minerals Rule and the tangential cultural and case history surrounding it are indicative of a progressive discontinuity between national state interests, private profit, and the promotion of global free trade. As morality becomes increasingly linked to our economic choices, the importance of corporate disclosure will continue to grow. However, implementing far reaching domestic policies that do not have inherent benefits to our country is not the best approach.

The Rule is beneficial in that it endorses a progressive movement towards an international norm that promotes conscious consumerism. Yet the overarching results of the Rule's moral compass have been found ineffective at best and detrimental at worst. "Today the discourse within the international community on 'conflict minerals' has changed. It's not just about conflict free. What's important is promoting responsible sourcing of minerals from conflict areas, despite the challenges. Whole-scale disengagement with artisanal miners almost always has harsh consequences for miners' livelihoods."[159]

As we consider the role that consumers play in influencing corporate social responsibility, and the importance of mitigating conflict and poverty globally, Westerners should implement policies that focus more directly on capacity building, internal transparency and governance, and investment. Conversely, policies that overly regulate commerce and those that are disproportionate to needs should not be endorsed. Therefore, the Dodd-Frank Act's Conflict Minerals Rule should not necessarily be revoked, but should be implemented in a way that is less burdensome to economic stability and provides more guided direction to place change in the hands of consumers and the people of the Great Lakes region.

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157. *Id.*

158. *Id.* at 27 *quoted in* Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 12-16 n.12 (1986) (plurality opinion).

159. Gillard, *supra* note 128.

ADDENDUM

On August 18, 2015, the United States District Court for the District of Columbia issued an eighty-one-page opinion after the panel rehearing of *National Manufacturers v. SEC*. The three-judge panel ruled that this compelled disclosure was unconstitutional, because the *Zauderer* standard only applies to voluntary advertisements, not governmentally compelled speech.[160] Specifically, the court noted that it "is entirely unproven and rests on pure speculation" that the extraordinarily costly Rule would diminish the impact of armed conflict on human rights in the DRC, particularly in light of the fact that many corporations have instead boycotted minerals from the country.[161] Therefore, there was not a sufficient interest in mandating the disclosure.[162] The court notes, "This is itself dooms the statute and the SEC's regulation."[163] Additionally, the court reaffirmed their ruling in *American Meat* and the assertion compelling that commercial disclosures must be "'purely factual and uncontroversial information' about the good or service being offered.'"[164] The court readily admitted to confusion as to what information might be considered "uncontroversial," but was certain that the claims against conflict minerals were not "purely factual."[165] In sum, the court pointed to the brief of the appellants:

> If the law were otherwise, there would be no end to the government's ability to skew public debate by forcing companies to use the government's preferred language For instance, companies could be compelled to state that their products are not "environmentally sustainable" or "fair trade" if the government provided "factual" definitions of those slogans—even if the companies vehemently disagreed that their [products] were "unsustainable" or "unfair."[166]

160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* (quoting Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 27 (D.C. Cir. 2014)).
165. *Id.*
166. *Id.* (quoting Brief for Appellant at 23, Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014) (No. 13-5252)). The SEC and Amnesty International have again appealed the court's decision, and so the saga continues.