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Is Extraterritorial Jurisdiction Still Alive? Determining the Scope of U.S. Extraterritorial Jurisdiction in Securities Cases in the Aftermath of *Morrison v. National Australia Bank*

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I. Introduction

Extraterritorial jurisdiction is the principle that permits courts of nations to extend their jurisdiction beyond the confines of their borders.[1] This jurisdictional principle allows parties that are typically unable to overcome the burden of a traditional jurisdictional test to have access to relief in courts in the United States.[2] One of the most notable applications of extraterritorial jurisdiction is found in the regulation of securities transactions. Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") is a sweeping anti-fraud provision that applies to all securities transactions, whether or not the securities are registered on a national exchange.[3] As several scholars have noted, however, this provision is vague and its legislative history is scant.[4] Much of the burden of determining the scope of this provision has fallen

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[1] *See* BLACK'S LAW DICTIONARY 929 (9th ed. 2009); Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1310-11 (1985).

[2] *See, e.g.*, Derek G. Barella, Note, *Checking the "Trigger-Happy" Congress: The Extraterritorial Extension of Federal Employment Laws Requires Prudence*, 69 IND. L.J. 889, 911-12 (1994) (noting some potential problems with establishing personal jurisdiction in a labor dispute where defendant is the foreign subsidiary of a multinational corporation).

[3] *See* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2010). Most provisions of the Exchange Act affect only those securities that must be registered under the Act, while Section 10(b) applies to all securities, registered or not. *Compare* Exchange Act § 14(a), *with* Exchange Act § 10(b)(2).

[4] ARNOLD S. JACOBS, DISCLOSURE AND REMEDIES UNDER THE SECURITIES LAW § 6:1 at 6-3 (2011) (noting that the legislative and administrative histories of § 10(b) and Rule 10b-5 are sparse); Kimberly Brame, Comment, *Beyond Misrepresentations: Defining Primary and Secondary Liability Under Subsections (a) and (c) of Rule 10b–5*, 67 LA. L. REV. 935, 937 (2007) (discussing the inconsistency created by the U.S. Supreme Court's holding in Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994), that the plain reading of § 10(b) did not provide a private right of action for securities fraud).

to the courts' sense of fairness.[5]

For the past forty-five years, the U.S. Court of Appeals for the Second Circuit has led the lower courts in shaping the jurisprudence surrounding Section 10(b) of the Exchange Act.[6] The Second Circuit developed two distinct tests to determine whether extraterritorial jurisdiction was proper: The "effects test" and the "conduct test."[7] Other circuit courts subsequently adopted and sometimes modified these tests.[8] In short, under the Second Circuit's doctrine, if plaintiffs could show that the facts of their particular case met—depending on the circuit—either the effects or conduct test, or, in some cases, a combination of the two, then the court typically found a sufficient interest in exercising extraterritorial jurisdiction in the fraud cases.[9]

In June 2010, the U.S. Supreme Court drastically changed the securities fraud landscape when it handed down the decision in *Morrison v. National Australia Bank.*[10] The Supreme Court held that plaintiffs, perhaps both public and private, lack valid claims in foreign-cubed cases.[11] This decision shook up securities law, leaving many judges, practitioners, and investors searching for

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5 JACOBS, *supra* note 4, § 6:1 at 6-3.

6 Roberta S. Karmel, *The Second Circuit's Role in Expanding the SEC's Jurisdiction Abroad*, 65 ST. JOHN'S L. REV. 743, 743 (1991) ("The Second Circuit has had such a profound impact on securities law that it has been referred to in this context as the 'Mother Court.'").

7 *See* Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) (asserting that Congress intended for the Exchange Act to protect U.S. markets against the *effects* of improper foreign securities transactions), *abrogated by* Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869 (2010); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972) (concluding that Congress intended the Exchange Act to provide extraterritorial jurisdiction only where there was fraudulent *conduct* in the buying or selling of securities), *abrogated by* Morrison, 130 S. Ct. 2869.

8 *See, e.g.*, Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 30-33 (D.C. Cir. 1987) (commenting on the various tests other courts have adopted before applying the Second Circuit's "conduct" test despite questioning its soundness), *abrogated by* Morrison, 130 S. Ct. 2869.

9 Derek N. White, *Conduct and Effects: Reassessing the Protection of Foreign Investors from International Securities Fraud*, 22 REGENT U. L. REV. 81, 88 (2010).

10 130 S. Ct. 2869 (2010).

11 *See* Richard Painter, Douglas Dunham & Ellen Quackenbos, *When Courts and Congress Don't Say What They Mean: Initial Reactions to* Morrison v. National Australia Bank *to the Extraterritorial Jurisdiction Provision of the Dodd-Frank Act*, 20 MINN J. INT'L L. 1, 6-7 (2011).

ways to accommodate the expanding global securities market in the post-*Morrison* regime.[12] Only time will tell how *Morrison* will affect both U.S. securities markets and securities markets throughout the world.

While plaintiffs' attorneys and entities that trade on U.S. exchanges, along with foreign securities issuers, were deciphering the array of possible implications of *Morrison*, Congress took action and addressed the issue.[13] Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[14] In addition to other aspects of the reform of U.S. financial markets, the Dodd-Frank Act addresses extraterritorial jurisdiction of Section 10(b).[15]

The purpose of this comment is to discuss the jurisdictional issues raised by *Morrison* and the extent to which the Dodd-Frank Act resolves them. Along with inspecting securities law, this article will discuss other areas of law that will face the implications of a post-*Morrison* world. Part II of this comment will examine the history of U.S. securities law under Section 10(b) of the Exchange Act and how the *Morrison* decision affects this

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[12] *See id.* at 6-7 (commenting that, despite its clarity, *Morrison*'s "transactional" test will likely create a significant amount of litigation because its design cannot accommodate private transactions that take place both inside and outside the U.S. or transactions where the broker-dealer or other intermediary is in a different country from the location of the transaction); CHRISTIAN J.WARD ET AL., COUNCIL OF INSTITUTIONAL INVESTORS, MORRISON V. NATIONAL AUSTRALIA BANK: THE IMPACT ON INSTITUTIONAL INVESTORS 1-2 (Feb. 2012), *available at* http://www.cii.org/UserFiles/file/resource%20center/publications/CII_Morrison_white%20pape_FINAL.pdf (discussing the concerns of institutional investors presented by the *Morrison* decision).

[13] George T. Conway III, *Applying the Supreme Court's Limits to "Foreign Squared Litigation,"* HARVARD LAW SCHOOL FORUM ON CORP. GOVERNANCE & FIN. REGULATION (Aug. 10, 2010, 9:25 AM) http://blogs.law.harvard.edu/corpgov/2010/08/10/applying-the-supreme-courts-limits-to-foreign-squared-litigation/ (discussing the district court's interpretation in Cornwell v. Credit Suisse Grp., 729 F.Supp. 2d 260 (S.D.N.Y. 2010), that *Morrison* does not bar American plaintiffs from bringing suit in the U.S. based upon securities transaction based in foreign nations).

[14] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered provisions of the U.S. Code); *see* Painter et al., *supra* note 11, at 14.

[15] Dodd-Frank Act § 929P(b)(2) (codified as amended 15 U.S.C. § 78aa); *see also* Painter et al., *supra* note 11, at 15.

history. Part III will explain the impact of *Morrison* in the securities world. Part IV will examine the legislative responses to *Morrison*. Notably, soon after the Supreme Court issued its decision in *Morrison*, Congress responded with a specific provision of the Dodd-Frank Act. Part V of this comment will discuss courts' response to these conflicting stances upon the application of extraterritorial jurisdiction in securities fraud cases. In addition, while the *Morrison* decision seems to solely implicate securities fraud cases with foreign parities, Part VI will examine available options for worldwide classes of plaintiffs seeking relief in securities litigation. Finally, Part VII demonstrates the perhaps unexpected applications of this decision, thus examining the courts' broadening of the *Morrison* decision by applying it in non-securities frameworks.

II. U.S. Federal Securities Law

In 1934, Congress expanded federal securities regulation by passing the Exchange Act, establishing disclosure regulations for companies that are required to register under U.S. securities law.[16] The goal of this legislation was to protect current and potential investors—those who were buying shares in publicly traded companies or had already invested.[17] The Act created a mandate for companies to fully disclose material information related to their traded securities as a protective measure in order to protect investors from fraud and encourage publicly traded companies to act with honesty and fair dealing.[18]

In the interest of investor protection, U.S. securities law provides a recovery remedy for investors who are harmed by a company's securities fraud.[19] Those who are harmed by violations

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16 *See* Securities Exchange Act of 1934 § 12, 15 U.S.C. § 78l (2010). Section 12 of the Exchange Act requires that securities traded on national exchanges be registered: "It shall be unlawful for any member, broker, or dealer to effect any transaction in any securities . . . on a national securities exchange unless a registration is effective as such security for each exchange in accordance with the provisions of this title and the rules and regulations thereunder." *Id.* § 12(a).

17 Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976) ("The [Exchange] Act was intended principally to protect investors against manipulation of stock prices . . . .").

18 *See, e.g.*, Julie B. Rubenstein, Note, *Fraud on the Global Market: U.S. Courts Don't Buy It; Subject-Matter Jurisdiction in F-Cubed Securities Class Actions*, 95 CORNELL L. REV. 627, 632 (2010).

19 *See id.* at 632-33 (describing that the purpose of the Exchange Act is to protect

of the securities laws have an implied right to action set out under the Act.[20] The Exchange Act also created the Securities and Exchange Commission ("SEC" or "the Commission") as the regulatory administrative agency tasked with ensuring that publicly traded companies comply with federal disclosure requirements and other securities regulations.[21]

This article discusses the anti-fraud provision of the Act, Section 10(b), and specifically, its jurisdictional reach. This provision states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe . . . .[22]

In accordance with the purpose of Section 10(b) of the Exchange Act, companies are prohibited from using any channel of interstate commerce to deceive investors.[23] The reach of this provision is wider in scope than other provisions of the Exchange Act.[24] Section 10(b) is essentially an anti-fraud catchall that is not limited to just those securities that are registered with the SEC

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investors and to provide the Securities and Exchange Commission with the authority to discipline those who violate the anti-fraud provision of Section 10(b)).

20 *Id.* at 632; *see* Exchange Act § 14; *see, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

21 *See* Exchange Act § 4.

22 Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2969, 2881-82 (2010) (quoting Exchange Act of 1934 § 10(b)).

23 *See* Exchange Act § 10(b).

24 Other provisions of the Exchange Act only apply to those securities that are required to register under Section 12. But Section 10(b) applies to both those securities that must be registered under Section 12 as well as any security not included in Section 12 registration requirements. For example, Section 14 includes proxy regulations, but Section 14 specifically states that it only applies to Section 12 registered securities. *See* Exchange Act § 14.

under Section 12;[25] instead it includes all securities, registered or otherwise.[26]

Unlike other provisions that apply extraterritorially,[27] the statutory language of Section 10(b) reflects no explicit jurisdictional language. There is no clear indication of whether Congress intended this provision to apply only to those cases arising within the domestic market involving domestic investors or to expand outside of the borders of the United States, allowing those who had invested in foreign markets to bring suit.[28]

A. History of Rule 10b-5

Immediately after the passage of the Exchange Act, the SEC had no broad power to regulate fraud in securities transactions.[29] Resulting from Section 10(b), Rule 10b-5 was adopted on the premise that everyone was against fraud.[30] "The clear purpose of Rule 10b-5 is to provide protection against investors being duped into purchasing or selling securities."[31] In order to provide this protection, Rule 10b-5 provides a claim if a plaintiff can establish the following: "(1) fraud of deceit, (2) by any person, (3) in connection with, (4) the purchase or sale, and (5) of any security."[32] Nonetheless, beyond this idea of simple fraud

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25 *See* Exchange Act § 12.

26 *See* Michael J. Calhoun, Comment, *Tension on the High Seas of Transnational Securities Fraud: Broadening the Scope of United States Jurisdiction*, 30 LOY. U. CHI. L.J. 679, 684 (1999); *see generally* Securities and Exchange Act § 14 (requiring members, brokers or dealers to register securities before transacting any security of a national securities exchange).

27 *See, e.g.*, Exchange Act § 30.

28 *See generally* Rubenstein, *supra* note 18, at 636 (explaining the vagueness of the Exchange Act in relation to U.S. securities law). The Securities Act of 1933 explicitly states that jurisdiction is only to be applied in U.S. district courts. *See* Securities Act of 1933 § 22, 15 U.S.C. § 77v(a) (2010). In contrast, the Exchange Act remains vague as to the extent of its jurisdiction; the use of the phrase "interstate commerce" creates questions of jurisdiction and congressional intent. *See* JACOBS, *supra* note 4, § 8:2 at 8-2 to 8-6.

29 *See* JACOBS, *supra* note 4, § 6:3 at 6-9.

30 *See* THOMAS LEE HAZEN & JERRY W. MARKHAM, CORPORATIONS AND OTHER BUSINESS ENTERPRISES 696-97 (3d ed. 2009) (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 767 (1917)).

31 *See* THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 12.3[3] (6th ed. 2009).

32 *See id.* § 12.4.

protection, much of what 10b-5 really meant was left unanswered even after its adoption.[33]

One question remaining after the passage of Section 10(b) was whether this provision of the Exchange Act provided for both a public and a private right, or only a public right.[34] Section 10(b) lacks a provision providing for an express private right, but it does provide an explicit public right that authorizes the SEC to take enforcement measures against securities issuers committing fraud.[35] In its release adopting Rule 10b-5, the Commission described this provision as "[closing] a loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase."[36]

Although Section 10(b) lacks explicit language of an express private right for individuals to bring claims, courts have found the existence of a private right under this section.[37] Initially, the lower courts found an implied private right within Section 10(b).[38] Then as a result of the lower courts' recognition of an implied right, even without the Supreme Court examining this issue, a private remedy under Section 10(b) of the Exchange Act became ingrained into securities law.[39]

Although a federal district court laid the foundation for this private right under Rule 10b-5 in 1946, the Supreme Court would wait almost twenty years before deciding to take up the issue.[40] In *Kardon v. National Gypsum Co.*,[41] the Court recognized the lack of an express private right but nevertheless held that the plaintiffs did have an implied private right to bring a complaint under Section 10(b).[42] By the time the Supreme Court addressed this

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33 *See* JACOBS, *supra* note 4, § 6:3 at 6-11.

34 *See id.* at 6-10 n.4.

35 *See id.*

36 Exchange Act Release No. 34-3230, 1942 WL 34443 (May 21, 1942).

37 *See* JACOBS, *supra* note 4, § 6:15; *see also* HAZEN & MARKHAM, *supra* note 30, at 696–700.

38 HAZEN & MARKHAM, *supra* note 30, at 697.

39 *Id.* at 697-98 (quoting Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946)).

40 *See id.* at 697-99.

41 69 F. Supp. 512 (E.D. Pa. 1946)

42 *See id.* at 513.

issue, the implied private right was so widely accepted that the Supreme Court quickly concluded the existence of a private right: "While this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result."[43]

Nonetheless, the implied right of injured investors became more restricted as time passed.[44] After a shift in the Supreme Court's composition in 1975, cases began to mark a change in the Court's interpretation of application of Section 10(b).[45] This new approach to Section 10(b) tended to be narrower, including the Court's stance regarding implied rights of action.[46]

In *Cort v. Ash*[47] the Supreme Court developed a four-part test to use in determining if a private right should be applied, thus revoking the Court's broader position on allowing for implied rights of action.[48] Nonetheless, due to the long history of hearing claims of private rights in security fraud cases, the Court essentially "grandfathered in" this implied right of Section 10(b).[49]

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43 J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964). "[C]ases have deduced a congressional willingness to permit implied rights of action from presumptions regarding the legislature's intent and Exchange Act provisions enacted in the 1930s." JACOBS, *supra* note 4, § 6:15 at 6-58.

44 *See* HAZEN & MARKHAM, *supra* note 30, at 697.

45 *Id.*

46 *Id.* As a conservative majority took control of the Supreme Court in 1975, the Court's stance on implied public rights shifted, producing a "narrow reading" of Rule 10b-5. *Id.*

47 422 U.S. 66 (1975).

48 *See id.* at 78. The four-part test established in *Cort v. Ash* allows for an implicit private right of action by considering:

> Is the plaintiff one of the class for whose especial benefit the statute was enacted,—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. (internal citations omitted).

49 *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975)

Neither *Cort* nor *Cannon v. University of Chicago*,[50] decided by the Supreme Court four years later, overturned precedent allowing for an implied private right under Rule 10b-5.[51] As a result, the implied right continued to be recognized as a valid claim in U.S. courts.[52]

B. Rule 10b-5 and International Securities Issuers

Initially, this private right was extended only to U.S. citizens.[53] This began to change as international law began to accept that Congress could extend U.S. regulatory laws outside of U.S. borders with regard to conduct that had a substantial domestic effect.[54] After this shift, the United States began to extend its securities protections abroad, including this implied private right of action.[55] "U.S. courts [initially] applied domestic regulatory law only to conduct occurring within the United States. Over time, this strict construction eroded as nations recognized the validity under international law of regulating foreign conduct when the conduct has substantial domestic effects."[56]

Due to the application of Section 10(b) to foreign securities issuers, foreign securities issuers have become subject to U.S. securities laws in two instances.[57] First, if the foreign issuer offers

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(commenting on the Court's ready acceptance of the consensus of the lower courts that the Exchange Act implied a private right); Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983) ("[A] private right of action under Section 10(b) of the 1934 Act and Rule 10b-5 has been consistently recognized for more than 35 years. The existence of this implied remedy is simply beyond peradventure.").

50 441 U.S. 677 (1979).

51 *See id.*; HAZEN & MARKHAM, *supra* note 30, at 701 (citing Cannon v. Univ. of Chicago, 441 U.S. 677, 717 (1979)).

52 *See Cort*, 422 U.S. at 78 (establishing a four-part test to determine whether the implicit private right is available); HAZEN & MARKHAM, *supra* note 30, at 700-01.

53 Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 268 (2006) [hereinafter Buxbaum, *Regulatory Litigation*].

54 *See id.* at 268-69.

55 *See id.* at 269 (citing U.S. v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945)) The idea of defining substantial effects is difficult as it creates deference for the judge to decide whether or not he believes there to be substantial domestic effects, so much that bringing the claim within the court's jurisdiction would be permissible. *Id.*

56 *Id.* at 268-69. The U.S. extended its securities law protection in those cases where the activity had substantial domestic implications. *Id.*

57 *See* Natalya Shnitser, *A Free Pass for Foreign Firms? An Assessment of SEC*

or sells stock on a U.S. securities exchange, the issuer must comply with U.S. securities law.[58] Second, if at least 300 U.S. investors purchase securities sold by a foreign issuer, then that foreign issuer must register in accordance with U.S. securities laws.[59] While this registration is required, foreign issuers are eligible for the foreign private issuer exemption.[60] This exemption enables foreign securities issuers to avoid most of the disclosure requirements of the Exchange Act.[61]

As the implied right expanded to include foreign plaintiffs, they began to take advantage of it and sought the protection of U.S. securities laws for a variety of reasons.[62] U.S. securities laws are "aggressive as compared to other nations," making U.S. courts appealing to foreign investors who are deciding which jurisdiction to file their securities fraud claim.[63]

Beyond the aggressive nature of U.S. securities law, foreign plaintiffs also began to observe a unique advantage to filing in the United States; namely U.S. courts are known for the enormous amount of monetary damages rewarded to plaintiffs.[64] For instance, in 2006, the amount of monetary damages awarded to private plaintiffs in securities fraud cases was $17 billion.[65] Foreign investors see massive amounts of money being awarded to plaintiffs in such cases and want the same.[66] Despite the higher possible remuneration, these large damages awards come at a cost of increased litigation prices.[67] Therefore, foreign investors must

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and Private Enforcement Against Foreign Issuers, 119 YALE L.J. 1638, 1650 (2010).

58 *See id.* at 1650-51.

59 *See id.* at 1651. The issuer must also have at least $10 million in total assets. *Id.*

60 *See id.*; *see also* SEC Rule 3b-4, 17 C.F.R. § 240.12g3-2 (2008).

61 *See* Shnitser, *supra* note 57, at 1651.

62 *See* Danielle Kantor, *The Limits of Federal Jurisdiction and the F-Cubed Case: Adjudicating Transnational Securities Disputes in Federal Courts*, 65 N.Y.U. ANN. SURV. AM. L., 839, 839-42 (2010).

63 *See id.* at 853.

64 *See generally id.* at 849 (explaining the nature of judgments given in favor of plaintiffs in securities fraud cases).

65 Shnitser, *supra* note 57, at 1685. During this same period, SEC sanctions against defendants in securities fraud cases totaled $3.275 billion. *Id.*

66 *See* Kantor, *supra* note 62, at 849 (providing figures of judgments granted by U.S. courts).

67 *See id.*

weigh the advantages of filing claims in U.S. federal courts against the disadvantages of high litigation costs and the unpredictability of the U.S. judicial system.[68] As later discussed, whether or not extraterritorial jurisdiction exists in Rule 10b-5 cases will have a considerable effect on the lack of predictability in U.S. securities fraud cases.[69]

C. The Globalization of Securities Markets and U.S. Jurisdictional Limits

As securities markets become increasingly globalized, it is becoming more important for domestic courts to know how to manage "transnational" securities fraud cases being filed in U.S. courts by both private plaintiffs and U.S. administrative agencies.[70] The United States Constitution defines the scope of a federal jurisdiction, and as a result, federal courts are barred from extending their jurisdiction beyond the limits set out in Article III of the Constitution.[71] Along with this constitutional limitation, Congress may also limit the federal courts' jurisdiction.[72]

Historically, domestic courts have approached extraterritorial jurisdiction with the presumption that U.S. laws do not extend outside of the United States, unless Congress expressly states the intent for them to do so.[73]

> Congress has the constitutional authority to extend the reach of domestic laws beyond the United States' borders. If, however, Congress is silent with regard to whether jurisdiction extends beyond the borders of the United States, there is a presumption against extraterritoriality. . . .

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68 *See id.*

69 *See generally id.* (explaining the deterrents plaintiffs face in deciding whether or not to litigate a securities fraud case in U.S. courts).

70 *See generally* Calhoun, *supra* note 26, at 679 (explaining the increasing burden of policing domestic securities markets).

71 *See* U.S. CONST. art. III, §2; *see also* Calhoun, *supra* note 26, at 685-86.

72 *See* Calhoun, *supra* note 26, at 685-86. The Constitution establishes the original jurisdiction of the Supreme Court. As the Court found in *Marbury v. Madison* this is a ceiling upon its jurisdiction, not the starting point. 5 U.S. (1 Cranch) 137 (1803). The Constitution allows for Congress to create lower federal courts. U.S. CONST. art. III, § 2.

73 *See* John H. Knox, *A Presumption Against Extrajursidictionality*, 104 AM. J. INT'L L. 351, 352 (2010).

> . . . The presumption against extraterritoriality can be overcome if the language and structure of a statute or its legislative history indicate a congressional intent that the statute ought to apply to areas of the United States.[74]

This presumption exists because Congress's power is recognized as *domestic* power—power to legislate directly on issues within the borders of the United States.[75] As a result, Congress should avoid involving itself in international conflicts.[76]

1. Foreign-Cubed Cases

Arising out of the globalizing securities markets are class action security fraud cases known as foreign-cubed cases.[77] A foreign-cubed case is the exercise of the private right under Section 10(b) in the form of "a class action brought against a foreign issuer on behalf of a class that includes foreign investors who transacted on a foreign exchange."[78] The number of foreign-cubed cases filed in U.S. courts has increased as the world's securities markets have become more interconnected.[79] In 2007, foreign-cubed cases made up forty percent of all securities fraud cases filed in U.S. courts.[80] This has occurred because foreign plaintiffs invested in foreign securities markets look to file complaints in U.S. courts, as opposed to filing in foreign courts, where there may be jurisdiction, and perhaps, even more appropriate jurisdiction; they do so because investors receive more protection under U.S. securities laws than under foreign securities laws.[81]

These cases are not novelties to U.S. courts.[82] The foreign

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74 Calhoun, *supra* note 26, at 687-88.

75 *See* Knox, *supra* note 73, at 354.

76 *See id.*

77 Rubenstein, *supra* note 18, at 628-29.

78 *Id.* at 629.

79 *See* Kantor, *supra* note 62, at 841 & n.3.

80 *See* Shnitser, *supra* note 57, at 1685 (citing Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 28 (2007)).

81 *See* Kantor, *supra* note 62, at 849-50 (describing the higher penalties available for investors and increased liability for defendants in U.S. courts).

82 *See* Rubenstein, *supra* note 18, at 629.

parties, who are harmed by investing in a global securities market, "are forcing the expanded engagement of domestic courts."[83] These foreign actors are essentially forcing U.S. courts to consider whether subject matter jurisdiction exists and U.S. courts often decide that these foreign-cubed cases are within their jurisdictions.[84] As a result, there is a disconnect between the way jurisdiction is typically granted in securities cases and the principles which govern anti-fraud doctrine within securities markets.[85]

The links between the world's securities markets are becoming stronger and more prominent, creating a need for nations to create regulatory means for controlling the securities market.[86] This increased globalization imposes new burdens on countries to ensure that they are taking measures to police and regulate securities markets within their borders.[87] Globalization opens courts to cases that may be composed of foreign plaintiffs and foreign companies that possess little apparent connection to the nation's courts.[88] The lead plaintiff in these private foreign-cubed cases is generally the plaintiff or plaintiff group with the largest financial stake in the matter.[89] Regardless of the lack of a logical connection between these foreign plaintiffs and the United States, U.S. courts are responsible for deciphering which cases are within their jurisdictions.[90]

Foreign-cubed cases should raise concern for U.S. courts for several reasons. One such reason is the increasing rate at which these cases are filed; plaintiffs' attorneys work diligently to find

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83 *See* Hannah L. Buxbaum, *National Jurisdiction and Global Business Networks,* 17 IND. J. GLOBAL LEGAL STUD. 165, 173 (2010) [hereinafter Buxbaum, *National Jurisdiction*].

84 *See id.* at 178.

85 *See id.*

86 *See* Buxbaum, *Regulatory Litigation*, *supra* note 53, at 261.

87 *See* Calhoun, *supra* note 26, at 679.

88 *See id.* at 679-80.

89 *See* Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 28 (2007) [hereinafter Buxbaum, *Multinational Class Actions*].

90 *See* Calhoun, *supra* note 26, at 680 (noting that while there is a general presumption against extraterritorial jurisdiction, there will be some circumstances where a court will find that there is subject matter jurisdiction in a foreign-cubed claim).

possible foreign plaintiffs who can file such suits in the United States.[91] This process leads to problems involving conflicts of law because foreign plaintiffs are suing under U.S. securities laws against foreign defendants, rather than American defendants.[92] These foreign defendants may be acting within the laws of their countries of domicile but perhaps not in accordance with U.S. securities laws.[93] Ultimately, courts need to decide if this is an acceptable extension of the U.S. hegemony.[94]

Aside from looking to the legislative intent of whether to extend jurisdiction extraterritorially, international comity creates a presumption against extraterritorial jurisdiction.[95] Simply stated, Congress may restrict the reach of American laws based upon goodwill towards sovereign foreign nations.[96] Allowing foreign-cubed cases into U.S. courts encroaches upon the sovereignty of foreign nations that possess their own system of governance.[97] As a result, the Supreme Court has shied away from allowing the extension of American laws into the jurisdiction of foreign nations.[98] "Traditional extraterritoriality analysis flows from a principle of international law: because all sovereign nations enjoy exclusive authority to regulate within their territorial borders, no nation will apply its laws to conduct that occurs in another."[99] This principle suggests that U.S. courts should apply U.S. securities laws to only those cases that occur within U.S.

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91 *See* Buxbaum, *Multinational Class Actions*, *supra* note 89, at 17.

92 *Id.* Buxbaum lays out four main reasons why the U.S. should be concerned with foreign-cubed cases infiltrating U.S. courts. *Id.* The first two reasons are discussed in this comment: these cases are increasing at an alarming rate, and the role that plaintiff attorneys have in this increased number of foreign-cubed litigations. *Id.* The third reason is that the jurisdictional rules applied in securities cases do not match up with the "substantive anti-fraud doctrine." *Id.* Finally, these cases display, in some sense, the assumptions that judges bring to the table when they undergo the analysis of securities law jurisdiction. *See id.* at 17-18.

93 *See* Buxbaum, *Regulatory Litigation*, *supra* note 53, at 279, 288-89.

94 *See id.* at 256. This extension of U.S. courts at the least appears to be judicial imperialism, and at the extreme, hegemonic behavior on the behalf of the United States. *Id.*

95 *See* Calhoun, *supra* note 26, at 688.

96 *See id.*

97 *See* Buxbaum, *Regulatory Litigation*, *supra* note 53, at 268.

98 *See id.* at 688-89.

99 *See* Buxbaum, *Regulatory Litigation*, *supra* note 53, at 268.

borders.[100]

D. Jurisdiction and Section 10(b)

Congress provided federal courts with the authority to hear cases arising under the Exchange Act.[101] Generally, it is easy to establish federal jurisdiction in a Section 10(b) claim because plaintiffs only have to make a showing that the fraud was carried out "by the use of any means or instrumentality of interstate commerce . . . ."[102] Stated another way, one court ruled "'the crookedness need not appear at all in the instrumentality used' and that it is 'sufficient if it were shown that fraud was used or employed *in connection with* the use of instruments of interstate commerce or the mails.'"[103]

Nonetheless, the text of Section 10(b) fails to explicitly state explicitly whether this provision extends extraterritorially.[104] This has led to the questioning of what Congress intended when it passed the legislation and how courts are to apply it to extraterritorial foreign-cubed cases.[105] As a result, parties participating in securities transactions push the courts into deciding where to draw the line to limit jurisdiction in foreign-cubed cases.[106] "When . . . a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of U.S. courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries."[107]

Courts seem to recognize a limitation on extending jurisdiction extraterritorially in other areas of law.[108] This limitation is based upon the principle of international comity, respecting the

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100 *See id.*

101 *See* Calhoun, *supra* note 26, at 686-87.

102 Securities Exchange Act of 1934 § 10, 15 U.S.C. § 78j(a)(1) (2010).

103 *See* HAZEN, *supra* note 31, § 12.3[3] (citations omitted).

104 Rubenstein, *supra* note 18, at 636.

105 *Id.* at 636-37.

106 *See id.* at 628-29.

107 Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975).

108 *See* Knox, *supra* note 73, at 362-65 (discussing the decision by the Supreme Court to narrow extraterritorial application of a federal statute criminalizing piracy).

sovereignty enjoyed by foreign nations.[109] Therefore, foreign nations maintain the authority to create their own structures and mechanisms for regulation and sanctioning securities fraud within their borders.[110] Overstepping these boundaries creates conflicts between the substantive nature of the securities law applied to Section 10(b) cases and the securities laws of the other country that is involved.[111]

A result of the statutory silence on the issue of jurisdiction has been the creation of two different interpretations of how to determine whether jurisdiction applies.[112] Those endorsing the first approach argue that the lack of statutory language on extraterritorial jurisdiction should be read as depriving U.S. courts of the authority to try foreign-cubed Section 10(b) cases.[113] But, those supporting the second interpretation note that Section 10(b) does provide U.S. courts with the authority to extend extraterritorial jurisdiction because it uses the language "interstate commerce," which is defined as "commerce . . . between any foreign country and any State."[114]

This area of law has lacked legal clarity for almost forty-five years.[115] The Supreme Court has refused to clarify how courts should decide whether jurisdiction should be extended in foreign-cubed cases,[116] leaving this to the lower courts' discretion.[117] Using their discretion, the lower courts have historically granted foreign-cubed plaintiffs with extraterritorial jurisdiction because they found that Congress passed Section 10(b) to regulate fraud within securities markets.[118] Therefore, there was no reason why

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109 *See id.* at 365.

110 *See id.*

111 *See* Buxbaum, *Regulatory Litigation*, *supra* note 53, at 270.

112 Rubenstein, *supra* note 18, at 636.

113 *See id.* at 636.

114 *See id.* at 636-37 (quoting 15 U.S.C. § 78c(17) (2006)) (citing Katherine J. Fink, *Such Stuff as Laws Are Made On: Interpreting the Exchange Act to Reach Transnational Fraud*, 2001 U. CHI. LEGAL F. 441, 450 (2001)).

115 *See* Calhoun, *supra* note 26, at 681.

116 *Id.* at 691-92 n. 87 ("The United States Supreme Court has denied certiorari to numerous cases involving the issue of subject matter jurisdiction over transnational securities transactions.") (citations omitted).

117 *See id.*

118 Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1336 (2d Cir.

jurisdiction should not extend to foreign issuers of securities.[119] Giving lower courts discretion to make these decisions has resulted in inconsistent decisions from various circuits.[120] Even with all the uncertainty surrounding the discretionary nature surrounding the jurisprudence of foreign-cubed cases, one thing is clear: the number of foreign-cubed cases filed has exploded in the last two decades.[121]

A typical jurisdictional test makes it difficult for a court to extend jurisdiction in foreign-cubed cases because the defendant is a foreign securities issuer whose business in the United States may not be engaging in domestic activity arising to the level of "continuous and systematic."[122] Meeting the burden of typical jurisdictional tests is difficult for foreign-cubed cases because the claim involves a transaction that neither took place in the United States nor was directed at the United States.[123] In the absence of Supreme Court guidance on extraterritorial jurisdiction, circuit courts have created two judge-made tests for determining jurisdiction in foreign-cubed cases.[124] These two tests were finalized in the Second Circuit decision *SEC v. Berger*.[125] As these two tests developed, lower courts applied them

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1972).

119 *Id.* at 1336-37.

120 *See* Buxbaum, *Multinational Class Actions*, *supra* note 89, at 17. The inconsistency amongst the circuit courts in applying the effects and conduct test was a policy incentive for the Supreme Court to act in *Morrison v. National Australia Bank*. *See* Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2879 (2010).

121 Rubenstein, *supra* note 18, at 629.

122 *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945). In *International Shoe*, the Supreme Court established a standard upon which U.S. courts should base personal jurisdiction determinations. *Id.* at 316. In order for a defendant to be brought within a court's jurisdiction, the court has to find that the defendant possesses "certain minimum contacts" within the jurisdiction so that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316. A mere "casual presence" is insufficient to meet this standard. *Id.* at 317. Considering this standard, this comment supports the idea that in order for a foreign securities issuer to be brought within the jurisdiction, of a U.S. court, it must find that the defendant possesses systematic and continuous contacts within the U.S.

123 Buxbaum, *National Jurisdiction*, *supra* note 83, at 178.

124 SEC v. Berger, 322 F.3d 187, 192-93 (2d Cir. 2003).

125 322 F.3d 187 (2d Cir. 2003); *see Morrison*, 130 S. Ct. at 2879 (citing *Berger*, 322 F.3d at 192-93).

inconsistently, leading to various interpretations.[126] The lack of consistency among jurisdictions was amplified when courts implanted their own policy analyses into their decision-making.[127]

In essence, by using these two tests to establish jurisdiction in foreign-cubed cases, courts have opened the U.S. judicial system to foreign litigants seeking the protection of U.S. securities laws.[128] As a result, U.S. courts are playing a larger role in the regulation of global securities markets.[129]

*E. Pre-*Morrison *Jurisdictional Tests*

1. Effects Test

The first of these two tests is known as the effects test.[130] The test emerged from a 1968 decision of the Second Circuit, *Schoenbaum v. Firstbrook*,[131] where jurisdiction was extended in a Section 10(b) claim under the Exchange Act brought by an American shareholder against a Canadian corporation.[132] As set out in *Schoenbaum*, when applying the effects test, a court is to ask "whether the wrongful conduct had a substantial [and adverse] effect in the United States or upon United States citizens."[133] The *Schoenbaum* court believed that Congress passed the Exchange Act intending that it would protect domestic investors and domestic securities markets.[134] Though the Act is domestic in nature, the Second Circuit held that courts should not prevent the Exchange Act from being applied to claims in which

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126 *See* Kantor, *supra* note 62, at 843-44; Rubenstein, *supra* note 18, at 637.

127 Kantor, *supra* note 62, at 843-44. Courts may take into account supplemental considerations to protect U.S. securities investors. *See id.* ("These include comity, interests in finality, and whether extending jurisdiction would be reasonable, efficient, or in the interests of public policy.") (footnotes omitted).

128 *See* Rubenstein, *supra* note 18, at 629.

129 *See* Buxbaum, *National Jurisdiction*, *supra* note 83, at 178.

130 Rubenstein, *supra* note 18, at 637.

131 405 F.2d 200 (2d Cir. 1968).

132 *Id.* at 204.

133 *See* Jonathan Wang, Comment, *Securities Pirates: Why a More Expansive Basis for Jurisdiction over Transnational Securities Fraud Will Prevent the United States from Turning into the Barbary Coast*, 62 ADMIN. L. REV. 233, 228 (2010).

134 *See Schoenbaum*, 405 F.2d at 206.

extraterritorial jurisdiction should be applied.[135]

Courts have an interest in ensuring that the laws of the United States protect U.S. citizens.[136] Considering this interest, courts should extend their jurisdiction to include foreign-cubed cases. Essentially, this test is contingent upon the location where the conduct's effect are experienced,[137] as well as how a court decides to define "substantial" in those circumstances.[138] The effects test confronts courts with a dilemma: Do U.S. courts extend jurisdiction to foreign investors who invested in a foreign market just because the effects of this fraudulent conduct are felt in the U.S. market or amongst its citizens?[139] While the belief is that such claims also will have a domestic impact, this creates a system where jurisdiction can be extended to cases that take place between foreign investors and foreign companies as long as the fraudulent conduct's effect is felt within the United States.[140]

The plaintiff in a foreign-cubed case must first show that the fraud occurred, which due to its nature was outside of any U.S. securities market, and second, that as a result of this fraud, the U.S. markets are adversely affected.[141] In order to overcome the burden set by this test, the plaintiff must show that the adverse effect was a particularized harm experienced by the plaintiff.[142] Courts have not upheld jurisdiction when the harm was general in nature.[143]

The performance of foreign securities markets affects the behavior of the U.S. markets. Thus, U.S. courts are protecting domestic markets by singling out any activity, domestic or otherwise, that affects the United States.[144] When information is

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135 *Id.*

136 *See* Wang, *supra* note 133, at 228.

137 *See* Buxbaum, *Regulatory Litigation*, *supra* note 53, at 277.

138 *See* Buxbaum, *Multinational Class Actions*, *supra* note 89, at 42.

139 *See* Buxbaum, *Regulatory Litigation*, *supra* note 53, at 277.

140 *Id.*

141 Buxbaum, *Multinational Class Actions*, *supra* note 89, at 42.

142 *Id.*

143 *See id.* at 42 ("[A] diminishment of investor confidence in the securities markets are not a sufficient jurisdictional basis. [Instead] [p]laintiffs must point to specific adverse effects[,] for instance, the artificial elevation of a security's price . . . .") (internal parenthesis omitted).

144 *See* Rubenstein, *supra* note 18, at 637-38 (citing Schoenbaum v. Firstbrook, 405

released into one market, this information has the potential to travel to securities markets in other nations, affecting the price of securities.[145] This integration of knowledge is called the efficient market hypothesis.[146] This spread of information can take place, essentially, in a negligible amount of time due to advances in technology.[147]

To prove fraud, a plaintiff must prove reliance upon fraudulent activity.[148] The fraud-on-the-market theory is a common means by which plaintiffs attempt to prove a presumptive reliance.[149] In foreign-cubed cases, plaintiffs have attempted to use this theory in order to prove reliance upon the fraudulent activity, but their attempts have been unsuccessful.[150]

Similar to domestic plaintiffs, plaintiffs in foreign-cubed cases use the fraud-on-the-market argument to show that there was reasonable reliance on the fraudulent misrepresentation.[151] The

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F.2d 200, 206 (2d. Cir. 1968)).

145 *See id.* at 651.

146 *See id.* at 635 (citing Basic Inc. v. Levinson, 485 U.S. 224, 241-42 (1988) (footnote omitted)).

147 *See id.* at 652.

148 37 C.J.S. *Fraud* § 50 (2008) ("Reliance is an essential element of a claim for fraud.") (footnote omitted); *see also* 79A C.J.S. *Securities Regulation* § 265 (2008) ("Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the private cause of action for securities fraud under the Securities Exchange Act of 1934.") (footnote omitted).

149 Related to the effects test is the theory of fraud-on-the-market. Jeffrey L. Oldham, *Taking "Efficient Markets" Out of the Fraud-on-the-Market Doctrine After the Private Securities Litigation Reform Act*, 97 NW. U. L. REV. 995, 1010 (2003). Fraud-on-the-market is a rebuttable presumption of reliance. *See* 79A C.J.S. *Securities Regulation* § 273 (2008). The Court in *Basic v. Levinson* stated that there was an accepted presumption that the

> persons who had traded . . . shares had done so in reliance on the integrity of the price set by the market, but because of . . . fraudulent material misrepresentations [or omissions] that the price had been fraudulently depressed [or inflated]. Requiring a plaintiff to show a speculative state of facts . . . would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market.

Basic, Inc. v. Levinson, 485 U.S. 224, 245 (1988) (citations omitted).

150 *See* Rubenstein, *supra* note 18, at 647.

151 *Id.*

Supreme Court's principle regarding global fraud-on-the-market is that by depriving U.S. courts of the authority to possess extraterritorial jurisdiction, the United States cannot protect against the realistic dangers of today's globalized and interconnected securities markets.[152] Courts have rejected this argument because accepting this premise would have the effect of extending the reach of U.S. jurisdiction too far into the judicial sovereignty of foreign nations.[153]

Overall, the burden of the effects test has generally been a difficult bar for foreign-cubed plaintiffs to meet.[154] U.S. courts view injury to U.S. securities markets as independent from those injuries that occur elsewhere.[155] Also, courts may differentiate between harms arising from the same wrongful conduct.[156] For instance, a court may extend jurisdiction to those claims resulting from an independent injury to U.S. markets, while at the same time denying jurisdiction in those cases where the harm occurred elsewhere, even if these harms arose from the same act.[157] In reaction to claims based upon the effects tests, courts have implemented the "transaction location" rule; this allows for courts to presume that jurisdiction over a securities fraud claim lies within the country where the fraud took place.[158]

2. *Conduct Test*

If conduct within the United States sufficiently meets two standards—substantial and extensive—courts have extended jurisdiction to cover foreign-cubed cases through a conduct

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152 *See id.* at 652.

153 *See id.* at 649 (citing In re AstraZeneca Securities Litigation, 559 F. Supp. 2d 453, 466 (S.D.N.Y. 2008)). Instead of making an evidentiary showing of reliance, plaintiffs in *In re AstraZeneca* presented a global fraud-on-the-market argument to the court in order to show presumed reliance. *Id.* at 648. The Court rejected the argument stating that it did not see that this theory "[held] true on a global level." In re AstraZeneca Securities Litigation, 559 F. Supp. 2d 453, 466 (S.D.N.Y. 2008). In this case, the Court stated that if it were to extend this argument of global fraud on the market, it would be allowing U.S. jurisdiction to extend too far. *Id.*

154 Buxbaum, *Multinational Class Actions*, *supra* note 89, at 42.

155 *Id.* at 42.

156 *Id.* at 42-43.

157 *Id.*

158 *Id.* at 43.

focused test.[159] Under the conduct test, courts must evaluate the nature of the fraudulent conduct that occurred within the United States and determine whether it was substantial and extensive enough to allow the claim to be brought in a U.S. court.[160] Since it requires a subjective interpretation, application of the conduct test has failed to be consistent. Subjectivity arises when a court has to decide how much domestic conduct is sufficient to find jurisdiction in a foreign-cubed case.[161]

Under the conduct test, foreign plaintiffs seeking to bring a claim based on U.S. securities law will ground their claim in a defendant's fraudulent conduct that occurred within the United States and caused the plaintiff's injury, even if the injury was experienced elsewhere.[162] While the conduct test was established in *Leasco Data Processing Equip. Corp. v. Maxwell*,[163] courts later modified this jurisdiction-determining test into its current form.[164]

The current version of the conduct test possesses the additional requirement of determining if the conduct goes beyond being "merely preparatory."[165] Under this requirement, if a plaintiff overcomes this burden by showing that the fraudulent conduct was more than merely preparatory, then a court can find that there is jurisdiction even if the there were no domestic consequences.[166]

Aside from requiring activity that is more than merely preparatory, some courts have raised the threshold to require that the domestic conduct be a direct cause of foreign investor's

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159 *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972).

160 *See* Rubenstein, *supra* note 18, at 639.

161 *See* Wang, *supra* note 133, at 229.

162 Buxbaum, *Multinational Class Actions*, *supra* note 89, at 43; Rubenstein, *supra* note 18, at 639.

163 468 F.2d 1326 (2d Cir. 1972).

164 Rubenstein, *supra* note 18, at 639-40.

165 *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975); SEC v. Berger, 322 F.3d 187, 195 (2d Cir. 2003). The court stated that there should be no jurisdiction in those cases where the foreign securities issuer's actions within the U.S. were "merely preparatory." *Bersch*, 519 F.2d at 987. Courts should look for conduct within the United States which directly caused the injury. *Id.* at 993. U.S. courts can decide if actions are "merely preparatory" if the court is able to find that the actions taken within the United States compared to those abroad are "relatively small." *Id.* at 987.

166 *See* Buxbaum, *Multinational Class Actions*, *supra* note 89, at 48.

injury.[167] This burden can be overcome if the plaintiff is able to show that there was "specific reliance on misstatements made within the United States in order to establish reliance."[168]

The idea behind the test is that extraterritorial jurisdiction should be extended in order to prevent the United States from becoming a "haven for fraudulent behavior that harms investors and markets elsewhere."[169] To achieve this, U.S. courts extend jurisdiction to those cases where there is a substantial and adverse effect within the United States or upon its citizens, or in instances where the fraudulent conduct occurred within the United States.[170] Jurisdiction is extended to prevent the United States from becoming a haven of fraud.[171] As one judge described, "[w]e are reluctant to conclude that Congress intended to allow the United States to become a 'Barbary Coast,' as it were, harboring international securities 'pirates.'"[172]

III. *Morrison v. National Australia Bank* Changes the Application of Extraterritorial Jurisdiction

In June 2010, the Supreme Court decided the issue of U.S. courts applying extraterritorial jurisdiction in foreign-cubed cases.[173] In *Morrison v. National Australia Bank*, the Supreme Court handed down a decision contrary to years of jurisprudence in U.S. circuit courts.[174] The Supreme Court's decision in *Morrison* significantly narrows the implied private right of action, which has been read into securities law by the courts since 1934.[175]

Respondent, National Australia Bank ("NAB"), was an Australian company that was incorporated under Australian corporate law.[176] NAB's securities were traded on foreign securities markets including the Australian Securities Exchange,

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167 Buxbaum, *Regulatory Litigation*, *supra* note 53, at 276.

168 *Id.*

169 *See* Wang, *supra* note 133, at 226.

170 *See* SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977).

171 *Id.*

172 *Id.*

173 *See* Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869 (2010).

174 *Id.* at 2888.

175 *See* HAZEN, *supra* note 31, §§ 12.3-12.7.

176 Morrison v. Nat'l Austl. Bank, 547 F.3d 167, 168 (2d Cir. 2008).

London Stock Exchange, Tokyo Stock Exchange, and New Zealand Stock Exchange.[177] NAB did not allow its securities to be traded on any U.S. exchange, but it did trade American Depositors Receipts (ADRs) on the New York Stock Exchange.[178] Additionally, NAB had American operations since 1998, when it acquired HomeSide Lending, Inc., a mortgage company located in Florida.[179]

The plaintiffs in this case were a class of Australian investors who had purchased NAB's securities.[180] They brought a foreign-cubed claim based on HomeSide's accounting practices, alleging that NAB knew that HomeSide officers manipulated the mortgage company's financial records in order to make it appear that the company was more valuable than it actually was.[181] The claim against NAB was based upon the alleged fact that NAB knew that these deceptive practices were taking place.[182] Since NAB failed to act, plaintiffs alleged that they, as investors, were injured when NAB's securities drastically decreased in value.[183] Plaintiffs brought this claim under Section 10(b) of the Exchange Act.[184]

The issue of the case was "whether the judicially implied private right of action under [Section] 10(b) of the [Exchange] Act should be allowed in class action fraud claims by foreign investors who purchased foreign stock issued by a foreign company."[185] The Supreme Court had to decide if Section 10(b) specifically applied to these facts, thus giving the Court the opportunity to officially extend officially the jurisdiction of U.S. courts to cover

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177 *See id.*

178 *See generally Morrison*, 547 F.3d. at 168. The Supreme Court did not explain why it did not consider the Respondent's ADRs traded on the New York Stock Exchange in the jurisdiction analysis.

179 *See Morrison*, 130 S. Ct. at 2875; *Morrison*, 547 F.3d at 168-69.

180 *Morrison*, 130 S. Ct. at 2876.

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

185 *See Morrison v. National Australia Bank: A Discussion with Counsel for Each Side*, SECURITIES LAW PRACTICE CENTER (July 9, 2010, 7:47 PM), http://seclawcenter.pli.edu/2010/07/09/morrison-v-national-australia-bank-a-discussion-with-counsel-for-each-side.

foreign transactions between two foreign parties.[186] The Second Circuit Court of Appeals applied the conduct test to the facts and found that, under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the plaintiffs lacked subject matter jurisdiction.[187] It upheld the district court's decision to dismiss the complaint.[188]

The Second Circuit based its decision on the lack of a sufficient showing of causal finding that these facts provided too lengthy of a causation, chain between the domestic conduct and the injury experienced by Australian investors.[189] It concluded this conduct did not have an effect within the United States or upon citizens thereof and that the conduct did not occur within the United States.[190] As Justice Ruth Bader Ginsberg later expressed during oral argument before the Supreme Court, "this is an Australian plaintiff, Australian defendant, shares purchased in Australia. It has 'Australia' written all over it."[191]

After granting certiorari in *Morrison* and reviewing the lower court's decision, the Supreme Court came to the same final result.[192] While the dismissal of the complaint was upheld, the Supreme Court based its decision on different reasoning.[193] In its opinion, the majority noted that for years the lower courts had overlooked the historic presumption against extraterritorial jurisdiction.[194] This presumption is centered on the thought that Congress's role is to legislate in the interest of domestic concerns.[195] The Court also noted that this presumption may be overcome if Congress explicitly displays its intent in the statutory language or legislative history.[196]

> It is a longstanding principle of American law that legislation of

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186 *See Morrison*, 130 S. Ct. at 2877.

187 *See id.* at 2876-77; *see also* FED R. CIV. P. 12(b)(1).

188 *See Morrison*, 130 S. Ct. at 2877.

189 Morrison v. Nat'l Austl. Bank, 547 F.3d 167, 176-77 (2d Cir. 2008).

190 *Id.* at 177.

191 *See* Transcript of Oral Argument at 7, *Morrison*, 130 S. Ct. 2869 (No. 08-1191).

192 *See Morrison*, 130 S. Ct. at 2876, 2888.

193 *Id.* at 2877-81.

194 *Id.*

195 *Id.* at 2877.

196 *Id.*

> Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. . . . It rests upon the perception that Congress ordinarily legislates with respect to domestic, not foreign matters. Thus, unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions.[197]

In its discussion, the Court analyzed the statutory language and how it should apply in deciding jurisdiction in Section 10(b) cases.[198] The Court found that Congress explicitly included jurisdictional statements in other sections of the Exchange Act—something that Section 10(b) lacks.[199] Since Congress took the time to include precise jurisdictional statements in those sections and not in Section 10(b), the Court believed that Congress did not intend for extraterritorial jurisdiction to apply in foreign-cubed cases.[200] The Court reasoned that if Congress had wanted it, Congress would have included it within the statutory language.[201]

Section 10(b) does not protect against deceptive conduct connected to a foreign national security exchange.[202] In this case, the Court would not allow for the protection of U.S. securities law to extend to the plaintiffs because there was no deceptive conduct connected to a national securities exchange.[203] Based on this conclusion, the Court dismissed the plaintiff's complaint, but not on grounds of lack of subject matter jurisdiction.[204] Rather, the Court found that since only those claims that Congress intended to be protected under Section 10(b) were valid claims in U.S. courts,

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197 *Morrison*, 130 S. Ct. at 2877 (internal quotations and citations omitted).

198 *Id.* at 2878-81.

199 *Id.* at 2880-81.

200 *See id.* It is generally believed that Congress legislates to impact domestic matters. *Id.* at 2877.

201 *See id.* at 2881.

202 *See Morrison*, 130 S. Ct. at 2881-82. The Exchange Act protects against deception on a national exchange not against deception on foreign exchanges. *Id.* at 2882. "The fleeting reference to the dissemination and quotation abroad of the prices of securities traded in domestic exchanges and markets cannot overcome the presumption against extraterritoriality." *Id.*

203 *See id.* at 2888.

204 *Id.* at 2877, 2888.

Morrison should be dismissed based on failure to state a claim.[205]

Out of *Morrison* emerged a new, judge-made, narrow transactional test.[206] This two-prong test, in effect, discriminates against a large portion of foreign-cubed cases filed within the United States.[207] The first prong is that the security must be listed on a domestic exchange.[208] The second is that the purchase or sale must take place domestically.[209] This test established a bright-line rule, which does away with the complexity and confusion of the effects and conduct tests.[210] The Court was looking to "weed the doctrine at its roots and replace it with a new bright-line transactional rule embodying the clarity, simplicity, certainty and consistency that the tests from the Second and other circuits lacked."[211]

In his concurring opinion, Justice Stevens wrestled with how exactly the Court's decision in *Morrison* could be reconciled with the years of Second Circuit jurisprudence that surrounded foreign-cubed cases—jurisprudence that had been the guidance for other federal courts of appeals.[212] Stevens suggested that the Court incorrectly interpreted the purpose of the Exchange Act.[213] As the Court's decision reflects the principle that Section 10(b) is solely to protect transactions on domestic exchanges, Stevens argues that Section 10(b) is more than just a protective mechanism for domestic exchanges.[214] Rather, he insists that its true purpose is to protect the public interest as well as investors' interests.[215]

A. Impact of Morrison

Morrison left the legal world disoriented as the Court whisked

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205 *See id.* at 2888.

206 *See* Cornwell v. Credit Suisse Grp., 729 F. Supp. 2d 620, 622-23 (S.D.N.Y. 2010).

207 *See id.* at 623.

208 *Id.*

209 *Id.*

210 *See Morrison*, 130 S. Ct. at 2879-81.

211 *Cornwell*, 729 F. Supp. 2d at 624.

212 *See Morrison*, 130 S. Ct. at 2888-91 (Stevens, J., concurring).

213 *Id.* at 2891-92 (Stevens, J., concurring).

214 *Id.* at 2892-95 (Stevens, J., concurring).

215 *Id.* at 2894 (Stevens, J., concurring).

away forty-five years of jurisprudence, and Congress, courts, lawyers, securities issuers, and investors are still trying to understand the impact *Morrison* will have on securities fraud litigation.[216] The Court seems to be saying that not only are private plaintiffs barred from bringing claims, but also that the Court will provide no exceptions for those claims filed by the SEC against foreign securities issuers.[217] Thus, the Court appears to bar claims brought by private and public plaintiffs alike. The Court's opinion sets forth a lack of clarity as to how far this new rule will reach.[218] Nevertheless, one thing is certain: courts now have a clear indication as to how to handle foreign-cubed cases filed in U.S. courts.[219] This clear rule, in essence, bars any American plaintiff who invested in a foreign company that only trades on non-U.S. exchanges from Section 10(b) protection and from filing a securities fraud claim in U.S. courts.[220]

Morrison did provide a narrow test for jurisdiction against foreign securities issuers.[221] This transactional test precludes many foreign-cubed actions from being filed in the U.S.[222] An advantage to this bright-line transactional test, however, is that it provides a more sufficient level of guidance to foreign securities issuers on how to avoid U.S. courts.[223] Prior to the *Morrison* test,

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216 *See* Michele E. Rose et al., *Supreme Court Closes the Border to Section 10(b) Plaintiffs*, LATHAM & WATKINS LLP (July 7, 2010), http://www.lw.com/Resources.aspx?page=FirmPublicationDetail&publication=3603.

217 *See id.*

218 *See id.*

219 Conway, *supra* note 13 (discussing the *Cornwell* court's interpretation that *Morrison* does not bar American plaintiffs from bringing suit in the U.S. based upon securities transactions based in foreign nations).

220 Cornwell v. Credit Suisse Grp., 729 F. Supp. 2d 620, 623 (S.D.N.Y. 2010). The first prong of the transactional test allows for suits to be brought against foreign securities issuers who trade on a U.S. exchange. *Morrison*, 130 S. Ct. at 2888 (Stevens, J., concurring). A concern is that U.S. citizens will be barred from bringing suit when the securities issuer does not trade on a U.S. exchange. *Cornwell*, 729 F. Supp. 2d at 626. But the courts should consider that this U.S. investor knowingly invested in a market where there may be a lack of regulation or available relief. *Id.* at 625.

221 *See Cornwell*, 729 F.Supp. 2d at 623.

222 *See id.* at 624-25.

223 *See* Ted Farris, *Adopting Location Based Bright Line Test for Securities Transactions—Rule 10b-5 Does Not Apply to Transactions in Securities Outside the United States*, DORSEY & WHITNEY LLP (June 28, 2010), http://www.dorsey.com/eu_corporate_morrisonvnationalbank_062510.

it was not apparent to the securities issuer whether or not it would be held accountable for fraudulent conduct under U.S. securities law based upon where its securities are traded.[224] The transactional test provides clarity for a securities issuer trading on a domestic exchange. Justice Stevens clearly understood the implications of the transactional test:

> [If] an American investor who buys shares in a company listed only on an overseas exchange [sic]. That company has a major American subsidiary with executives based in New York City; and it was in New York City that the executives masterminded and implemented a massive deception .... Or, imagine that those same executives go knocking on the doors in Manhattan and convince an unsophisticated retiree, on the basis of material misrepresentations, to invest her life savings in the company's doomed securities. Both of these investors would, under the Court's new test, be barred from seeking relief under §10(b). ... [T]he Court's rule turns §10(b) jurisprudence (and the presumption against extraterritoriality) on its head, by withdrawing the statute's application from cases in which there is *both* substantial wrongful conduct that occurred in the United States *and* a substantial injurious effect on United States markets and citizens.[225]

For those foreign securities issuers who seek to be outside of the scope of U.S. law, *Morrison* creates a "safe zone" where such securities issuers are untouchable by U.S. securities laws.[226] If the effect of *Morrison* reaches its potential, foreign securities issuers will be protected as long as they do not trade securities on a U.S. securities exchange.[227] Perhaps the natural reaction of foreign securities issuers that are currently traded on domestic exchanges will be to move to trade solely on foreign exchanges where they cannot be touched by U.S. securities laws.[228] Therefore, *Morrison* could ultimately result in a mass exodus of current securities

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224 See *Cornwell*, 729 F. Supp. 2d at 624-26.

225 *See Morrison*, 130 S. Ct. at 2895 (emphasis in original) (Stevens, J., concurring).

226 *See* Farris, *supra* note 223.

227 *Id.*

228 *Id.*

issuers for U.S. exchanges to foreign markets.[229] As a result, domestic and foreign investors on non-U.S. exchanges will seek other protections created through litigation in that foreign country. Additionally, more investors may participate in more offshore securities transactions.[230]

It seems obvious that foreign securities issuers, in reaction to *Morrison*, would leave the U.S. securities markets for foreign markets. But this may not happen since *Morrison* leaves an important question unanswered: How will courts approach foreign securities issuers whose securities are traded on multiple exchanges?[231] The Court did not provide an answer as to how courts should handle claims against securities issuers that are traded on both a foreign market and a U.S. securities exchange.[232] At some point, a court will have to answer this question, and then perhaps there will be some indication to foreign issuers as to where they will be held accountable.[233] At that point, courts may determine jurisdictional questions regarding whether such transactions occurred offshore or in the United States.[234]

B. Foreign Results

As foreign securities issuers seek the protection of other countries' borders from U.S. securities laws, foreign nations may be forced to develop class action-type remedies as the number of securities traded within their country increases.[235] As protection of U.S. securities laws become less available to investors, investors will begin to seek the protection of other countries' laws.[236] Foreign governments will feel the pressure to develop such

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229 *Id.*

230 *Id.* Foreign securities issuers strive not to be within reach of U.S. securities laws: "Non US issuers and underwriters have always made an effort, where possible, to avoid application of the US securities laws. *National Australia Bank* gives those issuers and underwriters a bright line test they can potentially use to avoid Rule 10b-5 liability in international securities transactions." *Id.*

231 *See* Rose et al., *supra* note 216.

232 *See id.*

233 *See id.* (explaining that foreign companies may unintentionally benefit from the lack of control U.S. law has over their actions after the *Morrison* decision).

234 *See id.*

235 *See id.*

236 Rose et al., *supra* note 216.

remedies to protect investors within their country as their markets experience increased investment.[237]

If other countries were to develop class action-type mechanisms within their own judicial systems, the result would free the U.S. judicial system from the burden of foreign-cubed cases.[238] With the inability to bring a claim possessing extraterritorial jurisdiction within the United States, the domestic judicial system will see a decreased number of class action litigation filed while also gaining the flexibility to devote its judicial resources elsewhere.[239]

All of the implications stemming from the *Morrison* decision give rise to a question of whether or not the United States wants to give up its control over global securities markets. Until *Morrison*, a U.S. federal court could extend its jurisdictional arm into foreign-cubed cases as long as it found that it met one of two subjective tests.[240] This drastically changed when the Supreme Court severed the extraterritorial jurisdictional arm of U.S. courts.[241] When the Court handed down its decision, the United States may have lost its status as a major player in regulating fraud in global securities markets.[242] Whether the United States should seek to relinquish this status should, of course, be balanced with the positive implications of this decision, such as the freeing up of judicial resources.[243] As discussed in the next section of this comment, there are other positive implications of the United States withdrawing from being such a force in regulating global securities markets, which may outweigh the benefits gained by allowing foreign-cubed cases in the domestic courts.[244]

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237 *See id.* A lack of extraterritorial jurisdiction could drive the U.S. to become a haven for securities fraud. *See* discussion *infra* Part III.D.

238 Paul Bessette & Jesse Weiss, *Morrison v. Nat'l Austl. Bank: Supreme Court Decision Limits Securities Claims By Investors Who Brought Shares in Non-U.S. Companies on Foreign Exchanges*, GREENBERGTRAURIG (July 2010), http://www.gtlaw.com/NewsEvents/Publications/Alerts?find=137737; Rose et al., *supra* note 216.

239 *See* Rose et al., *supra* note 216.

240 *Id.*; *see also* Morrison v. Nat'l Austl. Bank, 547 F.3d 167, 171 (2d Cir. 2008).

241 *See* Rose et al., *supra* note 216.

242 *See id.*

243 *See* Bessette & Weiss, *supra* note 238.

244 *See* discussion *infra* Part III.C.

C. *Advantages to Allowing Extraterritorial Jurisdiction in Securities Fraud Cases*

In a post-*Morrison* world, it seems that there is a high probability that domestic and foreign investors alike will be deprived of U.S. securities laws' protection when the foreign issuer that acted fraudulently is a foreign entity not traded on a U.S. exchange. Since 1968, it has been evident that U.S. courts have seen an advantageous justification for considering the extension of extraterritorial jurisdiction in foreign-cubed cases.[245] Courts admittedly extend this jurisdiction to cover foreign securities issuers because of policy reasons that support U.S. regulation of international entities within increasingly global securities markets.[246]

Ultimately, the overarching interest is that the United States should seek to ensure that it does not become a "Barbary Coast" for securities fraud.[247] Regardless of the presence of domestic investors' interests, the United States has an interest in preventing fraudulent behavior that originates within its borders but is directed elsewhere.[248] In its amicus brief, the SEC explained that the presumption against extraterritorial jurisdiction should not be a consideration in securities fraud cases.[249] The SEC argues that if the courts abide by the presumption, then the United States is setting itself up as a nation that can be used as a "base" for fraudulent activity.[250] This perspective is not to apply to cases when the fraudulent activity takes place and its effects are felt

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245 *See* Schoenbaum v. Firstbrook, 405 F.2d 200, 206-09 (2d Cir. 1968) (stating the benefits to hearing foreign-cubed cases including protecting domestic investors).

246 Brief for the United States as Amicus Curiae Supporting Respondents at 7-8, Morrison v. Nat'l Austl. Bank, Ltd., 130 S. Ct. 2869 (2010) (No. 08-1191) [hereinafter Amicus Brief-SEC].

247 *Id.* at 16-17 (citing SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977)).

248 *Id.* at 19.

249 *Id.* at 22.

250 *See id.* at 6-8. This argument in favor of extraterritorial jurisdiction is questionable. If the United States proceeds to remove itself from its self-imposed role of global regulator, then other nations will be forced to develop their own laws and regulations enforced in order to promote the confidence in their own securities markets, as the United States will no longer be the force working to ensure confidence and credibility in global markets. Therefore, the argument that the United States will become a "Barbary Coast" is weakened because foreign securities issuers acting fraudulently will be held accountable in an appropriate jurisdiction. *Id.* at 12.

outside of the United States.[251] Rather, the SEC believes that the presumption should be disregarded when the fraudulent activity is based within the United States.[252] In such instances, the foreign securities issuer acting fraudulently should not be outside the reach Section 10(b) of the Exchange Act.[253] The SEC believes that this should be the norm for the jurisdictional analysis of U.S. securities fraud claims, even if the effect of the fraudulent conduct is experienced outside of the United States because it is in the interest of the United States to protect itself from becoming a "Barbary Coast."[254] By regulating activity under a conduct and effects paradigm, the U.S. courts can protect its market by preventing the nation from becoming a "launching pad" for securities fraud.[255]

U.S. courts involving themselves in the global regulation of securities provides for "meaningful regulation."[256] Globalization of securities markets creates new mechanisms for fraudulent activity and the potential for increased levels of such activity.[257] As securities transactions take place on a more globally diversified scale, the chances of meaningful regulation on securities exchanges decreases.[258] If the U.S. judicial system is the global mechanism for setting standards and regulating global securities markets, then global securities traders play by U.S. rules regardless of the location of the market.[259] Thus, allowing for private plaintiffs to bring suit in the United States would encourage developing markets to institute regulations, equalizing the fairness and appeal of trading on markets globally.[260]

Aside from policy advantages, there is also an advantage of "promot[ing] procedural efficiency" through extraterritorial

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251 *See* Amicus Brief-SEC, *supra* note 246, at 7.

252 *See id.* at 22.

253 *Id.* at 7.

254 *Id.* at 16-17.

255 *See* Buxbaum, *Multinational Class Actions*, *supra* note 89, at 24 (showing that extending extraterritorial jurisdiction to conduct cases allows the United States to protect against unscrupulous foreign securities fraud).

256 Buxbaum, *Regulatory Litigation*, *supra* note 53, at 271.

257 Amicus Brief-SEC, *supra* note 246, at 19.

258 *See id.*

259 *See* Buxbaum, *Regulatory Litigation*, *supra* note 53, at 271.

260 *Id.*

jurisdiction.[261] Procedurally, private plaintiff classes could remain intact throughout the litigation.[262] Without extraterritorial jurisdiction, what could be a single class of plaintiffs must split into two classes: one composed of U.S. plaintiffs and one of foreign plaintiffs.[263] When the classes split, more than one judicial proceeding is then required in order to resolve the issue.[264]

D. Disadvantages of Extraterritorial Jurisdiction

In its opinion, the Second Circuit mentioned "a parade of horribles," where if U.S. courts have the authority to extend extraterritorial jurisdiction, it would lead to "undermin[ing] the competitive and effective operation of American securities markets, discourage cross-border economic activity, and cause duplicative litigation."[265] These "horribles," in addition to others, formulate a strong basis for why the United States should not open its courts to investors attempting to recover in foreign-cubed cases.

The dominant disadvantage arising out of recognizing extraterritorial jurisdiction as a valid principle under U.S. law is the implications on foreign nations.[266] When it does so, the U.S. judicial system intrudes upon the turf of foreign legal systems.[267] International comity, while not international law, is the idea that nations will act with "courtesy and good will" towards other nations.[268] As nations observe this principle, expansive U.S. securities laws regulating global securities markets could interfere with this good will and courtesy that the United States should extend to foreign nations.[269] While the United States maintains a presumption against extraterritorial jurisdiction, international comity reinforces a presumption against one nation interfering with the laws of another nation.[270]

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261 *Id.*

262 *Id.*

263 *Id.*

264 Buxbaum, *Regulatory Litigation*, *supra* note 53, at 271.

265 Morrison v. Nat'l Austl. Bank, 547 F.3d 167, 174 (2d Cir. 2008).

266 *See id.*

267 *See id.*

268 *See* Calhoun, *supra* note 26, at 688.

269 *Id.*

270 *Id.*

U.S. courts consider U.S. policies when bringing foreign securities issuers under their jurisdiction.[271] Nevertheless, courts should also take into consideration the policy interests of all nations with a stake in a case when interpreting the jurisdiction of a statute.[272] The policy interests considered by the United States are ones upon which reasonable minds may differ and ones upon which foreign nations may differ.[273]

The United States impedes foreign laws and enforcement mechanisms when it acts as a global securities fraud regulator.[274] This prevents foreign nations from enforcing, or even creating, their own securities laws and standards.[275] Other nations may choose to approach securities fraud differently, so the United States must consider if enforcing its own laws instead of the foreign issuer's domestic laws is worth damaging foreign governments' confidence in the United States.[276]

The British government established a regulatory agency, the Financial Services Agency ("FSA"), which is entrusted with, among other things, the regulatory responsibilities of the securities markets within the United Kingdom.[277] The FSA oversees a regulatory system that encompasses rules to regulate the activity within the United Kingdom's markets.[278] The United Kingdom created this agency along with its laws and regulations based upon its own policy considerations as a sovereign nation.[279] As the

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271 *See* Gregory K. Matson, *Restricting the Jurisdiction of American Courts Over Transnational Securities Fraud*, 79 GEO. L.J. 141, 163 (1990).

272 *See id.* at 166-67.

273 *See generally* Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Respondents at 12-13, Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869 (2010) (No. 08-1191) (showing that U.S. and Australian law differ on these issues).

274 *See* Matson, *supra* note 271, at 167 (arguing that crucial differences between U.S. law and the law of other nations could result in the United States seeming to dictate securities law globally).

275 *See id.* at 167-68 (giving examples of various other securities law schemes and the effect of U.S. hegemonic regulation on them).

276 Morrison v. Nat'l Austl. Bank, 547 F.3d 167, 174-75 (2d Cir. 2008).

277 *See* Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae Supporting Respondents at 7, *Morrison*, 130 S. Ct. 2869 (No. 08-1191) [hereinafter Brief of the United Kingdom] (outlining powers of the FSA).

278 *Id.* at 7-8.

279 *See id.* at 21-22 (discussing the United Kingdom's concern with maintaining

United States extends its jurisdiction to include corporations located in foreign nations such as the United Kingdom, the United States is ignoring the "fundamental interest" and policy interests of these nations.[280] As the U.S. Supreme Court stated, "[i]t is especially inappropriate to apply U.S. laws to claims that 'may embody different policy judgments.'"[281]

Foreign nations develop their own regulations and systems for enforcing such regulations in an effort to regulate "their own capital markets," not the capital markets located elsewhere.[282] These systems may differ from each other and may be regulated differently than U.S. markets.[283] As a result, when the United States enforces its anti-fraud laws upon other nations possessing their own regulatory mechanisms, and even those who do not, there is a violation of international comity.[284] As noted by one U.S. court, "United States law governs domestically but does not rule the world."[285]

Foreign nations have not hidden their displeasure with the United States enforcing its laws upon foreign defendants.[286] The blocking statues passed by foreign legislatures display their dissatisfaction.[287] For example, the United Kingdom's blocking statute directs citizens of the United Kingdom that foreign laws providing for the application of extraterritorial jurisdiction are potentially inadmissible if such statutes violate the jurisdiction of the United Kingdom.[288] Other nations that have passed this type of

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their sovereignty).

280 *Id.*

281 *Id.* at 22 (quoting Microsoft Corp. v. AT&T. Corp., 550 U.S. 437, 455 (2007)).

282 Brief of the United Kingdom, *supra* note 277, at 22.

283 *Id.*

284 *Id.* at 23-24.

285 *Id.* at 22 (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).

286 Matson, *supra* note 271, at 166-67.

287 *Id.* at 167. A country's legislature passes blocking statutes in order to "block" its citizens from abiding by the laws or court orders of a foreign nation. *See* Note, *Secrecy and Blocking Laws: A Growing Problem as the Internationalization of the Securities Markets Continues,* 18 VAND. J. TRANSNAT'L L. 809, 822-23 (1985) (explaining how blocking statutes prohibit foreign citizens from complying with U.S. laws). "These blocking statutes represent the hostile reaction of the international community to overzealous attempts on the part of the United States to impose its will on foreign citizens." Matson, *supra* note 271, at 167.

288 Protection of Trading Interests Act, 1980, c. 11, § 1(1) (Eng.).

legislation include Canada, France, Australia, and South Africa. [289]

Where other nations also have blocking statutes in place, there is a high probability that the procedural and substantive regulations will differ from the United States.[290] Extraterritorial jurisdiction essentially means that through their decisions, U.S. courts are manifesting conflicts of law in regards to both substance and procedure.[291] Procedurally, nations may differ in approaches to discovery, the opportunity of multi-party litigation, and plaintiff opt-out classes, among others.[292] As "most other countries do not have procedural devices that are even remotely similar to the U.S. class action,"[293] the U.S. judicial system allows for processes that may look entirely different under the civil procedures of a foreign nation.[294]

Canada's substantive approach to securities fraud differs from that of the United States.[295] Canada allows for securities fraud class action litigation, but Canada does not recognize fraud on the market doctrine within this litigation, a doctrine that plaintiffs consistently use in U.S. litigation to make a showing of the elements of a securities fraud claim.[296]

A very different example is that of Switzerland. Switzerland only allows private remedies in securities fraud cases, but the nation lacks any laws to regulate securities fraud.[297] This may seem inadequate to a nation such as the United States, where there is a systematic means of regulation. But the U.S. judicial system

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289 *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth) (Austl.); Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29 (Can.); Loi 80-583 du 18 juillet 1980 [Law 80-583 of July 18, 1980] (Fr.); Protection of Business Act of 1978 § 1 (S. Afr.); *see* Matson, *supra* note 271, at 167.

290 *See supra* note 289 and accompanying text.

291 *See* Buxbaum, *Regulatory Litigation*, *supra* note 53 at 270. *See* Kantor, *supra* note 62 at 854-56.

292 Brief of the United Kingdom, *supra* note 277, at 19.

293 David A. Skeel, Jr., *Can Majority Voting Provisions Do It all?*, 52 EMORY L.J. 417, 423 (2003).

294 *See* Buxbaum, *Regulatory Litigation*, *supra* note 53, at 296 (giving the example of treble damages and their unavailability in some international jurisdictions); *see also* Morrison v. Nat'l Austl. Bank, 547 F.3d 167, 174 (2d Cir. 2008) (quoting Skeel, *supra* note 293, at 423).

295 *See* Buxbaum, *Regulatory Litigation*, *supra* note 53, at 298.

296 *See id.* at 277.

297 *See Morrison*, 547 F.3d at 174.

must ask if it is within its authority to use its discretion to provide a remedy to investors who knowingly invested in a securities market in a country that provides no remedy for potential injury.[298]

The application of extraterritorial jurisdiction creates an overlap, which creates a jurisdictional conflict.[299] U.S. courts would bind foreign issuers to U.S. securities laws even though the foreign securities issuer had no intention of falling under the scope of U.S. laws.[300] Additionally, the United States may be using its judicial resources to decide cases that would be more appropriately heard in another venue.[301]

The U.S. judicial system has limited resources.[302] Foreign-cubed cases filed in U.S. courts demand a portion of the judiciary's capacity.[303] These cases deprive claims that are undoubtedly within the jurisdiction of U.S. courts of the essential resources they need.[304] Foreign-cubed cases are using the limited judicial resources based upon a legal principle that is founded on unstable legal grounds.[305] When foreign-cubed cases are filed in U.S. courts, the United States must use its own judicial resources for the litigation, even though these cases could be heard in another, more appropriate venue.[306] These are cases that are filed in U.S. courts against the nation's long-standing presumption against such far-reaching jurisdiction.[307] By allowing U.S. courts to try foreign-cubed class actions and permitting the SEC to bring suit against foreign securities issuers that do not trade on a U.S.

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298 *See* Brief of the United Kingdom, *supra* note 277, at 27 (arguing that the lack of regulatory measures does not necessarily provide the United States with the authority to extend extraterritorial jurisdiction).

299 Knox, *supra* note 73, at 358. The Supreme Court voiced this same idea in the past, where the Court's stated, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

300 Daniel Kahn, *The Collapsing Jurisdictional Boundaries of the Antifraud Provisions of the U.S. Securities Laws: The Supreme Court and Congress Ready to Redress Forty Years of Ambiguity*, 6 N.Y.U. J. L. & BUS. 365, 393 (2010).

301 *Id.* at 409.

302 *Id.*

303 *See id.*

304 *See id.*

305 Kahn, *supra* note 300, at 409-10.

306 *See id.* at 409.

307 *See* Knox, *supra* note 73, at 352.

exchange, limited judicial resources are being used for cases where domestic conduct may be quite limited, if existent at all.[308]

While there is a procedural advantage in allowing for extraterritorial jurisdiction in foreign-cubed cases, there are procedural aspects of securities fraud cases that serve as a disadvantage when extraterritorial jurisdiction is applied.[309] Considering that there may be a more appropriate forum elsewhere, for instance where the venue is more convenient for the parties to try the securities fraud case, this may open up the door to multiple lawsuits.[310] This would allow plaintiffs to take "two bites of the apple."[311]

It is debatable whether a U.S. court would recognize a judgment by a foreign court.[312] There is no reason why a foreign nation would find that it had to enforce a judgment in a foreign-cubed case when the United States was not the most appropriate jurisdiction for a judgment to be rendered.[313] It is generally observed that if a judgment is granted in a claim, the plaintiff cannot receive a second judgment for the same claim.[314] It is also generally likely that foreign nations that also recognize class action suits in securities cases will recognize this preclusion principle.[315]

Instead of recognizing and enforcing the U.S. judgment, a foreign judicial system may opt to hold a securities issuer accountable under its own jurisdictional laws and standards.[316] This supplies foreign plaintiffs with multiple jurisdictions in which to file a claim and ultimately recover damages.[317] This allows not only for duplicative litigation but also for duplicative recovery.[318]

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308 Kahn, *supra* note 300, at 410.

309 Brief of the United Kingdom, *supra* note 277, at 28.

310 *See* Kahn, *supra* note 300, at 413.

311 Brief of the United Kingdom, *supra* note 277, at 28.

312 *See* Kahn, *supra* note 300, at 413.

313 *Id.*

314 *Id.*

315 *See* Buxbaum, *Multinational Class Actions*, *supra* note 89, at 60.

316 *See id.* (explaining that when there is jurisdictional overlap, foreign states may simply not enforce any U.S. judgment granted).

317 *Id.*

318 *Id.* at 59-60.

Defendants are at the mercy of the courts and face inconsistent outcomes or even multiple judgments.[319] The most efficient and effective policy for the U.S. judicial system is to focus its resources on the cases where it is ensured that an effective and meaningful judgment will be enforced.[320] "There is the accompanying risk that the 'precious resources of United States courts and law enforcement agencies' could be devoted to cases that may be unfairly duplicated in other jurisdictions."[321]

Foreign plaintiffs may have the ability to forum shop and may be able to recover in multiple jurisdictions; therefore, they might make decisions on where to try their case based upon where they can recover without losing the ability to then file in another jurisdiction that will ignore any presumption of preclusion.[322] The potential for forum shopping supports the argument that extraterritorial jurisdiction should be denied in order to prevent plaintiffs from recovering in multiple jurisdictions.[323]

There are two reasons why plaintiffs would forum shop in foreign-cubed cases. First, plaintiffs are aware of the substantial judgments awarded in U.S. courts and of the possibility that a U.S. court will extend its jurisdictional authority to hear their case.[324] Once the U.S. court decides the case, there is potential that the plaintiffs may be able to file their claim in another jurisdiction.[325] Second, some foreign nations do not recognize class action law, and when the plaintiffs have no remedy in their own nation, they may resort to forum shopping.[326] When international forum shopping implicates other nations' interests, it interferes with the United States' relationships with those countries.[327] Yet, in regards to extraterritorial jurisdiction in relation to securities fraud,

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319 *See* Brief of the United Kingdom, *supra* note 277, at 28 (showing that cases may be inadvertently allowed to proceed in the United States and the United Kingdom, causing multiple outcomes).

320 *Id.*

321 *Id.* at 28 (quoting Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975)).

322 *See* Buxbaum, *Multinational Class Actions*, *supra* note 89, at 61.

323 *Id.*

324 *Id.*

325 *Id.*

326 *Id.* at 60-61.

327 *See* Buxbaum, *Multinational Class Actions*, *supra* note 89, at 61.

international implications in these circumstances lack the hostility and severity that may be the result of extending extraterritorial jurisdiction in other areas of the law.[328] Nevertheless, due to the interest of consistency and the presumption against extraterritorial jurisdiction, U.S. courts have an interest in keeping a tight rein on how far the scope of U.S. jurisdiction should extend.[329]

IV. Legislative Response to *Morrison*

Soon after the Supreme Court issued its decision on *Morrison*, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[330] The purpose of the legislation was "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[331]

Included in this financial reform legislation, and aligned with the purpose of the Dodd-Frank Act, is a provision that reflects Congress' reaction to the Court's *Morrison* decision.[332] This legislative provision can be interpreted as a responsive legislative

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328 *See id.* at 62.

329 *Id.* If foreign policy is an issue produced by extraterritorial jurisdiction, then this complicates the role of the U.S. judicial system in trying such foreign securities claims. *See* Buxbaum, *Regulatory Litigation*, *supra* note 53, at 290. Foreign policy is a responsibility of the executive branch, not the judicial branch. *Id.* Complicating the line between how the judicial branch should manage its jurisdiction and issues of foreign policy arising within those considerations creates a separation of powers dilemma. *Id.* As the authority of the two branches is to remain separate, the judicial branch, by deciding to extend extraterritorial jurisdiction is invading an exclusive consideration of the executive branch. *Id.*

330 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank Act] (to be codified in scattered provisions of the U.S.C.); Letter from Hannah L. Buxbaum, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission (Feb. 18, 2011), *available at* http://www.sec.gov/comments/4-617/4617-14.pdf (noting that while the provision in Dodd-Frank may have been drafted before the Supreme Court decided *Morrison*, it is viewed as Congress' reaction to the decision).

331 Dodd-Frank Act pmbl.

332 *See* Painter et al., *supra* note 11, at 20 (noting that "Congress [in enacting the Dodd-Frank legislation] intended to change the law (or at least change judicial interpretation of prior law).").

maneuver to undo the *Morrison* decision.[333] Section 929P of the Dodd-Frank Act includes a provision which amends the Exchange Act in order to grant extraterritorial jurisdiction to federal courts in certain cases where the SEC and other government enforcement agencies bring a federal claim in securities fraud cases.[334] The Dodd-Frank Act states:

> The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this title involving—
>
> (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
>
> (2) conduct occurring outside of the United States that has a foreseeable substantial impact within the United States.[335]

While it is seems as though the Supreme Court, in deciding *Morrison*, did not make an exception for the SEC or other enforcement agencies to have a public right to bring a Rule 10b-5 claim in extraterritorial securities cases, Congress attempts to use this portion of the Dodd-Frank Act to carve out an exception.[336] Congress's requirement that the SEC must solicit public comments and then conduct a study in order to determine to what extent the anti-fraud provision of the Exchange Act should allow for a private right of action is another example of the congressional intent behind the Dodd-Frank Act.[337]

All in all, the legislation shows that Congress clearly intended to overturn what the Court decided less than a month earlier in *Morrison*. In *Morrison* the Court never granted the U.S. courts

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333 *Id.* at 19-20.

334 *See* Dodd-Frank Act § 929P(b)(2) (codified as 15 U.S.C. § 78aa (2010)).

335 *Id.*

336 *See* Painter et al., *supra* note 11, at 19 ("Congress clearly intended: to empower the SEC to bring cases where the conduct was that described in the statute [under 10(b)].").

337 *See* Dodd-Frank Act § 929Y(a).

extraterritorial jurisdiction over securities fraud cases.[338] Instead the Court held that when lacking explicit congressional intent, the transactional test should be applied to determine if jurisdiction should be extended.[339] The Court sided with the presumption against extraterritorial jurisdiction because Congress had not explicitly stated that there was such jurisdiction in the statute, so none existed.[340] Nonetheless, Congress' intent is clearer than it has ever been with the passage of the Dodd-Frank Act; as the Congressional Record notes:

> [There] are securities frauds in which not all of the fraudulent conduct occurs within the United States or not all of the wrongdoers are located domestically. The bill creates a single national standard for protecting investors affected by transnational frauds by codifying the authority to bring proceedings under both the conduct and the effects tests developed by the courts regardless of the jurisdiction of the proceedings.
>
> . . . This bill's provisions concerning extraterritoriality, however, are intended to rebut that presumption by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department.[341]

The Dodd-Frank Act marks Congress's return to the "old" way of determining jurisdiction in extraterritorial cases by legislatively defining the conduct and effects tests.[342] Here, Congress is

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338 *See* Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2873 (2010).

339 *Id.* at 2873 ("It is a 'longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"") (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

340 *Id.*

341 *See* 156 CONG. REC. H5237 (daily ed: June 30, 2010) (statement of Rep. Paul Kanjorsky), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2010-06-30/html/CREC-2010-06-30-pt1-PgH5233.htm.

342 *See* Jim Hamilton, *Dodd-Frank Provision Rebuts the Supreme Court Presumption Against Extraterritorial Application of the Federal Securities Law*, JIM HAMILTON'S WORLD OF SEC. REGULATIONS (July 9, 2010, 9:09 AM), http://jimhamiltonblog.blogspot.com/2010/07/dodd-frank-provision-rebuts-supreme.html (noting that the "laws are intended to rebut that presumption by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice

limiting the scope of the Court's *Morrison* decision and working to make its intent clear: to set one national, uniform jurisdictional standard upon which protection against fraud will be provided for investors who participate in transnational securities markets.[343] Although this comment argues that Congress has been unsuccessful in overturning *Morrison*, if Congress is able to succeed, the conduct and effects test would govern SEC actions against foreign defendants. In return, foreign-cubed class actions would also be permitted in U.S. courts.[344] Congress's attempt in accepting and reverting back to the pre-*Morrison* jurisdictional world, at least in SEC cases, leaves courts to deal with the problem that *Morrison* attempted to solve.[345]

V. Court's Response to Conflicting Guidance

A. Cornwell v. Credit Suisse Group[346]

Morrison does more than simply impede foreign-cubed plaintiffs; the pivotal decision implicates more than those foreign parties transacting on foreign exchanges.[347] As the court described the *Morrison* decision in its opinion in *Cornwell*, "[t]his [c]ourt is not convinced that the Supreme Court designed *Morrison* to be squeezed, as in spandex, only into the factual straitjacket of its holding."[348] Additionally, the court discussed the sweeping expanse of *Morrison* as it affects all Section 10(b) cases.[349] There is no language in the Court's decision that permits any exceptions to this transactional rule.[350]

Department.").

343 *See id.*

344 *The U.S. Dodd Frank Act: Implications for Foreign Issuers*, CRAVATH, SWAINE & MOORE LLP (Aug. 4, 2010), http://www.cravath.com/US-Dodd-Frank-Act-Implications-for-Foreign-Private-Issuers-08-04-2010/.

345 *Id.*

346 729 F. Supp. 2d 620 (S.D.N.Y. 2010).

347 *Id.*

348 *Id.* at 625.

349 *Id.* at 623 (discussing that the Court in *Morrison* rejected all international applications of § 10(b) because it fails to express any specific extraterritorial scope).

350 *Id.* at 625 ("[T]he majority reached beyond the four corners of the case before it and went out of its way to fashion a new rule designed to correct the enumerated flaws the Court found in the [conduct and effects tests], while also fully aware of its far broader implications.").

The plaintiffs in *Cornwell* argued that the Court intended for *Morrison* to be a narrow decision, applying only to foreign-cubed plaintiffs.[351] Nevertheless, any ambiguity in exempting non-foreign cubed plaintiffs from the application of the transactional test soon became clear when the *Cornwell* court found in favor of the application of American laws to securities that are governed by the laws of another country.[352]

Less than a month after the Court handed down its decision in *Morrison*, the *Cornwell* court helped facilitate an understanding of what this decision would mean for securities issuers going forward—that the transactional test would bar protection under U.S. law for foreign securities purchases or sales on a foreign exchange regardless of whether American investors executed the agreements or if some part of the transaction occurred in the United States.[353] Thus, since the plaintiffs in *Cornwell* argued that the court should have exercised jurisdiction because of a connection between the securities transaction and the United States, it is an impermissible exception to the bright-line transactional test.[354]

B. In re Alstom, S.A. Securities Litigation[355]

In the months following the *Morrison* decision and the passage of the Dodd-Frank Act, a district court in the Second Circuit applied the new *Morrison* transactional test.[356] The plaintiffs argued that even if securities were sold on foreign exchanges, the fact that securities were sold on domestic exchanges should be enough.[357] They also argued that the fact that domestic exchanges were implicated meant that the court should extend supplemental jurisdiction, applying French law, to cover those securities sold on foreign exchanges.[358]

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351 *Cornwell*, 729 F. Supp. 2d at 622.

352 *Id.* at 624-25.

353 *Id.* at 625-26. As the court discussed, and is obvious considering the presence of the United States in global markets, it will be difficult, if not impossible, to find a security transaction to which the United States has no connection of any sort. *Id.*

354 *Id.* at 622.

355 741 F. Supp. 2d 469 (S.D.N.Y. 2010).

356 *Id.* at 471.

357 *Id.* at 471-72.

358 *Id.* at 472. It is interesting to note the eagerness of the plaintiffs to have the case

As a case involving private plaintiffs, not the SEC, the implication of *Morrison* seemed obvious in *In re Alstom*.[359] As the district court clearly noted, the Supreme Court in *Morrison* was concerned with the territorial location of the transaction—the result should be that any claim involving a transaction on a foreign exchange should be dismissed, and no supplemental jurisdiction should be extended by a U.S. court.[360] The court in *In re Alstom* correctly dismissed all such claims that attempted to claim U.S. jurisdiction on transactions on a foreign exchange.[361]

C. In re Vivendi Universal, S.A. Securities Litigation[362]

One question that remained open after *Morrison* was partially-resolved by *In re Vivendi Universal*: what should courts do about cross-listed securities?[363] *In re Vivendi Universal* listed ordinary shares on the New York Stock Exchange and on foreign exchanges.[364] Ultimately, the *In re Vivendi Universal* court found that there is no indication that the Supreme Court intended Section 10(b) to apply to cross-listed exchanges.[365] Thus, what previously seemed unclear now gains a sense of clarity: If the transaction takes place on a foreign exchange, even if the securities are cross-listed on a domestic exchange, there is no court that can grant such plaintiffs relief.

Another point of clarification within the court's discussion is the definition of a "domestic transaction."[366] The court noted that "there is little doubt that the phrase was intended to be a reference to the location of the transaction, not to the location of the

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heard in an American court, which implicates the policies discussed Part VII of this comment. *See infra* Part VII.

359 *In re Alstom* 741 F. Supp. 2d at 471. Dodd-Frank created the conflict between how the SEC as a plaintiff should be treated compared to private plaintiffs. *See* Painter et al., *supra* note 11, at 19 (discussing the treatment of the SEC in the Dodd-Frank Act). The Court in this case seemingly sees no alternative to the application of the transactional test in the wake of *Morrison*. *In re Alstom*, 741 F. Supp. 2d at 471.

360 *In re Alstom*, 741 F. Supp. 2d at 471-72.

361 *Id.* at 473.

362 765 F. Supp. 2d 512 (S.D.N.Y. 2011).

363 *Id.* at 531.

364 *Id.*

365 *Id.*

366 *Id.* at 532.

purchaser . . . ."[367] This applies regardless of whether or not the purchaser is American.[368]

D. SEC v. Goldman Sachs & Co. and Fabrice Tourre[369]

Courts seemed to have some difficulty in applying the transactional test to securities fraud cases arising post-*Morrison*.[370] Until *Goldman Sachs*, questions still remained: How does Dodd-Frank impact the *Morrison* decision? Did Congress actually achieve what it intended with the passage of Dodd-Frank? Did Congress succeed in overturning *Morrison*?

While such questions appear to remain unanswered,[371] *Goldman Sachs* does suggest that the Court was successful in broadly applying a presumption against extraterritorial jurisdiction.[372] The *Morrison* decision applied to both private and public plaintiffs.[373] While decided before the passage of Dodd-Frank, the court in *Goldman Sachs* refused to extend its jurisdiction over parties that did not engage in domestic transactions, even if one of those parties is the SEC.[374]

VI. What Can Plaintiffs Do?

A. State Law Actions

Perhaps one solution for plaintiffs is to avoid federal securities law altogether. In January 2012, a group of investors sued Sino-Forest along with its underwriters in U.S. federal court.[375] Rather than filing for relief based upon U.S. securities laws, the plaintiffs

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367 *In re Vivendi Universal*, 765 F. Supp. 2d at 532.

368 *Id.* at 533.

369 790 F. Supp. 2d 147 (S.D.N.Y. 2011).

370 *Id.* at 157.

371 At this time, it is unclear whether or not a court will extend extraterritorial jurisdiction to cases with a public plaintiff.

372 *Goldman Sachs*, 790 F. Supp. 2d at 160.

373 *See* Rose et al., *supra* note 216.

374 *Goldman Sachs*, 790 F. Supp. 2d at 160.

375 *See* Alison Frankel, *U.S. Investors Morrison-Proof New Sino-Forest Fraud Suit*, THOMSON REUTERS NEWS & INSIGHT (Jan. 31, 2012) http://newsandinsight.thomsonreuters.com/New_York/News/2012/01_-_January/U_S__investors_Morrison-proof_new_Sino-Forest_fraud_suit/.

are seeking relief under state laws.[376] These plaintiffs allege common-law fraud, unjust enrichment and breach of fiduciary duty under New York State law rather than appealing to federal securities fraud.[377] An advantage to filing under New York State laws is that the parties "avoid the procedural strictures of the Private Securities Litigation Reform Act and the heightened pleading standards for securities fraud."[378]

B. Seek Relief Elsewhere

Since *Morrison* drastically changed the legal landscape of U.S. securities fraud in the United States, other countries have reaped the benefits.[379] For instance, plaintiffs have discovered that Canadian courts are accessible for claims of securities fraud.[380] Canadian lawyers have taken advantage of the uncertainty of U.S. extraterritorial jurisdictions by finding plaintiffs who would have sought relief via the U.S. class action mechanism and filed those cases in Canadian courts instead.[381] Canada is experiencing the highest level of securities class actions in history, and this trend is expected to continue at least through 2012.[382] One of the reasons attributed to this upswing is the effect of the *Morrison* decision in U.S. courts.[383] A recent example is that rather than filing in the United States, plaintiffs are instead seeking relief in Canada against the Chinese company Sino-Forest.[384] The outcome of this case may cause an expansion of global securities litigation in Canada.[385]

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376 *Id.*

377 *Id.*

378 *Id.*

379 *Id.*

380 Frankel, *supra* note 375 ("Canada has become something of a plaintiffs' paradise for securities litigation, especially in contrast to the United States.").

381 *See id.*

382 *Filings of Securities Class Actions in Canada Reach New High*, BUSINESS WIRE (Feb. 1, 2012, 08:11 AM) http://www.businesswire.com/news/home/20120201005968/en/Filings-Securities-Class-Actions-Canada-Reach-High.

383 *Id.*

384 *Id.*

385 *See* Luke Green, *Securities Class Action Services, LLC, Case Brief, Sino-Forest and Asset Recovery in Canada, available at*

Aside from Canada, the Netherlands provides a form of collective action in which foreign investors can seek relief for securities claims.[386] Dutch law allows for a representative organization to file on behalf of a group of individuals who have opted-in.[387] Recent use of the Act on Collective Settlement of Mass Damages by Dutch courts is creating a more appealing forum for global securities litigation.[388] While there are glaring differences between the Dutch class action and that which is provided by the United States, this Dutch act allows for binding, global settlements;[389] such a settlement requires court approval.[390] The settlement agreement is legally binding and all individuals who are a part of the foundation are bound by the settlement unless they exercise their right to opt-out.[391] Despite the possible benefits of these actions, the difficulty in enforcing the settlement on parties within the European Union is at least one downside to bringing these claims in Dutch courts.[392]

While it appears to be a viable option that private plaintiffs can bring actions against foreign securities issuers in other courts outside of the United States, these plaintiffs may have issues working within the context of foreign class action regimes.[393] For

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http://www.issgovernance.com/files/ISSSecuritiesClassActionServicesSinoForestCaseBrief.pdf. Canada's law mimics the broader jurisdictional standard of the conduct and effects tests. *Id.* The Ontario Securities Act allows for jurisdiction if there is a substantial connection to Ontario. *Id.* Australia is another country with the potential for global securities litigation. *Id.*

386 Frankel, *supra* note 375.

387 *Id.*

388 *See* Kevin LaCroix, *Dutch Court Holds Collective Securities Settlement to Be Binding*, THE D&O DIARY (Jan. 19, 2012), http://www.dandodiary.com/2012/01/articles/securities-litigation/dutch-court-holds-collective-securities-settlement-to-be-binding/.

389 *Id.*

390 *Id.*

391 *See* Frankel, *supra* note 375. Parties used this process to settle a 2009 action against Royal Dutch Shell. LaCroix, *supra* note 388.

392 *See* LaCroix, *surpa* note 388 ("[W]hile the judgment of the Dutch court is in principle enforceable in courts outside the Netherlands, it remains to be seen whether or not other courts will in fact recognize the judgment.").

393 Green, *supra* note 385. For example, some countries treat individual class members differently (i.e. opt-in versus opt-out), regarding contingency fees and payment of legal fees. *Id.*

these reasons, countries with class action mechanisms mirroring the U.S. class action, such as Canada, have seen the uptick in filings.[394]

VII. *Morrison* and Extraterritorial Jurisdiction Outside of Securities Fraud

Since the Supreme Court's decision, some effects have been observed in global securities law.[395] A crucial indication as to how much this decision can, and should be, extended is reflected in what Justice Scalia wrote in his opinion in *Morrison*; he noted that "'unless there is an affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic concerns.' . . . When a statute gives no clear indication of an extraterritorial application, it has none."[396] While only dicta, this statement is a powerful one, which has the potential to affect not just securities fraud plaintiffs, but to affect a broader realm of plaintiffs.

While *Morrison* has the potential to extend to criminal cases, it seems likely that the broad spectrum of cases to which *Morrison* may be extended will probably not include criminal cases.[397] Rather, *Morrison's* effects are being seen in antitrust, racketeering, trade secrets, bankruptcy clawbacks, and alien tort cases.[398] The basis for these applications is the lack of extraterritorial language contained in the statutes that the cases were brought under.[399] While perhaps only dicta, the language of the *Morrison* is creating a strong force for the case's application. George Conway, III described the impact saying:

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394 *Id.*

395 *See* Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2878 (2010).

396 *Id.* at 2877-78 (internal citations omitted).

397 Courts appear to be avoiding the application of *Morrison*'s extraterritorial jurisdiction test to criminal cases. Instead the courts are relying on the 1922 U.S. Supreme Court opinion, United States v. Bowman 260 U.S. 94 (1922), which found that extraterritorial jurisdiction can be inferred from U.S. criminal laws. *See, e.g.*, United States v. Belfast, 611 F.3d 783, 811-13 (11th Cir. 2010) (applying *Bowman* and not *Morrison* to a criminal torture case).

398 *See* Alison Frankel, *Morrison v. NAB's 2nd Act: Way Beyond Securities Fraud and RICO*, THOMSON REUTERS NEWS & INSIGHT (Oct. 17, 2011), http://blogs.reuters.com/alison-frankel/2011/10/17/morrison-v-nabs-2nd-act-way-beyond-securities-fraud-and-rico/.

399 *See id.*

> There was never any question that Morrison would affect other statutes . . . . Still, it's been amazing to see the decision's extraordinary impact actually unfold . . . . Morrison straightforwardly applied a longstanding canon of construction, the presumption against extraterritoriality. But it did so more emphatically than ever before, perhaps because the justices realized that their earlier decisions . . . hadn't always been followed. By overturning four decades of significant lower-court securities cases, the Supreme Court made quite sure this time that its message on extraterritoriality will get through.[400]

VIII. Conclusion

At the time of publication, there are many questions still unanswered. For now, global classes of plaintiffs must seek alternate forums for relief in securities fraud cases or find a way to maneuver around the bright-line rule of *Morrison*. It is also unclear whether or not U.S. courts will allow the SEC to bring claims that require extraterritorial jurisdiction as the Dodd-Frank Act intended.

What is clear is that *Morrison* has changed the entire civil legal landscape in the United States. One statement made by Justice Scalia in dicta has forced lawmakers to reexamine language used in bills and laws and encouraged judges to apply the presumption of extraterritorial jurisdiction.

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400 *Id.*