

## Concrete Suggestions Around Conflict Minerals and Corporate Supply Chains

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Galit Sarfaty, [Shining Light on Global Supply Chains](#), 56 *Harv. Int'l L. J.* 419 (2015).

Supply chains. Not too long ago, I found myself nodding wisely along when someone was talking about them. The truth is that my nodding signaled only that I recognized their significance as components of the modern global economy, and as objects of legal study. In no way did my nodding signal that I actually knew much about them.

These are the things I do know about supply chains: they are important; they are complex and present complex challenges; their trans-border nature makes them hard to regulate; and bad things regularly happen in developing countries, at the ends of supply chains that provide goods many of us have come to rely on. Things I don't know about supply chains: above all, I don't know in precise terms just how inadequate existing legal regimes – domestic, transnational, public, or private – are in dealing with supply chain problems; where the shortcomings are and the precise consequences of those shortcomings; and whether I should be hopeful or despondent about the prospect of addressing them.

Happily, Galit Sarfaty has shone new light into one aspect of supply chain regulation, through something I do know a bit about: disclosure-based securities regulation. In the process, she has illuminated the potential of domestic law in addressing the use of conflict minerals within corporate supply chains, and the significant limits of corporate conduct on the matter to date.

In *Shining Light on Global Supply Chains*, Sarfaty considers the mandatory disclosure requirements under Dodd-Frank Section 1502, which requires companies that are publicly traded in the US, including their foreign subsidiaries, and which manufacture or contract to manufacture certain conflict minerals, to disclose whether their minerals originate from the Democratic Republic of Congo (DRC) or its neighboring countries. When they do, the company must exercise due diligence on the source and chain of custody of their minerals, and file a Conflict Minerals Report. Sarfaty's work quantitatively and qualitatively reviews the first round of such reports, 967 in total, filed in mid-2014, supplemented by ethnographic interviews and participant observation. As she points out, Section 1502 aims to use domestic disclosure rules to extend the extraterritorial reach of US domestic law far enough to provide some visibility into where the conflict minerals in our laptops and other electronics (along with gold and other minerals) actually come from, and the conditions under which they are obtained.

Sarfaty's first, striking finding is that most companies show genuinely poor due diligence when it comes to understanding their supply chains, let alone mitigating risks or seeking to improve supplier practices vis-à-vis conflict minerals. 48% of companies demonstrate weak due diligence based on her careful criteria, and only 7.34% (that is, 8 of 967 reporting companies) can claim to be demonstrating strong due diligence.

As Sarfaty shows, good supply chain due diligence is hard to achieve. Supply chains can be long, and tend to be fluid. International norms on supply chains are still at an early stage of development, so there is a lack of guidance around, e.g., how much due diligence work can be outsourced to third parties, and even what counts as a "conflict" for purposes of the rule. As well, multiple different parties – industry groups, NGOs, consulting firms, and governmental bodies – are now involved in developing certification standards and sourcing initiatives. The initiatives can conflict, can be non-transparent, and in any event are generating in the context of a competition among certifiers for market share. Coordination is less the norm than competition, and ameliorating the desperate situation in the DRC is not the certifiers' only priority. As well, of course, local security is very challenging and governance is very weak in the region, which inhibits mapping and traceability.

Then there are the factors that seem to correlate with higher compliance. Unsurprisingly, firm capacity and "social license" matter. Brand strength and company size (but not profitability, so much) are positively correlated with better compliance. Also strongly correlated is whether a company has been involved with particular international supply chain initiatives, like the Conflict Free Sourcing Initiative (CFSI). However, benefits taper off if a company is involved in more than one such initiative, presumably because at some point redundancy and even conflict between initiatives kick in. It also turns out that making things easier for companies – for example, by having independent third-party auditors certify smelters as conflict-free, as CFSI does – increases compliance. For regulation and governance nerds like me, Sarfaty's article also enriches the conversation about the comparative benefits of harmonization versus decentralization (i.e., in the context of federalism, or improving legal standards by allowing multiple standards to operate simultaneously). It reminds us that there can be real costs associated with allowing multiple initiatives to develop alongside each other, at least in the context of urgent human rights abuses on the ground. One harmonized set of due diligence reporting requirements, which are fairly easy for companies to implement, potentially with the assistance of credible on-the-ground actors like the CFSI would apparently make conflict mineral supply chains easier to map and to manage. While over the long run, multiple competing standards may be more effective at generating optimal standards, optimality in this environment may be less important than actually making some progress, sooner.

Sarfaty's work makes a welcome contribution to our understanding of how to improve supply chain due diligence. Hers is a positive early account of the application of domestic law to a thorny transnational problem, and Sarfaty's thoughtful and thorough analysis helps identify the specific ways in which we may be able to envision a yet more robust and meaningful strategy for dealing with conflict minerals, human rights abuses, and corporate supply chains.

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