BEYOND SECURITIES FRAUD: THE TERRITORIAL REACH OF U.S. LAWS AFTER *MORRISON v. N.A.B.*

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In Morrison v. National Australia Bank, *the Supreme Court sent a clear signal that the presumption against extraterritorial application of federal legislation must be construed seriously going forward. The Court then adopted a transaction-based approach to resolving claims brought under the antifraud provision of the Exchange Act, focusing almost exclusively on the place of the transaction. In the months after the decision, practitioners and academics alike directed much of their attention—and criticism—on the impact it would have on private securities litigations. This Note posits that the real significance of* Morrison *lies in its application beyond securities law. Indeed, in the two and a half years since the decision,* Morrison *has been raised by defendants seeking to dismiss claims brought under the RICO Act, the Alien Tort Statute, the Torture Act, the Lanham Act, the Sherman Act, and the Anti-Retaliation Provision of the Dodd-Frank Act, to name a few.*

The use of Morrison *to limit claims beyond securities fraud is troubling for several reasons. First, finding a clear expression of extraterritorial effect in the language and context of a statute is an inherently subjective exercise. Different courts have applied, and will continue to apply, inconsistent standards concerning similar statutes. Second, the transaction-based approach, which acts as a bright-line test in cases involving exchange-traded securities, may not be*

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so readily adapted under a wholly different set of law and facts. As a result, courts that agree on a statute's lack of extraterritorial effect may nonetheless disagree regarding its extension to reach a claim. Finally, many of the policy rationales for limiting the cross-border application of the Exchange Act do not so readily extend to other statutes. This Note examines the application of Morrison *both inside and outside of securities law. It then makes a case against extending* Morrison, *and suggests steps that Congress may take to provide greater clarity for the courts.*

I. INTRODUCTION

On November 30, 2009, the United States Supreme Court granted certiorari to the plaintiffs in *Morrison v. National Australia Bank*,[1] marking the first time that the highest Court would address the territorial reach of antifraud laws promulgated under Section 10(b) of the Exchange Act of 1934 ("Exchange Act") and the Securities and Exchange Commission's ("SEC") Rule 10b-5.[2] In *Morrison*,[3] the Court

[1] Paul Karlsgodt, *Cert Granted in Morrison v. National Australia Bank Ltd.*, CLASSACTIONBLAWG (Dec. 1, 2009), http://classactionblawg.com/2009/12/01/cert-granted-in-morrison-v-national-australia-bank-ltd.

[2] Rule 10b-5 states:

sought to establish a clear and consistent approach to "foreign-cubed" cases—securities fraud litigation brought by foreign investors against foreign issuers in connection with fraudulent securities transactions on foreign exchanges.

Seven months later, on June 24, 2010, the Supreme Court unanimously affirmed the Second Circuit's dismissal of *Morrison* in an opinion authored by Justice Scalia.[4] However, the Court opted to take a dramatically different approach. A five-justice majority began by relabeling the threshold issue as one of *merits* rather than *subject matter jurisdiction*.[5] The majority then introduced a new

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> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
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> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b–5 (2013).

3 Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).

4 Affirmed 8–0. Justice Stevens filed an opinion concurring in the judgment, joined by Justice Ginsburg. Justice Breyer filed an opinion concurring in part and concurring in the judgment. Justice Sotomayor took no part in the proceedings.

5 Justice Scalia's opinion began by addressing the previously critical issue of jurisdiction faced by lower courts. Citing the Exchange Act, the majority held that a district court had jurisdiction to decide whether or not Rule 10b-5 applied to the conduct of a foreign company—in this case National Australia Bank ("N.A.B.")—if that conduct took place within the United States. However, even if there is jurisdiction, there must still be a cause of action on the merits under the new "transactional" test. The transactional test limits the application of Section 10(b) to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." If the transactional test is not satisfied, a claim that has

transaction-based approach and, in doing so, effectively disposed of the decades-old "conduct and effects tests" long relied upon by circuit courts. The effect of this change was to considerably narrow the scope of securities actions that a plaintiff could bring under Rule 10b-5 in a U.S. federal court.[6]

Although *Morrison* has produced undeniably important changes in the enforcement of securities laws, this Note argues that the true legacy of the decision will be shaped not so much by its impact on securities-related litigations, but rather by its much broader impact on the extraterritorial application of U.S. laws in general. The majority's opinion explicitly held that when a statute, under its "most faithful reading," does not give any "clear indication of extraterritoriality," a court should conclude that it does not apply extraterritorially.[7] In short, if Congress intends for a law to reach outside of the United States, then it must exhibit this intent clearly through either the text or the context of the statute.

On its face, the majority's opinion did little more than reiterate a longstanding canon of construction—the presumption against extraterritoriality. In practice, however, it sent a powerful message to the lower courts that the presumption would be strictly enforced going forward. This pronouncement has produced a powerful weapon for the defense bar. In the more than two years since the Court's decision, *Morrison* has been raised by defendants to challenge litigation brought under a wide range of different laws.

This Note argues that, while the *Morrison* decision may be suitable for addressing securities fraud cases with a foreign element, the holding is not readily applicable to all U.S. laws. The lower courts, therefore, should be very

survived the jurisdictional test under FED. R. CIV. P. 12(b)(1) will nevertheless be dismissed on the merits under FED. R. CIV. P. 12(b)(6).

6 After *Morrison*, most—if not all—claims brought by investors who had purchased or sold their shares on non-U.S. exchanges would be disallowed in the U.S. federal courts.

7 *Morrison*, 130 S. Ct. at 2883.

careful when employing it in such a manner. On more than one occasion, courts have extended *Morrison*'s presumption and applied its transaction-based approach beyond the realm of securities law, only to reach conflicting results. To help develop a consistent approach in the courts, it is more important than ever for lawmakers to clearly indicate the territorial reach they intend for the laws they pass.

The next few sections begin by examining the impact of the *Morrison* decision both within and outside of the securities laws. Part II recaps the critical role of Rule 10b-5 in U.S. antifraud jurisprudence, and describes the body of common law interpreting Rule 10b-5's extraterritorial application prior to *Morrison*. It explains why the *Morrison* case ultimately came before the Supreme Court, and sheds some light on the significance of the Court's decision to overturn the decades-old conduct and effects tests. Part III summarizes the procedural history of *Morrison*, provides a closer look at the Supreme Court's decision, and discusses Congress's knee-jerk attempt to partially reverse the Court's decision in the Dodd-Frank Act. Part IV examines a selection of *Morrison*'s progeny cases, with an emphasis on district court cases handed down shortly after the decision. Part V then shifts the focus to cases beyond the securities laws. Part VI makes the case for limiting *Morrison*'s application by looking at some of the political and economic motivations behind the *Morrison* decision as they relate to securities fraud, and the practical difficulties of adapting *Morrison* beyond securities law. Finally, Part VII highlights some key issues regarding *Morrison*'s application and suggests steps that Congress and the SEC should take to address those issues.

II. THE ROAD TO *MORRISON*

A. The Exchange Act and Rule 10b-5

1. Background

The Exchange Act is part of a series of statutes enacted by the Roosevelt administration to regulate the purchase and sale of publicly traded securities. It came on the heels of the Securities Act of 1933 and significantly expanded the scope of federal regulation of the private sector. While the 1933 Act dealt primarily with original issuances of securities, Congress, through the Exchange Act, recognized the tremendous prominence of the secondary trading market and the need to extend federal regulation to include both securities issued and also those outstanding.[8] The Exchange Act is an enormous and sweeping piece of legislation that, among other things, grants authority to the SEC to conduct investigations and impose sanctions against certain restricted practices. Section 10 of the Act has become the SEC's most important enforcement authority, and Rule 10b-5 in particular has become the tool of choice for many private parties in litigation alleging securities fraud.[9]

2. Rule 10b-5

Congress intended for Rule 10b-5 to bestow broad powers upon the SEC to prevent fraud in the securities industry. Consequently, the language of Rule 10b-5, like that of Section 10(b), is constructively ambiguous, leaving the door open for courts and regulators to determine how wide a net to cast. The most powerful aspect of Rule 10b-5, however, lies not in its potential for enforcement by the SEC, but rather in the existence of an accompanying implied private

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[8] ALAN R. PALMITER, SECURITIES REGULATION: EXAMPLES & EXPLANATIONS 307–11 (4th ed. 2008).

[9] THOMAS LEE HAZEN, SECURITIES REGULATION: CASES AND MATERIALS 612–15 (8th ed. 2009).

right of action. While this private right of action is not expressly stated in the statute, courts have left little doubt as to its existence.[10]

It is no surprise, then, that the application of Rule 10b-5 to reach overseas defendants has raised the ire of multinational companies and foreign governments alike, and has been the subject of much debate and controversy. Yet, until very recently, the Exchange Act provided little guidance as to whether, and to what extent, Section 10(b) would apply to activities involving foreign investors, foreign defendants, or transactions on foreign securities exchanges. Instead, the legal doctrine dictating the extraterritorial reach of the Exchange Act in general, and Section 10(b) in particular, was settled by the courts more than forty years ago. The seminal case governing this area, *Schoenbaum v. Firstbrook*,[11] concluded that an action brought under the Exchange Act should not be invalidated based solely on the presumption against extraterritoriality.[12]

B. The Conduct and Effects Tests

1. The Effects Test

In dealing with antifraud cases, the federal courts—and especially the Second Circuit—have typically held that the strength of the legislative interest in protecting U.S. investors and the U.S. markets justifies the regulation of foreign conduct that results in a harmful effect within the

10 *See* Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 (1971); *see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975) ("[W]e confirmed with virtually no discussion the overwhelming consensus of the District Courts and Courts of Appeals that [a private] cause of action did exist.").

11 Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968).

12 *Id.* at 206 ("Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities.").

United States.[13] Fraudulent conduct that directly affects U.S. investors or the U.S. securities market is usually found to satisfy this "effects test." Injured investors domiciled in the United States or transacting in securities in domestic markets tended to be treated favorably under the effects test, while investors in foreign-cubed cases often found it difficult to pass the effects test.[14]

The Second Circuit in *Schoenbaum* was the first to apply the so-called effects test. In that case, U.S. investors holding shares of a Canadian company traded on both the American Stock Exchange and Toronto Stock Exchange brought a shareholder derivative suit against the company under Section 10(b). The plaintiffs alleged that the defendant had engaged in fraudulent conduct outside the United States through the sale of treasury stock at below-market prices to another Canadian company. The Second Circuit determined that the transaction could have potentially depreciated the company's share prices in the United States, thereby adversely affecting the U.S. securities markets and U.S. investors. Thus, the federal courts appropriately held subject matter jurisdiction to enforce Section 10(b).[15]

2. The Conduct Test

The "conduct test" was first articulated in *Leasco Data Processing Equipment Corp. v. Maxwell.*[16] Unlike *Schoenbaum*, *Leasco* dealt with securities that were not listed or traded on a U.S. exchange, making it difficult for the court to find jurisdiction under the effects test. In *Leasco*, officers of an English company made misrepresentations to officers of a U.S. company during

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13 Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 21 (2007).

14 However, plaintiffs in foreign-cubed cases could nevertheless rely on the conduct test to seek relief in U.S. courts. *See id.* at 42–43.

15 *Schoenbaum*, 405 F.2d at 208.

16 Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

meetings in the United States.[17] These misrepresentations induced the U.S. company to purchase shares of the English company's stock at overvalued prices, which prompted action by the U.S. company's shareholders. However, the actual transaction of the stock took place on the London Stock Exchange. Judge Friendly gave form to the conduct test, holding that "when . . . there has been significant conduct within the [United States], a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law."[18] The approach involved a comparatively loose interpretation of the presumption against extraterritoriality.

While the *Leasco* opinion established jurisdiction under a fairly narrow set of circumstances—specifically, where a foreigner comes to the United States and fraudulently induces a domestic investor to purchase foreign securities on a foreign exchange—Judge Friendly clearly intended for the conduct test to reach a broader set of cases. The *Leasco* version of the conduct test was expanded and refined several years later by the Second Circuit's twin decisions in *Bersch v. Drexel Firestone, Inc.* and *ITT v. Vencap.* In *Bersch*, the plaintiffs were purchasers of the stock of a Canadian company that had issued prospectuses with material omissions.[19] The initial prospectus was drafted within the United States, but the bulk of the work and distribution to investors took place in Canada. Judge Friendly ruled that Congress could not have intended for jurisdiction to be extended in situations where the domestic activity was "merely preparatory" and "relatively small in comparison to those abroad."[20] Subject matter jurisdiction should be extended only when the acts within the United States constitute significant activities that *directly* cause losses to

17 *Leasco*, 468 F.2d at 1330–33.

18 *Id.* at 1334.

19 Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 974–76 (2d Cir. 1975).

20 *Id.* at 987.

investors outside the United States.[21] The concurrent opinion in *Vencap* clarified this position. *Vencap* involved activities in the United States by a Bahamas-based company that supposedly related to a fraudulent transaction abroad. The court found the de minimis effects of the overseas fraud insufficient for extending jurisdiction under the effects test,[22] but it nonetheless remanded the case to determine if the defendants' activities within the United States constituted "significant activities" sufficient to pass the conduct test. Importantly, Judge Friendly recognized that Congress would not have "intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."[23]

3. A Fuzzy Standard

Over the next several decades, different courts applied the two tests under varying standards. Concerning the effects test, courts have mostly agreed that generalized effects, such as a general loss of investor confidence in securities markets, are insufficient by themselves. Rather, investors must point to the *specific adverse effects* that resulted in damages.[24] For example, in *Vencap* the Second Circuit suggested that a less than "substantial" effect would not invite the extension of subject matter jurisdiction.[25] In *Bersch*, the court held that "generalized effects" such as the "deterioration of investor confidence in American underwriters" and "impaired investors' confidence" contributing to a decline in the purchase of U.S. securities by foreigners "would not be sufficient to confer subject matter jurisdiction."[26]

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21 *Bersch*, 519 F.2d at 993.

22 IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975).

23 *Id.*

24 Buxbaum, *supra* note 13, at 42.

25 *Vencap*, 519 F.2d at 1017 ("[T]he losses . . . to these . . . American investors, owning only some .5% of a foreign investment trust . . . is not the 'substantial' effect within the territory of which the Restatement of Foreign Relations Law [Section] 18(b)(ii) speaks.").

26 *Bersch*, 519 F.2d at 974, 987–88.

Unlike the effects test, the conduct test has been applied less consistently. The Fifth and Seventh Circuits have aligned themselves more closely with the approach of the Second Circuit by requiring the fraudulent conduct taking place in the United States to be "more than merely preparatory" and by requiring that the conduct have "actually caused" the plaintiffs' loss.[27] The D.C. Circuit, on the other hand, has adopted a more stringent standard, finding the test to be satisfied only if all of the factors required by Section 10(b) occurred in the United States.[28] By contrast, the Third, Eighth and Ninth Circuits have adopted the least stringent standard, requiring only that "some conduct" designed to further the fraudulent scheme occur in the United States.[29]

Although the circuit courts' views were split regarding the level of activity required to extend jurisdiction, they all appeared to accept Judge Friendly's loose treatment of the presumption against extraterritoriality as it applied to the Exchange Act. This approach would be categorically rejected by the *Morrison* court in its bid to align the circuit courts and clarify what it considered a "fuzzy standard" concerning the extraterritorial reach of U.S. securities laws.

III. THE *MORRISON* DECISION

A. History and Background

The *Morrison* case involved a putative class action brought by four investors against National Australia Bank ("N.A.B."), one of the "Big Four" Australian banks, and one of the world's fifty largest banks by assets.[30] N.A.B.'s ordinary

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27 Elaine Buckberg & Max Gulker, *Cross-Border Shareholder Class Actions Before and After* Morrison 14 (Nat'l Econ. Research Assocs. Working Paper 2011).

28 *Id.* at 13–14.

29 *Id.*

30 Scott Murdoch, *Big Four Australian Banks Have Joined the Global Elite*, THE AUSTL., Jan. 26, 2009, www.theaustralian.com.au/business/breaking-news/big-four-join-global-elite/story-e6frg90f-1111118663656.

shares—the functional equivalent of U.S. common stock—were traded on the Australian Securities Exchange, the London Stock Exchange, the Tokyo Stock Exchange, and the New Zealand Stock Exchange. The ordinary shares were not traded on any U.S. securities exchange, but investors could trade the bank's American Depositary Receipts ("ADRs") on the New York Stock Exchange ("NYSE"). As of 2008, N.A.B. operated in ten countries globally, with total assets in the United States second only to those in Australia, and revenues in the United States trailing only those in Australia and New Zealand.[31]

In 1998, N.A.B. expanded its U.S. business by acquiring HomeSide Lending, Inc., a U.S. company headquartered in Jacksonville, Florida.[32] From 1998 to 2001, HomeSide reported inflated profits resulting from a faulty valuation model and an invalid method of accounting. In July 2001, N.A.B. announced that it would suffer a $450 million write-down due to a revaluation of HomeSide's future fees. This was followed by another write-down in September 2001 of $1.75 billion and restated financial statements in December 2001.[33] The write-downs and restatement resulted in significant declines in N.A.B.'s share price and, subsequently, a loss in the value of its ADRs.[34]

The plaintiffs comprising the representative class included three foreign owners of N.A.B.'s ordinary shares and one domestic owner of N.A.B.'s ADRs. They filed their suit in the United States District Court for the Southern District of New York, alleging, among other claims, violation

See also Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 168 (2d Cir. 2008), *aff'd*, 130 S. Ct. 2869 (2010) (noting that, at all relevant times, N.A.B. considered itself the largest bank in Australia).

31 NAT'L AUSTL. BANK, 2008 ANNUAL FINANCIAL REPORT 58 (2009), *available at* www.nab.com.au/NABGroup/archives/annual-reports/Annual-Financial-Report-2008.pdf.

32 HomeSide Lending, Inc. specialized in servicing mortgage payments in exchange for fees.

33 *Morrison*, 547 F.3d at 168–69.

34 *Id.*

of Section 10(b) of the Exchange Act.[35] The defendants moved to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure,[36] and the district court granted the motion.[37] Plaintiffs then appealed to the Second Circuit, which affirmed the district court's ruling.[38] The Supreme Court granted certiorari on November 30, 2009.

B. The Supreme Court's Decision

1. The Threshold Error

In the decades leading up to *Morrison*, a foreign plaintiff's ability to bring a Rule 10b-5 claim under Section 10(b) in the U.S. federal courts had always been treated as a question of subject matter jurisdiction. Justice Scalia's first step was to dispel this notion, which he considered to be a "threshold error" in the analysis of matters concerning Section 10(b)'s extraterritorial application.[39] Instead, the majority opinion concluded that "to ask what conduct [Section] 10(b) reaches is to ask what conduct [Section] 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case."[40] Reframing the issue as one of statutory interpretation allowed the majority to shift its attention to the text of Section 10(b).

2. The Presumption Against Extraterritoriality

The majority reiterated the "longstanding principle of American law," previously upheld in *EEOC v. Arabian*

35 *Morrison*, 547 F.3d at 168–70.

36 Rule 12(b)(1) states, "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction . . . ." FED. R. CIV. P. 12(b)(1).

37 *In re* Nat'l Austl. Bank Sec. Litig., No. 03 Civ. 6537(BSJ), 2006 WL 3844465 (S.D.N.Y. Oct. 25, 2006).

38 *Morrison*, 547 F.3d at 167.

39 Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2876–77 (2010).

40 *Id.* at 2877.

American Oil Co. ("*Aramco*"), that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[41] In *Aramco*, a case which did not deal with securities fraud, the Supreme Court held that the statutory language of Title VII of the Civil Rights Act of 1964 was insufficient to overcome the presumption against extraterritoriality and would not apply to the discriminatory employment practices of U.S. companies taking place outside of the United States.[42]

The *Morrison* court began by throwing their support behind *Aramco*, stating that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[43] Next, the Court voiced its concern that the Second Circuit's conduct and effects approach had resulted in "unpredictable and inconsistent application" across the other circuits.[44] The Court then determined that the "judicial-speculation-made-law" formulated by the circuit courts justified the application of a blanket presumption against extraterritoriality in all cases.[45]

Three challenges were raised asserting that both Section 10(b) and the Exchange Act in general have at least some extraterritorial application.[46] The majority easily dismissed the first two challenges as insufficient to overcome the presumption against extraterritoriality.[47] Regarding the third challenge, the majority held that although Section

41 *Morrison*, 130 S. Ct. at 2877 (quoting EEOC v. Arabian Am. Oil Co. ("*Aramco*"), 499 U.S. 244, 248 (1991)).

42 *Aramco*, 499 U.S. at 250–54.

43 *Morrison*, 130 S. Ct. at 2878. However, Justice Stevens, in his dissent, refers to this statement as dictum. *Id.* at 2892 (Stevens, J., dissenting).

44 *Id.* at 2880.

45 *Id.* at 2881.

46 *Id.* at 2882.

47 *See id.* (finding first, the "general reference to foreign commerce" in the definition of "interstate commerce" as it appears in the Section 10(b) does not "defeat the presumption against extraterritoriality"; and second, the "fleeting reference" to foreign countries as stated in Section 2 ("Necessity for Regulation") of the Exchange Act similarly fails to overcome the presumption against extraterritoriality).

30(b) of the Exchange Act specifically mentions the Act's extraterritorial application,[48] Congress intended for the Act to apply abroad only where the actions sought to "conceal a domestic violation, or might cause what would otherwise be a domestic violation to escape on a technicality."[49] Further, the Court found that Section 30(a)[50] "contains what Section 10(b) lacks: a clear statement of extraterritorial effect" and held that "[Section 30(a)]'s explicit provision for a specific extraterritorial application would be quite superfluous if the rest of the Exchange Act already applied to transactions on foreign exchanges."[51] This last point is worth emphasizing. As discussed earlier, the majority's opinion allowed that the *context* of the statute should be considered in gauging

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48 Section 30(b) states:

> The provisions of this chapter or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter.

15 U.S.C. § 78dd(b) (2011).

49 *Morrison*, 130 S. Ct. at 2882–83 (finding that Congress had purposely used the word "evasion" instead of "violation" so as to address cases where the perpetrator seeks to avoid punishment by labeling a domestic act as a foreign act).

50 Section 30(a) states:

> It shall be unlawful for any broker or dealer, directly or indirectly, to make use of the mails or of any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or to prevent the evasion of this chapter.

15 U.S.C. § 78dd(a) (2011).

51 *Morrison*, 130 S. Ct. at 2883.

Congress's intent. Thus, a clear statement of extraterritorial effect aimed exclusively at another provision in the statute—in this case, Section 30—could potentially weigh against a finding of extraterritoriality in other provisions—in this case, Section 10(b).

3. A Transaction-Based Approach

Having determined that the Second Circuit's approach failed to pay adequate deference to the presumption against extraterritoriality, the Court proceeded to replace the conduct and effects test with a new transactional test. Adhering closely to the statutory text, the Court found that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States."[52] As a result, there exists a cause of action under Section 10(b) only where the deceptive conduct occurred in connection with the purchase or sale of "securities listed on domestic exchanges, and domestic transactions in other securities."[53] The announcement of this two-pronged transactional approach is one of the most important judicial mandates established by this case.[54]

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52 *Morrison*, 130 S. Ct. at 2884.

53 *Id.*

54 It is worth noting that, in establishing the transactional test, the Court rejected the "significant and material conduct" test proposed by the Solicitor General, which would find a violation of Section 10(b) whenever "significant conduct in the United States . . . is material to the fraud's success." *See* Brief for the United States as Amici Curiae Supporting Respondents at 16, Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 719337. In addition to finding no textual support for the test, the Court dismissed the policy concern that the U.S. would become the "Barbary Coast for those perpetrating frauds on foreign securities markets," and instead pointed to the "fear that [the U.S.] has become the Shangri–La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets." *Morrison*, 130 S. Ct. at 2886. *See also* Brief for Securities Industry and Financial Markets Association et al. ("SIFMA") as Amici Curiae Supporting Respondents at 10–16, Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 723005.

4. Dismissal Under Rule 12(b)(6)

The Supreme Court unanimously affirmed the Second Circuit's decision to dismiss the case, but differed significantly in how it reached that decision. The five-justice majority adopted a merits-based approach and dismissed the complaint for failure to state a claim under Rule 12(b)(6) rather than for lack of subject matter jurisdiction under Rule 12(b)(1). Justice Stevens concurred in the judgment but authored an opinion strongly disagreeing with the Court's strict textual analysis of Section 10(b).[55]

C. The Dodd-Frank Act

1. Background

Less than a month after the *Morrison* decision was issued, President Barack Obama signed the monumental Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") into law.[56] The Dodd-Frank Act was

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[55] Specifically, Justice Stevens argued that where Congress has enacted an open-ended statute and allowed the courts wide judicial discretion to develop the doctrine, the resulting "judge-made law" so ostracized by Justice Scalia should instead be given favorable standing. *See Morrison*, 130 S. Ct. at 2890–91 (Stevens, J., concurring) ("The longstanding acceptance by the courts, coupled with Congress' failure to reject [its] reasonable interpretation of the wording of [Section] 10(b) . . . argues significantly in favor of acceptance of the [Second Circuit] rule by this Court.") (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975)). Rather than repudiating the Second Circuit's case-by-case conduct and effects approach in favor of the bright-line transaction approach, Justice Stevens would have the Court synchronize the various approaches taken by other circuits to the doctrine developed by the Second Circuit, which he views as having done the "best job of discerning what sorts of transnational frauds Congress meant . . . to regulate." *Id.* at 2894 ("I take issue with the Court for beginning *and ending* its inquiry with the statutory text . . . and for dismissing the long pedigree of, and the persuasive account of congressional intent embodied in, the Second Circuit's rule.").

[56] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter "Dodd-Frank Act"].

a direct response to the 2008 financial crisis that froze global credit markets and sent the U.S. economy into the worst recession since the Great Depression.[57] The Act, which spans over 2,300 pages, and affects nearly every aspect of the financial services industry, is the single most significant and comprehensive reform of U.S. financial regulation in more than eighty years.[58]

Title IX of the Dodd-Frank Act, titled the Investor Protection and Securities Reform Act of 2010,[59] makes several amendments to the antifraud provisions of the Exchange Act. Included in Section 929P(b) of Title IX was an eleventh-hour provision by the House Financial Services Committee.[60] Though hastily drafted and subject to much criticism by legal scholars,[61] the intention of the Committee was clear—the validity of securities fraud actions brought by the U.S. government would continue to be measured by the conduct and effects tests rather than the transactional test.[62] Additionally, Section 929Y tasked the SEC with soliciting public comment and conducting a study to determine the extent to which private rights of action should be extended extraterritorially.[63]

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57 Helene Cooper, *Obama Signs Overhaul of Financial System*, N.Y. TIMES, July 22, 2010, at B3.

58 William Sweet, *Dodd-Frank Becomes Law*, HARV. L. SCH. F. ON CORP. GOV. FIN. REG. (July 21, 2010, 11:49 AM), http://blogs.law.harvard.edu/corp gov/2010/07/21/dodd-frank-act-becomes-law.

59 Investor Protection and Securities Reform Act of 2010, Pub. L. No. 111-203, 124 Stat. 1822 (2010) (codified as amended in separate sections of 15 U.S.C.).

60 *See infra* note 68.

61 *See, e.g.*, Andrew Rocks, Note, *Whoops! The Imminent Reconciliation of United States Securities Laws with International Comity After* Morrison v. National Australia Bank *and the Drafting Error in the Dodd-Frank Act*, 56 VILL. L. REV. 163, 198 (2011).

62 Richard Painter et al., *When Courts and Congress Don't Say What They Mean: Initial Reactions to* Morrison v. National Australia Bank *and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INT'L L. 1 (2011).

63 *See infra* note 70.

2. Section 929P: Reinstatement of Conduct and Effects for Government Actions

In direct response to the Supreme Court's decision in *Morrison*, the House Financial Services Committee, then chaired by Representative Paul Kanjorski, drafted and included Sections 929P(b) and 929Y in Title IX.[64] Section 929P has been subject to much criticism by legal scholars[65] for apparently ignoring (or simply overlooking) the Supreme Court's shift of approach regarding the question of Section 10(b)'s extraterritoriality from one of jurisdiction to one of merits.[66] Despite the SEC and the Solicitor General's assertions in 2009 that the application of Section 10(b) was not a question of jurisdiction,[67] Congress nonetheless framed Dodd-Frank's extraterritoriality provision to preserve the SEC's subject matter jurisdiction over antifraud cases. Read literally, Section 929P(b) grants the SEC and the Department of Justice ("DOJ") jurisdiction over antifraud violations that no court ever denied they possessed.[68]

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64 *See* 156 CONG. REC. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski) (clarifying that "the purpose of the language of [S]ection 929P(b) of the bill is to make clear that in actions and proceedings brought by the SEC or the Justice Department, the specified provisions of the Securities Act, the Exchange Act and the Investment Advisers Act may have extraterritorial application" regardless of where the transactions take place); *see also* H.R. 4173, 111th Cong. § 929Y (2010).

65 *See, e.g.*, GEORGE T. CONWAY III, WACHTELL, LIPTON, ROSEN & KATZ, EXTRATERRITORIALITY OF THE FEDERAL SECURITIES LAWS AFTER DODD-FRANK: PARTLY BECAUSE OF A DRAFTING ERROR, THE STATUS QUO SHOULD REMAIN UNCHANGED (2010), *available at* www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.17763.10.pdf; *see also* Painter et al., *supra* note 62.

66 This drafting error is due in part to Congress' rush to include an extraterritoriality provision in Title IX before the *Morrison* opinion had even been issued. *See* 156 CONG. REC. H5237, *supra* note 64; *see also* H.R. 4173, 111th Cong. § 7216 (2009).

67 *See* Brief for the United States as Amici Curiae Supporting Respondents at 6 n.1, Morrison v. Nat'l Austl. Bank, Ltd. 130 S. Ct. 2869 (No. 08-1191), 2009 WL 3460235 (noting that Congress had already decided that the district courts should have subject matter jurisdiction).

68 Section 929P(b) states:

However, because it is clear that Section 929P(b) intended to reinstate the conduct and effects approach for civil and criminal enforcement actions brought by the government against overseas violators, it is unlikely that any lower court would interpret the statute in contradiction of Congress' objectives.[69]

3. Section 929Y: SEC Study on Section 10(b) Private Rights of Action

Section 929Y orders the SEC to solicit public comment and conduct a study to determine whether and to what degree Section 10(b)'s extraterritorial application should extend to private rights of action.[70] In April 2012, the SEC

> (c) EXTRATERRITORIAL JURISDICTION—The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 17(a) involving—
>
> > (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
> > (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

Dodd-Frank Act § 929P(b), 15 U.S.C. § 77v(a) (2010).

69 *See, e.g.*, Painter et al., *supra* note 62, at 19 ("Most judges will not be willing to tell Congress that, because of the way a statute is worded, it fails to accomplish anything at all.").

70 Section 929Y states:

> (a) IN GENERAL.—The Securities and Exchange Commission of the United States shall solicit public comment and thereafter conduct a study to determine the extent to which private rights of action under the antifraud provisions of the Securities and Exchange Act of 1934 (15 U.S.C. 78u-4) should be extended to cover—
>
> > (1) conduct within the United States that constitutes a significant step in the furtherance of the violation, even

released a comprehensive 106-page study that carefully reviews the history of *Morrison* and lays out the many available alternatives suggested by various trade groups, academics, and foreign governments over the course of its comment period.[71] The SEC's report reiterated many of the same arguments raised in its amicus brief in *Morrison*, but it made no specific recommendations to Congress regarding the steps it should take going forward. In fact, as Commissioner Luis Aguilar pointed out in a stinging dissent,[72] one option proposed by the SEC "would be for Congress to take no

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> if the securities transaction occurs outside the United States and involves only foreign investors; and
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.
>
> (b) CONTENTS.—The study shall consider and analyze, among other things—
>
> (1) the scope of such a private right of action, including whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise;
> (2) what implications such a private right of action would have on international comity;
> (3) the economic costs and benefits of extending a private right of action for transnational securities frauds; and
> (4) whether a narrower extraterritorial standard should be adopted.
>
> (c) REPORT.—A report of the study shall be submitted and recommendations made to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House not later than 18 months after the date of enactment of this Act.

Dodd-Frank Act § 929Y (2010).

71 *See* SEC, STUDY ON THE CROSS-BORDER SCOPE OF THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934 33–35 (2012) [hereinafter SEC STUDY], *available at* www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf.

72 Luis Aguilar, Comm'r, SEC, Defrauded Investors Deserve Their Day in Court (Apr. 11, 2012), *available at* www.sec.gov/news/speech/2012/spch041112laa.htm.

action."[73] Had the SEC recommended that Congress restore the conduct and effects approach for private litigants, the impact of *Morrison* would have been severely diminished. As it stands, *Morrison* appears to have cleared a final hurdle, and it seems unlikely that the prior reach of Section 10(b) will be restored in the foreseeable future.

IV. APPLICATION TO SECURITIES CASES

The majority in *Morrison* undertook an analysis that went far beyond the circumstances of the case and severely limited the ability of plaintiffs to seek recourse through private securities fraud litigation.[74] Almost without exception, plaintiffs have failed in their attempts to limit the *Morrison* holding to its facts.[75] In the more than two years since the decision, plaintiffs and their attorneys have attempted time and again, under various factual scenarios, to bypass the hurdle erected by *Morrison*.[76] In response,

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73 *See* SEC STUDY, *supra* note 71, at 58–59.

74 *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2888 (2010) (Breyer, J., concurring) (arguing that "[t]his case does not require us to consider other circumstances" because the facts alone sufficed to exclude the transaction from coverage under Section 10(b)); *see also id.* at 2892–95 (Stevens, J., concurring) (pointing out that no party "contends that [Section] 10(b) applies to wholly foreign frauds," and therefore the majority had no reason to overturn decades of circuit court jurisprudence dealing with such matters).

75 *See, e.g.*, Cascade Fund, LLP v. Absolute Capital Mgmt. Holdings Ltd., 08-cv-01381-MSK-CBS, 2011 WL 1211511 (D. Colo. Mar. 31, 2011) (rejecting plaintiff's argument that *Morrison*'s limitation on the scope of Section 10(b) applies only to so-called "f-cubed transactions" and holding instead that "[n]othing in the reasoning of *Morrison* suggests that the Supreme Court intended its analysis to be limited to the peculiar facts of that case . . . it is clear that *Morrison* intended its reach to extend far beyond the particular facts of that case."); *see also* Cornwell v. Credit Suisse Group, 729 F. Supp. 2d 620, 625 (S.D.N.Y. 2010) ("This Court is not convinced that the Supreme Court designed *Morrison* to be squeezed, as in spandex, only into the factual strait jacket of its holding.").

76 *See, e.g.*, *Cornwell*, 729 F. Supp. 2d 620; Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166 (S.D.N.Y. 2010); *In re* Alstom SA Sec. Litig., 741 F. Supp. 2d 469 (S.D.N.Y. 2010); Sgalambo v. McKenzie, 739 F. Supp. 2d 453 (S.D.N.Y. 2010); *In re* Société

courts have extended the holding in *Morrison*, which dealt exclusively with Section 10(b) of the Exchange Act, to cases involving the Securities Act[77] and the Investment Advisers Act.[78] Collectively, these progeny cases provide important guidance in dealing with transactions involving foreign and domestic exchange traded securities, as well as off-exchange transactions.

A. Exchange-Based Transactions

1. Purchasers on Foreign Exchanges

In *Cornwell v. Credit Suisse*,[79] just one month after *Morrison*, the district court granted the defendant's partial judgment on the pleadings against U.S. plaintiffs who had purchased Credit Suisse shares on the Swiss Stock Exchange ("SWX"). *Cornwell* involved two classes of plaintiffs—those who had purchased the defendant's ADRs on the NYSE,[80] and those who had purchased common shares on the SWX. The plaintiffs—U.S. residents who "made an investment decision and initiated a purchase of [CS stock], and incurred economic risk in the United States"—contended that *Morrison* is limited to its facts and applies only to foreign-

Générale Sec. Litig., No. 08 Civ. 2495(RMB), 2010 WL 3910286 (S.D.N.Y. Sept. 29, 2010); Elliott Associates v. Porsche Automobil Holding SE, 759 F. Supp. 2d 469 (S.D.N.Y. 2010); *In re* Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512 (S.D.N.Y. 2011); *In re* Royal Bank of Scotland Group PLC Sec. Litig., 765 F. Supp. 2d 327 (S.D.N.Y. 2011); United States v. Mandell, No. (S1) 09 CR. 0662(PAC), 2011 WL 924891 (S.D.N.Y. Mar. 16, 2011).

77 *See, e.g.*, *In re* Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512 (S.D.N.Y. 2011); *In re* Royal Bank of Scotland Group PLC Sec. Litig., 765 F. Supp. 2d 327 (S.D.N.Y. 2011); SEC v. Goldman Sachs & Co., 790 F. Supp. 2d 147, 164–65 (applying *Morrison*'s holding to Section 17(a) of the Securities Act).

78 *See, e.g.*, SEC v. ICP Asset Mgmt., LLC, No. 10 Civ. 4791(LAK), 2012 WL 2359830 (S.D.N.Y. June 21, 2012) ("Although *Morrison* involved the Exchange Act only, its holding is relevant to [Investment Advisers Act] claims.").

79 *Cornwell*, 729 F. Supp. 2d 620.

80 For a discussion about ADRs, *see infra* Part IV.C.

cubed plaintiffs.[81] The court rejected the plaintiffs' line of reasoning, finding that it resembled the Second Circuit's conduct test, which it considered to be dead letter.[82] Instead, the court adopted the view in *Stackhouse v. Toyota Motor Co.*, that "because the actual transaction takes place on the foreign exchange, the purchaser or seller has *figuratively traveled* to that foreign exchange—presumably via a foreign broker—to complete the transaction."[83] The court then dismissed the claims brought by those who had transacted over the SWX, while permitting those claims brought by plaintiffs who had purchased ADRs on the NYSE.

Cornwell is supported by *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance.*[84] In *Plumbers' Union*, the plaintiffs were U.S. investors who suffered a loss after Swiss Re's management misrepresented the riskiness of the company's credit default swap positions. The plaintiffs placed their purchase orders through traders located in Chicago.[85] However, during the relevant class period, the only stock exchange on which Swiss Re common stock was listed was the SWX, and the only stock exchange on which Swiss Re common stock traded was the "virt-x," a subsidiary trading platform of SWX based in London.[86] All transactions involving Swiss Re common stock were executed, cleared, and settled on the virt-x platform. The plaintiffs argued that a "purchase" of a security, for purposes of Rule 10b-5, occurs where the investor enters an order to buy—in this case, Chicago.[87] The court rejected this construction, finding that

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

82 *Id.* ("[T]he conduct and effect analysis as applied to [Section] 10(b) extraterritoriality disputes is now dead letter. Plaintiffs' cosmetic touch-ups will not give the corpse a new life.").

83 *Stackhouse*, No. CV 10-0922 DSF (AJWx), 2010 WL 3377409 (C.D. Cal. July 16, 2010) (emphasis added).

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

85 *Id.* at 172.

86 *Id.*

87 *Id.* at 177.

it too closely resembled the pre-*Morrison* conduct test,[88] and concluded that a "purchase order in the United States for a security that is sold on a foreign exchange is insufficient to subject the purchase to the coverage of [S]ection 10(b) of the Exchange Act."[89]

Finally, both *Cornwell* and *Plumbers' Union* were affirmed by *In re Royal Bank of Scotland Group PLC* ("*RBS*").[90] In *RBS*, the plaintiffs—investors who lived in the United States and decided to buy RBS stock while in the United States—brought a derivative action under the Securities Act after RBS suffered massive losses during the financial crisis due to its exposure to subprime mortgage securities. The court dismissed the claims,[91] and further ruled that the lead plaintiffs, whose claims were dismissed, lacked standing to bring claims on behalf of those who had purchased RBS's ADRs on the NYSE.[92]

After *Morrison*, lower courts have consistently struck down Section 10(b) claims involving transactions on foreign exchanges under the new transaction-based approach. They have also consistently allowed cases involving transactions on domestic exchanges to survive the pleading stage. For instance, a plaintiff's allegation that the defendant's stock was traded on the NASDAQ and that he purchased the stock on the NASDAQ was sufficient at the pleading stage to establish the applicability of the Exchange Act, despite the defendant's assertions that the plaintiff's conduct took place

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88 *Plumbers' Union*, 753 F. Supp. 2d at 177 (citing *In re* Société Générale Sec. Litig., No. 08 Civ. 2495(RMB), 2010 WL 3910286 (S.D.N.Y. Sept. 29, 2010) ("By asking the Court to look to the location of 'the act of placing a buy order,' and to . . . 'the place of the wrong,' Plaintiffs are asking the Court to apply the conduct test specifically rejected in *Morrison*.").

89 *Id.* at 178.

90 *In re* Royal Bank of Scotland Group PLC Sec. Litig., 765 F. Supp. 2d 327 (S.D.N.Y. 2011).

91 *Id.* at 337 ("Plaintiffs approach—that it is enough to allege that plaintiffs are U.S. residents who were in the country when they decided to buy RBS shares—is exactly the type of analysis that *Morrison* seeks to prevent.").

92 *Id.* at 338.

outside the United States, and a majority of the defendant's stock was held outside the United States.[93] In other cases, courts have held that where the purchases of the defendant's shares took place on a domestic securities exchange, it does not matter that the lead plaintiff is a foreign-based entity.[94]

2. Dual-Listing of ADRs on U.S. Exchanges

In *Alstom*, the court considered claims by investors who had purchased securities of a French energy company whose common shares were dual-listed on the Euronext in Paris and on the NYSE in the United States.[95] The relevant investors had purchased their shares on the Euronext and made contentions similar to those rejected by the court in *Cornwell*—that their purchases were "initiated" in the United States and therefore qualified as domestic transactions under *Morrison*.[96] The *Alstom* court easily rejected this first argument.[97] The plaintiffs' second argument, however, underscored what was likely a miswording by the Supreme Court in *Morrison* in its reference to "securities *listed on domestic exchanges*, and domestic transactions in other securities."[98] The plaintiffs claimed that, because Alstom's shares were also listed on a U.S. exchange, transactions made on a foreign exchange should nonetheless qualify as "domestic transactions" under

93 *See* Lapiner v. Camtek, Ltd., No. C 08-01327 MMC, 2011 WL 445849, at *2–3 (N.D. Cal. Feb. 2, 2011).

94 *See* Foley v. Transocean Ltd., 272 F.R.D. 126, 133–34 (S.D.N.Y. 2011) ("[N]othing in the [*Morrison*] decision provides any support for the notion that foreign investors are not adequate plaintiffs in United States courts when the securities at issue were purchased on a United States exchange."); *see also* Hufnagle v. RINO Int'l Corp., No. CV 10-8695-VBF, 2011 WL 710704, at *8 (C.D. Cal. Feb. 14, 2011) (finding that because plaintiff purchased its RINO shares in the United States through the NASDAQ stock exchange, *Morrison* did not apply).

95 *In re* Alstom SA Sec. Litig., 741 F. Supp. 2d 469 (S.D.N.Y. 2010).

96 *Id.* at 471.

97 *Id.* at 471–72.

98 Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2884 (2010) (emphasis added).

the first prong of the transaction-based approach.[99] However, the *Alstom* court viewed the plaintiffs' argument as "a selective and overly-technical reading of *Morrison* that ignores the larger point of the decision."[100] The court held that *Morrison* clearly intended for the focus of the Exchange Act to be upon the place where the purchase or sale took place, and not where registration or "ministerial pre-purchase activities" took place.[101]

Another case, *Vivendi*, addressed an even more convoluted set of facts involving ADRs and dual-listed securities.[102] *Vivendi* arose from a shareholder derivative suit brought under the Securities Act against the French media company's former CEO and CFO. Vivendi's ADRs had traded on the NYSE since a public offering in 2000. Pursuant to SEC requirements regulating public offerings of ADRs, Vivendi was required to register the ordinary shares underlying the ADRs as well. The plaintiffs claimed that, by registering its ordinary shares with the SEC, Vivendi had "listed its shares" in the United States within the meaning of *Morrison*.[103] The *Vivendi* court, however, disagreed that the act of registering securities with the SEC and the act of listing those securities on a domestic exchange were interchangeable.[104] The court took the analysis one step further by holding that even if the ordinary shares are listed on a domestic exchange, the shares must still be traded for Section 10(b) to apply.[105]

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99 From a purely economic perspective, this argument has some merit. Fraudulent acts impacting the price of Alstom's shares listed on the NYSE (as well as its ADRs) would undoubtedly affect its share price on the Euronext, and vice-versa.

100 *Alstom*, 741 F. Supp. 2d at 472.

101 *Id.* at 472–73; *see also Morrison*, 130 S. Ct. at 2884.

102 *In re* Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512 (S.D.N.Y. 2011).

103 *Id.* at 528.

104 *Id.* at 529 ("[R]egistration with the SEC is not the same as listing . . . on an exchange.").

105 *See id.* at 530 ("Read in this context, perhaps Justice Scalia simply made a mistake. He stated the test as being whether the alleged fraud concerned the purchase or sale of a security 'listed on an American stock

B. Off-Exchange Transactions

Morrison itself dealt with a transaction occurring on a foreign securities exchange, but it was largely silent regarding when a "purchase or sale" is made in the United States in cases involving off-exchange transactions. The opinion simply states that a Section 10(b) cause of action may exist where the transaction involves "securities listed on domestic exchanges, and *domestic transactions in other securities*."[106] To set the parameters for this second prong, lower courts must answer the difficult question of what types of off-exchange transactions qualify as "domestic transactions."

1. The "Irrevocable Liability" Approach

To determine *where* a purchase or sale took place in an off-exchange transaction, it is often important to first determine *when* the transaction was consummated. Courts have taken different approaches regarding when a transaction may properly be considered "complete."[107] The leading approach—looking for the moment when "irrevocable liability" is incurred—was first proposed by a court in the Southern District of New York, and has subsequently been confirmed by the Second Circuit. In *Plumbers' Union*,[108] the court looked to the statutory definition of "purchases and sales" under Section 3 of the Exchange Act.[109] Citing *Blue*

exchange,' when he really meant to say a security 'listed and traded' on a domestic exchange.").

106 Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2884 (2010) (emphasis added).

107 *See* SEC STUDY, *supra* note 71, at 33–35.

108 Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166, 177 (S.D.N.Y. 2010).

109 Section 3 of the Exchange Act states: "[U]nless the context otherwise requires—The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire. For security futures products, such term includes any contract, agreement, or transaction for future delivery." 15 U.S.C. § 78c(a)(13) (2011).

Chip Stamps,[110] the court held that an individual becomes a "purchaser" of a security when he or she has "incurred an irrevocable liability to take and pay for the stock."[111] Another court in the Southern District, in *Basis Yield Alpha Fund v. Goldman Sachs*, endorsed the irrevocable liability approach in determining when a transaction has been completed.[112] In *Basis Yield*, investors in an offshore fund sued Goldman Sachs for alleged material misrepresentations made during the sale of a collateralized debt obligation ("CDO") that eventually rendered the fund insolvent.[113] The court dismissed the plaintiff's Section 10(b) claims and determined that "to state a claim under Section 10(b), a plaintiff must allege that the parties incurred *irrevocable liability* to purchase or sell the security in the United States."[114] This approach received appellate approval in *Absolute Activist*.[115] There, the Second Circuit specifically held that "transactions involving securities that are not traded on a domestic exchange are domestic if *irrevocable liability is incurred* or *title passes* within the United States."[116]

2. Solicitations

A plaintiff may not necessarily need to demonstrate an irrevocable liability in order to receive the "domestic transaction" label. In *Stackhouse v. Toyota Motor*, a district court interpreted domestic transactions to include "purchases and sales of securities *explicitly solicited* by the issuer within the United States."[117] The *Stackhouse*

110 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 751 (1975).

111 *Plumbers' Union*, 753 F. Supp. 2d at 177.

112 Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc., 798 F. Supp. 2d 533 (S.D.N.Y. 2011).

113 *Id.*

114 *Id.* (emphasis added).

115 Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60 (2d Cir. 2012).

116 *Id.* at 67 (emphasis added).

117 Stackhouse v. Toyota Motor Co., No. CV 10–0922 DSF (AJWx), 2010 WL 3377409 (C.D. Cal. July 16, 2010) (emphasis added).

approach was accepted by the Southern District of New York in *Elliot Associates v. Porsche*,[118] but rejected by a District of Colorado court in *Cascade*.[119] *Cascade* involved a plaintiff who was solicited by an offshore advisor while in the United States, and wired the money for the investment to a bank based in the United States.[120] The *Cascade* court first held that the mere act of wiring the money did not mean that the transaction was completed in the United States,[121] then proceeded to reject the notion that the location of the solicitation was even relevant.[122]

3. Private Placements

In *Absolute Activist*,[123] the district court[124] indicated that there would be no cause of action where the relevant transaction took place directly between a foreign plaintiff and a foreign defendant through a private placement, even if the securities of those companies were also listed on U.S. exchanges. The court believed that, because the transaction was consummated directly between two offshore parties, there was no "domestic transaction" involved. By contrast,

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118 *See* Elliott Associates v. Porsche Automobil Holding SE, 759 F. Supp. 2d 469, 476 (S.D.N.Y. 2010) ("Although *Morrison* permits a cause of action by a plaintiff who has concluded a 'domestic transaction in other securities,' this appears to mean 'purchases and sales of securities explicitly solicited by the issuer in the U.S.,' rather than transactions in foreign-traded securities . . . .").

119 Cascade Fund, LLP v. Absolute Capital Mgmt. Holdings Ltd., No. 08-cv-01381, 2011 WL 1211511 (D. Colo. Mar. 31, 2011).

120 *Id.* at *1–2.

121 The rationale for this holding involved a technicality in the Subscription Agreement signed by the plaintiff. The Agreement gave the advisor the right to "reject an application for investment in any fund for any reason"—which precluded a determination that the transaction had been "completed." *Id.* at *1.

122 *Id.* at *6 (finding no reason to believe that the "domestic transaction" is defined by the "locus of solicitation").

123 Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60 (2d Cir. 2012).

124 Absolute Activist Value Master Fund Ltd. v. Homm, No. 09 cv-08862(GBD), 2010 WL 5415885 (S.D.N.Y. Dec. 22, 2010).

in *United States v. Mandell*, where the defendants defrauded investors through private placements in the United States,[125] the court held that even though none of the defendants' companies were listed on U.S. exchanges, this did not prevent the plaintiffs from bringing an action under *Morrison*'s second prong because the fraudulent and deceptive practices had been orchestrated and carried out to completion in the United States.[126]

4. Over-the-Counter Transactions

Transactions occurring off-exchange are typically referred to as "over-the-counter" ("OTC") transactions. OTC markets allow sophisticated parties to exchange stocks, bonds,[127] commodities, derivative products, and other financial instruments directly or through a registered broker-dealer, without the use of a centralized trading platform, such as a securities exchange. The OTC bond and equity markets, however, are dwarfed by the size of the OTC derivatives market.[128] Congress, through the Exchange Act, sought to regulate these OTC markets through registration requirements for broker-dealers,[129] establishment of an SEC broker-dealer inspection program,[130] and extension of the

125 United States v. Mandell, No. (S1) 09 CR. 0662(PAC), 2011 WL 924891 (S.D.N.Y. Mar. 16, 2011).

126 *Id.*

127 Most bonds are traded on the OTC market because, unlike equities, bonds tend to have different maturities, yields, and other characteristics that make them far less liquid.

128 With the development of increasingly complex and customized financial instruments by sophisticated parties, the OTC market has seen meteoric expansion over the past several decades. The Bank for International Settlements reported that the size of the OTC derivatives market had increased to a notional outstanding amount of more than $639 trillion and a gross market value of more than $25 trillion as of June 2012. *See* BANK FOR INTERNATIONAL SETTLEMENTS, SEMIANNUAL OTC DERIVATIVES STATISTICS AT YEAR-END 2012, at 1, tbl. 19 (2012) [hereinafter 2012 BIS REPORT], *available at* www.bis.org/statistics/otcder/dt1920a.pdf.

129 15 U.S.C. § 78o(a)–(b) (2011).

130 *See id.* § 78q(a).

Exchange Act's antifraud provisions in Section 10(b) to transactions in OTC securities.[131]

The five major categories of OTC derivatives are interest-rate contracts, foreign exchange contracts, equity-linked contracts, commodity contracts, and credit default swaps. A significant percentage of these OTC contracts involve "securities-based swap agreements."[132] According to the Bank for International Settlements, the notional size of the swaps market exceeded $400 trillion as of June 2012.[133]

Given the magnitude of the swaps market, it is no surprise that *Elliott Associates v. Porsche*,[134] which concerned the application of *Morrison*'s second prong to fraudulent acts in connection with swaps transactions, quickly became one of the most high-stakes rulings following *Morrison*. In *Porsche*, the plaintiffs, a group of hedge funds, executed an equity-linked swap agreement referencing common shares of Volkswagen ("VW"), a German company whose shares traded on a foreign exchange and whose ADRs traded on the U.S. OTC market. The swap effectively gave the investors a short position in VW shares—that is, the swap would produce limited gains as the price of VW shares declined and would suffer potentially unlimited losses as the

131 15 U.S.C. § 78j(b) (2011).

132 A swap agreement is a contract between two parties by which the parties agree to make a series of payments to each other at fixed dates in the future. One stream of payments is determined by an unknown variable—such as the future interest rate or currency exchange rate, the future price of an underlying commodity or stock, or, in the case of a credit default swap, the predetermined "insurance" payoff in the event of a loan default. This "floating" stream is usually pegged to an index (in the case of equity and commodity swaps) or references a certain rate (e.g., the London Interbank Offered Rate, or "LIBOR," in the case of interest rate swaps). The second stream of payments is typically a "fixed" stream, agreed upon by the parties to the swap. The "swap" of fixed for floating future payments allows one party to take on risk—for hedging or speculation purposes—while permitting its counterparty to mitigate risk through guaranteed fixed payments.

133 *See* 2012 BIS REPORT, *supra* note 128, at tbl. 19.

134 Elliott Assocs. v. Porsche Automobil Holding SE, 759 F. Supp. 2d 469 (S.D.N.Y. 2010).

price of VW shares rose.[135] Porsche Automobil Holding, also a German company, was the largest shareholder of VW. The plaintiffs alleged that misrepresentations by Porsche regarding its aggressive, behind-the-scenes purchases of VW stock resulted in a sudden spike in the price of VW shares when the actual ownership stake was publicly announced.[136] The resulting "short squeeze" caused VW shares to more than quadruple in value over two trading days and resulted in over a billion dollars in losses to the investors.[137] The plaintiffs claimed that, because all relevant steps necessary to transact in the swap agreements were carried out in the United States, the transaction should qualify as a "domestic transaction" within the reach of Section 10(b).[138] The district court rejected this reasoning, finding that the "swap agreements are essentially 'transactions conducted upon foreign exchanges and markets,'" because the swaps referenced securities traded exclusively on foreign exchanges.[139] The court was "loathe to create a rule that would make foreign issuers with little relationship to the United States subject to suits [in the United States] simply because a private party in this country entered into a derivatives contract that references the foreign issuer's stock."[140]

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135 *Porsche*, 759 F. Supp. 2d at 476.

136 During the first three quarters of 2008, Porsche increased its ownership of VW from 31 percent to nearly 75 percent, but publicly stated on several occasions that it did not intend to, nor did it have the ability to, acquire such a large stake. *Id.* at 472–73.

137 *See* Louise Story, Michael J. de la Merced & Carter Dougherty, *Panicked Traders Take VW Shares on a Wild Ride*, N.Y. TIMES, Oct. 29, 2008, at B1; *see also*, David Glovin & Chris Reiter, *Porsche Is Sued for $1 Billion by VW Short Sellers*, BLOOMBERG NEWS, Jan. 26, 2010, www.bloomberg.com/apps/news?pid=newsarchive&sid=aMQEXAQetL78.

138 *Porsche*, 759 F. Supp. 2d at 474.

139 *Id.* at 476 (quoting Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2882 (2010)).

140 *Id.*

After losing in federal court the hedge funds proceeded to file a parallel action in state court.[141] This move initially proved successful when the justice presiding over the case refused to grant a motion to dismiss by the defendants.[142] However, just several months later, the Appellate Division reversed the earlier decision on ground of forum non conveniens.[143] The appellate court found an "inadequate connection between the events of the transaction and New York" in part because "the VW stock is traded only on foreign exchanges" and further concluded that Germany provided an adequate alternative forum for the action.[144]

C. American Depositary Receipts ("ADRs")

ADRs are negotiable certificates that give an owner the right to obtain the underlying foreign stock they represent.[145] However, the owner of an ADR certificate *does not hold title to the foreign share* it references.[146] Most American investors in ADRs prefer to hold the ADR certificate rather than the foreign stock certificate because ADRs are subject to the 1933 Securities Act and the 1934 Exchange Act. Therefore, trading in ADRs is generally perceived by investors to be more secure than trading in the underlying foreign stock.[147] Indeed, ADRs were created in 1927 to facilitate investments in foreign securities by helping investors overcome the

141 *See* Viking Global Equities v. Porsche Automobil Holding SE, 36 Misc. 3d 1233(A), 2012 WL 3640684 (N.Y. Sup. Ct. Aug. 6, 2012), *rev'd*, 958 N.Y.S.2d 35 (App. Div. 2012). Plaintiffs have since appealed the district court decision.

142 *Id.*

143 Viking Global Equities v. Porsche Automobil Holding SE, 958 N.Y.S.2d 35 (App. Div. 2012).

144 *Id.* at 36.

145 J.P. MORGAN CHASE & CO., DEPOSITARY RECEIPTS: REFERENCE GUIDE 3 (2005), *available at* www.adr.com/Home/LoadPDF?88b09551120043cface03554006845cb.

146 Pinker v. Roche Holdings Ltd., 292 F.3d 361, 367 (3d Cir. 2002).

147 *Id.*

regulatory hurdles and risks associated with foreign currency exchange.[148]

ADRs allow American investors to invest in foreign companies, through an intermediary "depositary institution" (such as BNY Mellon, JPMorgan Chase, and Deutsche Bank), while realizing dividends and other capital gains in U.S. dollar currency.[149] Today, the stocks of most foreign companies that trade in the U.S. markets are traded as ADRs.[150] When an ADR is purchased or sold, the trade is settled and cleared in U.S. dollars and all subsequent dividends are paid out in dollars by the depositary bank based on the relevant exchange rates.[151]

1. Sponsored vs. Unsponsored ADRs

There are two broad categories of ADRs: "sponsored" ADRs and "unsponsored" ADRs. Unsponsored ADR programs are established between the investor and the depositary bank with little or no involvement by the issuer (the company whose shares are referenced). Since an issuer is not involved in the implementation or in the maintenance of the unsponsored ADR program, it has little, if any, control or influence over the treatment of ADR holders.[152] In addition, unsponsored programs can be established by multiple competing depositary banks with different fee structures and shareholder services.

By contrast, in a sponsored ADR program, both the issuing company and the depositary bank are parties to the deposit agreement. Thus, the issuer is able to exercise direct control regarding the terms and conditions of the program,

148 *Pinker*, 292 F.3d at 367.

149 *International Investing*, SEC, www.sec.gov/investor/pubs/ininvest.htm (last updated Aug. 14, 2012).

150 *Id.*

151 An investor often retains voting rights to the foreign share referenced by the ADR. However, an investor who wishes to exercise this right would effectively be voting by proxy through the depositary bank.

152 SHEARMAN & STERLING LLP, UNDERSTANDING AND DEALING WITH UNSPONSORED ADR PROGRAMS 2 (2008), *available at* www.shearman.com/files/upload/Client_Publication_Unsponsored_ADR_Programs.pdf.

and is able to monitor the number of ADRs registered for trading, and the rights of the holders of those ADRs.[153] Sponsored ADRs are issued by only one depositary bank and cannot be replicated by competitors.[154]

2. Off-Exchange Transactions in ADRs

Although ADRs are usually exchange-traded, *Morrison*'s second prong has been applied on at least one occasion involving ADRs traded OTC. *In re Société Générale* involved a derivative action brought by American investors against the French Bank Société Générale ("SocGen") after a rogue trader cost the bank €4.9 billion by making unhedged, directional trades in CDOs and residential mortgage-backed securities outside of his trading limit over the course of two years.[155] Of the three pension funds that made up the plaintiff class,[156] two had purchased ordinary shares of SocGen on the Euronext Paris exchange.[157] After *Morrison* was decided, the defendants moved to dismiss the claims of those two plaintiffs for failure to state a claim, but they took no action against the claim brought by the third plaintiff.[158] The court refused to apply the narrow interpretation of *Morrison* proposed by the plaintiffs, and proceeded to grant the defendants' motion.[159]

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153 UNDERSTANDING UNSPONSORED ADR PROGRAMS, *supra* note 152, at 1.

154 *Id.*

155 Nicola Clark, *Rogue Trader at Société Générale Gets 3 Years*, N.Y. TIMES, Oct. 6, 2010, at B1.

156 *In re* Société Générale Sec. Litig., No. 08 Civ. 2495 (RMB), 2010 WL 3910286, at *3–5 (S.D.N.Y. Sept. 29, 2010).

157 *Id.* at *1.

158 *Id.* at *5.

159 *Id.* at *6 ("Where, as here, domestic plaintiffs purchased shares of a foreign bank traded on a foreign exchange, the Exchange Act is inapplicable, and Plaintiffs Vermont and Boilermaker have not shown otherwise.").

3. Exchange Traded ADRs Post-*Société Générale*

After dismissing the first two claims, the court, in a highly unanticipated move, went a step further and dismissed the claims of the third plaintiff—who had purchased its ADRs domestically on the U.S. OTC market—sua sponte.[160] Judge Berman, the district judge presiding over the case, found that "because trade in ADRs is considered to be a 'predominantly foreign securities transaction,' Section 10(b) is inapplicable."[161] The weight of this pronouncement is considerable, but it is unclear whether the court had in mind only trades in ADRs conducted OTC, or *all* trades in ADRs.[162] However, in a follow-up footnote, the court interprets the decision in *Cornwell v. Credit Suisse* to mean that even if the ADRs had been listed on an official American exchange, because of their "predominately foreign" nature, the Exchange Act's antifraud provisions would still be inapplicable.[163] This is an unfortunate misreading of the *Cornwell* decision. While the *Cornwell* court dismissed the claims brought by plaintiffs who had purchased common shares of Credit Suisse stock on the SWX, it nevertheless allowed claims brought by plaintiffs who had purchased ADRs listed on the NYSE to proceed.[164] But the *Société Générale* court's language seems to indicate that it views all transactions in ADRs to be "predominantly foreign."

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160 *Société Générale*, 2010 WL 3910286, at *5 ("Though Defendants argue that only [the first two claims] should be dismissed under *Morrison*, the Court finds that *Morrison* compels dismissal of all three . . . .").

161 *Id.* at *6.

162 For instance, two sentences later, the opinion points out that SocGen's ADRs "were not traded on an official American securities exchange; instead, ADRs were traded in a less formal market with lower exposure to U.S.-resident buyers." *Id.* at *6.

163 *Id.* at *9 n.5 ("Courts have also held that Section 10(b) is inapplicable to transactions in which a plaintiff purchases ADRs on a U.S. exchange.") (citing Cornwell v. Credit Suisse Group, 729 F. Supp. 2d 620, 621 (S.D.N.Y. 2010)).

164 *Cornwell*, 729 F. Supp. 2d at 627–28.

Misreading aside, the *Société Générale* decision is troubling for several reasons. First, as commentators have pointed out, it appears to severely narrow, if not altogether abolish, one of the few possible types of claims that still remain against foreign companies after *Morrison*.[165] In the wake of *Cornwell*, *Alstom*, and *Vivendi*, one might have concluded that all cases involving domestic exchange-listed ADRs would generally receive the same treatment as cases involving the exchange of common stock—that is, as long as the transaction was consummated on a domestic exchange, Section 10(b) would apply.[166] A faithful reading of the *Société Générale* decision, however, indicates that this may no longer be the case. Second, like other lower court cases involving ADRs, *Société Générale* adopts a blanket view of ADRs that does not distinguish between the different categories. At the very least, courts should factor in whether an ADR was purchased as part of a sponsored or unsponsored program. It seems fair and reasonable that a foreign company *should* be subjected to the Exchange Act's antifraud provision when its ADRs are listed and traded on a U.S. exchange and distributed as part of a sponsored program, because an issuer participating in a sponsored program can directly control the terms of its ADRs and the amounts registered for trading. Similarly, a foreign company *should not* be subjected to Section 10(b) when its

165 *See, e.g.*, Kevin LaCroix, *So Morrison Precludes Even Domestic ADR Purchasers' Securities Suits?*, D&O DIARY (Sept. 30, 2010), www.dandodiary.com/2010/09/articles/subprime-litigation/so-morrison-precludes-even-domestic-adr-purchasers-securities-suits ("If domestic purchasers of ADRs cannot assert claims under the Exchange Act, there would be very few if any holders of securities of many foreign domiciled companies who could assert Exchange Act claims."); *see also*, Luke Greene, *Morrison Developments in the Lower Courts: A Quick Reference Guide*, ISS GOVERNANCE (Oct. 13, 2010, 4:13 PM), http://blog.issgovernance.com/slw/2010/10/morrison-update-clarity-or-confusion.html ("If ADRs are ultimately found to be beyond the reach of the Exchange Act it could have far reaching consequences.").

166 *See, e.g.*, *Cornwell*, 729 F. Supp. 2d 620; *In re* Alstom SA Sec. Litig., 741 F. Supp. 2d 469 (S.D.N.Y. 2010); *In re* Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512 (S.D.N.Y. 2011).

ADRs are transacted OTC via an unsponsored program, because it will have little, if any, involvement in setting the terms and amounts of those transactions. These issues will inevitably face appellate review, but much time and uncertainty could be spared by the lower courts' agreement on when, if ever, an ADR transaction is considered domestic.

V. APPLICATION BEYOND SECURITIES LAW

Since *Morrison*, plaintiffs' lawyers have employed numerous factual scenarios to test the bounds of the decision as it applies in securities fraud cases. While some questions still remain regarding unique types of transactions—such as those occurring off-exchange and those involving ADRs—the doctrine concerning the Exchange Act's extraterritorial application is, for the most part, well developed. *Morrison*'s "second act," as some have referred to it,[167] concerns the application of the Court's holding beyond the realm of securities law.

The majority in *Morrison* famously proclaimed that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[168] Many defendants have already seized on this proclamation as a means to escape liability in cases completely unrelated to securities fraud. One of the first instances in which *Morrison*'s holding was extended beyond securities law arose in a case concerning the territorial reach of the Racketeer Influenced and Corrupt Organizations Act ("RICO").[169] The defendants' successful extension of *Morrison* to the RICO Act opened the door for other cases involving a wide range of U.S. laws.

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167 Alison Frankel, *Morrison v. NAB's 2nd Act: Way Beyond Securities Fraud and RICO*, THOMSON REUTERS NEWS & INSIGHTS (Oct. 13, 2011), http://newsandinsight.thomsonreuters.com/Legal/News/2011/10_-_October/Morrison_v__NAB_s_2nd_act__way_beyond_securities_fraud_and_RICO.

168 Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010).

169 *See* Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29 (2d Cir. 2010) (per curiam).

A. Racketeering Influenced and Corrupt Organizations Act ("RICO")

A court in the Southern District of New York was the first to extend *Morrison*'s presumption to the RICO statute. In *Cedeño v. Intech Group, Inc.*,[170] Judge Rakoff found that "[a]lthough Morrison does not address the RICO statute, its reasoning is dispositive here."[171] A month later, in *Norex Petroleum Ltd. v. Access Industries, Inc.*, the Second Circuit similarly relied on *Morrison* to find that the RICO Act did not have extraterritorial application.[172] The plaintiff in *Norex* filed a claim alleging that defendants had participated in a widespread racketeering and money laundering scheme with the goal of seizing control of the Russian oil industry. To escape the application of *Morrison*, the plaintiff further claimed that the defendant "committed numerous acts within the United States in furtherance of its scheme."[173]

The *Norex* court began by citing precedent to find that the RICO statute was "silent as to any extraterritorial application."[174] Next, the court rejected the plaintiff's contention that the RICO Act contained language giving it extraterritorial effect,[175] because, according to *Morrison*, "'even statutes that contain broad language in their definitions of commerce do not apply abroad.'"[176] The court concluded that, in light of *Morrison*'s rejection of the conduct and effects tests, the "slim contacts with the United States

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170 Cedeño v. Intech Group, Inc., 733 F. Supp. 2d 471 (S.D.N.Y. 2010) (dismissing RICO action brought by a citizen of Venezuela against defendants associated with the Venezuelan government, who allegedly arranged to have the citizen unjustifiably imprisoned in Venezuela).

171 *Id.* at 473.

172 *Norex*, 631 F.3d at 33.

173 *Id.* at 31.

174 *Id.* at 32 (citing North South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996)).

175 *See* 18 U.S.C. § 1962(a)–(d) (2011) (forbidding any person from engaging in activities which affect "interstate or foreign commerce" through a pattern of racketeering activity).

176 *Norex*, 631 F.3d at 33 (quoting Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2882 (2010)).

alleged by [plaintiff] are insufficient to support extraterritorial application of the RICO statute."[177] Although *Norex* left open the question of RICO's extraterritorial application in government actions,[178] subsequent cases have confirmed that *Morrison* extends to RICO cases brought by the Department of Justice.[179]

While most courts agree that *Morrison*'s presumption extends to the RICO statute, these courts have differed in their approaches to its application. In *RJR Nabisco*, a court in the Eastern District of New York determined that the focus of RICO is on the location of the "enterprise."[180] According to *RJR Nabisco*, the location of the RICO enterprise—determined using the "nerve center" test adopted in *Hertz Corp. v. Friend*[181]—must be within the United States. By contrast, in *Chevron Corp. v. Donziger*,[182] a Southern District court focused not on the location of the enterprise, but instead on the place where the alleged racketeering activity was conceived and orchestrated.[183] There, Chevron brought a RICO claim against a New York attorney, claiming the attorney had conspired to defraud the company of billions in damages by bringing environmental litigation on behalf of indigenous peoples of the Amazon rainforest.[184] Judge Kaplan found that the RICO statute

177 *Norex*, 631 F.3d at 33.

178 *Id.* ("[B]ecause Norex brought a private lawsuit pursuant to [RICO], we have no occasion to address . . . the extraterritorial application of RICO when enforced by the government . . . .").

179 *See, e.g.*, United States v. Philip Morris USA, Inc., 783 F. Supp. 2d 23 (D.D.C. 2011) (refusing to apply RICO to claim based on English cigarette manufacturer's foreign racketeering activities).

180 European Cmty. v. RJR Nabisco, Inc., No. 02-CV-5771 (NGG) (VVP), 2011 WL 843957 (E.D.N.Y. Mar. 8, 2011) ("Because the 'focus' of RICO is the 'enterprise,' a RICO 'enterprise' must be a 'domestic enterprise.'").

181 Hertz Corp. v. Friend, 130 S. Ct. 1181 (2010).

182 Chevron Corp. v. Donziger, No. 11 Civ. 0691(LAK), 2012 WL 1711521 (S.D.N.Y. May 14, 2012).

183 *Id.* at *4–9.

184 For additional details concerning the history of the Chevron litigation, see Patrick R. Keefe, *Reversal of Fortune*, NEW YORKER, Jan. 9,

afforded a remedy to a "U.S. plaintiff who claims injury caused by domestic acts of racketeering activity *without regard to the nationality or foreign character of the defendants or the enterprise* whose affairs the defendants wrongfully conducted."[185] This approach, according to Judge Kaplan, was consistent with both the Supreme Court's focus on the place of the transaction rather than the place of the parties in *Morrison*, as well as Congress's intent to protect Americans from domestic racketeering activities by any enterprise—be it foreign or domestic. Thus, because Chevron had alleged domestic acts of racketeering, the *Donziger* defendants' motion to dismiss on extraterritorial grounds was denied.

B. Alien Tort Statute ("ATS")

The extension of *Morrison* may have enormous implications on ATS cases involving the overseas conduct of individuals and corporations. In the past two decades, the ATS has served as a primary means of redress for survivors of human rights abuses. Enacted by the First Congress in 1789, it lay dormant until it was raised by the plaintiff in *Filartiga v. Pena-Irala* in 1980.[186] In *Filartiga*, a foreign plaintiff brought a suit in the United States against a foreign police official for the torture and death of the plaintiff's son in a foreign country. The Second Circuit held that where an alleged torturer is found and served with process by an alien within the borders of the United States, the ATS provides federal jurisdiction.

The typical ATS claims brought against individuals often involve instances of torture,[187] arbitrary and prolonged

2012, *available at* www.newyorker.com/reporting/2012/01/09/120109fa_fact_keefe.

185 *Donziger*, 2012 WL 1711521, at *8 (emphasis added).

186 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

187 *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (former prisoners in Ethiopia filed suit against official of former Ethopian government charging him with responsibility for their torture and other cruel acts; judgment of $200,000 in compensatory damages and $300,000 in punitive damages was awarded to each plaintiff); Arce v. Garcia, 434

arrests,[188] murders and executions,[189] and genocide and other crimes against humanity.[190] Between 1980 and 1996, only fifteen cases were brought against corporations,[191] and most were dismissed. However, in 1997, a California district court refused to dismiss ATS claims brought by a group of Myanmar villagers against Unocal Corporation alleging human rights violations in the construction of a gas pipeline in Myanmar.[192] That case, *Doe v. Unocal*, was eventually

F.3d 1254 (11th Cir. 2006) (Salvadoran refugees, tortured by soldiers in El Salvador during the course of a campaign of human-rights violations, brought action against Salvadoran military officials who had become United States permanent residents; jury awarded $54.6 million to plaintiffs); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (Muslim victims of torture and other human rights abuses in Bosnia-Herzegovina brought action against former Bosnian Serb police officer; court found officer liable for torture, cruel and inhumane treatment, arbitrary detention, violations of the law of war, and crimes against humanity under international law).

188 *See, e.g.*, *Mehinovic*, 198 F. Supp. 2d 1322; Kpadeh v. Emmanuel, 261 F.R.D. 687 (S.D. Fla. 2009) (action against Liberian commander for arbitrary arrest, prolonged detention, and torture, ultimately resulting in $22.4 million jury award to plaintiffs).

189 *See, e.g.*, Cabello v. Fernández-Larios, 402 F.3d 1148 (11th Cir. 2005) (survivors of Chilean official who was killed following coup d'état filed cause of action against former Chilean military officer, alleging extrajudicial killing, torture, crimes against humanity, and cruel, inhuman or degrading punishment); Doe v. Constant, 354 F. App'x 543 (2d Cir. 2009) (summary order) (default judgment entered against defendant in action alleging extrajudicial killing, torture, and crimes against humanity).

190 *See, e.g.*, Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995) (victims from Bosnia-Herzegovina successfully brought actions against self-proclaimed president of unrecognized Bosnian-Serb entity for violations of customary international law and law of war; jury awarded $745 million judgment); Lizarbe v. Rondon, 642 F. Supp. 2d 473 (D. Md. 2009) (action against a former Peruvian Army officer, alleging extrajudicial killing, torture, and war crimes arising out of a massacre in a Peruvian village during a civil war).

191 *Corporate ATCA Cases*, AM. LAWYER, http://amlawdaily.typepad.com/ATS%20Cases.pdf (last visited Apr. 17, 2013).

192 Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997).

settled out of court in 2005 for an undisclosed sum.[193] Among cases filed since 1997, over 150 ATS claims have been brought against corporations,[194] with over a dozen resulting in settlements.[195]

The nature of corporate ATS cases often resembles that of RICO cases such as *Cedeño* and *Norex*. Plaintiffs in these ATS cases are typically foreign citizens bringing an action against a multinational corporation—with operations in the United States—for violations that occurred overseas. It comes as no surprise, then, that defendants in ATS litigation eagerly embraced the *Morrison* presumption as their new weapon of choice for dismissing plaintiffs' claims. In *Sarei v. Rio Tinto, PLC*,[196] plaintiff-landowners in Papua New Guinea brought a claim alleging genocide and other human rights violations in New Guinea by a joint venture formed between the Papua New Guinea government and Rio Tinto. Rio Tinto sought to dismiss the case by arguing that the ATS did not apply extraterritorially in foreign-cubed cases. The Ninth Circuit, in an en banc decision, distinguished the ATS from the Exchange Act and the RICO statute.[197] The court first pointed out that *Norex* was the only circuit decision to apply the *Morrison* standard in a case outside of securities law. It then found "strong indications that Congress intended the ATS to provide jurisdiction for certain violations of international law occurring outside the United States,"[198] and concluded that "the ATS is not limited to conduct occurring within the United States or to conduct

193 *Final Settlement Reached in* Doe v. Unocal, EARTHRIGHTS INT'L (Mar. 21, 2005, 12:00 AM), www.earthrights.org/legal/final-settlement-reached-doe-v-unocal.

194 Rebecca Hamilton, *A History of the U.S. Alien Tort Statute*, REUTERS, Sept. 30, 2012, *available at* http://newsandinsight.thomsonreuters.com/Legal/News/2012/09_-_September/A_history_of_the_U_S__Alien_Tort_Statute.

195 For examples of such settlements, see *Corporate ATCA Cases*, *supra* note 191.

196 Sarei v. Rio Tinto, PLC, 671 F.3d 736, 744 (9th Cir. 2011) (en banc).

197 *Id.* at 747 ("We deal with the ATS, not RICO or a securities act.").

198 *Id.*

committed by United States citizens" and that "[t]here is no extraterritorial bar to applying the ATS to the conduct alleged in this case."[199]

Sarei was the latest in a series of cases dealing with the ATS as applied to multinational corporations—an issue that had fueled a split among the circuit courts.[200] However, the Ninth Circuit's approach in *Sarei* appears to have been rejected in the latest and most widely publicized case involving the ATS.[201] In *Kiobel v. Royal Dutch Petroleum Co.*,[202] the plaintiffs—twelve Nigerian citizens—filed an ATS claim in U.S. federal court against Royal Dutch for allegedly aiding the Nigerian government in killing and torturing Nigerian civilians in Nigeria. When the Supreme Court initially granted certiorari, it was primarily concerned with the question of whether corporations could be held liable under the ATS. However, soon after the initial oral argument the Court issued an order for a second round of briefing and re-argument, directing the parties to focus exclusively on the issue of extraterritoriality—that is, whether, and under what circumstances, U.S. federal courts could find a cause of action for ATS violations taking place entirely outside the territory of the United States.[203] With *Morrison* in the backdrop, plaintiffs feared—and rightly so—

199 *Sarei*, 671 F.3d at 747.

200 *Compare* Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1025 (7th Cir. 2011) (finding that denial of extraterritorial application for the ATS would render it superfluous), *and* Doe v. Exxon Mobil Corp., 654 F.3d 11, 26 (D.C. Cir. 2011) (reinstating ATS claims upon finding that corporations may be liable under the ATS, and that the ATS extends to extraterritorial activity), *with* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 145 (2d Cir. 2010) (finding, in a matter of first impression, that the ATS does not confer jurisdiction over claims against corporations), *cert. granted*, 132 S. Ct. 472 (2011).

201 Shortly before the publication of this Note, the Supreme Court released its much anticipated decision in *Kiobel*. *See* Jess Bravin, *Justices Limit Law's Reach for Acts Overseas*, WALL ST. J., Apr. 18, 2013, at A5.

202 Kiobel v. Royal Dutch Petroleum, No. 10-1491, 2013 WL 1628935 (U.S. Apr. 17, 2013).

203 *See* Order for Reargument, *Kiobel*, 132 S. Ct. 1738 (2012) (No. 10-1491).

that the Court's reframing of the issue in this manner would severely undermine the more than three decades of ATS case law first set in motion by *Filartiga*.

Chief Justice Roberts, writing for the *Kiobel* Court,[204] began by pointing out that the presumption against extraterritoriality is especially appropriate in the context of a "strictly jurisdictional" statute such as the ATS due to the "danger of [granting] unwarranted judicial interference in the conduct of foreign policy" to the federal courts.[205] He noted that in order "to rebut the presumption, the ATS would need to evince a 'clear indication of extraterritoriality.'"[206] After examining the language and the history of the statute, Justice Roberts concluded that "nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality. Nor does the historical background against which the ATS was enacted overcome the presumption . . . ."[207] Thus, "the presumption against extraterritoriality applies to claims under the ATS, and . . . nothing in the statute rebuts that presumption."[208]

C. Other U.S. Laws

1. Torture Act

Unlike the ATS, the Torture Act,[209] passed as implementing legislation to the United Nations Convention Against Torture,[210] is deemed to overcome the *Morrison*

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204 Although the judgment was unanimous, the Justices split 5-4 on the reasoning behind the conclusion. *See Kiobel*, 2013 WL 1628935, at *12 (Breyer, J., concurring) ("Unlike the Court, I would not invoke the presumption against extraterritoriality.").

205 *Id.* at *5 (majority opinion).

206 *Id.* at *6 (citing Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2883 (2010)).

207 *Id.* at *6–7.

208 *Id.* at *10.

209 18 U.S.C. §§ 2340–2340A (2011).

210 U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

presumption. In *United States v. Belfast*,[211] the Eleventh Circuit, less than a month after *Morrison*, held that "[t]he language of the Torture Act . . . evinces an unmistakable congressional intent to apply the statute extraterritorially."[212] Specifically, the court read the language imposing a fine or prison sentence on "[w]hoever outside the United States commits or attempts to commit torture" as a "clear expression" of Congress' intent to extend the Act's reach beyond U.S. borders.

2. Lanham Act

Just two weeks after the *Morrison* decision was issued, the Ninth Circuit had the opportunity to review the extraterritorial reach of the Lanham Trademark Act.[213] In *Love v. Associated Newspapers*,[214] the Ninth Circuit found that the *Morrison* presumption did not restrict the Lanham Act's reach over foreign conduct, so long as certain other requirements were met.[215] The court noted that the Lanham Act grants a civil right of action against the improper "use in commerce" of a registered trademark,[216] and that, for purposes of the Act, the word "commerce" is "sweepingly defined as 'all commerce which may lawfully be regulated by Congress.'"[217] The court ruled that the explicit statutory language expanding the scope of the Lanham Act sufficiently distinguished it from the Exchange Act, thereby neutralizing the limiting effects of *Morrison*.[218]

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211 United States v. Belfast, 611 F.3d 783 (11th Cir. 2010).

212 *Id.* at 811.

213 15 U.S.C. §§ 1051–1141n (2011).

214 Love v. Associated Newspapers, Ltd., 611 F.3d 601 (9th Cir. 2010).

215 *Id.* at 612 ("We analyze the Lanham Act's coverage of foreign activities under a three-part test originally developed in the antitrust context.").

216 *Id.* at n.6.

217 *Id.* (quoting 18 U.S.C. § 1127).

218 *Id.*

3. Anti-Retaliation Provision

In *Asadi v. G.E. Energy (USA)*,[219] the United States District Court for the Southern District of Texas dismissed an action brought by a former American employee of GE Energy who was temporarily assigned to Amman, Jordan. The action had been brought under the whistleblower program established by the SEC pursuant to the Section 922(h) Anti-Retaliation Provision of the Dodd-Frank Act.[220] The plaintiff claimed that GE Energy terminated his employment after he informed his supervisors that the company had potentially violated the Foreign Corrupt Practices Act and other company policies.

The court determined that, because the language of the Anti-Retaliation Provision is silent regarding its extraterritorial application, the Provision must be presumed "not [to] govern conduct outside the United States."[221] The

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219 Asadi v. G.E. Energy (USA), LLC, No. 4:12-cv-00345, 2012 WL 2522599 (S.D. Tex. June 28, 2012).

220 Section 922(h)(1)(A) states:

> IN GENERAL.—No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
> (iii) in making disclosures that are required or protected under the [Sarbanes-Oxley Act], [The Exchange Act], and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Dodd-Frank Act § 922(h), 15 U.S.C. § 78u-6(h)(1)(A)(2011).

221 *Asadi*, 2012 WL 2522599, at *4 ("Like the language of Section 10(b), the language of the Dodd-Frank Anti-Retaliation Provision is silent regarding whether it applies extraterritorially. The Court therefore applies the presumption that the Provision does not govern conduct outside the United States.").

court then looked to the "context" of Title IX of the Dodd-Frank Act for indications of extraterritorial intent. In a somewhat ironic twist, the court pointed to Section 929P(b), which was drafted for the purpose of preserving the conduct and effects tests for actions brought by the government, as reinforcement of the notion that the Anti-Retaliation Provision does not apply extraterritorially.[222] The court concluded that, in cases where "the majority of events giving rise to the suit occurred in a foreign country," whistleblowers would not be permitted to claim protection under the Anti-Retaliation Provision.[223]

4. Antitrust Law

The Seventh Circuit's recent en banc decision in *Minn-Chem*[224] may have important implications for the extraterritorial reach of U.S. antitrust laws. In *Minn-Chem*, the Seventh Circuit began by extending *Morrison*'s analysis of jurisdiction to the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), which Congress passed to restrict the Sherman Act's extraterritorial application.[225] The court held that the FTAIA establishes the merits of an antitrust claim where foreign conduct is involved by requiring certain criteria be met before the claim can be brought under the Sherman Act. Therefore, federal courts "possess subject-matter jurisdiction to adjudicate antitrust cases involving foreign conduct."[226]

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222 *Asadi*, 2012 WL 2522599, at *4 ("[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.").

223 *Id.* at *5.

224 Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845 (7th Cir. 2012) (en banc).

225 *See id.* at 852; *see also* FTAIA, 15 U.S.C. § 6a (2011); Sherman Antitrust Act, 15 U.S.C. §§ 1–2 (2011).

226 *See* DAVIS POLK & WARDWELL LLP, EXPANSION IN GLOBAL REACH OF U.S. ANTITRUST LAWS 2 (2012), *available at* www.davispolk.com/files/Publication/f46b2435-9c7c-4d95-8de4-0ae30c09b4e0/Presentation/PublicationAttachment/63a0f521-a508-40b4-8db5-0cc23b2862a1/071912_Expansion_in_Global_Reach_of_U.S._Antitrust%20Laws.pdf.

The true significance of *Minn-Chem*, however, stems from the court's narrowed reading of the FTAIA. For years, the FTAIA has been applied to preclude antitrust actions based on overseas activities that do not have a "direct, substantial, and reasonably foreseeable effect" on commerce in the United States.[227] In an earlier case, *LSL Biotechs*,[228] the Ninth Circuit held that an effect is "'direct' if it follows as an immediate consequence of the defendant's activity."[229] The Ninth Circuit then read the FTAIA in a manner that limited the scope of antitrust liability for defendants in cases involving foreign conduct. According to *LSL Biotechs*, in order for liability to arise under the Sherman Act, the effect on U.S. commerce would have to be an "immediate consequence" of the foreign conduct. In *Minn-Chem*, the Seventh Circuit unanimously rejected the "immediate consequence" requirement and instead adopted the DOJ's lower standard of "direct effect." The *Minn-Chem* court held that foreign conduct has a "direct effect" on U.S. commerce if there is "a reasonably proximate causal nexus."[230] This

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227 The FTAIA specifies that the Sherman Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless:

> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> > (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> > (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States . . . .

15 U.S.C. § 6a (2011).

228 United States v. LSL Biotechnologies, 379 F.3d 672 (9th Cir. 2004).

229 *Id.* at 680 ("After the lower federal courts struggled for years to define 'direct effect,' the Supreme Court unanimously declared that an effect is 'direct' if it follows as an immediate consequence of the defendant's activity.").

230 Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845. 857 (7th Cir. 2012) (en banc) (finding the Ninth Circuit's approach in *LSL Biotechs* unconvincing, and reasoning that "[t]o demand a foreseeable, substantial,

interpretation would significantly expand the Sherman Act's reach over foreign conduct by relaxing the limitations imposed by the FTAIA.

In *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, the Supreme Court held that the FTAIA should be read to "clarify, perhaps to limit, but *not to expand* in any significant way the Sherman Act's scope as applied to foreign commerce."[231] But *Minn-Chem* has resulted in a split concerning the interpretation of the FTAIA's "direct effect" requirement, with the Seventh Circuit construing the requirement more expansively than the Ninth Circuit. Although the case may ultimately be resolved by the Supreme Court,[232] it is unlikely that *Morrison* will play a decisive role in its outcome. The concern over the Sherman Act's extraterritorial scope in *Minn-Chem* is readily distinguishable from that of the Exchange Act in *Morrison* because the circuit split is not over whether the Sherman Act applies overseas but rather how proximate the conduct must be in order for the Sherman Act to apply. Through the language of the FTAIA, Congress clearly stated its intention for the Sherman Act to reach foreign conduct—something it failed to do in the language of the Exchange Act's Section 10(b).

VI. THE CASE FOR LIMITING *MORRISON*

As made clear by the examples above, *Morrison*'s application in cases involving securities laws has been far from clear-cut. While the majority arguably succeeded in setting a bright-line approach for dealing with standard exchange-traded securities, it has drastically underestimated

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and 'immediate' consequence on import or domestic commerce comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA's coverage").

231 F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004) (emphasis added).

232 *See* ARNOLD & PORTER LLP, THE SEVENTH CIRCUIT'S EXPANSIVE TAKE ON EXTRATERRITORIAL REACH OF U.S. ANTITRUST LAWS 3 (2012), *available at* www.arnoldporter.com/resources/documents/Advisory-Foreign_Trade_ Antitrust_Improvements_Act_of_1982.pdf.

the volume and complexity of transactions taking place *off-exchange*. The convoluted facts in *Porsche* and *Absolute Activist* are evidence that the majority's transactional test is not so readily adapted to OTC transactions where the timing and the location of consummation may be hotly disputed.

Despite certain obvious shortcomings, *Morrison*'s impact on private securities litigations has nonetheless been well received by many industry trade groups[233] and foreign governments.[234] *Morrison*'s proponents have long pointed to a slew of reasons for limiting the reach of U.S. antifraud laws abroad. Among these reasons is the uncertainty caused by the conduct and effects tests, the risk of harm to foreign direct investment ("FDI") in the United States, the importance of international comity and respect for foreign regulatory regimes, and the threat of the United States becoming the "Shangri-La" of class action litigation[235] for trigger-happy plaintiffs' lawyers worldwide.

Viewed from an economic perspective, *Morrison* may indeed provide a measure of certainty for foreign investors in the United States. The combination of an unpredictable legal environment and plaintiff-friendly class action laws, coupled with the rapid growth of foreign capital markets and increased opportunities for investment in countries with comparatively fewer legal risks, has contributed to the loss of FDI in the United States. A 2012 report by the Organization for International Investment found that

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233 Trade groups supporting the *Morrison* standard include (among others) the SIFMA and the GC100. *See, e.g.*, Letter from John Davidson, Chair, GC 100, to the SEC 2 (Feb. 18, 2011), *available at* www.sec.gov/comments/4-617/4617-5.pdf; Letter from Kevin M. Carroll, Managing Dir., SIFMA & Lorraine Charlton, Managing Dir., Assoc. Fin. Mkts. Eur., to the SEC 1–2 (Feb. 18, 2011), *available at* www.sec.gov/comments/4-617/4617-15.pdf.

234 The governments of Switzerland, France, Germany, and the United Kingdom are among those who submitted amicus briefs in support of the *Morrison* holding. *See generally Comments on Study on Extraterritorial Rights of Action*, SEC, www.sec.gov/comments/4-617/4-617.shtml (last updated Mar. 23, 2012).

235 Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2886 (2010).

> [T]he U.S. share of total world stock in [FDI] dropped 18% in 2010, down significantly from 37% a decade earlier as worldwide competition for foreign investment dollars has increased and multinational companies have expanded investments in developing economies. For the first time, in 2010, more than half of all [FDI] flowed to transitional and developing economies, including China, India, and Brazil.[236]

Notably, just eight countries accounted for more than eighty-four percent of all FDI in the United States,[237] and the governments of four out of the five largest contributors—Switzerland, the United Kingdom, France, and Germany—are among those that submitted amicus briefs in support of respondents, and comment letters to the SEC endorsing the Supreme Court's decision in *Morrison*.

The United States has also struggled to maintain the competitiveness of its capital markets. The yearly average of total U.S. IPOs decreased from twenty-seven percent of worldwide value in the 1990s to just twelve percent from 2000 to 2007.[238] In 2010, U.S. IPOs made up just thirteen percent of the global total by capital raised, and eight percent by number of deals.[239] Proponents argue that, at a time when companies have easy access to cheaper sources of capital in foreign markets—in 2010, the "Greater China" region (consisting of China, Hong Kong and Taiwan) captured more than forty-five percent of the global IPO

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236 ORGANIZATION FOR INTERNATIONAL INVESTMENT, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 1–2 (2012), *available at* http://ofii.org/docs/FDIUS_3_14_12.pdf.

237 ECON. & STATISTICS ADMIN., U.S. DEP'T OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 1 (2011), *available at* www.esa.doc.gov/sites/default/files/reports/documents/fdiesaissuebriefno2061411final.pdf.

238 Claire Brunel, *The Rise of IPO Activity Around the World*, NAT'L BUREAU ECON. RESEARCH (Aug. 2011), www.nber.org/digest/aug11/w16916.html.

239 *Global IPO Trends 2011*, ERNST & YOUNG, www.ey.com/GL/en/Services/Strategic-Growth-Markets/Global-IPO-trends-2011 (last visited Apr. 17, 2013).

share[240]—abandoning the *Morrison* holding would further reduce the competitiveness of the U.S. markets.[241] In addition to the fall in IPOs, proponents also point to the string of de-listings by foreign companies from U.S. exchanges as a troubling sign. From the beginning of 2007 through the end of 2010, the number of British companies listed on the NYSE fell from forty-three to twenty-five, German companies from sixteen to five, French companies from seventeen to seven, and Swiss companies from eleven to seven.[242]

Politically, *Morrison*'s treatment of private actions will likely be viewed as a positive step toward fostering closer diplomatic relations. Even those who believe in the expansive reach of U.S. securities laws abroad can appreciate that the need for a unified global approach to financial regulation is more important today than it has ever been. The financial crisis has shown us that, while global regulatory strategies are often fragmented, the markets they seek to protect are, in fact, closely linked. In the past few years the world stood witness to the catastrophic results of inconsistent regulatory efforts aimed at containing financial contagion. In light of recent events in the global financial markets, cultivating these diplomatic ties would go a long way toward promoting much needed international regulatory cooperation.

With the help of some creative maneuvering by the defense bar, and astute interpretation by lower courts, *Morrison* has gained a fairly consistent following in securities law cases. The same cannot be said for extensions

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240 *Global IPO Trends 2011*, ERNST & YOUNG, www.ey.com/GL/en/Services/Strategic-Growth-Markets/Global-IPO-trends-2011 (last visited Apr. 17, 2013).

241 *See, e.g.*, Letter from John Davidson to the SEC, *supra* note 227, at 1.

242 *Compare December 31, 2007—Market Summary*, SEC 1, www.sec.gov/divisions/corpfin/internatl/foreignmarketsumm2007.pdf (last visited Apr. 17, 2013), *with December 31, 2010—Market Summary*, SEC 1, www.sec.gov/divisions/corpfin/internatl/foreignmarketsumm2010.pdf (last visited Apr. 17, 2013).

of *Morrison* beyond securities law. The cases raised in Part IV demonstrate that, while defendants have been eager to expand the bounds of *Morrison*, attempts by the courts to limit other U.S. laws through the strict presumption against extraterritoriality, and to fit wholly different scenarios under *Morrison*'s transaction-based approach, have resulted in even greater inconsistency and uncertainty.

The first instances of inconsistency often arise during the exercise of statutory interpretation. For instance, in *Norex*, the Second Circuit held that references to "interstate or foreign commerce" in the RICO Act were the sort of "broad" statutory language defining "commerce" that nonetheless failed to overcome the *Morrison* presumption.[243] However, the Ninth Circuit in *Love v. Associated Newspapers* held that the sweeping definition of "commerce" in the Lanham Act sufficed to overcome the *Morrison* presumption.[244] In these situations, courts are left with rather wide discretion to decide whether a statute's language and context would point toward its extraterritorial application.

Inconsistencies also arise when courts set out to *apply* the presumption. In the RICO district court cases discussed above, some courts—such as the Eastern District of New York in *RJR Nabisco*—found it made more sense to focus on the location of the RICO *enterprise*, whereas other courts—such as the Southern District of New York in *Donziger*—favored a direct application of the transaction test that looked to the location of the racketeering *activity*. These cases show that, even where different courts agree that the presumption applies to limit a statute's extraterritorial reach, they may still disagree as to whether a particular case survives the presumption.

Legal matters aside, there are also inconsistent policy implications in applying *Morrison* outside the securities fraud context, as many of the reasons for supporting *Morrison*'s limit on private securities litigation simply do not

243 Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 33 (2d Cir. 2010) (per curiam).

244 Love v. Associated Newspapers, Ltd., 611 F.3d 601, 612 n.6 (9th Cir. 2010).

apply to claims involving other laws. For instance, the Exchange Act and the ATS differ considerably in their purpose and substance. The ATS is a purely jurisdictional statute—it grants jurisdiction to U.S. federal courts to hear claims brought by non-U.S. persons alleging violations of customary international law. In doing so, the ATS seeks to implement well-established international norms that have long been recognized and accepted worldwide. The Exchange Act, meanwhile, aims to preserve the integrity of the *domestic* securities markets through a host of provisions that are unique to the United States. Unlike international norms, the U.S. securities laws—and especially the antifraud provisions under Section 10(b)—are viewed by many nations as exceedingly intrusive and burdensome, and numerous governments have openly rejected the U.S. private securities class-action model. This hostile attitude is less common in claims brought under the ATS.

The Exchange Act and the ATS also stand apart when considering a key basis for the presumption against extraterritoriality—the importance of respect for the principle of international comity. International comity requires the United States to avoid *unreasonably* interfering with the sovereign authority of other nations, and one of the central determinants of "reasonableness" is the potential for conflict with the regulations of another state.[245] Because the ATS merely grants jurisdiction for claims arising out of customary international law—claims that most foreign nations would willingly recognize if the conduct had occurred within their own borders—there is little risk of the sort of conflict with home-country laws that the presumption against extraterritoriality aims to prevent.

Finally, whereas the existence of a private right of action under Section 10(b) is entirely judicially created,[246] the ATS's private right of action is expressly stated in the statutory

245 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 403(2), 416(2) (1987).

246 *See* Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) ("It is now established that a private right of action is implied under [Section] 10(b).").

language approved by Congress.[247] Therefore, while the courts may have justification—arguably even an obligation—to limit the scope of private actions brought under Section 10(b),[248] the same is not true of the ATS.

VII. WHAT CONGRESS NEEDS TO DO

A. Concerning Securities Laws

With respect to the enforcement of U.S. securities laws, the *Morrison* decision raises important political and economic concerns. As discussed above, Congress must be well attuned to the political implications of potentially intrusive U.S. laws, and be mindful that foreign governments, like the U.S. government, have similarly strong interests in protecting their citizens from fraud and in regulating their securities markets. Congress should show a respectful degree of deference for the courses of action those governments choose to pursue. Where possible, Congress should always strive to encourage the continued convergence of U.S. regulation with that of other countries.

The economic impact of *Morrison* should be closely monitored in the years to come. Congress should task the SEC with monitoring *Morrison*'s effects on the behavior of foreign companies. Some areas of interest might include, but are not limited to, the decisions of foreign companies to engage in foreign direct investment in the United States, to raise capital in the U.S. markets through IPOs and private placements, and to register their securities for listing on U.S. securities exchanges. The SEC should also track the ability of investors to pursue private actions under foreign laws. This may involve examining the quantity of litigation, the costs of litigating abroad, success rates and settlement rates,

247 *See* 28 U.S.C. § 1350 (2011).

248 *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) ("When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn.").

and other factors important to plaintiffs in their decisions to seek legal recourse.

In addition to monitoring the economic and political costs of *Morrison*, Congress must clarify some of the technicalities related to its application. The most pressing issues involve the handling of off-exchange transactions. Congress should task the SEC with standardizing the meaning of "domestic transaction." Specifically, the SEC must provide guidance as to when a transaction can be considered "consummated," so that this is not subject to different treatment by different courts. The "irrevocable liability" approach adopted by some courts is just one promising solution.[249]

The treatment of swap transactions must also be clarified. The SEC should endorse the court's treatment of swap transactions in *Porsche*. Swaps make up a significant share of the market for OTC products and, to date, *Porsche* remains the most convincing approach to addressing such transactions. The *Porsche* holding is a sensible approach that balances both political and economic concerns. Unlike suits where the plaintiff and defendant deal directly with each other, often the party or parties accused of fraud in a swap arrangement will never have had any interaction with the complaining party or parties. It seems fair that the defendant should not be held liable to everyone who owned a derivative instrument but not the underlying asset itself.

The treatment of private placements should follow the court's approach in *Absolute Activist*.[250] Frauds perpetuated through private placements executed directly between two offshore parties should not be actionable under Section 10(b) just because the securities are also transacted domestically. Private placements are increasingly the funding strategy of

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249 *See, e.g.*, Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166, 177 (S.D.N.Y. 2010); Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc., 798 F. Supp. 2d 533 (S.D.N.Y. 2011); Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60 (2d Cir. 2012).

250 *See supra* text accompanying notes 123–126. *See also* Absolute Activist Value Master Fund Ltd. v. Homm, No. 09 CV 08862(GBD), 2010 WL 5415885 (S.D.N.Y. Dec. 22, 2010).

choice for many foreign investors, and it is important to establish a measure of certainty for investors engaging in these types of transactions outside the United States when the transactions involve domestically traded securities.

Lastly, clarity is needed in dealing with ADRs. The *Société Générale* case stands at odds with earlier cases such as *Cornwell* and *Vivendi* concerning how exchange-traded ADRs should be viewed in light of *Morrison*. The SEC should recommend that a more thorough approach be adopted when dealing with cases involving ADRs. These are sophisticated instruments transacted by sophisticated parties, and investors who make conscious decisions to invest in unsponsored ADRs should have significantly lower expectations about their ability to recover for fraud against the underlying issuer. Similarly, foreign companies that have little to no control over the pricing and distribution of their unsponsored ADRs should not be held accountable to investors injured by fraud arising out of these transactions, especially when the ADRs in question are traded over-the-counter.

B. Beyond Securities Laws

Courts should be very careful about extending the *Morrison* presumption against extraterritoriality beyond the realm of securities laws, and even more careful when trying to fit substantially different factual scenarios arising under different laws within *Morrison*'s transaction-based approach. To prevent inconsistent outcomes across different courts, Congress must take great care to express its extraterritorial intentions clearly. As guidelines, Congress can look to the many cases where courts have reviewed a statute under the *Morrison* presumption and found express extraterritorial intent. The language of the Torture Act and the Foreign Trade Antitrust Improvements Act, discussed above, are examples of such cases.

Congress must also take care not to create ambiguities through the "context" of its statutes. As we have seen repeatedly in post-*Morrison* cases, courts will now review a statute as a sum of its parts. Any mention of extraterritorial

effect in one section of a statute may support a finding that such effect does not hold in the other sections. This *expressio unius* approach was taken by the *Asadi* court in finding that the Anti-Retaliation Provision in Dodd-Frank did not extend to activities arising overseas.

VIII. CONCLUSION

The *Morrison* Court reasserted the longstanding presumption against extraterritoriality and introduced a far-reaching transactional test. Since then, lower courts have taken the decision's holding even further, first to resolve securities law cases arising under different factual scenarios, and more recently, to resolve cases completely unrelated to securities. These lower courts should recognize that the strict presumption against extraterritoriality and the evaluation of claims under a transaction-based approach are not suitable for resolving every case involving the extraterritorial application of a U.S. statute. Further, if a court does decide to extend *Morrison* outside of securities law, it should be willing to consider not just the language and context of the statute under scrutiny, but also its history and policy. For its part, Congress should be explicit when it intends for a statute to carry extraterritorial effect. This is not merely a forward-looking exercise, but will require revisiting and amending existing statutes, and working closely with the various government agencies to promulgate clarifying rules. As guidance, Congress and the relevant agencies should look to the statutes where courts have previously found a clear expression of extraterritorial effect.

In time, the Supreme Court may revisit the *Morrison* decision to define its appropriate reach, both inside and outside of securities law. However, for the time being, the resolution of these difficult and high-stakes cases remains a task for the lower courts. *Morrison*'s legacy will largely depend on the creativity of the defense bar and the willingness of lower courts to extend its holding into new areas of law. If these past few years are any indication of the future, *Morrison* is well on its way to becoming one of the most significant cases of this era.