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Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation

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ESCAPING FEDERAL LAW IN TRANSNATIONAL CASES: THE BRAVE NEW WORLD OF TRANSNATIONAL LITIGATION*

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What happens when U.S. federal courts close their doors to transnational cases? Recent Supreme Court decisions regarding personal jurisdiction, the Alien Tort Statute, extraterritorial application of U.S. federal law, plausibility pleading, class action certification, and forum non conveniens pose substantial obstacles for transnational cases to be adjudicated by U.S. federal courts. The result of this is that plaintiffs are now seeking other law—U.S. state and foreign law—and other fora—including U.S. state and foreign courts—to escape federal law and courts in order to plead transnational claims. This Article offers a first glimpse at a brave new world of transnational litigation where federal, state, and foreign courts compete through their courts and law to adjudicate transnational cases and regulate transnational activities. The Article also explores the impact that closing federal law and federal courthouse doors to transnational cases might have on state law, foreign law, and transnational law generally. After critically evaluating this new world of transnational litigation, the Article offers a framework for adjudication that focuses on jurisdictional rules and sovereign interests when resolving forum competition in transnational cases.

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INTRODUCTION

Suppose that you were a lawyer representing a plaintiff injured in a foreign country by a defendant arguably subject to personal jurisdiction in the United States. Where would you advise your client to bring suit? Of course, that decision would be made by comparing the substantive and procedural laws of various jurisdictions—such as the foreign place of injury with the place of domicile of the defendant—to determine where the most convenient and law-favorable forum would be to bring your case.[1] A rational litigant would shop among the various potential fora for the forum where

1. If this was a contract claim, you might also have to evaluate whether the contract has choice-of-law and choice-of-forum clauses and whether these clauses point to a favorable forum (and law) for your client. Should those clauses be valid and enforceable, you might not have much of a choice where you bring the suit. Should those clauses be void or nonexistent, your evaluation of the case would be the same as in the main text.

there is the highest likelihood of a favorable outcome and bring the suit there so long as litigation funding supported that choice.[2]

At one time, your advice to the client would have probably been in many (perhaps most) transnational cases: "Sue in the United States." As Lord Denning, arguably the most celebrated English judge of the twentieth century,[3] famously opined, "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."[4] The argument is that even in a world of increasing globalization, plaintiffs would prefer to bring suit in the United States to take advantage of favorable substantive and procedural law that presents far greater potential for recovery than in other legal systems.[5]

There are several reasons why a plaintiff would want to bring suit in a U.S. forum. First, U.S. substantive law is thought to be more generous than the laws of other countries.[6] Second, U.S. procedural law—in particular, notice pleading, liberal discovery, and aggregate (class action) litigation—provides plaintiffs substantial leverage in pleading, proving, trying to a favorable verdict, and settling their cases.[7] Third, U.S. damages law—especially punitive damages and substantial jury awards—present the potential for a windfall for plaintiffs or, at a minimum, significant leverage to encourage defendants to settle.[8] For these and other reasons, a plaintiff in a transnational case would be expected to choose a U.S. forum to bring suit, if possible as a matter of jurisdiction, even in cases where the harms complained of occurred abroad and even in cases where the

2. *See, e.g.*, Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 383 (2006) ("The law regularly provides more than one authorized, legitimate forum in which a litigant's claims may be heard. To shop among those legitimate choices for the forum that offers the potential for the most favorable outcome is the only rational decision under rational choice theory and game theory because forum shopping maximizes the client's expected payoff.").

3. J. Skelly Wright, *Law and the Logic of Experience: Reflections on Denning, Devlin, and Judicial Innovation in the British Context*, 33 STAN. L. REV. 179, 180 (1980).

4. Smith Kline & French Labs., Ltd. v. Bloch, [1983] 1 W.L.R. 730 (C.A.) at 733 (Eng.).

5. *See, e.g.*, Richard D. Freer, *Refracting Domestic and Global Choice-of-Forum Doctrine Through the Lens of a Single Case*, 2007 BYU L. REV. 959, 971 (2007).

6. *See* Russell J. Weintraub, *Introduction to Symposium on International Forum Shopping*, 37 TEX. INT'L L.J. 463, 463 (2002) ("Typically our courts afford to foreign plaintiffs injured abroad lower barriers to suit and higher recoveries than other available forums would offer.").

7. *See* Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 338–40, 338 n.194 (2008).

8. *See* Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 509, 511–12, 516 (2008).

evidence is located abroad. Specifically, you might counsel your client to sue in U.S. federal court and even under U.S. federal law, as federal courts and federal law have generally been seen as particularly hospitable to transnational cases.[9]

In today's world of transnational litigation, your advice to the client might be different. Generally speaking, U.S. federal courts are increasingly reluctant to adjudicate transnational cases.[10] Furthermore, the Supreme Court has made substantial refinements to doctrines such as personal jurisdiction,[11] forum non conveniens,[12] and the extraterritorial application of U.S. federal law[13] that pose substantial obstacles for filing transnational suits in U.S. federal courts, especially under federal law.[14] Indeed, upon filing a case in the United States, a foreign plaintiff is particularly susceptible to having her case dismissed by a U.S. federal court in favor of a foreign forum.[15] Similarly, the Supreme Court has also constricted pleading doctrine[16] and made it harder to certify class actions.[17] Taken together, these federal developments short-circuit many of the reasons why a plaintiff in a transnational case would be drawn to U.S. federal law and courts.

Perhaps no better examples exist of this restriction of federal court access in transnational cases than the Supreme Court's recent decisions in *Kiobel v. Royal Dutch Petroleum*[18] and *Daimler AG v.*

9. *See* Weintraub, *supra* note 6, at 463 ("The United States ranks first among the world's magnet forums.").

10. *See, e.g.*, Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1113 (2010); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 483–84 (2011).

11. *See, e.g.*, Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2855 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2791 (2011).

12. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 429 (2007).

13. Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 247 (2010).

14. One scholar has helpfully labeled these and similar doctrines as "transnational litigation avoidance doctrines." *See* Pamela K. Bookman, *Once and Future U.S. Litigation*, *in* FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 35, 36–37 (Paul B. Stephan ed., 2014) (describing forum non conveniens, forum selection clauses, comity, personal jurisdiction, and the political question doctrine as "transnational litigation avoidance doctrines").

15. *See* Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT'L L. 157, 165 (2012) (explaining the impact of the forum non conveniens doctrine on foreign plaintiffs).

16. Ashcroft v. Iqbal, 556 U.S. 662, 664 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007).

17. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011).

18. 133 S. Ct. 1659 (2013).

Bauman.[19] In *Kiobel*, the Court held that a Nigerian plaintiff could not bring suit against a Dutch corporation under the Alien Tort Statute ("ATS")[20] for alleged human rights violations occurring in Nigeria.[21] According to the Court, where the harms complained of occurred entirely abroad, the ATS does not apply unless the alleged tortious conduct "touch[es] and concern[s]" the territory of the United States.[22] In *Bauman*, the Court held that Daimler AG, a German corporation, was not subject to general jurisdiction in California in a case alleging tortious activities committed by a subsidiary of Daimler AG in Argentina.[23] Daimler AG was, according to the Court, in no way "essentially at home" in California because of its "slim contacts with the State [of California]," even though it had a subsidiary there subject to general jurisdiction.[24]

These cases are just two examples of federal courts restricting plaintiffs' access to U.S. federal law and courts in transnational cases. This emerging "restrictive ethos"[25] to federal procedural and substantive law in transnational cases impacts not only cases filed in U.S. federal courts, which would be the expected outcome of such decisions. Importantly, it also affects plaintiffs bringing transnational cases in federal, state, and foreign courts generally. For instance, some plaintiffs are engaging in domestic forum shopping and intentionally avoiding federal procedural and substantive law by seeking to plead transnational cases under state law, in some cases in state courts in the very first instance.[26] This forum selection raises complex issues regarding the allocation of judicial powers between

19. 134 S. Ct. 746 (2014).

20. 28 U.S.C. § 1350 (2012) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

21. *Kiobel*, 133 S. Ct. at 1669.

22. *Id*.

23. *Bauman*, 134 S. Ct. at 762.

24. *Id.* at 760, 762.

25. *See* A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 368 (2010) (citing *Iqbal* and other recent cases as an example of an efficiency-focused "restrictive ethos in procedure [that] appears ascendant and poised for dominance"). I note that this restrictive ethos has been examined in significant detail in the context of domestic litigation. *See, e.g.*, Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 729–30 (2010); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 291–92 (2013). This Article explores that ethos in the context of transnational litigation.

26. Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of U.S. State Law in the Wake of* Morrison v. National Australia Bank, 92 B.U. L. REV. 535, 539–40 (2012).

federal and state courts in cases where foreign affairs might be implicated.

Even more interesting, some plaintiffs now actively avoid U.S. federal procedural and substantive law altogether. Instead, they file their claims in U.S. courts under foreign law and, in some cases, file claims in the first instance under foreign law in foreign courts.[27] This raises an important question: Should U.S. courts take account of this development as they apply domestic legal doctrine in transnational cases, and, if so, how?

Notably, plaintiffs engaging in transnational forum selection are seeing significant success filing suits abroad. On January 30, 2013, for instance, a trial court in The Hague announced that it had entered a judgment against Shell Petroleum Development Company of Nigeria, a member of the Royal Dutch Shell group of companies, for violations of Nigerian law for harms arising from an oil spill in Nigeria.[28] According to one commentator, this case "constitutes the first time that a Dutch multinational has been sued before a civil court in The Netherlands in connection with allegations of damage caused abroad by a subsidiary and appears to be part of a trend" whereby plaintiffs "from the developing world turn[] to the courts in developed countries for redress against multinationals."[29] In years past, this case would have been a prime candidate for filing in the United States, especially under the ATS,[30] as the plaintiffs did in *Kiobel*.[31] Today, it appears there is a comparative advantage in filing such cases in foreign fora, especially in Europe.[32]

Plaintiffs seek out nonfederal law and fora because those fora are engaged in *forum competition* to adjudicate transnational cases. Foreign courts are developing their law, both procedural and

27. Wulf A. Kaal & Richard W. Painter, *Forum Competition and Choice of Law Competition in Securities Law After* Morrison v. National Australia Bank, 97 MINN. L. REV. 132, 140 (2012).

28. David Jolly & Stanley Reed, *Mixed Decision for Shell in Nigeria Oil Spill Suits*, N.Y. TIMES (Jan. 30, 2013), http://www.nytimes.com/2013/01/31/business/global/dutch-court-rules-shell-partly-responsible-for-nigerian-spills.html?pagewanted=all.

29. Roger Alford, *Dutch Court Issues Mixed Ruling on Shell's Liability for Nigerian Environmental Claim*, OPINIOJURIS (Feb. 5, 2013), http://opiniojuris.org/2013/02/05/dutch-court-issues-mixed-ruling-on-shells-liability-for-nigerian-environmental-claim/.

30. 28 U.S.C. § 1350 (2012); *supra* notes 20–22 and accompanying text; *see, e.g.*, Doe v. Exxon Mobil Corp., 654 F.3d 11, 40–41 (D.C. Cir. 2011).

31. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1660 (2013).

32. Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127, 129 (2013).

substantive, to encourage forum shopping into their courts.[33] We are thus at the very beginning stage of a brave new world of transnational litigation where domestic and foreign courts compete through domestic and foreign law, both substantive and procedural, to regulate transnational activities as part of a transnational law market.

This new world of transnational litigation is largely driven by private parties and their lawyers, who are forum shopping for favorable substantive and procedural law. These efforts are also part of an ongoing movement not only to file transnational cases in U.S. state and foreign courts, but also to influence legal change in those fora.[34] For instance, there is a movement in Europe to overcome the traditional reluctance to aggregate litigation in favor of allowing U.S. class-action-like devices.[35] There are also increasing damages awards in foreign courts that similarly show at least some export of traditionally American robust systems for recovery.[36] In short, we now have a transnational law market where domestic and foreign courts compete to adjudicate transnational cases and where private parties and their lawyers engage in efforts designed to encourage such competition. We are in the midst of a brave new world of transnational litigation where U.S. and foreign courts compete through their legal regimes for transnational cases.

This Article explores the burgeoning brave new world of transnational litigation. The Article is divided into four parts. In Part I, the Article explains the emergence of a law market for transnational cases. The transnational law market concept identified herein illustrates how the transnational movement of goods, people, and commerce has created a transnational movement of law, both procedural and substantive. Part II examines the market in action. By analyzing the impact that the Supreme Court's decisions in *Morrison v. National Australia Bank*[37] (involving transnational securities fraud) and *Kiobel v. Royal Dutch Petroleum* (involving transnational torts) have had on forum and substantive law choice, the Article shows how restricting access to federal courts encourages the migration of

33. *See, e.g.*, R. DANIEL KELEMEN, EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION 7–8 (2011).

34. *See generally, e.g.*, Mark A. Behrens et al., *Global Litigation Trends*, 17 MICH. ST. J. INT'L L. 165, 192–93 (2009) (highlighting European fora that are now instituting forms of punitive damages and multi-claimant litigation).

35. S.I. Strong, *Regulatory Litigation in the European Union: Does the U.S. Class Action Have a New Analogue?*, 88 NOTRE DAME L. REV. 899, 912 (2012).

36. *See, e.g.*, Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 621 (S.D.N.Y. 2011) (detailing a multi-billion dollar judgment entered against a U.S. company in Ecuador).

37. 561 U.S. 247 (2010).

transnational cases to other courts in search of more favorable law. Part III explores the contraction of federal substantive and procedural law generally and explains how that retrenchment further informs and enables the transnational law market. Part IV proposes a normative view of transnational litigation. Key to this view is that, as the name "transnational" denotes, cases touching on transnational legal issues should be subject to increased transnational regulation and cooperation between governments in light of sovereign interests.

I. THE TRANSNATIONAL LAW MARKET

Before examining the federal doctrinal landscape that encourages forum shopping in transnational cases, it is important to reconceptualize the ways in which litigants and courts interact in such cases. In this Part, the Article explains that transnational litigants are active participants in a transnational law market. This Part explores the development of the transnational law market in three sections. It begins by describing the market for transnational law and identifying the conditions that make transnational forum selection possible. It next focuses on the strategic choices made by litigants in transnational cases in response to the substantive and procedural laws provided by different fora. After exploring these choices, this Part illustrates how litigant choice operates within a transnational law market where U.S. and foreign courts compete through their substantive and procedural laws for transnational cases. Understanding the operation of the transnational law market provides context for the exploration of how that market will respond to restrictive federal substantive and procedural law, which will be analyzed in Parts II and III.

A. Is There a Market for Transnational Law?

It is not surprising that litigants in transnational cases engage in strategic forum-selection behavior to maximize their chances of legal recovery.[38] As one might recall from the first year of law school, substantial time is spent acculturating lawyers to the benefits of forum choice. In one's study of civil procedure, for instance, students examine in exhausting detail doctrines such as subject matter jurisdiction, personal jurisdiction, the *Erie* doctrine, and venue that impact forum choice and intersect with forum selection. While forum shopping is the equivalent of a legal "dirty word," it is, in fact, "only a pejorative way of saying that, if you offer a plaintiff a choice of

38. Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1372 (2004).

jurisdictions, he will naturally choose the one in which he thinks his case can be most favorably presented; this should be a matter neither for surprise nor for indignation."[39] Federal civil procedure doctrines are designed to encourage the just and fair resolution of cases in light of the fact that parties engage in strategic behavior to find the forum where their likelihood of success is the greatest.[40]

In the United States, especially in a purely domestic case,[41] forum selection is a question of "where" a certain case should be localized. For instance, can a Virginia corporate defendant that does substantial business in California be sued in California for a tort committed in Virginia against a California domiciliary? At first blush, this would seem to be a question of personal jurisdiction—namely, whether the Virginia defendant has the requisite contacts with California to permit suit there.[42] However, this can also be viewed a question of venue because if the Virginia defendant cannot be sued in California it most certainly can be sued in Virginia based on general jurisdiction.[43] The case will be localized somewhere in the United States. "Where" in the United States is the only question.

Importantly, there is a strategic question embedded within this jurisdictional question: Where would the plaintiff have the best chance of recovery under governing law? In other words, in *which forum* would the plaintiff have the best chance of success applying state choice-of-law rules to determine the substantive law applicable?[44] Similarly, to the extent different fora employ different

39. The Atlantic Star, [1974] A.C. 436 (H.L.) at 471 (Eng.).

40. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986) ("Sobered by the fate of the Field Code, Dean Clark and the other drafters of the Federal Rules set out to devise a procedural system that would install what may be labelled the 'liberal ethos,' in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.").

41. By "purely domestic case," I mean one that involves a U.S. plaintiff, a U.S. defendant, and allegations of harms occurring in the United States.

42. The test is now a modification of the well-known *International Shoe* test: a defendant must have the requisite minimum contacts with the forum state such that the assertion of jurisdiction does not offend "traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

43. *See* Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2193 (2012) ("The rules governing personal jurisdiction and venue usually pose minimal obstacles to plaintiffs seeking to bring cases against U.S. defendants. Almost invariably, there will exist some state or federal jurisdiction (typically many) where a U.S. business defendant is amenable to suit.").

44. *See* Whytock, *supra* note 10, at 488 (noting the connection between choice of law and forum shopping). As should be obvious, there is a domestic law market as well. *See generally* ERIN O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET (2009)

procedural laws—for instance, notice pleading or plausibility pleading—the litigant will have to take these matters into account as well when choosing the optimal forum.

Choice of law enters the equation because the several states have different choice-of-law rules. For instance, Virginia will, with limited exceptions, apply the law of the place of injury to the case (in this example, Virginia law).[45] California, however, might apply Virginia substantive law, or it might apply California substantive law.[46] To the extent Virginia and California substantive law materially differ, parties have an incentive to forum shop for the most favorable law. Furthermore, Virginia and California procedural law may differ. At a minimum, the background of the judge and jury will be different as between Virginia and California. These differences in substantive and procedural law encourage a plaintiff to shop between the laws and courts of Virginia and California, both federal and state, to identify the forum where the likelihood of success is the greatest. Principles of personal jurisdiction constrain this choice.

While a plaintiff might seek a California court (federal or state) in hopes of finding a forum where her likelihood of recovery is greatest, that decision can be short-circuited by a defendant's reverse forum shopping.[47] For example, if the plaintiff can file the case in a California state court because there is personal jurisdiction there, then the defendant may remove the case from state to federal court to limit some of the strategic advantages of filing in the state court.[48] A defendant might also move to transfer from one federal court to another.[49]

As the preceding paragraphs explain, plaintiffs and defendants *both* engage in forum shopping for the forum where their relative

(acknowledging that a law market exists amongst U.S. state and federal jurisdictions). The concern here is with the transnational aspects of the law market.

45. *E.g.*, Jones v. R.S. Jones & Assocs., 431 S.E.2d 33, 34 (Va. 1993) (holding that the settled law in Virginia is to adhere to the place of the wrong standard).

46. *E.g.*, Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 934 (Cal. 2006) (holding that conflicts of law are resolved "by applying the law of the state whose interest would be more impaired if its law were not applied").

47. *See* Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 525 (1993) ("In reality, plaintiffs engage in forum shopping and defendants engage in reverse forum shopping, each seeking to turn to their own advantage the laws and procedures in the respective forums.").

48. 28 U.S.C. § 1441 (2012) (permitting a nonresident defendant to remove a case from state court to an appropriate federal court).

49. *See* 28 U.S.C. §§ 1404, 1631 (2012) (allowing a change of venue for the convenience of parties and witnesses or for want of jurisdiction).

chances of success on the merits are greatest. In so doing, however, various procedural doctrines level the playing field to prevent a party from using the rules of the system to create an excessive and unfair litigation advantage.[50] Importantly, domestic forum shopping is frequently about choice of law and convenience to the parties,[51] as relative procedural uniformity throughout the several states discounts many of the reasons for domestic forum shopping.[52] Transnational cases, however, present different strategic choices for litigants.[53] To understand why a plaintiff would be drawn to U.S. courts in a transnational case, one must understand the traditional advantages offered to a foreign plaintiff by U.S. substantive and procedural law.

First, U.S. courts allow extensive pretrial discovery controlled by the parties and not the court. In most other legal systems, pretrial discovery is limited.[54] As such, U.S. courts give plaintiffs significant advantages to force settlements through the threat of discovery.[55] Such discovery also gives plaintiffs a greater ability to prove their cases by giving them access to information.[56] Second, it is believed that U.S. courts grant and approve higher damages awards than foreign courts, particularly in cases that are tried to a jury.[57] U.S. law recognizes categories of compensatory damages, such as damages for emotional distress or pain and suffering, that are not generally

50. *See, e.g.*, Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1918 (2008) (describing the various responses to forum shopping in the history of American procedural law).

51. Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753, 1791 (2012).

52. *See* Z.W. Julius Chen, Note, *Following the Leader:* Twombly*, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1432 (2008) (describing uniformity of procedural law in the United States).

53. *See* Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559, 567–68 (2002) (noting the impact of choice-of-law doctrine on international forum shopping and arguing that it is stronger than the impact on domestic forum shopping).

54. *E.g.*, John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 830–31 (1985) (explaining the differences between discovery in the United States and Germany).

55. *See* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 551 (2010) (analyzing this belief through empirical data).

56. Arthur R. Miller, McIntyre *in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 474 (2012).

57. *See* Russell J. Weintraub, *Methods for Resolving Conflicts-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 152–53 (stating that foreign parties flock to the United States for a variety of reasons, including "the American jury and its open-hearted generosity").

recognized abroad.[58] U.S. law also provides for punitive damages, which are rejected in most other legal systems.[59] Third, U.S. courts permit class actions that cannot be brought as aggregate cases in other countries.[60] In these cases, which can involve many thousands of class members, potential liability for defendants is amplified, providing significant incentives for settlement. Finally, U.S. lawyers are able and willing to represent plaintiffs on contingent-fee arrangements. Such arrangements are generally not permitted in other countries.[61] Plaintiffs in the United States are also not subject generally to a "loser pays" system, allowing lawyers and plaintiffs to bring claims that may not be successful without the fear of bearing both sides of litigation costs.[62]

For each of these reasons, U.S. courts, both federal and state, present a compelling choice for plaintiffs in transnational cases. These substantive and procedural advantages also illustrate why defendants would prefer to avoid litigation in the United States.

Perhaps no better example of the lengths that a defendant will go to escape U.S. courts and law (and the lengths a plaintiff will go to escape foreign courts and law) is presented in the classic case of *Piper Aircraft Co. v. Reyno*,[63] which applied the forum non conveniens doctrine in the transnational context.[64] In that case, a representative of the estates of several Scottish citizens brought a wrongful death action in California state court against two American defendants who had manufactured the engine and propellers of a plane that crashed in Scotland.[65] All victims of the crash were Scottish citizens, as were their next-of-kin.[66] A Scottish lawyer referred the next-of-kin to a plaintiff's air-crash lawyer in California, who arranged to have a

58. *See* Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards*, 55 DEPAUL L. REV. 399, 418 (2006) (finding quantitatively that U.S median recoveries for non-compensatory damages are "enormously larger" than in European courts).

59. *See* John Y. Gotanda, Essay, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507, 510 (2007) ("Most civil law countries limit recovery of damages in private actions to compensatory damages.").

60. *See generally* Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. INT'L L.J. 141, 173 (2010) (discussing the differences between the U.S. and European legal and procedural backgrounds).

61. Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551, 1555 (2012).

62. JOHN G. FLEMING, THE AMERICAN TORT PROCESS 187–234 (1988).

63. 454 U.S. 235 (1981).

64. *Id.* at 238.

65. *Id.* at 239–40.

66. *Id.*

probate court in Los Angeles appoint his legal assistant, Gaynell Reyno, as the administratrix of the estates of some of the deceased passengers.[67] Reyno, an American citizen domiciled in California, instituted wrongful death litigation in state court in Los Angeles.[68]

The defendants removed the case to a California federal court and then transferred the case to a Pennsylvania federal court, where they then moved for dismissal on forum non conveniens grounds.[69] The district court granted dismissal in favor of a Scottish forum and the Third Circuit reversed, finding that dismissal was inappropriate because Scottish law was less favorable to the plaintiff's case.[70] Even though the plaintiff would be disadvantaged by limited recovery before a Scottish court, the Supreme Court reversed the Third Circuit and held, in an opinion by Justice Marshall, that various public and private interest factors could displace a foreign plaintiff's choice of a U.S. forum.[71]

What makes this case such a good example of the transnational law market is how it illustrates the ways in which both plaintiffs and defendants engage in forum shopping. For the plaintiff, California state courts were chosen as the forum to bring their case because the substantive and procedural law of California was significantly more favorable to them than the substantive and procedural law of Scotland.[72] For the defendants, it was understandable that they would want to have the case heard in Scotland, as that is where the accident happened. They also wanted to have the case heard in Scotland in light of the fact that Reyno would not be able to pursue the cause of action there, because only next-of-kin could bring wrongful death actions.[73] Additionally, "the plaintiff's lawyer could not practice law in Great Britain," the "litigation in Scotland would not include American-style discovery," and, perhaps most significantly, "Scottish courts would not permit recovery of damages for anguish and would not employ American tort theories of liability."[74]

It was probably clear to all involved that a forum non conveniens dismissal would effectively seal victory for Piper and Hartzell. Indeed, after the Supreme Court reversed the Third Circuit, "apparently no

67. *Id.*

68. For a wonderful description of the case, see Richard D. Freer, *supra* note 5, at 971–72.

69. *Piper*, 454 U.S. at 238–40.

70. *Id.* at 238.

71. *Id.*

72. *See id.* at 240.

73. *Id.*

74. Freer, *supra* note 5, at 972.

suit was ever brought against the American manufacturers in Great Britain concerning this crash; evidently no lawyer thought the potential recovery worth the effort."[75]

This case illustrates why plaintiffs would want to forum shop into the United States in this particular case. The case, however, also shows how fora may compete for legal business. For California to permit such suits even when it has limited or no interest in the case illustrates that California is competing for legal business by creating opportunities for suits that do not exist elsewhere. For courts and litigants to view a legal system in this way illuminates that law is more than just a framework for adjudication; it is a market. Defining this transnational law market is the subject of the next section.

B. Defining the Transnational Law Market

In light of the above considerations, transnational litigation can be viewed as operating within a market for goods, where the goods are legal recovery. As Erin O'Hara and the late Larry Ribstein explain in their foundational book *The Law Market*, the market for law contains the following elements:

> First, there must be some significant demand for alternative laws as evidenced by parties' ability and willingness to take the necessary steps to avoid undesired laws and to select the laws of other states. Second, some states must be willing and able to supply the desired laws. Third, political forces must respond to enhanced choice . . . . Fourth, federal statutory or constitutional law may play a role in the competition by either facilitating or hindering party choice.[76]

Put in slightly different terms, on the demand side, plaintiffs seek law that meets their need for convenient, swift, and substantial recovery. As explained above in Part I.A, we have already seen the ways in which forum shopping illustrates the demand side of the transnational law market.

However, there is another side to the story—the supply side. States may compete to offer legal actors what they want. This means that parties engage in forum shopping in light of the fact that different jurisdictions *compete* for law and legal services. Forum shopping by litigants and forum competition by legal systems go hand in hand.[77]

75. *Id.* (citations omitted).

76. O'HARA & RIBSTEIN, *supra* note 44, at 166.

77. *See* Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1553 (2003) (understanding markets

There would be no reason for a party to undertake the Herculean efforts to shop between various jurisdictions if fora did not craft different legal rules. Different legal rules may be the result of happenstance in legal culture or concerted efforts on the part of fora to compete for legal business.[78] They may also be the result of judges in individual cases seeking justice for plaintiffs through expansive application of legal doctrines or even the result of judges wishing to cultivate prestige or reputation in hearing such cases.[79] These reasons create a supply side in the transnational law market.

Historically, the potential for a transnational law market was quite limited. A plaintiff injured in one nation would only have the law and the courts of that nation, regardless of their benefits or disadvantages, to bring her case. This was so because travel and financial limitations constrained a plaintiff's ability to file a case in a foreign jurisdiction. In today's world of increasing globalization, there is significant movement of goods, people, and services across borders. Transnational litigation "is now a sophisticated multi-billion dollar industry[] driven by the globalization of business and the possibility of securing an enormous money judgment against a multinational corporation."[80]

Today, a party can forum shop for law transnationally in the same way that it would shop for any other good or service.[81] Indeed, a party might even be encouraged to forum shop because third parties engage in litigation financing.[82] Litigation financing enables forum competition by increasing the mobility of the parties and their ability to shop for law.[83] For example, a plaintiff injured in Nigeria by a Nigerian corporation would be expected to bring her case in Nigeria under Nigerian substantive and procedural law. Today, that same

"requires an understanding of both supply and demand conditions in order to identify the resulting equilibrium").

78. *See, e.g.*, Daniel Klerman & Greg Reily, *Forum Selling* 8 (Univ. S. Cal. Ctr. for L. and Soc. Sci., Working Paper No. 14-44, 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2538857.

79. *See id.* at 25, 38.

80. Gregory H. Shill, *Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States*, 54 HARV. INT'L L.J. 459, 502 (2013).

81. O'HARA & RIBSTEIN, *supra* note 44, at 1.

82. Roger Parloff, *Have You Got a Piece of This Lawsuit?*, FORTUNE/CNNMONEY (June 28, 2011, 6:06 PM), http://features.blogs.fortune.cnn.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/.

83. *See generally* Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306 (2011) (providing an overview of this phenomenon in the context of transnational class actions).

party may be able to bring suit against a Nigerian domiciliary in another country where that domiciliary has contacts or where its agents and affiliates have contacts,[84] especially if the party can obtain litigation financing.[85]

The basic idea is that "[j]urisdictions compete to offer legal rules and adjudication procedures that attract users."[86] The jurisdiction benefits from this competition by "franchise and other taxes, fees for lawyers and other professionals, private sector opportunities for government officials and judges, and collateral benefits for other businesses in the jurisdiction such as banks and broker-dealers."[87] To return again to the Dutch example, the Dutch courts must signal that they are open and willing to hear cases involving transnational torts. In other words, they must show plaintiffs that they will supply recovery if it is sought there. In sum, litigant demand and jurisdictional supply connect to help the transnational litigant localize her case.

Legal and political forces giving plaintiffs enhanced forum choice also play a role in the transnational law market.[88] The next Part investigates these areas.

II. THE TRANSNATIONAL LAW MARKET IN ACTION

This Part illustrates the development of the transnational law market by examining recent court decisions closing U.S. federal courthouse doors to transnational cases. It examines the operation of that market through the Supreme Court's decision in *Morrison v. National Australia Bank*, which held that the anti-fraud provisions of federal securities laws do not apply to allegations of fraud occurring on foreign exchanges.[89] After explaining that decision and its aftermath, which encouraged the filing of securities claims in state and foreign fora, this Part applies the transnational law market concept to other areas of law. As to the ATS in particular, this Part points to the impact that the Supreme Court's recently issued decision

84. David Jolly & Stanley Reed, *Mixed Decision for Shell in Nigeria Oil Spill Suits*, N.Y. TIMES (Jan. 30, 2013), http://www.nytimes.com/2013/01/31/business/global/dutch-court-rules-shell-partly-responsible-for-nigerian-spills.html?pagewanted=all.

85. *See, e.g.*, Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT'L L. 159, 161–63 (2011); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1282 (2011).

86. Kaal & Painter, *supra* note 27, at 144.

87. *Id.*

88. O'HARA & RIBSTEIN, *supra* note 44, at 166.

89. 561 U.S. 247, 265 (2010).

in *Kiobel v. Royal Dutch Petroleum*, which limited the ability of foreign plaintiffs to bring transnational tort claims in the United States for injuries occurring in a foreign country,[90] may have on the transnational law market.

A. Extraterritorial Application of U.S. Federal Law

A key part of the transnational law market is that "political forces must respond to enhanced choice" and that "federal statutory or constitutional law may play a role in the [law market] by either facilitating or hindering party choice."[91] This subpart describes how the Supreme Court has responded to the transnational law market in interpreting the federal securities laws by holding that those laws, and federal law in general, are presumed not to apply extraterritorially. In so doing, this subpart is divided into three sections. First, it describes the presumption against extraterritoriality. Second, it examines the presumption's application in the *Morrison* case. Third, it examines the impact that case has had on the filing of transnational securities claims. Parts II.B and II.C then take up the question of the *Morrison* decision's impact on other federal laws.

1. The Presumption Against Extraterritoriality

Congress clearly has the power to enact legislation that applies to conduct outside the United States.[92] However, courts seek to construe ambiguous federal statutes to avoid "unreasonable interference with the sovereign authority of other nations"[93] that would result from the extraterritorial application of federal law. Courts have developed a presumption that U.S. federal law is not to apply extraterritorially absent a clear indication of congressional intent to the contrary.[94] "[U]nless there is the affirmative intention of the Congress clearly expressed," in "the language [of] the relevant Act," federal courts presume a statute does not apply to actions arising abroad.[95] The presumption against extraterritoriality "serves to protect against

90. 133 S. Ct. 1659, 1669 (2013).

91. O'HARA & RIBSTEIN, *supra* note 44, at 166.

92. *See* EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) ("Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."). This view comports with international law. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1986) (noting that a state has prescriptive jurisdiction over its own nationals and conduct that threatens its national security or is intended to have an effect within its territory).

93. F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004).

94. *Aramco*, 499 U.S. at 248.

95. *Id.* (citation omitted).

unintended clashes between our laws and those of other nations which could result in international discord."[96]

The presumption against the extraterritorial application of U.S. federal law has a long pedigree. In an opinion written by Justice Joseph Story in the early 1800s, holding that federal customs statutes could not be extended to foreign vessels outside U.S. waters, the Supreme Court explained that "[t]he laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens."[97] Reaffirming this view in the early 1900s with a slightly different formulation, Justice Oliver Wendell Holmes, Jr. observed, in refusing to apply the Sherman Act to the actions of a U.S. company in Costa Rica, that there was a "general and almost universal rule . . . that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[98] In the late twentieth century, after some years of uncertainty,[99] the Supreme Court, in an opinion by then-Chief Justice Rehnquist, rejecting the application of Title VII to alleged employment discrimination against an American citizen occurring abroad, resuscitated the doctrine in *EEOC v. Arabian American Oil Company (Aramco)*.[100] The Court explained that 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."[101] This limitation exists because "unless there is an affirmative intention of the Congress clearly expressed" to give extraterritorial statutory effect "we must presume it is primarily concerned with domestic conditions."[102] Based on these cases, the presumption does not apply where there is "an affirmative intention of the Congress clearly expressed" to extend the statute extraterritorially.[103]

The presumption requires that Congress, rather than the courts, address any extraterritorial application of U.S. law in the first instance:

96. *Id*.
97. The Apollon, 22 U.S. 362, 370 (1824).
98. American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).
99. *See, e.g.*, Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 384 (1959); Lauritzen v. Larsen, 345 U.S. 571, 573 (1953).
100. 499 U.S. 244 (1991).
101. *Id*. at 248.
102. *Id*.
103. *Id.*

> For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.[104]

The field is "delicate" because application of U.S. law to conduct on foreign soil "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs."[105] Because "the presumption [against extraterritoriality] has a foundation broader than the desire to avoid conflict with the laws of other nations,"[106] it is not limited to situations where "there is a risk of conflict between the American statute and a foreign law."[107]

The presumption is, however, simple to state but hard to operationalize because what it means to be an *extraterritorial* application of U.S. law is uncertain, especially when a U.S. domiciliary or some conduct or effect in the United States is at issue in a case. In other words, the very first question for a court to resolve is whether there is an extraterritoriality problem presented by the case at all. The next section explores how courts apply the presumption today.

2. Applying the Presumption: *Morrison v. National Australia Bank*

In *Morrison v. National Australia Bank*, the Supreme Court addressed the extraterritorial reach of the Securities Exchange Act of 1934, specifically section 10(b) of that Act and Rule 10b-5, which create liability for fraudulent activities in connection with securities.[108] National Australia Bank ("NAB") was headquartered in Australia and its shares traded on the Australian Securities Exchange as well as other foreign exchanges.[109] NAB had American Depository Receipts

104. Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957); *see also, e.g.*, McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21–22 (1963) (acknowledging that Congress must give U.S. courts express authority to decide certain matters regarding international maritime law).

105. F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004); *see also, e.g.*, *Aramco*, 499 U.S. at 248 (asserting the presumption that Congressional legislation is meant only to apply within the territorial United States "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord").

106. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 174 (1993).

107. Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 255 (2010).

108. *Id.* at 261–65. Personal jurisdiction was apparently not raised before the courts. *Id*.

109. *Id.* at 251.

("ADRs") listed on the New York Stock Exchange ("NYSE").[110] NAB purchased HomeSide Lending, Inc., a Florida mortgage servicing company, which received fees for servicing mortgages.[111] The future income from the servicing contracts was calculated into NAB's balance sheet.[112] However, in July 2001, NAB announced that it would be taking a $450 million write-down based on the decreased value of those estimates.[113] In September of that same year, NAB took another write-down of $1.75 billion.[114] Following those write-downs, NAB's share price fell substantially.[115]

Seeking to avail themselves of favorable U.S. law, a class of Australian plaintiffs, who purchased shares of NAB on an Australian stock exchange, brought suit under section 10(b) of the Exchange Act alleging that NAB "knowingly used unreasonably optimistic valuation assumptions or methodologies" in their calculation of the revenue the mortgage servicing fees would bring in.[116] The plaintiffs sued NAB and other defendants in New York federal court and claimed, under then-existing Second Circuit precedent, that the involvement of the U.S. subsidiary justified the application of section 10(b).[117]

The district court dismissed the case on the basis that it lacked subject matter jurisdiction because the acts in the United States were "at most, a link in the chain of a scheme that culminated abroad."[118] On appeal, the Second Circuit also dismissed for lack of subject matter jurisdiction under its "conduct" and "effects" tests.[119] These tests were the predominant approach for analyzing the extraterritorial application of the anti-fraud provisions of the federal securities laws up until the *Morrison* decision.[120]

The "effects" test, first announced in *Schoenbaum v. Firstbrook*,[121] looked to whether the wrongful conduct had a substantial effect within the United States or on a U.S. citizen.[122] The

110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 252.
114. *Id.*
115. *Id.*
116. Morrison v. Nat'l Austl. Bank, 547 F.3d 167, 169 (2d Cir. 2008).
117. *Id.*
118. *Id.* at 172.
119. *Id.* at 171–76.
120. *See* Merrit B. Fox, *Securities Class Actions Against Foreign Issuers*, 64 STAN. L. REV. 1173, 1232 (2012).
121. 405 F.2d 200 (2d Cir. 1968).
122. *Id.* at 206–09.

"conduct" test accepted an extraterritorial reach of the securities laws if foreign investors were harmed by conduct arising from the United States.[123] Applying these tests, the Second Circuit determined that there was not subject matter jurisdiction because the acts occurring in the United States did not comprise "the heart of the alleged fraud."[124] According to the Second Circuit, the heart of the fraud was Australia.[125]

Before the Supreme Court, the plaintiffs argued that the language of section 10(b) overcame the presumption against extraterritoriality.[126] Speaking for the Court, Justice Scalia's opinion found on the merits[127] that no statutory language expressed Congress's clear intention to have section 10(b) apply outside the territorial jurisdiction of the United States.[128] The Court rejected the "conduct" and "effects" test and instead opted to adopt a transactional approach.[129] In order for 10(b) to apply, the security must be listed on a domestic (U.S.) exchange or the transaction must be domestic.[130] Therefore, a valid 10(b) claim can arise only for shares traded on a U.S. exchange or a transaction occurring within the United States.[131] Since NAB shares were not listed on a domestic exchange, the Court affirmed the dismissal of the complaint under Rule 12(b)(6).[132]

Importantly, the language of the opinion clearly expands the presumption against extraterritoriality to all federal statutes. According to the Court, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[133] Thus, for any federal statute to overcome this presumption, Congress must clearly state its intention for the statute to apply abroad.

This statement of the presumption presents a question at the very heart of the case: *When* are the securities laws (or any other federal statute) being applied extraterritorially? For instance, what if

123. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1336–37 (2d Cir. 1972).

124. *Morrison*, 547 F.3d at 175–77.

125. *Id*.

126. Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 262–64 (2010).

127. By resolving the case on the merits, the Court disclaimed that this was a matter of subject matter jurisdiction, thus continuing a recent trend to separate subject matter jurisdiction from the merits.

128. *Morrison*, 561 U.S. at 264–65.

129. *Id.*

130. *Id.* at 266–67.

131. *Id.*

132. *Id.* at 273.

133. *Id.* at 255.

a major portion of the fraudulent activity occurred in the United States even though it was directed to Australia? In fact, the plaintiffs in *Morrison* argued as much. The plaintiffs "contend[ed] that they [sought] no more than domestic application anyway, since Florida is where HomeSide and its senior executives engaged in the deceptive conduct of manipulating HomeSide's financial models," and because other misleading statements were made in Florida.[134]

To answer this argument, the Court provided an additional gloss on the presumption against the extraterritorial application of U.S. law by requiring courts to look to the "focus" of the statute they are applying to determine its reach. In the securities context, the Court held that "the focus of the Exchange Act is not upon the place where the deception originated, but upon the purchases and sales of securities in the United States."[135] The Court then turned to the language of the Exchange Act, observing that "the objects of the statute's solicitude" were "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[136] According to the Court, "[i]t is those transactions that the statute seeks to regulate [and] it is parties or prospective parties to those transactions that the statute seeks to protect."[137]

In sum, the Court acknowledged that plaintiffs had alleged *some* U.S. activity, but this did not make their proposed application of 10(b) domestic rather than extraterritorial. In the Court's view, "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case."[138]

The benefit of the Court's approach is the advantage of a bright-line rule as opposed to a case-specific approach. However, requiring courts to look at the "focus" of each federal statute in the process of conducting an extraterritoriality analysis presents the possibility of circuit splits developing in many areas of law where the extraterritorial application of federal law is challenged. This is so because different federal courts might view the focus of a federal statute differently, depending on the context of the case. As such, the Supreme Court has not given the final word on the extraterritoriality

134. *Id.* at 266.
135. *Id.* at 249.
136. *Id.* at 267.
137. *Id.* (citations omitted).
138. *Id.* at 266.

analysis, and there is reason to believe that the Court will have to take up other extraterritoriality cases in the years to come. Litigation following *Morrison* confirms that a statute's "focus" can be hard to ascertain.

3. *Morrison*'s Impact on Transnational Securities Cases

Following the *Morrison* decision, another round of forum shopping in transnational securities cases began. In the *Morrison* case itself, the plaintiffs refiled their action in Australia. The case was later settled.[139] In other securities cases, plaintiffs sought to escape the Court's precise holding by pleading that there was a U.S. nexus under federal law or that a cause of action was available under U.S. state law. Plaintiffs also began to seek out foreign fora. Each of these developments is discussed in turn.

Federal Law. Plaintiffs focused generally on two different theories to escape the presumption against extraterritoriality announced in *Morrison* when pleading federal law in securities fraud cases. The first strategy focused on shares being "listed" on a domestic exchange, even though they are not traded domestically. Under *Morrison*, section 10(b) applies to "the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."[140] One way to read *Morrison* is that if shares are listed in the United States, then the statute is not being applied extraterritorially and the presumption does not apply.[141] Under the listing theory, plaintiffs argued that any security that is registered and listed with a domestic exchange survives *Morrison*.[142] However, a number of courts have rejected this interpretation.[143]

139. Email from George T. Conway III, Wachtel, Lipton, Rosen & Katz to author (Jan. 28, 2014) (on file with author) (email from counsel for NAB confirming the settlement).

140. *Morrison*, 561 U.S. at 273.

141. Other theories have also been put forward. *See, e.g.*, Wu v. Stomber, 883 F. Supp. 2d 233, 240 (D.D.C. 2012) (arguing that the EURONEXT exchange is actually American because it is owned by a Delaware corporation), *affirmed by* 750 F.3d 994 (D.C. Cir. 2014); MVP Asset Mgmt. v. Vestbirk, No. 2:10-cv-02483-GEB-CKD, 2012 WL 2873371, at *5–6 (E.D. Cal. July 12, 2012) (arguing that transferring funds between New York-based banking institutions establishes a domestic transaction).

142. *See, e.g.*, *In re* Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512, 525 (S.D.N.Y. 2011).

143. *See, e.g.*, *In re* Royal Bank of Scotland Grp. PLC Sec. Litig., 765 F. Supp. 2d 327, 330–31 (S.D.N.Y. 2011); *In re Vivendi*, 765 F. Supp. 2d at 525; *In re* Infineon Techs. AG Sec. Litig., No. C 04-04156 JW, 2011 WL 7121006, at *3, *6 (N.D. Cal. Mar. 17, 2011).

The second strategy sought to create an implication of a domestic transaction when the purchase order is submitted from the United States even though the ultimate purchase occurs on a foreign exchange. Here again, plaintiffs sought to escape the presumption by pleading a domestic condition. The main argument surrounds the application of the *Morrison* language holding that section 10(b) suits are appropriate "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange."[144] However, many courts have held that "[section] 10(b) would not extend to foreign securities trades executed on foreign exchanges even if purchased or sold by American investors, and even if some aspects of the transaction occurred in the United States."[145] District courts appear disinclined to subject purchases on foreign exchanges to section 10(b) merely on the basis of a purchase order signed in the United States.[146] However, a recent court of appeals decision has cracked the door open for domestic plaintiffs.[147]

To be clear, plaintiffs also face substantial procedural obstacles to pleading transnational securities actions in federal courts when the fraud complained of occurred abroad. In *Absolute Activist Value Master Fund Ltd. v. Ficeto*,[148] for instance, the Second Circuit held that "to sufficiently allege a domestic securities transaction in securities not listed on a domestic exchange," a plaintiff must "allege facts suggesting that irrevocable liability was incurred or title transferred within the United States."[149]

District courts within and outside the Second Circuit have begun to apply the *Absolute Activist* test. For example, the district court in *Bayerische Landesbank v. Barclays Capital, Inc.*[150] denied a motion to dismiss, finding the plaintiffs made "at least a plausible showing that [the notes at issue] . . . were purchased by the New York branch," which satisfied the issue of whether "irrevocable liability was incurred

144. *Morrison*, 561 U.S. at 269–70.

145. Cornwell v. Credit Suisse Grp., 729 F. Supp. 2d 620, 625–26 (S.D.N.Y. 2010).

146. Plumbers' Union Local No. 12 Pension Fund v. Swiss Reins. Co., 753 F. Supp. 2d 166, 178 (S.D.N.Y. 2010).

147. *See generally* Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60 (2d Cir. 2012) (holding that transactions involving securities that are not traded on a domestic exchange are domestic, and thus subject to section 10(b) and Rule 10b-5, if irrevocable liability is incurred or title passes within the United States); Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada, 645 F.3d 1307 (11th Cir. 2011) (holding that transfer of title of foreign securities with the United States may fall within the reach of 10(b)).

148. 677 F.3d 60 (2nd Cir. 2012).

149. *Id.* at 68.

150. 902 F. Supp. 2d 471 (S.D.N.Y. 2012).

or title was transferred within the United States" sufficiently to survive a motion to dismiss.[151] Several months earlier, the same judge dismissed the claim in *Pope Investments II, L.L.C. v. Deheng Law Firm*,[152] finding plaintiffs' allegations that they "drafted the Securities Purchase Agreement, presumably in China" without "alleg[ing] where that agreement was negotiated or signed" were insufficient to avoid dismissal.[153] Similarly, in *MVP Asset Management (USA) L.L.C. v. Vestbirk*,[154] the court dismissed plaintiffs' claims "that certain funds were transferred in between New York-based banking institutions," finding them "insufficient to establish the existence of a domestic transaction."[155] The state of the law is, therefore, presently unsettled. Nonetheless, the trend of the case law is that defendants have arguments under procedural and substantive law to short-circuit the choice of a U.S. forum.

In light of the current interpretations of the *Morrison* decision by federal courts and in light of heightened pleading standards required under federal procedural law, plaintiffs face substantial obstacles to filing transnational securities fraud claims in federal courts, but may face fewer obstacles in other fora, which are discussed below.

State Law. Besides trying to plead around *Morrison*'s precise holding in federal court under federal law, other plaintiffs have filed cases under U.S. state securities laws in federal courts or in U.S. state courts.

Two New York state court decisions highlight the trend. In *Basis Yield Alpha Fund v. Goldman Sachs Group, Inc.*,[156] a New York Supreme Court justice refused to dismiss a fraud claim brought against Goldman Sachs by an Australian hedge fund.[157] The case was originally filed in federal district court the same month the Supreme Court decided *Morrison.*[158] The federal court dismissed the suit following the *Morrison* decision, and plaintiffs filed a parallel case in state court alleging state law claims.[159] The state law claims included a

151. *Id.* at 473 (quoting Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 68 (2d Cir. 2012)).

152. No. 10 Civ. 6608(LLS), 2012 WL 3526621 (S.D.N.Y. Aug. 15, 2012).

153. *Id.* at *6–7.

154. MVP Asset Mgmt. v. Vestbirk, No. 2:10-cv-02483-GEB-CKD, 2012 WL 2873371 (E.D. Cal. July 12, 2012).

155. *Id.* at *7.

156. No. 652996/2011, 961 N.Y.S.2d 356 (N.Y. Sup. Ct. Oct. 18, 2012).

157. *Id.* at *10.

158. *Id.* at *4.

159. *Id.* (acknowledging that the S.D.N.Y dismissed the same case "on the ground that the underlying transactions were not domestic securities transactions, and, therefore, not subject to federal securities laws").

variety of common law claims, and while the court granted defendants' motion to dismiss on some of those claims, it denied the motion with respect to most of plaintiffs' claims.[160]

In *Viking Global Equities, L.P. v. Porsche Automobil Holding SE*,[161] plaintiff hedge funds allegedly sustained losses as a result of misrepresentations made by Porsche relating to its intention to acquire shares in Volkswagen AG.[162] Although plaintiffs initially survived a motion for summary judgment, the victory was short-lived. In December 2012, only a month after argument on Porsche's appeal, the First Department of New York's Appellate Division reversed the trial court, holding—in an opinion only two paragraphs long—that the plaintiffs were barred on the ground of forum non conveniens.[163]

These two cases illustrate that plaintiffs continue to face substantial obstacles even when pleading state law claims. This will encourage plaintiffs to search for other favorable law and fora to bring cases.

Foreign Law and Courts. To date, plaintiffs have had limited success under federal and state law. One might expect plaintiffs to plead foreign law in federal and state courts. Such cases would, however, be a prime candidates for forum non conveniens dismissal.[164] In light of the likelihood of dismissal, it is not surprising that plaintiffs have sought foreign courts to plead foreign law, and they have begun to see some success. In short, a transnational law market has developed where foreign courts compete through their laws for transnational securities claims.

At present, Canada and the Netherlands present favorable laws and fora for litigating transnational securities cases. Canada presents a compelling forum because it has recently enacted laws that are

160. *Id.* at *10.

161. 101 A.D.3d 640 (N.Y. App. Div. 2012).

162. *Id.* at 641.

163. *Id.* at 640–41.

164. Forum non conveniens dismissals are most likely when a foreign plaintiff brings a case in a U.S. court and pleads foreign law. *See* Donald Earl Childress III, *When* Erie *Goes International*, 105 NW. U. L. REV. 1531, 1562 (2011) (analyzing the doctrine's increased usage and impact). Other difficulties with pleading foreign law in U.S. courts would be the fact that foreign public laws are generally not enforceable in the United States and problems with the superiority element of Rule 23 of the Federal Rules of Civil Procedure. Linda J. Silberman, Morrison v. National Australia Bank*: Implications for Global Securities Class Actions* 11–14 (N.Y.U. Sch. of L., Pub. Law & Legal Theory Research Paper Series, Working Paper No. 11-41, 2011), *available at* http://papers.ssrn.com/sol3/papers cfm?abstract_id=1864786.

similar to section 10(b).[165] In addition, in 2011, the Ontario Superior Court of Justice declined to adopt a *Morrison*-like rule on global claims in *Abdula v. Canadian Solar, Inc.*[166] Canada has also handled a global class action in *Silver v. IMAX, Corp*.[167] In light of these recent cases, it is not surprising that since the *Morrison* decision, securities class action suits in Canada have been on the rise.[168]

Between 2008 and 2010, twenty-seven new securities class actions were filed in Canada.[169] In 2011, fifteen new security class actions were filed.[170] In total, forty-five securities class actions are active in Canada, totaling $24.5 billion in claims.[171] Of those claims, six are cross-border cases.[172] With this jump, it appears that many of the claims previously brought in the United States have made their way across the northern border. Filings should be expected to increase in Canadian court because:

> (1) the impact of *Morrison* on claims in U.S. courts for non-U.S. investors in non-U.S. stocks (which makes Canada a more attractive venue for these cases), (2) the growth in the Canadian class action bar in terms of both firms and lawyers bringing and defending the cases, (3) Canadian rulings granting certification of global classes and giving plaintiffs leave to proceed, and (4) the success of class counsel in reaching multi-million dollar settlements in Canada (and class-counsel fee awards).[173]

The Netherlands has also recently opened its doors to transnational litigation. For example, in 2005, the Netherlands enacted the *Wet collectieve afwikkeling massaschade* ("Collective Settlement of Mass Damages Act," or "WCAM"), a statute that allows Dutch courts to settle—but not litigate—transnational disputes

165. *See* Ontario Securities Act, R.S.O. 1990, c. S.5 (Can.), *available at* http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90s05_e.htm.

166. 2011 ONSC 5105 para. 45 (Can.).

167. 2009 CanLII 72334 (Can. Ont. Sup. Ct. J.).

168. Ashby Jones, *Lawyers Looking to Canada for Shareholder Litigation*, WALL ST. J., Feb. 27, 2012, at B4.

169. John E. Black, Jr. & Ellen D. Jenkins, *D & O Litigation Trends in 2010*, IRMI (Mar. 2011), http://www.irmi.com/expert/articles/2011/black03-directors-officers-insurance.aspx.

170. Bradley A. Heys & Mark L. Berenblut, *Trends in Canadian Securities Class Actions: 2011 Update*, NERA 1 (Jan. 31, 2012), http://www.nera.com/content/dam/nera/publications/archive2/PUB_Recent_Trends_Canada_2011_0412.pdf.

171. *Id.*

172. *Id.* at 6.

173. Kaal & Painter, *supra* note 27, at 188.

on a class-wide, opt-out basis.[174] The WCAM is open not only to Dutch citizens, but also to citizens of other countries.[175] In 2010, two months after *Morrison*, the Amsterdam Court of Appeals declared "an international collective settlement binding in a case where none of the potentially liable parties and only some of the potential claimants are domiciled in the Netherlands."[176] The potential for forum shopping to the Netherlands is obvious: such suits could involve plaintiffs whose securities transactions occurred both within and outside the United States. Because the Netherlands allows for class actions in limited circumstances and because its substantive law recognizes a variation of the fraud-on-the-market theory,[177] suing in the Netherlands might be highly attractive.[178]

In sum, contracting federal law has encouraged plaintiffs to seek state and foreign law and, in some cases, foreign courts, to bring their cases. In light of the foregoing, there is every reason to believe that this trend will continue in the years to come. As such, it will create the possibility of not only regulatory competition between fora but also regulatory overlap as various legal regimes are asked to adjudicate transnational cases. Transnational securities cases are but one example of this trend. The next subpart explores the possibility of increased regulatory competition in other areas of law.

B. The Presumption's Impact on U.S. Federal Law

Cases filed in U.S. courts under the federal securities laws are not the only transnational cases impacted by the *Morrison* decision. Courts have also used the extraterritoriality rationale of *Morrison* in analyzing federal Racketeer Influenced and Corrupt Organizations

174. *See* Deborah R. Hensler, Keynote, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 310–14 (2011) (discussing the 2005 Dutch Act).

175. *See* Madeleine Giansanti et al., *Europe*, 44 INT'L LAW. 645, 652 (2010) (noting that two recent settlements in Dutch courts "demonstrate that WCAM has truly global potential to settle class claims, at least against Dutch defendants").

176. *Interim Ruling by Amsterdam Court of Appeal on International Jurisdiction in Collective Settlement Cases*, NAUTADUTILH (Nov. 18, 2010), http://www.newsletter-nautadutilh.com/EN/xzine/class_actions/interim_ruling_by_amsterdam_court_of_appeal_on_international_jurisdiction_in_collective_settlement_cases.html?cid=4&xzine_id=4488.

177. *See* Shelley Thompson, *The Globalization of Securities Markets: Effects on Investor Protection*, 41 INT'L LAW. 1121, 1139–41 (2007) (comparing U.S. and Dutch securities laws).

178. Other fora also present viable alternatives. *See generally* Samuel Issacharoff & Thad Eagles, *The Australian Alternative: A View from Abroad of Recent Developments in Securities Class Actions*, 38 U. NEW S. WALES L.J. 1 (2015) (discussing Australia's favorable class action regime for securities cases in particular).

Act ("RICO") cases.[179] Following *Morrison*, the Second Circuit has held that because "RICO is silent as to any extraterritorial application," it does not have any "extraterritorial reach."[180] Courts have taken two principal approaches to determining whether an alleged RICO violation is domestic or foreign. The majority of courts to address the issue look at the location of the alleged RICO enterprise itself, as opposed to the location of the predicate acts of racketeering. For instance, Judge Rakoff explained the rationale for this approach in *Cedeño v. Intech Group, Inc.*[181]:

> RICO is not a recidivist statute designed to punish someone for committing a pattern of multiple criminal acts. Rather, it prohibits the use of such a pattern to impact an enterprise . . . . Thus, the focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity.[182]

Courts that have looked at the location of the alleged RICO enterprise have generally applied a "nerve center" test. Under this test, an alleged RICO violation is deemed to occur at "the place where overall corporate policy originates or the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objectives."[183] In analyzing the territoriality of an enterprise in a RICO complaint, the court should focus on that enterprise's decisions that effectuate the relationships and common interests of its members.[184] A minority of courts that have analyzed the application of *Morrison* to RICO have

179. 18 U.S.C. § 1961 (2012).

180. Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 32–33 (2d Cir. 2010) (quoting North South Finance Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996)).

181. 733 F. Supp. 2d 471 (S.D.N.Y. 2010), *aff'd sub nom.* Cedeño v. Castillo, No. 10-3861, 2012 WL 205960 (2d Cir. Jan. 25, 2012).

182. *Id.* at 473–74. For similar cases on point, see Aluminum Bahrain B.S.C. v. Alcoa Inc., No. 08-299, 2012 WL 2093997, at *2–4 (W.D. Pa. June 11, 2012); Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc., 871 F. Supp. 2d 933, 939 n.7 (N.D. Cal. 2012); Sorota v. Sosa, 842 F. Supp. 2d 1345, 1350 (S.D. Fla. 2012); *In re* Le-Nature's, Inc., No. 9-1445, 2011 WL 2112533, at *2–3 (W.D. Pa. May 26, 2011); *In re* Toyota Motor Corp., 785 F. Supp. 2d 883, 914 (C.D. Cal. 2011); United States v. Philip Morris USA, Inc., 783 F. Supp. 2d 23, 28–29 (D.D.C. 2011); European Cmty. v. RJR Nabisco, Inc., No. 02-5771, 2011 WL 843957, at *4–6 (E.D.N.Y. Mar. 8, 2011), *vacated*, 764 F.3d 129, 130 (2d Cir. 2014).

183. Royal Indem. Co. v. Wyckoff Heights Hosp., 953 F. Supp. 460, 462–63 (E.D.N.Y. 1996) (citations omitted).

184. *Id.*

looked at the location of the predicate acts of racketeering in addition to the location of the alleged RICO enterprise.[185]

One recent decision adopts a different approach. In *European Community v. RJR Nabisco, Inc.*,[186] the Second Circuit held that "RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate."[187] The court went on to hold that when the predicate statute itself manifests an "unmistakable congressional intent to apply extraterritorially, RICO will apply to extraterritorial conduct, too, but only to the extent that the predicate would."[188] In light of these diverging opinions, there is reason to believe that the Supreme Court will have to resolve the split in the near future.

Another area of law impacted by *Morrison* is fraud actions under the Commodities Exchange Act ("CEA").[189] While the CEA resembles federal securities law, it does not have the same language of section 10(b) that limits claims to the "purchase or sale of a security."[190] However, two courts have found that the logic of *Morrison* extends to actions brought under the CEA and have required the plaintiff's claims to allege facts that would satisfy the application of the CEA under *Morrison* and *Absolute Activist*'s irrevocable liability test.[191] In both cases, the plaintiffs failed to plead sufficient facts to show that they incurred irrevocable liability within the United States.[192] These cases show the extent that *Morrison*'s test and the development of case law applying *Morrison*'s principles can affect other areas that are similar to the federal securities laws originally at issue.

Morrison has also impacted the antiretaliation provisions of the Dodd-Frank Act. In *Asadi v. G.E. Energy (USA), L.L.C.*,[193] Asadi, a duel U.S. and Iraqi citizen, was a U.S.-based employee for G.E. Energy but was temporarily relocated to Jordan.[194] Asadi claimed he learned that G.E. Energy was engaged in corrupt actions during a

185. *See, e.g.*, Chevron Corp. v. Donziger, 871 F. Supp. 2d 229, 242 n.50, 245 (S.D.N.Y. 2012) (holding that while the location of the RICO enterprise may be relevant, a court should also look at where the pattern of racketeering is alleged to have occurred).

186. 764 F.3d 129 (2d Cir. 2014).

187. *Id.* at 136.

188. *Id.*

189. 7 U.S.C. § 60 (2012).

190. *Id.*

191. *See* Loginovskaya v. Batratchenko, 936 F. Supp. 2d 357, 374 (S.D.N.Y. 2013); Starshinova v. Batratchenko, 931 F. Supp. 2d 478, 487 (S.D.N.Y. 2013).

192. *Loginovskaya*, 936 F. Supp. 2d at 375; *Starshinova*, 931 F. Supp. 2d at 487.

193. No. 4:12-345, 2012 WL 2522599 (S.D. Tex. June 28, 2012).

194. *Id.* at *1.

negotiation for a lucrative Joint Venture Agreement with the Iraqi government.[195] The alleged corruption involved the hiring of a woman "closely associated" with an Iraqi official.[196] After learning of the hiring, Asadi reported the potential corruption to his superiors. He was later fired and brought suit.[197] In analyzing his claim, the court found that Dodd-Frank was silent as to the extraterritorial application of the whistleblower provisions.[198] Asadi argued that he was a U.S. employee and that the termination invoked U.S. at-will employment law, but the court held that the termination was in Jordan, relating to employment in Jordan, and the statute's language was insufficient to bring the conduct within the Anti-Retaliation Provision of Dodd-Frank.[199] Other cases have followed this reasoning.[200] Thus, even if an employee is under a U.S. employment contract, if his whistleblower actions occur abroad, he may find it difficult to apply the protections of Dodd-Frank after *Morrison.*

The *Morrison* reasoning could also have an impact in antitrust, employment, and environmental cases.[201] In light of the limited ability for plaintiffs to plead transnational cases under federal law, it is likely that plaintiffs will seek other fora in U.S. state and foreign courts.

The next subpart focuses on the Supreme Court's recently issued opinion in *Kiobel* and explores how the transnational law market may respond to it.

C. Current and Evolving Impact: The Alien Tort Statute

The effect of *Morrison*'s revival of the presumption against extraterritoriality is evidenced by the Supreme Court's recent opinion in *Kiobel*.[202] In that case, the court addressed whether the ATS provided a cause of action for violations of the law of nations that occur in a foreign country.[203] The plaintiffs, residents of Ogoniland, Nigeria, brought suit against Shell Petroleum Development Company of Nigeria ("SPDC"), incorporated in Nigeria, and its parents: Royal Dutch Petroleum Company, incorporated in the Netherlands, and

195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at *4.
199. *Id.* at *5.
200. *See, e.g.*, Liu v. Siemens A.G., 978 F. Supp. 2d 325, 329 (S.D.N.Y. 2013).
201. Stephen R. Smerek & Jason C. Hamilton, *Extraterritorial Application of United States Law after* Morrison v. National Australia Bank, 5 NO. 1 DISP. RESOL. INT'L 21, 30–33 (2011).
202. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662–63 (2013).
203. *Id.* at 1662.

Shell Transport and Trading Company, incorporated in England.[204] The complaint alleged that SPDC utilized the Nigerian government to "violently suppress" environmental protests by the town.[205] The Nigerian military and police forces allegedly attacked villages in the area "beating, raping, killing, and arresting residents and destroying or looting property."[206] The complaint also alleged that SPDC "aided and abetted" the Nigerian government by allowing the military to use SPDC property as a staging ground for these attacks, as well as providing food, transportation, and compensation to the military.[207] The plaintiffs were granted political asylum by the United States where they are now legal residents.[208] They brought suit against SPDC alleging numerous law of nations violations stemming from the attacks in Ogoniland.[209]

When the Supreme Court initially took the case, the Court was asked to decide whether corporations were subject to suit under the ATS.[210] However, after oral argument, the Court took the atypical step of setting the case for re-argument and requested additional briefing on the question of whether the ATS could be applied extraterritorially.[211] After this second round of briefing and argument, the Court held that the presumption against extraterritoriality applied to the ATS.[212] According to the Court, "all the relevant conduct took place outside the United States," and the presumption could not be rebutted.[213] Even if the ATS claims "touch and concern" conduct within the United States, that conduct "must do so with sufficient force to displace the presumption against extraterritorial application."[214] The fact that a corporation is present in the country would not be sufficient.[215] Thus, the Court has substantially limited the ATS's application to most transnational tort claims, allowing it only where this "sufficient force" exists.[216] Indeed, since the *Kiobel* decision, most federal courts adjudicating cases have dismissed ATS

204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 1662–63.
208. *Id.* at 1663.
209. *Id.*
210. *Id.*
211. Lyle Denniston, Kiobel *to Be Expanded and Reargued*, SCOTUSBLOG (Mar. 5, 2012, 2:01 PM), http://www.scotusblog.com/2012/03/kiobel-to-be-reargued/.
212. *Kiobel*, 133 S. Ct. at 1669.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*

claims because the plaintiffs had not plausibly pled allegations involving significant unlawful activity in the United States.[217]

In light of *Kiobel*'s holding, plaintiffs might seek out U.S. state law—in federal and state courts—and foreign law—in foreign courts—to plead transnational tort claims. In fact, many plaintiffs had already included state law claims in ATS litigation prior to *Kiobel*.[218] These claims appear in the form of the torts of wrongful death, battery, and assault—contrasted with their ATS counterparts of summary execution and torture.[219]

Two cases are of note in predicting what future transnational tort litigation may look like in state court. In *Doe v. Unocal Corp.*,[220] plaintiffs refiled the pendent state claims arising from a pipeline project in Burma that were dismissed following the ATS dismissal in district court.[221] The case went through discovery in state court and eventually settled prior to trial.[222] In *Doe v. Exxon Mobil Corp.*,[223] the D.C. Circuit ruled that the ATS claims could proceed to trial along with the state law tort claims.[224] After sua sponte staying proceedings while the Supreme Court considered *Kiobel*, it subsequently vacated its order as to the ATS claims and remanded the case to the district court for consideration of the ATS claims in light of *Kiobel*.[225] In so doing, it expressly preserved the parts of its prior opinion that permitted the state law tort claims to proceed.[226] In those parts of the

217. *See, e.g.*, Mujica v. AirScan Inc., 771 F.3d 580, 591–92 (9th Cir. 2014); Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1189–91 (11th Cir. 2014); Balintulo v. Daimler AG, 727 F.3d 174, 191–92 (2d Cir. 2013).

218. Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 15 (2013).

219. *Id.*

220. 963 F. Supp. 880 (C.D. Cal. 1997) [hereinafter *Unocal I*], *aff'd in part*, *rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

221. *Id.* at 883–84, 892 (denying defendants' motion to dismiss); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1312 (C.D. Cal. 2000) [hereinafter *Unocal II*] (granting defendants' motion for summary judgment), *aff'd in part*, *rev'd in part*, 395 F.3d 932, 962–63 (9th Cir. 2002) (consolidating Unocal's motions in *Unocal I* and *Unocal II*, reversing summary judgment and remanding for trial).

222. *See Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6. For further explanation of the procedural history of both the federal and state actions, see also Doe v. Unocal *Case History*, EARTHRIGHTS INT'L, http://www.earthrights.org/legal/doe-v-unocal-case-history (last visited Feb. 24, 2015).

223. 654 F.3d 11 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013) (mem.).

224. *Id.* at 69–70, 71.

225. *See generally* Doe v. Exxon Mobil Corp., 527 F. App'x 7 (D.C. Cir. 2013) (mem.) (vacating and remanding in light of *Kiobel*).

226. Rich Samp, *Post-*'Kiobel' *Human Rights Suits vs. Corporations: A New Reliance on Common Law?*, FORBES (Aug. 19, 2013, 9:08 AM), http://www.forbes.com/sites/wlf/2013/08/19/post-kiobel-human-rights-suits-vs-corporations-a-new-reliance-on-common-law/.

opinion, the court determined under choice of law rules that the law of Indonesia would apply.[227] The case is presently pending before the D.C. federal district court.[228] These cases illustrate how plaintiffs may find their way into U.S. courts using state tort law as opposed to ATS causes of action.[229]

Notwithstanding *Kiobel*, it is possible for plaintiffs to plead state law claims in federal court under diversity[230] or supplemental jurisdiction.[231] A plaintiff would also be able to plead foreign law under these same doctrines.

Plaintiffs might, however, prefer to bring suit under foreign law in foreign courts. As mentioned in the Introduction, a recent transnational tort case filed against a Dutch corporation for torts allegedly committed in Nigeria just reached a favorable judgment in the Netherlands. On January 30, 2013, a Nigerian subsidiary of Shell was held liable for damages in Nigeria based on Nigerian tort law.[232] At least two other countries, the United Kingdom and Canada, also present viable fora for such cases in the years to come.

Recently, courts in the United Kingdom have resolved numerous ATS-like disputes. The results of these cases vary. One case in particular has reportedly settled, in part, for perhaps as much as $400 million.[233] Other cases have settled for many millions of dollars, including one case for $48 million.[234] According to one keen observer of these trends, "the rate of settlement in the U.K. court is [] impressive" because "80% (four out of five) of its U.K. business human rights disputes litigated to a full conclusion [in the United Kingdom] have resulted in a payout. The comparable figure for U.S. corporate alien tort suits is 9.5%."[235]

The continuing impact of the *Kiobel* decision on the filing of transnational tort cases in the United States and elsewhere will take time to evaluate, depending on how plaintiffs and courts respond to the Court's *Kiobel* decision.

227. *Exxon Mobil Corp.*, 654 F.3d at 70.

228. Doe v. Exxon Mobil Corp., No. 1:11-CV-0912, 2014 WL 4745256 (D.D.C. Sept. 23, 2014).

229. For a more complete review of state law claims in human rights litigation, see generally Hoffman & Stephens, *supra* note 218.

230. *See* 28 U.S.C. § 1332 (2012).

231. *See id.* at § 1367.

232. *See supra* notes 28–30 and accompanying text.

233. Sylvia Pfeifer & Jane Croft, *Shell's Nigeria Pay-Out Could Top 250m*, FIN. TIMES (Aug. 3, 2011, 7:21 PM), http://www.ft.com/cms/s/0/4209f536-bde8-11e0-ab9f-00144feabdc0.html#axzz3Pf1hpUjN.

234. Goldhaber, *supra* note 32, at 131.

235. *Id.*

As explained above, recent Supreme Court decisions restricting the extraterritorial application of U.S. federal law in the securities and ATS contexts have encouraged plaintiffs to file transnational cases under state and foreign law and, in some cases, in state and foreign fora. These cases show the impact that limiting the extraterritorial application of U.S. federal law can have on litigant choice. In the next Part, this Article examines other areas that point to a restrictive ethos in federal procedural and substantive law. These developments will also encourage litigants to seek other law and other fora to file transnational cases.

III. RESTRICTING TRANSNATIONAL CASES

The transnational law market described above is not simply the reaction to one or two Supreme Court decisions regarding the extraterritorial application of U.S. federal law. Rather, there is a significant movement generally in U.S. law towards restricting federal law and federal courts that will impact transnational litigation.[236] In this Part, the Article takes a more systemic approach and analyzes the array of procedural devices, such as personal jurisdiction, pleading doctrine, class actions, and doctrines of discretion, utilized by U.S. federal courts to limit transnational cases. To the extent that these decisions constrict the ability of plaintiffs to avail themselves of U.S. federal fora in transnational cases, there will be an opportunity for other fora to compete to adjudicate and regulate transnational harms, which will be discussed in Part IV.

A. Restricting Personal Jurisdiction

As already noted, one of the key reasons why transnational plaintiffs are drawn to the United States is the belief that a liberal personal jurisdiction doctrine affords them the opportunity to bring suit here.[237] The Supreme Court, however, has made it much more difficult to file transnational cases in U.S. courts when the defendant does not cause a harm or is not personally served within the forum state's borders.

In January 2014, the Court handed down its decision in *Daimler AG v. Bauman*.[238] In that case, the Court was asked to decide whether

236. One scholar has termed this trend as "litigation isolationism," and has counseled against its expansion. *See generally* Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2546351.

237. *See* Whytock, *supra* note 10, at 484.

238. 134 S. Ct. 746 (2014).

Daimler, a German corporation, could be sued based on general jurisdiction in California for alleged harms committed by one of its subsidiaries in Argentina during that country's "Dirty War."[239] While the plaintiffs conceded that Daimler did not have the requisite contacts with California itself to sustain general jurisdiction, they creatively argued that another of Daimler's subsidiaries, Mercedez-Benz USA, could have its contacts with California attributed to Daimler to establish general jurisdiction.[240] Surprisingly, the Court did not reach the question of attribution but took the opportunity to restate its view established in *Goodyear Dunlop Tires Operations, S.A. v. Brown*[241] that general jurisdiction is only appropriate in a corporate defendant's state of incorporation, principal place of business, or in an exceptional case in some other forum where the defendant is "essentially at home."[242]

In *Goodyear*, two North Carolina residents were killed in a bus accident in Paris, France, due to an allegedly defective tire manufactured in Turkey by a foreign subsidiary of Goodyear.[243] Plaintiffs argued that the North Carolina state court had general jurisdiction over the foreign defendants because the defendants sold their product in the United States, including in North Carolina where tens of thousands of tires were sent to the forum state between 2004 and 2007.[244] The Supreme Court reversed the court below, holding in a unanimous opinion that a corporation is only subject to suit in its principal place of business, state of incorporation, or another place where the corporation is "essentially at home in the forum state."[245]

In another case argued and decided the same day, *J. McIntyre Machinery, Ltd. v. Nicastro*,[246] a New Jersey plaintiff was injured by a metal-shearing machine while working in New Jersey.[247] The machine was manufactured in England, where the defendant was incorporated, and distributed in the United States through the English manufacturer's independent Ohio distributor.[248] Plaintiffs argued that the New Jersey state court had specific jurisdiction because the product was purposefully directed at the U.S. market and caused an

239. *See id.* at 748.
240. *See id.* at 751.
241. 131 S. Ct. 2846, 2850 (2011).
242. *Bauman*, 134 S. Ct. at 761.
243. *Goodyear,* 131 S. Ct. at 2850.
244. *Id*. at 2852.
245. *Id*.
246. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).
247. *Id.* at 2786.
248. *Id.* at 2786, 2796.

injury in New Jersey.[249] Here again, the Court reversed the lower court, holding in a plurality opinion that the defendant must purposefully target a specific U.S. state to be subject to the forum's jurisdiction.[250] Because the manufacturer sold the machine through a U.S. distributer that sold throughout the United States and did not specifically target the forum state, jurisdiction was found wanting.[251]

In these cases, the Court constricted the ability of plaintiffs to bring transnational cases as a matter of personal jurisdiction in the United States. In short, it will be much harder in years to come for foreign defendants in transnational cases to be sued in the United States, both in federal and state courts. Especially with regard to foreign corporations, plaintiffs will need to find a forum in the United States where there are substantial business contacts, such as in New York for most companies, given stocks and corporate presence. However, such an approach to personal jurisdiction, known as "doing business" jurisdiction, is presently unsettled.[252] In the alternative, plaintiffs will have to bring suit against U.S. subsidiaries of foreign corporations and argue that the jurisdictional contacts of the subsidiary should be attributed to the parent.[253] This area is equally unsettled.[254]

Even in these cases, as discussed below, the forum non conveniens doctrine may continue to limit the availability of a U.S. forum. It appears, therefore, that transnational cases will be subject to personal jurisdiction in U.S. courts only in cases where the foreign defendant is "essentially at home" there or where the defendant purposefully targets the precise forum where the harm occurs, which means that the case involves a transnational defendant that has caused harm in a particular U.S. forum. The likelihood of filing a *Kiobel* or *Morrison* case—cases where there are foreign plaintiffs and foreign defendants being sued for foreign harms—is substantially limited in light of this recent case law. As discussed in the next subpart, other recent developments in federal procedural law also limit these types of cases.

249. *Id*. at 2790.

250. *Id*. at 2790–91.

251. *Id*.

252. *See generally* Meir Feder, Goodyear*, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671 (2012) (explaining doing business jurisdiction and pointing to its viability in light of recent Supreme Court cases).

253. *See, e.g.*, Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 920 (9th Cir. 2011), *rev'd*, 124 S. Ct. 746 (2014).

254. *See* Donald Earl Childress III, *General Jurisdiction After* Bauman, 66 VAND. L. REV. EN BANC 203, 204–05 (2014).

B. Restricting Pleading Doctrine

Recall that one reason why plaintiffs would bring suit in the United States is the belief that liberal discovery will help the plaintiff develop his case or perhaps encourage a settlement. Federal courts are also constricting access to discovery because a plaintiff is only entitled to discovery if she can survive a motion to dismiss. However, heightened pleading standards will limit the general availability of discovery in many transnational cases.

Through two recent cases, *Bell Atlantic v. Twombly*[255] and *Ashcroft v. Iqbal*,[256] the Court has instituted a plausibility pleading standard for cases filed in federal court. Rule 8(a)(2) of the Federal Rules of Civil Procedure states that "a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief."[257] After *Twombly* and *Iqbal*, the "short and plain statement" standard became harder to meet. Now, in general, a plaintiff must plead sufficient facts, accepted as true, and state a claim that is "plausible on its face."[258] In order for that claim to be plausible, the facts must be sufficient for the court to draw reasonable inferences that the defendant is liable for the alleged conduct.[259] Furthermore, those facts need to show more than a "sheer possibility" that the defendant is liable and the facts cannot be "merely consistent with a defendant's liability."[260] Thus, plaintiffs must pass a higher bar in the pleading stage, "nudg[ing their] claims . . . across the line from conceivable to plausible."[261]

Lest there be any doubt, courts are requiring heightened pleading standards in transnational cases. After *Morrison* and *Kiobel*, for instance, courts struggled to determine what facts plaintiffs needed to plead in order to determine if the defendant's conduct was extraterritorial. In the securities context, the leading case is *Absolute Activist Value Master Fund v. Ficeto*.[262] The Second Circuit determined that *Morrison* required claims to fall within two categories to be domestic transaction subject to federal securities laws.[263] First, transactions involving securities traded on domestic

255. 550 U.S. 544 (2007).
256. 556 U.S. 662 (2009).
257. FED. R. CIV. P. 8(a)(2).
258. 556 U.S. at 678.
259. *Id.*
260. *Id.*
261. *Id.* at 680 (internal quotation marks omitted).
262. 677 F.3d 60 (2d Cir. 2012).
263. *Id.* at 66.

exchanges would suffice.[264] The second prong required the transaction itself to be domestic.[265] For a transaction to be domestic and outside of *Morrison*'s extraterritoriality analysis, the complaint must allege that "irrevocable liability was incurred or that title was transferred within the United States,"[266] that is, "when the parties become bound to effectuate the transaction."[267]

Several courts have adopted this approach to cases post-*Morrison*.[268] Thus in order to survive a motion to dismiss, the pleading must "allege facts leading to the plausible inference of a domestic transaction."[269] This approach brings its own difficulties for plaintiffs. In a world of transnational business, plaintiffs alleging fraud must spend the resources to find sufficient facts to plead that the transaction was domestic under the "irrevocable liability" test.

The same pleading difficulties can be seen in the ATS context as well. In *In re South African Apartheid Litigation*,[270] the court found it was possible for the plaintiffs to plead a private act of apartheid with the "requisite degree of specificity."[271] However, such a claim was not widely recognized, and the court refused to allow it.[272] The difficulty in pleading with specificity is that ATS litigation requires the tort be recognized as a violation of the law of nations.[273]

Therefore, plaintiffs face two difficulties in pleading ATS claims. First, plaintiffs must develop a theory (and elements) to sustain a cause of action under a tort in violation of the law of nations, and they must also do so with sufficient particularity. Second, plaintiffs must plead "that the actions of [the foreign defendants] touch and concern the United States with sufficient force to rebut the presumption

264. *Id.*
265. *Id.*
266. *Id.* at 62.
267. *Id.* at 67.
268. *See* SEC v. Chicago Convention Ctr., 961 F. Supp. 2d 905, 917 (N.D. Ill. 2013) ("The Second Circuit has provided guidance on what constitutes a domestic purchase or sale for purposes of the *Morrison* transactional test."); MVP Asset Mgmt. (USA) LLC v. Vestbirk, No. 2:10-cv-02483-GEB-CKD, 2013 WL 1726359, at *2 (E.D. Cal. Mar. 22, 2013) (utilizing the Second Circuit's test to determine if the transaction was domestic). *But see* Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada, 645 F.3d 1307, 1310–11 (11th Cir. 2011) (determining that the second prong would only be satisfied if the transaction occurred within the territorial reach of the United States).
269. Arco Capital Corp. v. Deutsche Bank AG, 949 F. Supp. 2d 532, 541 (S.D.N.Y. 2013) (internal quotation marks omitted).
270. 617 F. Supp. 2d 228 (S.D.N.Y. 2009).
271. *Id.* at 251.
272. *Id.* at 252.
273. *See id.* at 257.

against the extraterritorial reach of the ATS."[274] In compliance with *Iqbal* and *Twombly*, the facts they plead must also be plausible and not mere conclusions or assertions. This difficulty may cause ATS plaintiffs to forum shop away from U.S. federal courts in search of fora where pleadings need not comport with such stringent standards. Alternative courts include state and foreign courts.

As such, plaintiffs will not only face significant hurdles in pleading their claims, but also may not have the benefit of discovery in hopes of ferreting out wrongdoing.[275] Similarly, defendants will have increased bargaining position when it comes to settlement decisions in light of the fact that discovery, and the costs associated with it, might be avoided.

C. Restricting Class Actions

The possibility of aggregate litigation is another reason why transnational plaintiffs would seek out U.S. courts. Class actions are, however, being restricted in the United States. To begin with, Congress has limited the reach of class actions through the Class Action Fairness Act ("CAFA"),[276] which amended the federal diversity statute to allow parties to move class actions out of state court and into federal court.[277] While the reasons for passing this statute were many, a significant reason was the belief that sending state class actions to federal judges makes class certification less likely.[278]

Even putting aside CAFA, class action certification is increasingly subject to heightened standards in light of the Court's recent decision in *Wal-Mart v. Dukes*.[279] In *Dukes*, the court reviewed the class certification of a case against Wal-Mart, the nation's largest private employer, brought by more than one and a half million female employees who alleged gender discrimination under Title VII over pay and promotions.[280] The plaintiffs alleged the discrimination was

274. *In re* S. Afr. Apartheid Litig., Nos. 02 MDL 1499, 02 Civ. 4712, Civ. 6218, Civ. 1024, 03 Civ. 4524, 2013 WL 6813877, at *2 (S.D.N.Y. Dec. 26, 2013).

275. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009) ("[Rule 8] does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."). A plaintiff must have sufficient facts to allege the wrongdoing in order to reach discovery where the proof of such facts can be found. The simple conclusion will no longer suffice.

276. 28 U.S.C. § 1711 (2012).

277. *Id.*

278. *See* Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1912–13 (2006).

279. 131 S. Ct. 2541 (2011).

280. *Id.* at 2547.

common to all Wal-Mart female employees, based on a "corporate culture" that allowed bias against women.[281] The Court took the case to review whether the class complied with Federal Rule of Civil Procedure 23(a) and its four requirements: numerosity, commonality, typicality, and adequate representation.[282]

The case turned on the commonality requirement—whether the plaintiffs showed that "there are questions of law or fact common to the class."[283] Commonality requires that every class member "suffer[ed] the same injury," beyond merely a violation under the same law.[284] The requirement means that the claims "must depend upon a common contention," such as bias by the same supervisor.[285] Furthermore, that common contention must be capable of class-wide resolution—the contention's resolution will resolve an issue central to every individual claim "in one stroke."[286] A class-action plaintiff cannot merely plead a case meeting the Rule 23 requirements.[287] The Court requires that the plaintiff must prove that the requirements are met "in fact."[288]

Here, the Court determined the record showed only one common policy—local supervisor discretion over employment matters, which would establish a discriminatory environment.[289] However, the Court concluded that a local discretionary policy worked against the plaintiff's contention that there was a common employment practice, which the plaintiffs needed to meet the commonality requirement.[290] Furthermore, even recognizing that such claims "can exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common."[291] The Court found that there was "no convincing proof" of a company-wide discriminatory policy.[292] Because the plaintiffs could not show that the class certification would lead to a common

281. *Id.* at 2548.
282. *Id.* at 2550.
283. *Id.* at 2550–51.
284. *Id.* at 2551 (quoting Gen. Telephone Co. of S.W. v. Falcon, 457 U.S. 147, 157 (1982)).
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.* at 2554.
290. *Id.*
291. *Id.* (internal quotation marks omitted).
292. *Id.* at 2556–57.

question on such a policy, the Court reversed the certification of the class.[293]

Dukes restricted the use of the class-action vehicle unless the plaintiff class can meet this rigorous requirement. The class cannot merely plead that the Rule 23 requirements are met, but must also show they are met with "convincing proof" if they are to survive as a class.[294] Because of these requirements, it is likely that transnational plaintiffs will face heightened procedural bars to filing their cases as class actions in the United States. Other more flexible procedural doctrines also present themselves as obstacles for transnational plaintiffs and are discussed in the next subsection.

D. Restrictive Doctrines of Discretion

Courts might also use other doctrines to limit transactional cases. There has been a significant increase in forum non conveniens decisions in federal courts in recent years. Between 1990 and 2006, there were roughly 691 (about 43 per year) reported transnational forum non conveniens decisions by federal courts.[295] Overall, the courts dismissed in favor of a foreign forum in about 50% of these cases.[296] In cases involving a foreign plaintiff, the dismissal rate was higher, at 63%.[297] Foreign plaintiffs are "twice as likely to have their suits dismissed" compared to domestic plaintiffs.[298]

Forum non conveniens motions may increase in future years in light of recent Supreme Court precedent encouraging the doctrine's

293. *Id.* at 2561.

294. *See* Kassman v. KPMG LLP, 925 F. Supp. 2d 453, 464 (S.D.N.Y. 2013) (determining that a *Dukes* argument was premature at the motion to dismiss or strike stage because the relevant inquiry is whether it was plausible); *see also* Calibuso v. Bank of Am. Corp., 893 F. Supp. 2d 374, 390 (E.D.N.Y. 2012) ("[I]t is plausible that plaintiffs will come forth with sufficient evidence at the class certification stage to demonstrate commonality."); Barghout v. Bayer Healthcare Pharms., No. 11-cv-15761, 2012 WL 1113973, at *10, *12 (D.N.J. Mar. 30, 2012) (finding that a motion to dismiss should be denied where plaintiffs had plausibly alleged a disparate impact claim based on company-wide promotion and pay policies).

295. Christopher A. Whytock, *Politics and the Rule of Law in Transnational Judicial Governance: The Case of Forum Non Conveniens* 15 (Feb. 28, 2007) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969033.

296. *Id.* at 16.

297. Whytock, *supra* note 10, at 503. This is likely accounted for by the fact that in conducting the forum non conveniens analysis, a court may give less deference to a foreign plaintiff's choice of forum under Supreme Court case law. *See* Piper Aircraft v. Reyno, 454 U.S. 235, 255–56 (1981) ("When the home forum [is] chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign . . . this assumption is . . . less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.").

298. Whytock, *supra* note 10, at 503–04.

use.[299] Besides increased invocation of forum non conveniens, many federal district courts have applied other doctrines like international comity, the political question doctrine, and exhaustion that might limit the ability of transnational cases to go forward.[300] Taken together, it is likely that courts may use these doctrines to restrict transnational cases.

The closing of federal courthouse doors brought about through federal extraterritoriality decisions as well as other federal procedural movements potentially creates opportunities for other fora to prescribe and adjudicate transnational harms. This outcome has the potential to move litigants away from federal law in federal courts and towards other law—state and foreign—in other fora—including state and foreign. We may thus see a brave new world of transnational litigation where litigation occurs (1) in federal courts under state and foreign law, (2) in U.S. state courts under state and foreign law, and (3) in foreign courts under foreign law. In the next Part, the Article explains how courts should account for the transnational law market.

IV. A NEW APPROACH TO THE TRANSNATIONAL LAW MARKET

While it may be too early to take full account of the substantive and procedural trends that compromise a foreign plaintiff's ability to file a transnational case in U.S. federal courts, one can examine prospectively the impact that this movement of restricting federal court access will have on transnational litigation beyond federal courts and law. Such an examination is timely and important. It is timely given the Supreme Court's recent *Morrison* decision, which has impacted a wide swath of federal statutes, and the decision in *Kiobel*, which has the potential to change the way transnational human rights litigation is conducted in the United States. It is

299. *See* Sinochem Int'l Co. v. Malay Int'l. Shipping Corp., 549 U.S. 422, 436 (2007).

300. *See, e.g.*, Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005) ("This case must also be dismissed because it interferes with the foreign policy of the United States of America . . . . For this court to preclude sales of Caterpillar products to Israel would be to make a foreign policy decision and to impinge directly upon the prerogatives of the executive branch of government."); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005) ("[T]he State Department has filed a Statement of Interest outlining several areas of foreign policy that would be negatively impacted by proceeding with the instant case . . . . [P]roceeding with the litigation would indicate a 'lack of respect' for the Executive's preferred approach of handling the Santo Domingo bombing and relations with Colombia in general."); *In re* Nazi Era Cases Against Ger. Defendants Litig., 334 F. Supp. 2d 690, 695–96 (D.N.J. 2004) ("[T]he political question doctrine counsels the Court to dismiss this action . . . . If this Court adjudicated the Complaint, it would do so against the recommendation of the Executive Branch.").

important because legal scholarship in this area to date has focused almost entirely on federal law as applied by federal courts.[301] Examining state and foreign law in federal, state, and foreign courts presents a fresh look at the role of transnational law in domestic courts and points to future battlegrounds for litigants, courts, and scholars.

In light of the *Morrison* and *Kiobel* decisions, it is likely that many transnational securities and tort cases will not be subject to suit in federal court under federal law. Combining this realization with empirical evidence demonstrating a significant decline in transnational litigation generally in federal courts,[302] as well as the doctrines discussed above restricting court access in other areas of federal procedural law, it is arguable that a significant number of transnational cases will not be litigated in federal court under federal law. Will these cases simply go away or will they escape federal law for other law and fora? And, what happens when transnational cases escape federal law?

As discussed above, in the wake of the *Morrison* decision, plaintiffs filed nearly identical state law claims alleging fraud or other violations of state statutory and common law to escape the limits imposed on them by federal law.[303] Some of these cases were filed in federal court under diversity jurisdiction,[304] while others were filed directly in state courts.[305] Some of these state court cases will, of course, be subject to removal[306] and thus, reenter a federal procedural system that poses significant obstacles to litigating the case. In those cases, federal courts will again be asked to adjudicate transnational cases under U.S. state and foreign law. Will the courts so adjudicate, or will they use forum non conveniens and other doctrines to short-

301. *See, e.g.*, Genevieve Beyea, Morrison v. National Australia Bank *and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 OHIO ST. L.J. 537, 538 (2011); Alex Reed, *But I'm an American! A Text-Based Rationale for Dismissing F-Squared Securities Fraud Claims After* Morrison v. National Australia Bank, 14 U. PA. J. BUS. L. 515, 515 (2012). *But see* Florey, *supra* note 26, at 539 (examining the rise of state law claims in transnational cases).

302. Whytock, *supra* note 10, at 510.

303. *See* Ahn v. C2 Educ. Sys., No. CL–2011–615, 2012 WL 1856475, at *2 (Va. Cir. Ct. 2012) (asserting claims in state court under the Virginia Securities Act, which is identical to section 10(b) of the Exchange Act).

304. *See* King Cnty., Wash. v. IKB Deutsche Industriebank AG, 708 F. Supp. 2d 334, 338 (S.D.N.Y. 2010) (pleading common law fraud against securities rating agencies with respect to ratings for a collapsed structured investment vehicle).

305. Carclucci v. Han, 886 F. Supp. 2d 497, 527–28 (E.D. Va. 2012) (claims under Virginia Securities Act brought in diversity jurisdiction dismissed due to heightened pleading standards).

306. 28 U.S.C. § 1441 (2012).

circuit the plaintiff's forum shopping? Some cases, however, will not be subject to removal, and this will thrust U.S. state courts into transnational securities litigation. Finally, some cases will be filed abroad,[307] either because of dismissals in federal or state court or because of forum and law shopping. Recent filings in foreign fora confirm the attractiveness of foreign courts today, even though in the past plaintiffs were seemingly drawn to U.S. courts "Like Moths To a Flame."[308]

Such an outcome may be appropriate. It might be the case that a constricted U.S. approach to transnational litigation is in accord with the original design for the federal courts. Yet, thrusting transnational cases into state courts risks creating discord in an important area of international relations that requires the speaking of "one voice" by the federal government.[309] It may also be the case that sending these cases abroad will have unforeseen consequences. These movements to escape federal law will push lawmaking powers to other courts. The impact that this will have on U.S. law, foreign law, and judicial decisionmaking is in need of examination.

As detailed in the previous parts, there arguably exists a transnational law market that will impact litigation before federal, state, and foreign courts. As the exploration of the market's impact on securities litigation post-*Morrison* and on transnational tort litigation post-*Kiobel* showed, litigants respond to restrictive federal and procedural law by seeking out other courts—state and foreign—and other law—state and foreign—to plead transnational cases. As litigants seek out other fora, it is to be expected that state and foreign fora will compete for these cases by opening their doors to litigation foreclosed in federal court. For instance, while American class action procedures remain uncommon, many countries have recently adopted mass aggregation rules that substantially overlap with U.S. procedures.[310] Part of the reason for this change in foreign law might be that plaintiffs are now seeking out these fora on account of limited federal law to reach their claims.

307. *See, e.g.*, Abdula v. Canadian Solar, 2011 ONSC 5105 (Can.); Black & Jenkins, *supra* note 169.

308. Marco Ventoruzzo, *Like Moths to a Flame? International Securities Litigation After* Morrison*: Correcting the Supreme Court's "Transaction Test*,*"* 52 VA. J. INT'L L. 405, 411–15 (2012) (explaining both substantive and procedural reasons that plaintiffs were drawn to U.S. courts).

309. Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976) ("[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments.").

310. *See* Strong, *supra* note 35, at 954–60. (describing aggregate litigation in Europe).

One might also speculate that in future years, foreign law might adopt remedial and procedural schemes similar to U.S. practice to accommodate such cases. The evidence points beyond speculation. First, foreign legal systems are beginning to issue damages awards that rival, even if they do not surpass, U.S. awards.[311] Second, foreign legal systems have begun to employ aggregate litigation or collective action mechanisms similar to U.S. class actions.[312] Third, foreign systems now permit alternative litigation funding structures.[313] This development both facilitates transnational litigation in foreign courts and reflects the growth of high-stakes litigation abroad.[314] Finally, "foreign courts recognize jurisdiction over foreign defendants in ways that are as expansive or even more so than American courts."[315]

Several developments are thus in play. First, foreign courts are changing their substantive and procedural laws to encourage the litigation of transnational claims before their courts. Second, these changes are occurring both at the level of substance and procedure. Third, there is reason to believe that these cases may in fact end up, once again, in the United States. Once the plaintiffs secure a favorable judgment abroad, the plaintiffs may seek enforcement of the judgment before U.S. courts.[316] When reviewing requests for enforcement, U.S. courts have traditionally employed a confined approach that does not permit the U.S. court to retry the case.[317] Rather, a U.S. court will generally enforce the foreign judgment so long as there are not systemic, due process, or public policy issues with judgment enforcement.[318] U.S. courts may have closed their courthouse doors through restricting procedural and substantive law.

311. *See* KELEMEN, *supra* note 33, at 74; Behrens et al., *supra* note 34, at 192–93.

312. *See, e.g.*, Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 202 (2009); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 21–25 (2009).

313. *See, e.g.*, Behrens et al., *supra* note 34, at 183–87; Robertson, *supra* note 85, at 161–62.

314. These developments parallel increasing legal costs in Europe. When compared to European countries or Canada, the United States has "the highest liability costs as a percentage of GDP," but "liability costs in the U.K., Germany and Denmark have risen between 13% and 25% per year since 2008." DAVID L. MCKNIGHT & PAUL J. HINTON, U.S. CHAMBER INST. FOR LEGAL REFORM, INTERNATIONAL COMPARISON OF LITIGATION COSTS: EUROPE, THE UNITED STATES, AND CANADA 2 (2013), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/NERA_FULL.pdf.

315. Bookman, *supra* note 236.

316. *See* Shill, *supra* note 80, at 462 (explaining the dynamics of enforcement of foreign judgments).

317. *Id.*

318. *Id.* at 493–95.

To the extent foreign courts respond by developing their substantive and procedural law to allow such claims, U.S. courts, through enforcement proceedings, now may become the handmaiden of this transnational forum shopping through judgment enforcement.

Federal courts cannot close their doors to transnational cases without having a significant impact on the development of law in other fora. Traditionally, federal doctrine has had little concern for the impact that closure has on other fora. Yet, one must ask an important question at the heart of transnational litigation: Should U.S. courts make the decision to reject transnational cases without concern for the impact that will have on the transnational law market? Failure to consider the impact on the market will risk unleashing a brave new world of transnational litigation where litigants demand that courts compete for these cases. The end result will not only be jurisdictional conflict, but also, perhaps more problematic, forum competition where fairness and access to justice are subsumed in a market for law. In the following sections, I propose a new approach to the transnational law market to take account of these concerns.

A. Why Are Federal Courts Restricting Access?

Before proposing a different approach, it is helpful to take account of some of the reasons that U.S. federal courts have employed the above doctrines to limit access in transnational cases. There is no doubt that judicial concern with excessive litigation and case management has driven many of the contractions identified above, especially those in the context of pleading and class actions. Similarly, the Supreme Court has restricted federal law because it questions the expansive costs of litigation.[319] The Supreme Court is

319. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) ("So when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." (quoting 5 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 233–34 (3d ed. 2004) (internal quotation marks omitted))); Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005) ("[Insufficient pleadings] would permit a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonable founded hope that the discovery process will reveal relevant evidence." (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975)) (internal quotation marks omitted))); Car Carriers, Inc. v. Ford Motor Co. 745 F.2d 1101, 1106 (7th Cir. 1984) ("[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint."); Asahi Glass Co. v.

cognizant of the practicalities of litigation, specifically noting three concerns: discovery is costly, abuse is possible, and settlements are sometimes unjustified.[320] Another reason is judicial efficiency. In the face of a presumed "docket explosion," federal courts are increasingly using procedural mechanisms to limit the cases they ultimately hear.[321] As explained above, one can safely say that there is a general hesitancy on the part of federal courts to adjudicate not just transnational cases, but domestic cases also.

Yet, something additional is at work in the specific context of transnational litigation that better explains the application of these restrictive doctrines in transnational cases. Courts are reluctant to interfere with the sovereignty of other nations. Additionally, courts do not wish to interfere with foreign policy matters for fear of creating international discord.[322] The Court certainly fears engaging in acts of "legal imperialism" unless specifically directed to do so by the legislative branch.[323]

This policy of deference to the political branches in foreign affairs certainly underlies much of the restrictive transnational jurisprudence discussed above. For instance, the Court has revitalized the presumption against extraterritoriality to ensure that it will only engage in international conflicts when explicitly directed to do so by Congress.[324] By limiting foreign plaintiffs' access to federal courts through the presumption against extraterritoriality and other procedural doctrines, the Court has also accomplished the goal of limiting judicial interference in international affairs. Yet, as discussed above, this contraction will shunt transnational cases to state and foreign law and state and foreign courts. As state and foreign courts

Pentech Pharms., Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase.").

320. *See Dura Pharms., Inc.*, 544 U.S. at 347; Arthur Miller, *Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587, 597 (2011).

321. Diarmuid F. O'Scannlain, *Access to Justice Within the Federal Courts—A Ninth Circuit Perspective*, 90 OR. L. REV. 1033, 1047–49 (2012) ("Rather than being able to assimilate those changes in caseload, just to keep their heads above water, the federal courts have been forced to rely increasingly on procedural mechanisms.").

322. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013) ("The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.").

323. F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004).

324. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 256–57 (2010).

hear these cases, new issues will arise that will create the potential for international discord.[325]

B. The Need for a Different Approach

In this section, the Article briefly outlines a new approach to the transnational law market based on sovereign interests. As explained above, a significant reason for the restriction of federal court access in transnational cases has to do with the perceived impact on foreign sovereign interests and international relations. This approach that follows aims to enlist courts and policy makers as active participants in a transnational legal system that takes account of the transnational law market by regulatory coordination as opposed to federal judicial abstention and transnational forum shopping.

1. A Sovereign-Interest Approach

As a matter of policy, it is arguable that the restrictive ethos discussed above is being applied in transnational cases in order to avoid "unreasonable interference with the sovereign authority of other nations."[326] Much like the presumption against extraterritoriality, restricting federal court access in transnational cases generally "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[327] The "primary source of that conflict is differences in substance between the law applied and the law of the other country or countries involved, particularly when conduct permitted where it occurred is prohibited where it has effect."[328]

The key functional concerns are as follows. First, there is a concern that litigating transnational cases in U.S. courts might interfere with other, foreign measures to regulate or address the harm in question. Second, there appears to be some concern that private lawsuits may be inappropriate means to pursue the regulatory and public policy goals of much transnational litigation.

The key to resolving these functional concerns is to refocus the court-access doctrines discussed above on state consent. To do this, courts should seek to determine the precise sovereign interests at

325. According to Pamela Bookman, these doctrines have done little to accomplish their stated goals and may in fact have negative implications for U.S. parties—both plaintiff and defendant—as well as U.S. sovereign interests. Bookman, *supra* note 236.

326. *F. Hoffman-LaRoche*, 542 U.S. at 164.

327. EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991).

328. Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 270 (2006).

stake by seeking the input of the sovereigns implicated by a court's decision.[329] Such an approach would encourage coordination between the United States and foreign sovereigns and has the potential to minimize externalities created by the transnational law market.

First, one way to accomplish this goal is to narrow a plaintiff's jurisdictional choices. One reason that the transnational law market encouraged the filing of suits in the United States was the perception that U.S. law permitted expansive assertions of jurisdictions. As noted above, other legal systems may now permit similarly expansive jurisdiction. Restricting jurisdictional choice has largely been accomplished in the United States through the Supreme Court's recent general jurisdiction decisions that require a transnational defendant to be "at home" in the United States. In so doing, the Supreme Court has made it possible as a matter of jurisdiction to bring transnational cases only against U.S. defendant domiciliaries, unless there is specific jurisdiction over a foreign defendant domiciliary. This approach does much to permit assertions of jurisdiction in the United States only when there is a substantial connection with the United States and the given forum for suit.

However, such an approach will only work if other countries adopt similar rules. As noted above, foreign legal systems may be expanding their jurisdictional rules even beyond what has been regarded as relatively permissive U.S. jurisdictional doctrines. Yet, there may be potential for regulatory cooperation.

The Brussels I Regulation Recast provides a useful example. Under the Regulation, the starting principle is that a defendant domiciled in a contracting state should generally be sued in the courts of that state.[330] Domiciliaries of contracting states may only be sued in the courts of other contracting states if one of the Regulation rules permits.[331] For example, the permissible bases of jurisdiction are such that in matters of contract the suit may be brought in the place of performance.[332] In matters of tort, suit may be brought where the harmful act occurred.[333] This is understood as covering both the place where the damage occurred and the place of the event giving rise to

329. *See id*. at 308–09 ("For transnational litigation to become an effective element in global economic regulation, the consent of the other countries involved . . . is necessary.").

330. Regulation 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), art. 4, 2012 O.J. (L 351) 7.

331. *Id.* at art. 5, 2012 O.J. (L 351) 7.

332. *Id.* at art. 7, 2012 O.J. (L 351) 7.

333. *Id.*

it. In respect to disputes arising out of the operation of a branch office or agency, suit may proceed in the place where the branch or agency is located.[334] And in actions in rem, the state where the property is located has exclusive jurisdiction.[335] Under these rules, contracting states are prohibited from exercising judicial jurisdiction against domiciliaries of other contracting states on exorbitant bases.

Based on these provisions, it can be said that the acceptable bases for adjudicatory jurisdiction are domicile, consent, acts or effects occurring in the nation, and ownership or possession of property.

It is important to note that these jurisdictional rules only apply to defendants domiciled in European Union member states. For suits against non-member-state-party domiciliaries, the law of the state where the suit is brought determines.[336] Thus, additional regulatory cooperation is needed to both model the approach of the Brussels I Regulation Recast, as well as to fill holes left for non-member-state-party domiciliaries.

Second, further governmental involvement in transnational cases could be encouraged. Such involvement should be encouraged and solicited by courts and parties in transnational cases.[337] By encouraging this involvement, courts and parties will recognize and embrace the fact that disputes between private litigants have important ramifications for sovereign interests as well as public policy.[338] Courts can better address these functional concerns by encouraging sovereigns to precisely explain their interests in transnational cases. There should be a strong presumption that courts will apply forum law and exercise jurisdiction in transnational cases absent compelling and articulated sovereign concerns to the contrary. As extensions of the forum sovereign, courts should be reluctant to shirk the obligation to apply forum law.[339] Likewise, courts should be cautious about needlessly relinquishing jurisdiction given that there is

334. *Id.*

335. *Id.* at art. 24, 2012 O.J. (L 351) 10.

336. *See id.* at art. 5, 2012 O.J. (L 351) 7.

337. In addition to statements of interest and briefs, the U.S. government, as well as foreign governments, sometimes file letters with courts regarding pending cases. *See, e.g.*, First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 764–65 (1972) (plurality opinion).

338. Horatia Muir Watt, *Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy*, 9 COLUM. J. EUR. L. 383, 404 (2003).

339. *See* Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 1015 (1991) ("Judges are, after all, agents of the state's citizenry and lawmakers, and their paramount responsibility must be the implementation of the state's own law.").

a "virtually unflagging obligation" to exercise a court's jurisdiction in cases before them.[340] Courts should, of course, be concerned with the nuanced international relations issues present in specific transnational cases. But such a concern should not encourage a court at the first instance to disregard the necessity of ascertaining the precise sovereign interests at stake in its exercise of jurisdiction.

2. Outcomes

The primary outcome of the above approach would be the encouragement of courts to explicitly describe their reasons for adjudicating transnational cases in such a way that illuminates the sovereign interests at stake. In so doing, the democratic-enhancing function of the judicial process is brought to the forefront of judicial decisionmaking. Courts have important democratic functions to carry out as extensions of the sovereign and, in the case of the United States, of the people for whom the sovereign speaks. Through this approach, courts, parties, and sovereigns will be prevented from obscuring complex issues of international relations behind the nomenclature of law. The sovereign interests at stake will be sought and articulated and the democratic branches of government will be provided with an important check on judicial decision-making in transnational cases. Likewise, the public grappling with these important issues will perhaps encourage further democratic activity, such as congressional action in important areas of transnational litigation that touches on international relations. Finally, this approach has the potential to mitigate concerns present in the transnational law market by replacing litigant demand and forum competition with sovereign interests.

CONCLUSION

This Article has described and analyzed a brave new world of transnational litigation where litigants forum shop for favorable law as fora compete for legal cases. Reconceptualizing transnational litigation as a transnational law market enables one to see the myriad ways in which procedural and substantive law enable and frustrate forum choice in transnational cases. Viewed in this light, decisions by U.S. federal courts to limit transnational cases must be viewed not only for the effect that such rules have domestically in federal courts, but also in terms of the likely impact they will have on the filing of

340. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

cases under state and foreign law in state and foreign courts. Forum choice and competition impact these cases, and additional scrutiny should be given to whether jurisdictional constriction on the part of U.S. federal courts is appropriate in light of the transnational law market identified above. Furthermore, courts, legislators, and governments should begin to examine the possibilities for transnational regulatory cooperation with specific regard for the sovereign interests at stake in many transnational cases.