Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict

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This Article examines a form of securities class action that is growing increasingly popular in U.S. courts: the "foreign-cubed" action, brought against a foreign issuer on behalf of a class that includes foreign investors who purchased securities on a foreign exchange. These cases are becoming an important part of the regulatory landscape, and they create the potential for particularly severe conflict with other countries on the question of how best to regulate global economic activity. Yet they point out quite clearly that the traditional conduct and effects tests for subject-matter jurisdiction are inadequate to the task of delimiting the reach of U.S. securities laws in the global capital markets. The Article draws on a study of forty-five foreign-cubed claims. It analyzes the arguments made by foreign investors seeking to justify the application of U.S. law to their claims—arguments that base an expansive theory of regulatory jurisdiction on the interconnections among the world's capital markets. It then turns to judicial disposition of such claims, addressing the various stages of litigation (including class certification) at which courts confront jurisdic-
tional questions and identifying a series of assumptions that courts make in attempting to draw jurisdictional lines. Examining those assumptions, the Article concludes that courts operating within the current jurisdictional framework cannot adequately manage the regulatory conflicts that foreign-cubed claims present. It therefore supports a jurisdictional limit based on the location of investment transactions.

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I. INTRODUCTION

The globalization of financial markets has brought about the globalization of securities litigation. Given the prevalence of multiple listings, global offerings, and other cross-border capital-raising activity, foreign entities are increasingly likely to participate in secu-
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rities litigation before U.S. courts—as plaintiffs, in the case of foreign investors, or as defendants, in the case of foreign issuers. Such litigation, arising from conduct with foreign as well as U.S. elements, raises questions regarding the reach of U.S. securities law into the global capital markets. Considering the stakes involved, one might expect that the scope of subject-matter jurisdiction under the federal securities laws would by now be firmly established. Quite the opposite is true. Congress has enacted no legislation on the point, the Supreme Court has declined to address the question, and the lower federal courts apply in inconsistent and therefore unpredictable ways a pair of judicially created jurisdictional tests that are now almost 40 years old.

A particular form of securities litigation has arrived onto this scene that both highlights and heightens the confusion surrounding jurisdictional analysis: the multinational class action. I define this as an action brought against a foreign issuer, on behalf of a plaintiff class that includes not only investors who purchased the securities in question on a U.S. securities exchange, but also foreign investors who purchased the securities on a foreign securities exchange. These cases, sometimes described as “foreign cubed,” present some especially thorny jurisdictional questions. They warrant particular attention for several reasons. First, the rate of such claims is increasing, and courts will face these complicated cases more frequently in the future. Second, the U.S. plaintiffs’ bar is taking deliberate steps to cultivate potential foreign claimants, and that activity is likely to heighten a conflict between the United States and other countries over cross-border securities litigation that has until now remained essentially latent. Third, these cases reveal a growing but unexamined disjuncture between the jurisdictional rules that courts apply in securities cases and the market efficiency-based aspects of substantive anti-fraud doctrine. Fourth, and perhaps most importantly, these cases can be used as a lens through which to examine the framing assumptions that courts bring to their analysis of jurisdiction under the


4. See infra Part V.B.2.
securities laws. That examination can help clarify the particular regulatory interests to which courts respond most strongly when addressing cross-border cases, and thereby provide a basis for assessing the viability of various proposed solutions to jurisdictional conflict.

This Article examines multinational class actions under federal securities laws, based on a study of forty-five claims filed between 1996 and 2005 on behalf of multinational classes. It approaches these claims from the perspective both of the plaintiffs, analyzing the specific arguments they make to justify the application of U.S. securities law, and of the courts, examining their disposition of these arguments. The Article proceeds as follows. Part II sets out the law governing subject-matter jurisdiction in securities claims, outlining the different bases on which courts assert jurisdiction over claims with foreign elements. Part III turns to the specific challenges that multinational class actions present. It examines the various points during litigation at which courts confront jurisdictional questions, and considers the success rate of foreign claimants seeking inclusion in multinational classes. Part IV expands that analysis, examining the specific arguments that foreign investors make in their attempts to establish subject-matter jurisdiction over their claims. These arguments are based on the interconnections among today's capital markets, and illustrate particularly clearly the weaknesses of the traditional jurisdictional tests. They also reveal the points at which these tests no longer square with those aspects of U.S. anti-fraud jurisprudence that reflect theories about market efficiency. This Part also considers judicial responses to multinational class actions, identifying certain assumptions that courts make about the regulatory interests at stake in multinational cases. Part V assesses whether courts operating within the current jurisdictional framework can adequately manage foreign-cubed claims and the regulatory conflicts they present. The Article concludes that, at present, they cannot, lending support to proposals for a jurisdictional limit based on the location of investment transactions.

II. SUBJECT-MATTER JURISDICTION UNDER FEDERAL SECURITIES LAW

Securities claims based on transactions with foreign elements present difficult questions of subject-matter jurisdiction—difficult because the anti-fraud provisions of the federal securities laws do not

5. See infra Part III.B for a description of this data set.
speak directly to the scope of their application in the international context. Certain anti-fraud provisions contain inherent limitations on their reach. The express remedies provided in the Securities Act of 1933, for example, are limited to misstatements or omissions in filings with the Securities and Exchange Commission, and therefore do not apply to foreign-market transactions.6 The central anti-fraud provision, however, Rule 10b-5, contains no such limitation: it applies to any transaction in connection with the purchase or sale of a security.7 The rule does contain a basic "jurisdictional means" requirement in that it applies only to fraud committed "by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange."8 Because this requirement is met whenever U.S. mail or phone service is used, however, the jurisdictional means is present in virtually every case involving some contact with the United States. The question therefore remains how to limit the application of U.S. law in cross-border cases.

It is broadly accepted that Congress expected U.S. securities laws to apply to certain international transactions or conduct.9 Pre-


7. Rule 10b-5, adopted pursuant to Section 10(b) of the Securities Exchange Act of 1934, provides in its entirety as follows: 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,

(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.


8. Id. "Means of interstate commerce" refers to the phone or wire systems in the United States. See Securities Exchange Act of 1934 § 3(a)(17), 15 U.S.C. § 78c (2000) ("The term 'interstate commerce' means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State ... . The term also includes intrastate use of (A) any facility of a national securities exchange or of a telephone or other interstate means of communication ... ").

9. Section 30(b) of the Exchange Act, for instance, states that a person engaged in a business in securities outside the United States may be exempted from regulation "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 title." 15 U.S.C. § 78dd (2000). Courts have inferred from this provision that "the [Exchange] Act was meant to apply to those foreign transactions not specifically exempted." Schoenbaum v. Firstbrook, 405 F.2d 200, 208 (2d Cir. 1968). Cf. Margaret V. Sachs, The International Reach of Rule 10b-5: The Myth of Congressional Silence, 28 COLUM. J. TRANSNAT'L L. 677 (1990) (arguing that the legislative history suggests Congress intended the anti-fraud provisions to
cisely which transactions or conduct are covered remains a matter of judicial interpretation. As the Second Circuit summarized in an early case, "when . . . a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries."\(^\text{10}\)

Legislative jurisdiction over cross-border securities claims rests on two alternative bases: conduct occurring within the United States, and effects within the United States of conduct taking place abroad.\(^\text{11}\) Over the past several decades, federal courts have developed and refined tests that establish the parameters of jurisdiction on these bases. The Supreme Court has never spoken on the issue, however,\(^\text{12}\) and, as one court recently put it, "a substantial degree of doctrinal ambiguity and division [exists] in the governing legal rules and precedents" addressing subject-matter jurisdiction.\(^\text{13}\)

The following sections set out the tests for establishing subject-matter jurisdiction over claims with foreign elements. My goal is not a comprehensive treatment of this subject, as the historical development of these tests and their numerous variations have been amply analyzed elsewhere.\(^\text{14}\) Rather, I aim to sketch the tests only in sufficient detail to identify (1) how courts have framed the policy in-

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12. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 518 n.12 (1974) (setting aside the question of scope in securities law as not presented by that case). But see id. at 529–30 ("It has been recognized that the 1934 Act, including the protections of Rule 10b-5, applies when foreign defendants have defrauded American investors, particularly when, as alleged here, they have profited by virtue of proscribed conduct within our boundaries.").
interests they see emerging in foreign as opposed to domestic transac-
tions, and (2) the specific obstacles these tests create for claimants in
multinational class actions. Readers familiar with jurisdictional
analysis under the securities laws may wish to proceed directly to
Part III.

A. Jurisdiction Based on Effects within the United States

Jurisdiction on the basis of effects involves the extraterritorial
application of domestic securities law, as, by definition, the conduct
in question occurs in another country. As in other areas of law,
courts interpreting securities law assume that “Congress is primarily
concerned with domestic conditions,”15 and therefore recognize a
general presumption against the application of U.S. law to foreign
court.16 However, the presumption against extraterritoriality can
be overcome by a finding that Congress intended the legislation in
question to reach foreign conduct or transactions. In securities cases,
courts have frequently held that the strength of the legislative interest
in protecting U.S. investors and markets is sufficient to justify the
regulation of foreign conduct that causes effects within the United
States.17

The effects test was first fully articulated in Schoenbaum v.
Firstbrook,18 a derivative action brought by a U.S. shareholder of a
Canadian corporation. The complaint alleged that in a transaction
taking place in Canada, the corporation had sold its treasury stock at
a price artificially depressed by the non-disclosure of relevant inside
information, thereby reducing shareholder equity and diminishing the
value of the company’s securities on the U.S. market.19 The court
held that even isolated foreign transactions could be subject to the
application of U.S. securities law, noting their potential to affect ad-
versely the interests of U.S. investors. In its view, “Congress in-

16. The presumption against extraterritoriality stems from a number of foreign-policy
and related concerns. See generally EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244
(1991); Gary B. Born, A Reappraisal of the Extraterritorial Reach of U.S. Law, 24 LAW &
POL’Y INT’L BUS. 1 (1993); William S. Dodge, Understanding the Presumption Against Ex-
17. See, e.g., Sloane Overseas Fund, Ltd. v. Sapiens Int’l Corp., 941 F. Supp. 1369,
1374 (S.D.N.Y. 1996) (stating that the Aramco case, and thus the presumption against extraterritoriality, has “never been applied” to securities claims in the Second Circuit).
18. 405 F.2d 200 (2d Cir. 1968), overruled on other grounds, 405 F.2d 215 (2d Cir.
1968).
19. Id. at 204–08.
tended 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.”

The opinion takes an expansive view of the policy underlying the Exchange Act. It characterizes the goal of the Act not only as protecting the fairness of U.S. markets—in the sense of regulating the conditions under which transactions on U.S. exchanges take place—but also more generally as protecting the interests of U.S. investors.

In a sense, among securities cases with foreign elements, the effects cases present a particularly clear policy rationale for U.S. regulation: the need to protect U.S. investors from securities fraud that directly affects their financial interests. The court in Schoenbaum itself attached significant weight to the fact that the securities in question were listed and traded on a U.S. market. This seems to have been a way of emphasizing the magnitude of the U.S. interest, and therefore suggests a narrow scope of application for the effects test. Simply by going beyond U.S. transactions, however, the decision set the stage for expansive application of U.S. law. Indeed, later cases applied the test more broadly, finding that legislative jurisdiction could be established over claims based on transactions in non-U.S. listed securities as well.

The primary limitation that has emerged on the reach of effects-based jurisdiction is that the claimant must show detrimental effect on specific interests within the United States. Courts have consistently rejected arguments that U.S. securities law reaches foreign conduct simply because that conduct affects general confidence in the U.S. securities markets. As one court stated, “The anti-fraud provisions of the U.S. securities laws would then be used to address general market conditions rather than redress specific harms suffered by some U.S.-interested party, a goal specifically foreclosed by numer-

20. Id. at 206.

21. In one passage of its opinion, the court cites Section 2 of the Exchange Act, which has a clear focus on transactions, but then turns to the interests of investors more generally. See id. at 206 (arguing that Congress would not have intended “to preclude application of the Exchange Act to transactions regarding stocks traded in the United States which are effected outside the United States, when extraterritorial application of the Act is necessary to protect American investors”; the Act “seeks to regulate the stock exchanges and the relationships of the investing public to corporations which [list] on such exchanges” (emphasis added)).

22. Id. at 208 (“at least when the transactions involve stock registered and listed on a national securities exchange”).

23. See Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 989 (2d Cir. 1975) (holding that “an adverse effect on this country’s general economic interests or on American security prices” was insufficient to establish jurisdiction).
ous interpretations of the securities laws." Thus, generalized effects of foreign conduct on U.S. markets or the U.S. economy are insufficient as a jurisdictional basis.

B. Jurisdiction Based on Conduct within the United States

The conduct test was developed to assess legislative jurisdiction over transactions that, although predominantly foreign, involve a certain amount of fraudulent conduct within the United States. The first case articulating the conduct test, *Leasco v. Maxwell*, focused on the policy at the heart of the securities laws: protecting the interests of U.S. investors. The case involved allegations that the defendants had engaged in fraudulent misrepresentations within the United States in order to induce the U.S. plaintiff's purchase of securities in London. Those securities were not listed or traded in the United States, thereby, in the court's view, distinguishing the situation from that in *Schoenbaum* and rendering the effects test inapplicable. In holding that the U.S.-based conduct was sufficient to confer jurisdiction, the court emphasized the policy of protecting U.S. interests: "Still we must ask ourselves whether, if Congress had thought about the point, it would not have wished to protect an American investor if a foreigner comes to the United States and fraudulently induces him to purchase foreign securities abroad—a purpose which its words can fairly be held to embrace."

Had it remained limited to this factual setting, the conduct test would be quite narrow, and would remain linked to precisely the same policy as the effects test (protecting the interests of U.S. investors, though not necessarily limited to interests acquired in U.S. transactions). Later courts, however, interpreted the conduct test to confer jurisdiction over transactions that did not affect U.S. investors at all. In a case decided only three years after *Leasco*, the Second Circuit considered a case brought by a Luxembourg investment trust that had very few American fundholders. The fund alleged that a foreign defendant had committed fraud in connection with a complicated series of investment transactions, at least some aspects of which had unfolded within the United States. In that case, the court

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26. Id. at 1331.
27. Id. at 1334.
28. See id. at 1337 (distinguishing the situation in which two foreign parties are injured by conduct occurring in the United States).
29. IIT v. Vencap, Ltd., 519 F.2d 1001, 1016 (2d Cir. 1975) (noting that American fundholders made up only .2% of the total).
concluded that U.S. investors had felt no substantial effects. It nevertheless held that the conduct test conferred jurisdiction, articulating an entirely different policy rationale to justify the application of U.S. law to the fraudulent conduct: "We do not think Congress 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." As applied to claims brought by foreign claimants on the basis of non-U.S. transactions then, the conduct test protects not the core policy of protecting U.S. investors and markets, but the subsidiary policy of preventing the United States from becoming a "launching pad" for fraudulent behavior directed elsewhere.

Although conduct within the United States—at least significant conduct—is traditionally recognized as an acceptable basis of legislative jurisdiction, this expanded version of the conduct test may reach conduct that affects neither U.S. market conditions nor the financial interests of U.S. investors. In other words, the "launching pad" concern is present whether or not the interests of U.S. investors are directly implicated. It therefore enables the type of claim here considered—in which a foreign plaintiff sues a foreign defendant for damages arising out of a foreign transaction, on the grounds that substantial conduct connected with that transaction occurred within the United States.

This expansive interpretation of the conduct test has led to considerable fragmentation and complexity in subject-matter jurisdiction jurisprudence. Some courts have embraced Leasco's implication that U.S.-based conduct creates a basis of jurisdiction completely independent of effects on U.S. interests. Others, in cases in which

30. Id. at 1016–17.
31. Id. at 1017.
32. These cases indirectly protect U.S. interests by encouraging reciprocity in the policies of our trading partners. "This country would surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States. By the same token it is hard to believe Congress meant to prohibit the SEC from policing similar activities within this country . . . ." Id. See also SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977) (outlining three policies for extending jurisdiction even over claims that cause no effect on U.S. markets or to U.S. investors: (1) preventing the United States from becoming a base of operations for fraudulent conduct; (2) promoting reciprocal enforcement by other countries where fraud is directed toward the United States; and (3) furthering the policy of maintaining high standards of conduct in securities transactions within the United States).
34. See IIT, 519 F.2d at 1018 (recognizing this extension of the conduct test).
35. See Straub v. Vaisman & Co., Inc., 540 F.2d 591, 595 (3d Cir. 1976); In re Cable & Wireless, PLC, Sec. Litig., 321 F. Supp. 2d 749, 764 (E.D. Va. 2004) (conceding that the fraud in question "did not effect [sic] a great deal of Americans nor did they impact American markets," but concluding nevertheless that "defendants' domestic conduct alone gives
U.S. interests are not directly affected, seek some additional connection to the United States. Over the years, the different circuits have developed competing standards for evaluating the kind or quantity of local conduct that is necessary to create jurisdiction over predominantly foreign transactions. Under the standard most frequently invoked, a court may exercise subject matter jurisdiction over securities claims if "(a) there was conduct in the United States that directly caused the [claimant’s] losses and (b) such conduct was more than ‘merely preparatory’ to a securities fraud conducted elsewhere.”

C. Jurisdiction Based on the Combination of Conduct and Effects

In one case, the Second Circuit suggested that rather than inspect effects and conduct separately, courts should engage in a more holistic analysis. Such an approach might be used to expand the reach of U.S. law, since courts could view the jurisdictional test as satisfied by a combination of conduct and effects that standing alone would not be sufficient. However, it might also be used to narrow the scope of subject-matter jurisdiction, as courts could interpret it to require that at least some level of both conduct and effects be established in order to justify the application of U.S. law. In a similar vein, some decisions have gone beyond application of the conduct and effects tests to look for additional “tipping factors” that would favor jurisdiction in cases with predominantly foreign elements. In this Court subject matter jurisdiction over the foreign purchaser Plaintiffs’ claims.”

36. See Psimenos v. E.F. Hutton & Co., Inc., 722 F.2d 1041, 1045 (2d Cir. 1983) (noting that the conduct test is separate and meant to be so); Ohman v. Kahn, 685 F. Supp. 1302, 1306 (S.D.N.Y. 1988) (noting that the cumulative effect of alleged preparatory activities was sufficient to invoke U.S. securities law).


38. Itoba Ltd. v. Lep Group PLC, 54 F.3d 118, 122 (2d Cir. 1995) (“There is no requirement that [the conduct and effects] tests be applied separately and distinctly from each other. Indeed, an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court.”).

39. See Gordon, supra note 14, at 531–32 (suggesting that, under the blended approach, jurisdictional contacts independently insufficient to satisfy either test could be combined).

40. Interbrew S.A. v. Edperbrascan Corp., 23 F. Supp. 2d 425, 432 (S.D.N.Y. 1998) (in simple securities litigation, noting fraudulent filings on which the foreign plaintiff might have relied, but then seeking additional connecting factors). See also Europe & Overseas
general, the cases that deviate from the strict conduct-effects dichotomy reflect judicial unease with the application of domestic securities law in cases with strong connections to other jurisdictions.

III. SUBJECT-MATTER JURISDICTION IN MULTINATIONAL CLASS ACTIONS

This Part turns to the application of jurisdictional rules in the particular context of multinational class actions. It begins by discussing litigation procedure in class actions under federal securities laws, considering the different points at which parties may challenge subject-matter jurisdiction over foreign-based claims. It then examines the disposition of multinational class actions, looking at the different tools that courts use to address foreign-cubed claims.

A. Securities Class Action Procedure and the Points of Jurisdictional Challenge

Securities class actions in U.S. federal courts are conducted pursuant to the procedural framework laid out in the Private Securities Litigation Reform Act (PSLRA).41 The PSLRA was enacted in 1995 in order to address perceived abuses in group securities litigation.42 Critics were particularly concerned that plaintiffs' attorneys, rather than plaintiffs themselves, were managing class actions, with the frequent result that case outcomes enriched the attorneys rather than providing meaningful compensation to the plaintiff class. With the aim of discouraging frivolous litigation, the statute introduced some amendments to the substantive elements of securities claims—for instance, it imposed heightened pleading requirements,43 created

42. See 7 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 22:2 (4th ed. 2002) (recounting the Act's legislative history); Stephen J. Choi, The Evidence on Securities Class Actions, 57 VAND. L. REV. 1465, 1469 (2004) (discussing the goals of the PSLRA). See also Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) (recognizing the possibility that “[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense”).
safe havens for some categories of forward-looking statements,\textsuperscript{44} and eliminated certain types of derivative liability for securities violations.\textsuperscript{45} It also addressed class action procedure. The PSLRA did not disturb the basic structure established by Rule 23 of the Federal Rules of Civil Procedure: to be certified as a class action, a securities claim must therefore meet the usual requirements of numerosity, commonality, typicality, and adequacy.\textsuperscript{46} However, the PSLRA did adopt a new process for selecting the representative plaintiff.\textsuperscript{47}

Prior to the PSLRA, as in class action process generally, the plaintiff who first filed a claim was the presumptive class representative. This meant that a drop in a company’s securities price could set off a race to the courthouse among potential plaintiffs, with the risk that the class would be represented by small investors easily manipulated by class counsel.\textsuperscript{48} The Act eliminated the first-to-file rule. It requires a plaintiff filing a securities claim on behalf of a putative class to publish notice of that action, providing other shareholders the opportunity to seek appointment as lead plaintiff.\textsuperscript{49} Following the end of the notice period, the court must then consider the applications of any investors—whether they filed their own actions or not—who move for that appointment.\textsuperscript{50} The statute instructs the court to appoint the party who will most adequately represent the interests of the class, and creates a presumption that the most adequate plaintiff is the one with the largest financial interest at stake.\textsuperscript{51}

\begin{itemize}
\item \textsuperscript{44} See id. § 21E.
\item \textsuperscript{45} See id. § 21D(f).
\item \textsuperscript{46} FED. R. CIV. P. 23(a). Plaintiffs must also establish that their claim falls within one of the Rule 23(b) categories. On the interaction between the Federal Rules’ class action process and the PSLRA, see generally Louis Loss & Joel Seligman, Fundamentals of Securities Regulation 1376-92 (5th ed. 2004).
\item \textsuperscript{48} See Fisch, supra note 47, at 535-39 (describing the “abuse scenario” painted by legislators as including the danger that small shareholders (a) had little financial incentive at stake in the case and therefore (i) little reason carefully to monitor class counsel and (ii) little reason to resist a premature settlement; and (b) tended to be unsophisticated and therefore unable to monitor the litigation effectively). See also Weiss & Beckerman, supra note 47.
\item \textsuperscript{50} See id. § 21D(a)(3)(B). The court is expected to consider such motions and make the appointment within 90 days, although in many cases the process is extended when investors challenge each other’s motions for appointment.
\item \textsuperscript{51} See id. § 21D(a)(3)(B)(iii). Either an individual plaintiff or a group can be appointed lead. The lead plaintiff also selects, subject to court approval, class counsel. See id. § 21D(a)(3)(B)(v).
\end{itemize}
Over the course of securities class action litigation, jurisdictional questions may arise at a number of different points. Some are implicated only by the particular procedural steps involved in class actions, but others are presented in individual as well as group litigation.

1. Selection of Lead Plaintiff

As discussed above, the individual plaintiff or plaintiff group with the largest financial interest at stake—and that otherwise meets the requirements of Rule 23—is presumed to be lead plaintiff. That presumption can be rebutted by a showing that the presumptive lead plaintiff would not “fairly and adequately protect the interests of the class,” or would face unique defenses not implicated by the claims of other class members.\(^{52}\) In recognizing these grounds for challenging the presumptive status of a lead plaintiff, the PSLRA responds to the concerns incorporated in the typicality and adequacy requirements of Rule 23(a). In many securities cases, foreign investors have sought appointment as lead plaintiff. Other potential lead plaintiffs often contest their motions for appointment, requiring the courts to consider whether a movant’s foreign status is relevant to its ability to serve as lead.\(^{53}\)

One factor courts have considered in this regard, related only tangentially to jurisdiction, is the logistical complexity that may arise when a lead plaintiff is foreign. This factor is not linked to the location of the transactions giving rise to the potential lead plaintiff’s claim; it is merely a question of a foreign resident’s ability to manage adequately litigation occurring in the United States. Those challenging foreign plaintiffs on this basis argue that they would provide inadequate representation due to differences in language and legal systems. Courts have generally found such logistical issues surmountable, disposing relatively quickly of this concern.\(^{54}\)

A second factor courts address when they consider appointing foreign investors as lead plaintiffs presents jurisdictional questions

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52. See id. § 21D(a)(3)(B)(iii)(II).
53. This is often the first point during securities litigation at which the court is asked to rule on a motion that raises jurisdictional issues.
more directly. In cases in which the proposed lead plaintiff's claims arise from foreign-market transactions rather than U.S.-market transactions, they have been challenged on the grounds that their claims would be subject to unique defenses, such as lack of subject-matter jurisdiction and forum non conveniens. Courts are mixed in their responses to this question. Some have at this initial stage been willing to go forward despite potential challenges to subject-matter jurisdiction later in the litigation. Others, conscious of the difficulties that would result if a foreign investor were appointed sole lead plaintiff only to have its claims later dismissed for lack of subject-matter jurisdiction, have chosen to override the presumption in favor of a U.S.-based claimant. Several courts have adopted an intermediate approach, approving the use of co-lead plaintiffs in multinational class actions—one plaintiff (or group) whose transaction arose out of a foreign investment, and one whose claim was based on a U.S. market transaction. These courts have suggested that the appointment of co-leads would recognize the stake of foreign claimants in the litigation, while ensuring that the specific concerns raised by claims based on foreign transactions did not shift the focus of litigation away from the common issues of law and fact at the base of the action.

2. Certification of the Class

Class certification is governed not by the PSLRA but by the ordinary process set forth in Federal Rule of Civil Procedure 23.


56. See, e.g., In re Royal Ahold N.V. Sec. Litig., 219 F.R.D. 343, 352 (D. Md. 2003) (rebutting the presumption in favor of a foreign institutional investor on the grounds that it would not be able to avoid devoting a substantial portion of its efforts to defending against jurisdictional attacks, and noting that its claims might be dismissed at the certification stage).


58. See generally CONTE & NEWBERG, supra note 42, § 22:4. Courts have recognized the utility of co-lead plaintiffs in enhancing class representation outside the context of jurisdiction as well. Some, for example, have held that the combination of an institutional and individual investor could help assure the best representation possible of all claims within a class. See In re Oxford Health Plans, Inc. Sec. Litig., 182 F.R.D. 42, 49 (S.D.N.Y. 1998) (limiting a proposed 30-member group to three co-lead plaintiffs: “Allowing for diverse representation, including in this case a state pension fund, significant individual investors and a large institutional investor, ensures that the interests of all class members will be adequately represented in the prosecution of the action and in the negotiation and approval of a fair settlement, and that the settlement process will not be distorted by the differing aims of differently situated claimants.”).
When the lead plaintiff moves for certification of the plaintiff class, it must therefore meet the general Rule 23(a) requirements of numerosity, commonality, typicality and adequacy of representation. In addition, it must show that the action falls within one of the Rule 23(b) categories. Plaintiffs in securities class actions generally proceed under Rule 23(b)(3), under which they must establish that questions of law or fact common to the class members predominate over questions that affect only individual class members, and that the class action is superior to any other method of adjudicating the controversy. Certain Rule 23(a) and Rule 23(b) elements present obstacles to the certification of multinational classes.

a. Typicality under Rule 23(a)

To satisfy the typicality requirement, the plaintiffs must establish that the interests of the class representatives are shared by group members. Even if the claims of representatives and other class members arise out of the same set of events (for instance, a single instance of fraudulent misrepresentation that affects an issuer’s securities prices on multiple markets), typicality may be absent if the claims depend on different legal arguments. This can become an issue in multinational class actions if courts believe that different legal standards apply to domestic-based claims and claims made by foreign investors. To take an example that is discussed in further detail below, a court might exclude foreign claimants for lack of typicality if it found that they, unlike U.S. claimants, were not entitled to use the fraud on the market theory to satisfy the reliance requirement of Rule 10b-5.

59. Rule 23(a) states the following prerequisites to a class action: “(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a).

60. Rule 23(b) sets forth the conditions under which an action that meets the prerequisites of Rule 23(a) may be maintained. FED. R. CIV. P. 23(b).


62. See infra Part IV.B.1.a.

63. See, e.g., Smith v. Dominion Bridge Corp., No. Civ. A. 96-7580, 1998 WL 98998, at *4 (E.D. Pa. Mar. 6, 1998) (finding that the plaintiff had failed to establish typicality for this reason). A similar issue is sometimes raised in connection with pendent state law claims in federal litigation. Defendants have argued that because presumptive reliance is unavailable under state law, those claims cannot be appended to federal claims without defeating the predominance requirement. Courts have rejected such objections. See CONTE & NEWBERG, supra note 42, § 22:63.
b. **Predominance of Common Issues under Rule 23(b)**

The Rule 23(b) requirement that common issues predominate, while it overlaps with the Rule 23(a) commonality requirement, is applied more rigorously. Plaintiffs must establish not only the existence of common questions of law or fact, but that such questions are not overwhelmed by questions particular to certain class members. Here, again, the causation elements of a Rule 10b-5 cause of action present potential difficulty, as a court might require individualized rather than class-wide proof of reliance if it finds the fraud on the market theory to be unavailable to foreign claimants. Some defendants therefore challenge the suitability of multinational classes on the basis of this requirement.

c. **Superiority under Rule 23(b)**

The primary jurisdictional question arising from Rule 23(b) relates to the superiority requirement, and centers on the preclusive effect of any judgment or settlement reached in a class action. This concern has two components. The first is that a successful plaintiff might not be able to enforce a judgment against assets of a defendant located abroad; the second is that a judgment or settlement reached in a U.S. court might lack preclusive effect in other countries, permitting unsuccessful plaintiffs to relitigate in a foreign court. The first issue is largely unproblematic, as the defendants in multinational actions generally have assets in the United States sufficient to satisfy any judgment there. The second, however, presents a real obstacle to the certification of classes including foreign claimants.

Preclusive effect is the centerpiece of a viable group litigation mechanism. A class action defendant must be able to enter into a settlement, or proceed to judgment, with the assurance that members of the plaintiff class will not later be able to lodge the same claims again in another forum. Class actions involving only U.S. plaintiffs provide this assurance. The Supreme Court has held that a court in one state may bind absent class members—even if they have no contacts...
with that state—as long as they are afforded “minimal procedural due process protection.” Adequate notice and an opportunity to opt out satisfy those minimal requirements. Once a U.S. court approves a settlement or enters judgment, courts in other U.S. states will grant its action preclusive effect in accordance with the Constitutional full faith and credit guarantee. In class actions involving foreign plaintiffs, however, the situation is different. While a U.S. court may conclude that the absent (foreign) class members have been afforded due process, it cannot guarantee the subsequent recognition of its decision by a foreign court.

Countries differ in their approach to recognizing and enforcing foreign judgments, including the judgments of U.S. courts. Virtually all countries, however, reserve the right to refuse enforcement of judgments that violate local public policy. It is in this regard that class-action settlements and judgments present particular problems. Most foreign legal systems do not permit group litigation, and even those that have adopted some form of collective action mechanism do not recognize the validity of opt-out procedures. The opt-out procedure relies on the theory of constructive notice, but other systems start from the principle that absent class members who have not had actual notice of the litigation, and who did not participate in that litigation, cannot be bound by its outcome. It is therefore possible that courts in one or more foreign systems would refuse to recognize a U.S. class action settlement or judgment, creating the risk that a defendant would face further litigation in a country in

68. Id. at 812 (discussing “notice plus an opportunity to be heard and participate in the litigation,” and the “opportunity [for the plaintiff] to remove himself from the class by executing and returning an ‘opt-out’ or ‘request for exclusion’ form to the court”).
72. See e.g., In re DaimlerChrysler AG Sec. Litig., Declaration of Rolf Stürmer, 294 F. Supp. 2d 616 (D. Del. 2003) (No. 00-993/00-984/01-004-JJF), 2003 WL 24337540 (concluding that in various countries procedural law would require individual notice to class members in a manner inconsistent with the procedures followed under current class action practice in the United States).
MULTINATIONAL CLASS ACTIONS

which transactions in its securities had taken place.\textsuperscript{73} U.S. courts hearing securities claims have long noted this risk. In one early case, the Second Circuit recognized the unfairness to the defendant that would result if plaintiff class members were not bound, and on that basis excluded foreign plaintiffs from the class: "[The question of preclusive effect] must be considered not simply in the halcyon context of a large recovery which plaintiff visualizes but in those of a judgment for the defendants or a plaintiffs' judgment or a settlement deemed to be inadequate. . . . If defendants prevail against a class they are entitled to a victory no less broad than a defeat would have been."\textsuperscript{74}

Courts are divided on the question whether uncertainty regarding claim preclusion should bar the certification of multinational classes. Some recognize the theoretical possibility of subsequent litigation abroad, but reject it as unlikely due to a variety of practical concerns.\textsuperscript{75} First, the likelihood that plaintiffs in a U.S. class action would relitigate elsewhere may as a practical matter exist only in jurisdictions that themselves have group litigation mechanisms. In other systems, the economic impracticability of bringing small claims individually renders relitigation unlikely.\textsuperscript{76} Second, the substantive securities law of foreign jurisdictions may discourage effective group litigation. In many countries, for instance, plaintiffs receive no presumption of reliance, and the need to establish individualized reliance therefore makes group action unwieldy. On these bases, courts sometimes find that the prospect of relitigation is simply too remote to worry about preclusion, and conclude that a U.S. class action remains a superior method of adjudication.\textsuperscript{77}

\begin{itemize}
  \item \textsuperscript{73} See In re Vivendi Universal, S.A. Sec. Litig., 242 F.R.D. 76, 95–105 (S.D.N.Y. 2007) (providing a full exploration of these issues under the laws of Austria, England, France, Germany, and the Netherlands).
  \item \textsuperscript{75} See, e.g., In re U.S. Financial Sec. Litig., 69 F.R.D. 24, 48–49 (S.D. Cal. 1975) (noting that because meaningful discovery was unavailable in other systems, it would be nearly impossible for plaintiffs to mount a successful case in other jurisdictions, and that the defendant was not doing business in other countries and thus would not be amenable to suit there); id. at 53 (stating that the res judicata concern is more compelling when plaintiffs have in fact already filed claims elsewhere).
  \item \textsuperscript{76} As some commentators have noted, this concern may actually have greater force in other areas of the law, where the claims being aggregated are individually small. In securities class actions, however, there are often individual plaintiffs with quite substantial stakes. It may therefore be difficult to conclude ex ante that relitigation even in jurisdictions without class action procedures is unlikely.
  \item \textsuperscript{77} Some cases have also noted that the inclusion of a named foreign plaintiff may, in the case of a foreign system that uses class actions, allow the U.S. court to assert jurisdiction over the absent foreign class members. See Krangel v. Golden Rule Resources, Ltd., 194
These questions about the likelihood of relitigation abroad are often addressed through a battle of experts as to whether the foreign systems in question would in fact grant preclusive effect to a settlement or judgment reached in a U.S. court. Decisions reflect a variety of responses to the “maybes” that such battles inevitably produce. Some courts will dismiss foreign claims on this basis only if they are convinced of the “near certainty” that a settlement or judgment would not be recognized in the relevant foreign system.78 A few have gone even further, refusing to order a dismissal as long as there is some possibility of recognition in the relevant foreign country.79 Other courts, however, have voiced more concern, defining classes to exclude foreign plaintiffs.80 In its recent decision in the Vivendi litigation, the Southern District of New York adopted a sliding-scale approach: “The closer the likelihood of non-recognition is to being a ‘near certainty,’ the more appropriate it is for the Court to deny certification of foreign claimants.”81

3. Motions to Dismiss Under 12(b)(1)

Defendants frequently attack the question of subject-matter jurisdiction directly, moving to dismiss claims based on foreign investment transactions. Such motions are often part of omnibus motions to dismiss following the filing of the complaint. In addition, courts may consider the presence of subject-matter jurisdiction sua sponte.82 In some cases with cross-border elements, courts have at various stages in the litigation simply asked the parties to brief the is-

78. In a case considering whether foreign shareholders would be required to opt in, or could be included in the opt-out process, the court stated that “[b]ecause defendant has not borne its burden of demonstrating a substantial probability of subsequent foreign suits and consequent enforcement of adverse judgments against assets held abroad, we decline to depart from the traditional opt out class action format.” Jordan v. Global Natural Resources, Inc., 104 F.R.D. 447, 448 (S.D. Ohio 1984) (emphasis added). See also In re Cable & Wireless, PLC, 321 F. Supp. 2d 749, 766 (E.D. Va. 2004) (characterizing res judicata concerns as a mere possibility and therefore unproblematic in the context of a motion to dismiss for lack of subject-matter jurisdiction). Accord In re Royal Dutch/Shell Transport Sec. Litig., 380 F. Supp. 2d 509, 547 (D.N.J. 2005).
79. See, e.g., In re Turkcell Iletisim Hizmetler, A.S. Sec. Litig., 209 F.R.D. 353, 360 (S.D.N.Y. 2002) (“The case law suggests that, if there is some possibility that a class action judgment would be enforceable—or at least have some substantial effect—in the foreign jurisdiction at issue, then class certification is proper.”).
82. Federal Rule of Civil Procedure 12(h)(3) provides that “[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”
sue, and then followed with jurisdictional rulings.83

4. Motions to Dismiss on the Basis of *Forum Non Conveniens* or Comity

a. *Forum Non Conveniens*

In a number of early cases, courts held that claims brought under U.S. regulatory law were not subject to dismissal on the basis of *forum non conveniens*.84 They based these holdings on the special venue provisions incorporated in those laws,85 which in their view signaled Congressional belief that the use of U.S. judicial fora was mandatory in regulatory cases. In recent years, however, courts have departed from this analysis and held that *forum non conveniens* is a proper ground to dismiss claims brought under federal regulatory law, including securities law.86 Because multinational class actions involve substantial contacts with foreign jurisdictions, they are often met with such motions.87

In order to obtain a dismissal on the basis of *forum non conveniens*, the defendant must first show that an adequate forum is available elsewhere.88 It must then establish that the balance of rele-


84. See, e.g., United States v. Nat'l City Lines, Inc., 334 U.S. 573 (1948) (holding that the venue provision of the Clayton Act eliminated judicial discretion to dismiss antitrust claims on the basis of *forum non conveniens*).


87. This may become a more important alternative in light of the Supreme Court's recent holding that courts may dismiss claims on the basis of *forum non conveniens* without first establishing personal and subject-matter jurisdiction over the claims. Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 127 S. Ct. 1184, 1192 (2007). In multinational class actions presenting particularly difficult jurisdictional issues, courts may view *forum non conveniens* as a more straightforward route to dismissal. See id. at 1194 ("[W]here subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course.").

88. This generally means that the defendant must be subject to service of process in an identified foreign forum, and that forum must permit litigation of the subject matter. See
vant private- and public-interest factors implicated in the litigation weighs strongly in favor of dismissal.89 Both of these steps implicate jurisdictional questions in multinational class actions.

i. Adequate Available Forum

A foreign forum will generally be deemed adequate if the subject-matter of the claim in question can be litigated there.90 As the Supreme Court has made clear, simply demonstrating that the substantive law to be applied in the foreign forum is different from the law that would be applied by the U.S. court—even different in ways that would make the plaintiff's claim substantially less likely to succeed—is not alone enough to defeat a motion to dismiss.91 Similarly, differences in procedural law do not generally preclude dismissal: thus, courts have often held that the absence of broad pre-trial discovery, or of the right to trial by jury, is not alone enough to defeat a motion to dismiss.92 However, substantive or procedural differences may be so substantial that they would essentially prevent the plaintiff from asserting its claim in the foreign forum at all. In such a case, the forum may properly be found inadequate.

Courts considering motions to dismiss securities claims are not generally troubled by differences between U.S. and foreign law as long as they share basic substantive features. If applicable foreign law provides a remedy for fraud, the foreign forum may be seen as adequate even if the specific elements of the claim, or the precise remedy available, differ from their U.S. counterparts.93 Class actions, however, rely on two features of U.S. law whose absence in foreign systems raises particular concern. First, class action plaintiffs in U.S. court need generally not establish individual reliance; rather, reliance is presumed on the basis of the fraud on the market theory.94

89. See Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508-09 (1947) (outlining the relevant interests).
90. See generally Born, supra note 70, at 351-52.
92. See Born, supra note 70, at 353 (concluding that “U.S. courts are generally reluctant to deny dismissal merely because foreign procedures differ from those in the United States”).
93. See Howe v. Goldcorp Invs. Ltd., 946 F.2d 944, 952 (1st Cir. 1991) (noting that the foreign law “offer[s] shareholders somewhat similar protections by forbidding misrepresentation and fraud and imposing fiduciary obligations,” and affirming dismissal of the action in favor of Canadian court); In re Corel Corp. Inc. Sec. Litig., 147 F. Supp. 2d 363, 365 (E.D. Pa. 2001) (concluding that Ontario was an adequate alternative forum).
Second, of course, they are enabled by the claim aggregation and opt-out mechanisms established by U.S. procedural law. Some courts have concluded that legal systems lacking both of these features do not afford a meaningful remedy to class action plaintiffs, and on that basis have held foreign fora to be inadequate.95

ii. Relevant Interest Factors

Courts deciding cross-border securities cases examine the full range of public and private-interest factors that are presented by international litigation. For instance, courts consider the location of relevant documents; the availability of witnesses;96 the burden of jury duty; and so forth.97 One public-interest factor has emerged as particularly important in the securities context: the interest of the United States in having its securities laws enforced. While courts do not weigh this factor uniformly, many have concluded that, because of the mandatory and regulatory nature of the federal securities laws, the country’s interest in having those laws applied is particularly strong.98 As in other kinds of litigation, securities claims involving U.S. plaintiffs are less likely to be dismissed—not just because of the general presumption in favor of their choice of forum,99 but because

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95. See, e.g., Lernout & Hauspie, 208 F. Supp. 2d at 92 (expressing an unwillingness to force thousands of U.S. purchasers to file individual suits in Belgian court); DeRensis v. Coopers & Lybrand Chartered Accts, 930 F. Supp. 1003, 1007-09 (D.N.J 1996) (holding that the absence of these features of U.S. class action law rendered the Canadian system inadequate). Accord Trafton, 1994 WL 746199, at *11-12 (recognizing that in cases where an alternative forum would deny plaintiffs the right to bring a claim, such alternative jurisdiction is not adequate (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981))). But see Beddome v. DeYoung, 707 F. Supp. 132 (S.D.N.Y. 1989) (finding the analogous system in Canada adequate); In re Cinar Corp. Sec. Litig., 186 F. Supp. 2d 279 (E.D.N.Y. 2002) (assuming arguendo that the Canadian system was adequate, but later refusing dismissal based on analysis of the Gilbert factors).


97. See Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508-09 (1947) (setting out the range of interest factors relevant to the convenience analysis).

98. See Allstate Life Ins. Co. v. Linter Group, Ltd., 994 F.2d 996, 1002 (2d Cir. 1993) ("While appellants are correct in asserting that United States courts have an interest in enforcing United States securities laws, this alone does not prohibit them from dismissing a securities action on the ground of forum non conveniens."). Cf. DiRienzo v. Philip Servs. Corp., 294 F.3d 21, 33 (2d Cir. 2002) (identifying the "strong public interest" of the United States in enforcing its securities laws as a relevant public interest factor).

99. In general, the plaintiff's choice of forum will be respected, but that presumption is weaker when the plaintiff is foreign. Piper, 454 U.S. at 255.
the claims of U.S. nationals more strongly implicate local regulatory interests. This analysis becomes particularly important in multinational class actions. When such actions appear driven by the interests of foreign claimants against foreign defendants, the U.S. interest seems weaker and the balance may shift in favor of dismissal. Conversely, when U.S. claimants file an action that does not include foreign claimants, the case may survive a *forum non conveniens* challenge, even given substantial connections to other countries.

**b. Motions to Dismiss on the Basis of Comity**

In situations in which a lawsuit arising out of the same course of events has already been filed in another country, U.S. courts sometimes entertain motions to dismiss securities claims on the basis of comity. Comity claims are similar to *forum non conveniens* claims, but rest on a court's decision to recognize a proceeding already underway in a foreign forum, not merely the theoretical possibility of litigation elsewhere. This analysis also turns on an examination of the claim's connection with other jurisdictions, and therefore on the relative strength of the U.S. regulatory interest vis-à-vis that of foreign nations.

**B. The Disposition of Claims Brought in Multinational Class Actions**

Given all of these different points at which jurisdiction can become relevant, it is important to identify how courts actually address the conflicts that multinational class actions present. In order to

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100. *See Corel*, 147 F. Supp. 2d at 367 (in a case involving substantial trading on U.S. exchanges, stating that "the United States has an interest in enforcing its securities laws and maintaining the integrity of its securities markets").

101. *See*, e.g., *Yung v. Lee*, No. 00-CV-3965-DAB, 2002 WL 31008970, at *2 (S.D.N.Y. Sept. 5, 2002) ("While this Court agrees that the allegedly fraudulent SEC filing by ITNG has potential domestic impact, that impact is dwarfed by the vast majority of conduct in and impact upon China.").

102. *See*, e.g., *In re Cinar Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 300 (E.D.N.Y. 2002) (noting that all of the plaintiffs were American citizens).

103. *See* *Paraschos v. YBM Magnex Ltd.*, 130 F. Supp. 2d 642, 645 (E.D. Pa. 2000) ("The rationale for dismissals based on comity is . . . deference to the foreign country's legal, judicial, legislative and administrative system of handling disputes over which it has jurisdiction, in a spirit of international cooperation.").

104. *See id.* at 645 (noting that "this is a securities fraud action pertaining to Canadian registered securities, brought by a purported class of investors who are virtually all Canadian, against predominantly Canadian defendants, concerning a Canadian corporation whose stock was sold only on Canadian stock exchanges.").
answer that question, I attempted to identify as full a set as possible of multinational securities class actions filed over a ten-year period (from January 1, 1996 to December 31, 2005). In assembling that set, I used the information available at the Stanford Securities Class Action Clearinghouse, and began by identifying class actions filed in U.S. court against foreign issuers during the period in question. Removing a group of cases that dealt with manipulation in the IPO market left 115 cases. I then read the complaints in those cases to ascertain whether the actions were brought on behalf only of investors who had purchased securities on U.S. markets, or whether they purported to include claims based on foreign-market transactions as well. Almost forty percent—forty-five complaints—specifically encompassed claims based on foreign transactions.

Of the forty-five claims brought on behalf of mixed classes, fourteen have at the time of this writing generated no specific resolution on the question of subject-matter jurisdiction. This is true of some cases because they were filed relatively late in the time period under examination, and have not yet reached the stage at which the issue will be decided. In others, the complaints were dismissed in their entirety for failure to state a claim under the securities laws, with no independent discussion of the status of claims based on foreign transactions. One claim was withdrawn, along with a parallel class action that had been initiated in Israel.

105. The Clearinghouse, at http://securities.stanford.edu, does not code actions for issuer nationality. In order to identify actions filed against foreign issuers, I (a) input ticker symbols of companies listed on either the New York Stock Exchange, the American Stock Exchange or NASDAQ, and (b) searched for terms signaling global securities (ADR, ADS, DR, and GDR).

106. These were included in a single consolidated action before the Southern District of New York. They dealt only with manipulation in the IPO market and so did not raise the jurisdictional issue I consider here.

107. See Appendix hereto.

108. See Appendix hereto.

109. This category includes complaints involving the issuers AstraZeneca plc, Rhodia S.A., Converium Holding AG, and Infineon Technologies AG. The defendants' replies to these complaints often raise the question of subject-matter jurisdiction, indicating that the issue is likely to be addressed as litigation proceeds. See, e.g., Bridgestone Corp.'s Reply in Support of Motion to Dismiss, in Part, for Lack of Subject-Matter Jurisdiction, In re Bridgestone Sec. Litig., 430 F. Supp. 2d 728 (M.D. Tenn. 2007) (No. 03:01-0017), 2007 WL 460660.


In sixteen cases, all foreign-cubed claims were excluded from the U.S. litigation.\textsuperscript{112} Courts used a variety of procedural mechanisms to achieve this result. In several cases, jurisdiction was decided on a 12(b)(1) motion to dismiss the foreign claims for lack of subject-matter jurisdiction.\textsuperscript{113} In some cases, the court considered jurisdiction at the certification stage, choosing to certify classes that included only claims based on U.S. market transactions.\textsuperscript{114} One case was dismissed on the basis of \textit{forum non conveniens},\textsuperscript{115} and another on the basis of comity.\textsuperscript{116}

In fifteen cases, the class action went forward including all or some foreign-cubed claims.\textsuperscript{117} The record in these cases does not always reflect a justification for including foreign claims—indeed, in some there is no suggestion that the defendants ever specifically challenged subject-matter jurisdiction. Eight of the cases, for example, seem to have settled quite quickly. In these, it is the terms of the settlement notices that indicate the exercise of jurisdiction over foreign-market based claims.\textsuperscript{118} In other cases, however, reported decisions are available in which courts specifically considered and rejected jurisdictional challenges.\textsuperscript{119} Many of the cases that proceeded with a multinational class involved issuers from Canada, whose regulatory scheme is relatively similar to that of the United States. But some involved issuers from countries whose substantive and procedural law is quite different from U.S. law, including the Netherlands, Germany and France.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{112} See Appendix hereto.
\item \textsuperscript{114} \textit{See, e.g.}, \textit{In re} DaimlerChrysler AG Sec. Litig., 216 F.R.D. 291, 301 (D. Del. 2003) (certifying class including only domestic investors in litigation against German issuer).
\item \textsuperscript{115} \textit{In re} Royal Group Tech. Sec. Litig., 04-CV-9809-HB, 2005 WL 3105341, at *3 (S.D.N.Y. Nov. 21, 2005) (dismissing a complaint against a Canadian issuer).
\item \textsuperscript{117} See Appendix hereto.
\item \textsuperscript{118} \textit{See, e.g.}, Notice of Pendency and Proposed Settlement of Class Action at 3, \textit{In re} Intershop Communications AG Sec. Litig., No.C-01-20333-JW (N.D. Cal. Sept. 30, 2005), available at http://securities.stanford.edu/1017/ISHP01/2005930_r01n_0120333.pdf (defining the class to include "(a) all persons who purchased Intershop American Depositary Shares ... on the NASDAQ market and (b) all persons who purchased Intershop common stock ... on the [German] Neuer Market").
\item \textsuperscript{119} These decisions form the basis of the analysis in Part IV below.
\end{enumerate}
\end{footnotesize}
While the size of this set of cases is too small to permit statistical analysis, this look at outcomes in multinational actions yields two preliminary observations. First, the rate at which such actions are filed is increasing, and one must assume that U.S. courts will face the "foreign cubed" problem more frequently in the future. Second, a substantial percentage of multinational class claims are clearing the jurisdictional obstacle. This result is somewhat counterintuitive. After all, what result would one expect if foreign-cubed claims were brought alone? It is hard to imagine that a U.S. court would exercise subject-matter jurisdiction over the claims of foreign investors, brought against foreign issuers, for losses suffered in foreign market transactions. Indeed, courts considering such claims have rejected them with little difficulty. Yet when such claims are appended to a class action including plaintiffs whose claims are based on U.S.-market transactions, they frequently survive jurisdictional challenge. The next Part examines the multinational class action claims in more detail in order to explore that jurisdictional puzzle and its consequences for cross-border securities regulation.

IV. Establishing Jurisdiction in Multinational Class Actions

This Part identifies the specific jurisdictional arguments plaintiffs make in multinational class actions and examines the courts' analysis of those arguments under the conduct and effects tests. It concludes that these tests have failed to keep pace with developments in securities regulation in two respects. First, their focus on geographical location—whether of conduct or of effects—makes it difficult for courts to adapt them to current conditions in securities markets. The consolidation of financial markets, the exponential increase in cross-border financial activity, and the effect of technology on the speed with which information is transmitted have all contributed to a degree of interpenetration among securities markets that undermines the tests' focus on location. Second, their evolution over

120. Of the decisions here reviewed, the rate increased from two complaints filed in each of 1996 and 1997 to nine in 2004 and eight in 2005.
122. See Donald C. Langevoort, Fraud and Insider Trading in American Securities...
the past few decades has not kept pace with the evolution of the substantive law governing securities fraud. Courts that have integrated theories of market efficiency into Rule 10b-5 doctrine in the domestic context are often uncertain whether those theories translate to the global markets—and, if so, how they intersect with the question of jurisdiction. Their decisions therefore frequently foreclose, on the basis of jurisdictional concerns, arguments that are viable under current Rule 10b-5 jurisprudence.

A. Jurisdiction on the Basis of Effects

Some foreign investors involved in multinational class actions have sought to establish jurisdiction over their claims on the basis of the effects test. They argue that when fraud occurring outside the United States causes harm in multiple jurisdictions—adversely affecting the U.S. securities markets as well as one or more foreign securities markets—then the effects within the United States create a basis for jurisdiction over all claims arising out of that conduct.123

This argument has uniformly failed. Courts considering it often begin by invoking the limitation stated in Bersch: generalized effects (for instance, a diminishment of investor confidence in the securities markets) are not a sufficient jurisdictional basis.124 Plaintiffs must point to specific adverse effects (for instance, the artificial elevation of a security’s price) leading to the harm they suffered. The difficulty foreign claimants face is that courts tend to view adverse effects on the U.S. markets as independent of any adverse effects occurring elsewhere—in other words, they see a change in the price of a security on the New York Stock Exchange as independent of a change in the price of that security on a foreign exchange.125 For this reason, courts have generally concluded that while effects felt within the United States may give rise to subject-matter jurisdiction over the claims of investors whose harm flowed from those effects (that is, in-


123. See, e.g., In re The Baan Company Sec. Litig., 103 F. Supp. 2d 1, 11 (D.D.C. 2000) (discussing plaintiffs’ contention that “the defendants’ acts had an effect in the United States because Baan shares trade in tandem on the world’s markets, and therefore the value of Baan’s shares owned by United States residents was affected”).


125. See, e.g., McNamara v. Bre-X Minerals Ltd., 32 F. Supp. 2d 920, 923 (E.D. Tex. 1999) (“Though losses in the instant case were clearly sustained by American Plaintiffs, those losses were independent and did not flow from the Canadian purchases. The Canadian Plaintiffs cannot justify jurisdiction by bootstrapping on independent, American losses”).
vestors who purchased on U.S. markets), they do not automatically give rise to jurisdiction over the claims of investors whose harm flowed from effects outside the country. As to effects-based jurisdiction, then, courts have effectively adopted a "transaction location" rule pursuant to which subject-matter jurisdiction over securities claims presumptively lies in the country on whose exchanges the transaction in question was effected.

B. Jurisdiction on the Basis of Conduct

Due to the difficulties in satisfying the effects test, most investors whose claims arise from foreign-market transactions rely on U.S. conduct as a jurisdictional basis. In some class actions, the only relevant conduct alleged consists of the public dissemination within the United States of allegedly misleading information, whether through filing with U.S. regulatory authorities or otherwise. In others, the foreign claimants allege some additional form of fraudulent activity occurring within the United States. The application of the conduct test differs in these two contexts, and I will therefore treat them separately.

1. Conduct Consisting of Information Disclosure within the United States

In some cases, foreign investors have based their claims on the public dissemination within the United States of documents that contain misleading information, usually in the form of a filing with the Securities and Exchange Commission. They argue that the

126. See, e.g., Alstom, 406 F. Supp. 2d at 369–70 (refusing to extend jurisdiction where fraudulent actions took place overseas and the effects only felt by the U.S. economy or investors generally, because doing so would "address general market conditions rather than redress specific harms suffered by some U.S.-interested party, a goal specifically foreclosed by numerous interpretations of the securities laws" (quoting Interbrew v. Edperbrascan Corp., 23 F. Supp. 2d 425, 430 (S.D.N.Y. 1998))); Baan, 103 F. Supp. 2d at 11 (rejecting the notion that the more generalized effects created when there is a U.S. market in the securities then confers jurisdiction over the foreign claims as well (citing Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 988–89 (2d Cir. 1975))). See also Kaufman v. Campeau Corp., 744 F. Supp. 808, 810 (S.D. Ohio 1990) (non-class action).

127. As discussed below, the conduct test may provide an independent basis for asserting subject-matter jurisdiction over such claims. Therefore, the lack of effects-based jurisdiction in such a case does not necessarily bar their litigation in U.S. courts.

128. This proposition should hold true regardless of whether the issuer in question is a U.S. or a foreign corporation. Thus, if a plaintiff purchases securities of a U.S. issuer on a foreign exchange, effects-based jurisdiction would lie in the country in which that exchange is based.

129. See, e.g., Baan, 103 F. Supp. 2d at 10.
conduct taking place in the United States causes their harm by distorting the prices at which they transact in the securities on foreign exchanges. In one such complaint, for example, the plaintiffs alleged that defendants made materially false and misleading statements in the United States . . . . These SEC filings and press releases affected both the price of Infineon ADSs traded in the United States and the price of Infineon common stock traded in Germany. The price of Infineon ADSs and common stock traded in tandem, so that conduct affecting the price on one exchange affected the price on the other exchange. . . .

Such claims present difficulties with respect to both reliance and causation, two interdependent elements of a Rule 10b-5 cause of action. To satisfy them, a plaintiff must show that it relied on the defendant's fraud in entering into the transaction in question, and that the fraud complained of actually caused the plaintiff's loss.

a. Reliance: Toward a "fraud on the global market" theory?

A plaintiff bringing a securities lawsuit may seek to establish reliance directly—for instance, by showing that it read and relied upon a particular prospectus containing a misrepresentation. In class actions, however, a requirement of "individualized" proof by each plaintiff would be procedurally impossible, and courts therefore apply a presumption of reliance derived from the fraud on the market theory. The Supreme Court adopted this presumption in its 1988 decision in Basic v. Levinson, holding that "an investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action." In class actions, then, plaintiffs generally satisfy the reliance requirement by establishing that they transacted on an efficient market at a price which therefore reflected the defendants' fraud.

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In actions involving foreign transactions, like domestic ones, plaintiffs of course have the opportunity to establish direct reliance on the misleading information. Typically, however, investors purchasing on foreign markets are unlikely to have seen, read and relied upon filings made elsewhere. Foreign claimants in multinational class actions therefore seek to establish presumptive reliance. Because the information in question was disseminated in the United States (as it must be to satisfy the conduct test), and not in the market on which they actually transacted, they must also establish an additional factor: that information disseminated in one country can affect market prices in another.

In order to link misrepresentations made in the United States with effects on securities prices abroad, plaintiffs draw on the efficient market hypothesis. They argue that given the efficiency of global capital markets, information publicly available in one country will affect the price of the issuer's securities in other markets as well. This argument expands the fraud on the market theory into the global arena. One court summarizes the argument as follows:

Plaintiffs argue that the alleged fraudulent misrepresentations and omissions contained in the forms [the issuer] filed with the SEC constitute significant activity in furtherance of the fraud against [the issuer’s] ordinary shareholders because the market absorbed the information contained in those filings and the price of both [the issuer’s] ADRs and [its] ordinary shares reflected that information. In support of this argument, plaintiffs point, inter alia, to the fact that [the] ADRs on the NASDAQ market traded in tandem with [the] ordinary shares on the London Stock Exchange. They argue that there was a "seamless, worldwide market" for [the issuer’s] securities and what [the issuer] said in either London or in the SEC filings affected the price of [its] ADRs and ordinary shares identically. Thus, according to plaintiffs, what [the issuer] said to the SEC in the United States was as significant to the

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133. See Itoba Ltd. v. Lep Group PLC, 54 F.3d 118, 122 (2d Cir. 1995) (in an individual claim, noting that information contained within a U.S. filing had in fact been used as the basis of the investment decision).

134. See, e.g., McNamara v. Bre-X Minerals Ltd., 32 F. Supp. 2d 920, 925 (E.D. Tex. 1999) (noting that "[n]ot a single [foreign] Plaintiff has alleged that he or she relied on (or was even aware of) any statements, reports or filings which emanated from the United States.").

fraud as what it said in the press in London.136

This should be a viable argument: as one commentator notes, “in a technologically-linked investment marketplace . . . virtually every investment-related action anywhere in the world will promptly produce significant distortions of investment decisions in every other developed country . . . .”137 In one multinational class action, plaintiffs whose claims arose from foreign-market transactions made this argument successfully. That case was brought against Royal Ahold NV, a Dutch issuer, by a multinational class some members of which had purchased their securities on the Euronext market. The defendants argued that these plaintiffs’ investment decisions had rested on information disseminated in Europe, and not on filings with the SEC; therefore, they had failed to establish reliance on the alleged U.S.-based fraud.138 The court rejected this argument, noting simply that SEC filings were the type of document on which investors might reasonably rely.139 The decision provides no further discussion on this point: the court neither concluded that the foreign investors had in fact read and relied on U.S. filings nor stated explicitly that it was referring to reliance on market pricing. Nevertheless, it accepted the possibility that the filing of information in the United States was a jurisdictional contact sufficient to satisfy the conduct test.

More frequently, however, courts reject “fraud on the global market” arguments. Interestingly, they generally do so without directly analyzing whether the relevant markets are in fact efficient.140 In one representative case, the court simply stated that applying a presumption of reliance in such cases would over-extend the jurisdictional reach of U.S. law:

Defendants do not challenge the plaintiffs’ reliance on [the fraud on the market] doctrine, as applied to American purchasers. However, employing that doctrine to fulfill the requirements of the conduct test would extend the reach of the 1934 Act too far. It would allow a foreign plaintiff to sue a foreign defendant based on an extraterritorial transaction whenever

137. Langevoort, supra note 14, at 245.
139. Id. (citing Itoba Ltd. v. Lep Group PLC, 54 F.3d 118, 123 (2d Cir. 1995)).
that foreign defendant had filed a fraudulently misleading document with the SEC.\textsuperscript{141}

Thus, the refusal to apply the fraud on the market theory to foreign-cubed claims is based not on skepticism regarding the efficiency of the global capital markets, but simply on concerns regarding jurisdictional overreach.

This approach may lead to artificial line-drawing in the application of the conduct test, as one recent case involving a German company illustrates. In 2004, the Southern District of New York dismissed the claims of foreign purchasers who had purchased stock in the company on foreign exchanges, holding simply that the fraud on the market theory could not be used to satisfy the conduct test.\textsuperscript{142} The court then affirmed this holding after repleading.\textsuperscript{143} Subsequently, an action was filed on behalf of (a) investors who had purchased the company's securities on U.S. markets and (b) U.S. citizens or residents who had purchased the securities on any exchange, U.S. or foreign.\textsuperscript{144} In that action, plaintiff's counsel addressed the question of fraud on the global market more directly, arguing that

[b]ecause the prices of [the issuer's] securities were comparable across [the European exchanges, the U.S. over-the-counter market and the New York Stock Exchange], [the] securities traded in a single, integrated market . . . . The prices in this market were set efficiently . . . . These characteristics [of efficiency] are sufficient to satisfy Lead Plaintiff's burden, at the class certification stage, to show that the existence of an efficient market—and thus the element of reliance—can be proven classwide.\textsuperscript{145}

On this basis, the argument proposes that some investors whose claims arose from foreign transactions should be able to establish reliance on U.S. filings.\textsuperscript{146} Yet if the market in the issuer's secu-


\textsuperscript{142.} In re Bayer AG Sec. Litig., No. 03 Civ.1546 WHP, 2004 WL 2190357, at *18 (S.D.N.Y. 2004).

\textsuperscript{143.} In re Bayer AG Sec. Litig., 423 F. Supp. 2d 105, 113 n.2 (S.D.N.Y. 2005) (declining "to engage in a purely advisory discussion of Plaintiffs' fraud on the market theory").

\textsuperscript{144.} Memorandum of Law in Support of Motion for Class Certification, In re Bayer AG Sec. Litig., 423 F. Supp. 2d 105 (S.D.N.Y. 2005) (No. 03 CV 1546 (WHP)), 2006 WL 1140263.

\textsuperscript{145.} Id. at 17.

\textsuperscript{146.} Including U.S. citizens, who may have been resident abroad and therefore unlikely
rities is in fact an efficient, global market, then the jurisdiction plain-
tiffs seek to establish over only a subset of claims based on foreign
transactions (those entered into by U.S. citizens or residents)
should—under the conduct test—be established over all claims based
on foreign transactions.

Nevertheless, a number of courts have followed this line of
reasoning, and the weight of authority on this point, although taking
the low number of cases into account, suggests that foreign claimants
seeking to establish jurisdiction on the basis of filings within the
United States will not reliably satisfy the reliance requirement under
Rule 10b-5.

b. Loss Causation: The "More Than Merely Preparatory"
Requirement

The loss causation element of a Rule 10b-5 claim requires a
plaintiff to show that the defendant's fraud was a substantial cause of
the losses alleged. In cases with foreign elements, this requirement
intersects with the jurisdictional requirement that the U.S. conduct be
more than merely preparatory in order to justify the application of
U.S. law to the claims.

As discussed above, the Second Circuit distinguished early
between conduct that is "merely preparatory" to a fraud committed in
larger part elsewhere and fraudulent conduct that is engineered and
executed in the United States.\textsuperscript{147} Preparatory conduct is insufficient
as a basis of jurisdiction, while conduct crossing that threshold can
support subject-matter jurisdiction even when only foreign interests
are affected. Although this requirement suggests a temporal in-
quiry—determining whether fraudulent conduct that occurred in the
United States was simply the first step in a fraud that was ultimately
consummated elsewhere—it has been interpreted more as an inquiry
into the relative importance of various steps in a program of fraud. In
determining whether particular conduct is more than merely prepara-
tory, in other words, courts focus on the significance of the U.S.-
based conduct relative to the overall fraud.

In cases in which the only U.S.-based conduct is the dissemi-
nation of information, courts grappling with the question of its over-
all significance tend to inquire into the location at which the relevant
documents were prepared. In one case, for example, the court con-
cluded that the fraudulent misrepresentations in question had been

\textsuperscript{147} See Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 987 (2d Cir. 1975).
authored elsewhere, and their filing in the United States was "merely incidental,"\textsuperscript{148} in another, that documents filed with the SEC "emanated" from overseas.\textsuperscript{149} Issuers, of course, usually prepare their financial reports in their home countries. Because the defendants in multinational class actions are foreign companies, it is therefore generally the case that the relevant disclosure is prepared outside the United States. This focus on the location of preparation, rather than the location of dissemination, makes it unlikely that filings within the United States alone will satisfy the "more than merely preparatory" requirement.\textsuperscript{150}

More importantly, the location at which fraudulent disclosures are prepared is, in today's markets, not necessarily a good measure of their overall significance. Rather, the location of their initial dissemination is the critical factor, since that is the step that will actually affect securities prices.\textsuperscript{151} Some courts have criticized the focus on location of preparation for this reason, noting that a locus of preparation test would simply induce foreign issuers to prepare

\textsuperscript{148} Nathan Gordon Trust v. Northgate Exploration, Ltd., 148 F.R.D. 105, 108 (S.D.N.Y. 1993) (noting that the misrepresentations in question were authored entirely in Canada, and that their inclusion in documents filed with the SEC was "merely incidental"). See also In re Bayer AG Sec. Litig., 423 F. Supp. 2d 105, 111–12 (S.D.N.Y. 2005) (concluding that the misstatements emanated from Germany and could not support jurisdiction over the claims of a large foreign class); Froese v. Staff, No. 02 CV 5744(RO), 2003 WL 21523979, at *2 (S.D.N.Y. 2003) (stating that the fraud occurred when the misstatements were "conceived, engineered, and published in Germany").

\textsuperscript{149} Kaufman v. Campeau Corp., 744 F. Supp. 808, 810 (S.D. Ohio 1984) (finding that, where the fraud emanated from Canada, and the only U.S.-based conduct was the inclusion of alleged misrepresentations in filings and other public information, such conduct was too "insubstantial in comparison to [alleged foreign conduct]" to justify jurisdiction). See also Societe Nationale d'Exploitation v. Salomon Bros. Int'l Ltd., 928 F. Supp. 398, 405 (S.D.N.Y. 1996) (finding no jurisdiction when "the bullet was fired from places abroad" (citing Bersch v. Drexel Firestone, Inc., 928 F. Supp. 398, 986–87 (S.D.N.Y. 1996)); cf. Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir. 1991) (reversing the district court's dismissal due to lack of jurisdiction after accepting "plaintiffs' largely uncontroverted allegations of conduct consummating the fraud in the United States as true"); Cromer Fin. Ltd. v. Berger, 137 F. Supp. 2d 452, 476 (S.D.N.Y. 2001) (finding that jurisdiction was proper where a party's administrative services were "created, managed and operated in the United States"); CL-Alexanders Laing & Cruickshank v. Goldfeld, 709 F. Supp. 472, 478–79 (S.D.N.Y. 1989) (determining that U.S.-based conduct was more than mere "field work" performed by a local office and "that a preponderance of the fraudulent statements alleged here emanated from the United States," and holding that this, combined with the fact that "the securities are those of a domestic company," was enough to warrant the exercise of subject-matter jurisdiction).

\textsuperscript{150} See, e.g., In re Yukos Oil Co. Sec. Litig., No. 04 Civ. 5243(WHP), 2006 WL 3026024, at *10 (S.D.N.Y. Oct. 25, 2006) ("Although the Complaint alleges that Yukos filed its 2002 Annual Report with the SEC... that document is not alleged to have been prepared in the United States. ... [I]n this putative class action challenging a raft of allegedly misleading statements, a single SEC filing by a foreign corporation is not a 'substantial act' in furtherance of the fraud sufficient to confer federal subject matter jurisdiction." (quoting Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1045 (2d Cir. 1983))).

\textsuperscript{151} Cf. Langevoort, supra note 119, at 186 (suggesting a focus on the source of corporate disclosure, presumptively the site of issuer incorporation).
misleading statements outside of the United States and then use them to commit fraud within. In some cases, of course—perhaps in most cases—the location of preparation and the location of initial dissemination will be the same. When they are not, however, the two factors must be differentiated, as an issuer might otherwise be able to deliberately release information first in the U.S. market in order to affect others. In one recent case, for example, the plaintiffs alleged that a foreign issuer had “intentionally entangled” U.S. conduct with its foreign listing by using misrepresentations in the United States in order to increase demand for its securities in Hong Kong. Such behavior would provide an example of fraud launched from the United States to harm foreign investors—behavior that the conduct test, as currently articulated, encompasses.

2. Conduct Constituting Additional Fraudulent Activity within the United States

In light of these difficulties with establishing reliance and loss causation, claims relying on filings as the only form of U.S. conduct are unlikely to succeed in establishing subject-matter jurisdiction. Many foreign claimants in class actions therefore allege not merely the dissemination of misleading information within the United States but some additional conduct occurring there. Such conduct ranges from actions taken in the marketing of the securities (for example, investor presentations) to the preparation of financial information to ongoing business activities of the issuer.

In some cases, foreign claimants identify as relevant conduct the U.S. business activities of a foreign defendant that are later misleadingly characterized in filings or other publicly available information. In an action against the Finnish company Nokia, for exam-

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152. See Itoba Ltd. v. Lep Group PLC, 54 F.3d 118, 124 (2d Cir. 1995); In re Gaming Lottery Sec. Litig., 58 F. Supp. 2d 62, 75 (S.D.N.Y. 1999). Cf. Langevoort, supra note 119, at 186 (arguing that “at least regarding corporate disclosure policy, subject matter jurisdiction should be based not on the alleged violation’s impact but on its source”).


154. This would catch a particular category of cases that one might characterize as fraud “launched” from the United States.


ple, the plaintiffs stated that "[i]n addition to the substantial U.S. conduct in furtherance of the fraud, Nokia has a vast U.S. presence that justifies the exercise of subject matter jurisdiction over the claims of all plaintiffs who, relying on the health and value of Nokia’s substantial U.S. businesses, acquired Nokia securities traded on foreign markets, and were defrauded by defendants’ misrepresentations." This argument suggests that if misleading disclosure relates to the activities of a foreign issuer’s U.S. operations, then, regardless of where that disclosure was prepared, one may characterize the relevant conduct as U.S.-based. Courts are generally unimpressed by these arguments, finding that they conflate fraudulent nondisclosure or misrepresentation with non-fraudulent business activity.\textsuperscript{158}

In the cases in which U.S.-based conduct was held to create a sufficient jurisdictional basis, that conduct was generally both substantial and directly related to the ultimate fraud. In litigation against the French conglomerate Vivendi, for example, it was shown that the company’s CEO and CFO had relocated to New York in order to manage a series of acquisitions of U.S. companies. The plaintiffs alleged that false and misleading statements were made in order to inflate the price on foreign exchanges of Vivendi securities, which were being used to finance those acquisitions. On that basis, the court concluded “that the U.S. based conduct was integral and not merely preparatory to” the fraud directed at foreign purchasers on foreign exchanges.\textsuperscript{159} In the \textit{In re Gaming Lottery} litigation, similarly, the court found that the defendant’s allegedly illegal operation of a U.S. subsidiary, and improper attribution of the earnings from that subsidiary, were the “very factual predicates [lying] at the heart


\textsuperscript{158} See, e.g., \textit{Alstom}, 406 F. Supp. 2d at 394 (stating that the relevant conduct was not the various United States activities “[i]n and of themselves,” but rather the nondisclosure and misrepresentations regarding that activity); \textit{Tri-Star Farms}, 225 F. Supp. 2d at 578–79 (“Marconi’s United States business operations were not themselves fraudulent. Rather, the fraud arises from the representations defendants did or did not make about those operations.”).

\textsuperscript{159} \textit{In re Vivendi Universal, S.A. Sec. Litig.}, No. 02 Civ. 5571(RJH), 2004 WL 2375830, at *4 (S.D.N.Y. Oct. 22, 2004) (referring to 2003 opinion); \textit{id.} at *7 n.6 (stating that the officers “purposely moved to and operated Vivendi from the United States allegedly to better implement a fraudulent scheme”). \textit{See also} Second Consolidated Amended Class Action Complaint, \textit{In re Nortel Networks Corp. Sec. Lit.}, No. 01-CV-1855 (RMB) (S.D.N.Y. Jan. 18, 2002), \textit{available at} http://securities.stanford.edu/1017/NT01/2002118_r01c_011855.pdf (alleging the use of artificially inflated shares as currency for the acquisition of companies).
C. Identifying the Assumptions Courts Make in Multinational Cases

The decisions reviewed above reveal certain assumptions that courts make when they think about jurisdiction, and the particular regulatory interests to which they respond. Understanding these assumptions will assist in predicting the future course of jurisdictional analysis absent legislative guidance and in evaluating possible solutions to regulatory conflict.

In this section, I temporarily set aside the bivalent conduct/effects framework in an attempt to ascertain precisely the regulatory interests to which courts respond in making jurisdictional decisions. In doing that, I will refer to the various transaction constellations illustrated in the following chart:

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1. Assumption #1: The Interest in Protecting U.S. Investors and U.S. Markets is Not Diminished When Foreign Investors and Markets are Also Affected

Judicial treatment of multinational class actions reveals one core assumption: courts are not willing to deprive U.S. investors who purchase securities on U.S. markets of a remedy under U.S. law. This is true even if the issuer in question is a foreign company, and even if the fraudulent conduct complained of took place outside the United States. Moreover, it is true even if the conduct in question caused significantly more harm to foreign investors than to U.S. investors. This is not to suggest that courts do not consider the relative strength of an issuer’s contacts with different countries. The decisions pay careful attention to factors such as the percentage of investors located in the United States versus abroad, the presence of in-

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tent to market the relevant securities in the United States, and the extent of an issuer's business operations in the United States. But such analysis is generally undertaken with an eye only on the claims based on foreign transactions—that is, courts weigh these factors in determining whether a class should be expanded to encompass foreign claimants, but not to question the jurisdictional status of claims based on U.S. transactions.

In the Gaming Lottery litigation, for instance, the court noted that over 50% of the Canadian issuer's common shares were held in the United States, and for that reason felt comfortable certifying a class that included foreign claimants. In the Bayer litigation, by contrast, the court found that only 8% of the issuer's common shares were held in the United States. Primarily on that basis, it excluded the foreign claimants from the class. Even in the latter case, however, the court did not consider the possibility of dismissing the U.S.-based claims on the basis that the entire litigation more properly belonged in Germany, the issuer's home jurisdiction and location of the vast majority of its shareholder base.

2. Assumption #2: The Protection of U.S. Law Extends to Foreign Investors Who Transact on U.S. Markets

Claims falling into the upper right-hand box of the chart—

order, noting that the percentage of shares traded on NASDAQ, as compared to the percentage traded on foreign markets, would be relevant to determining the U.S. interest as the forum.


163. See In re Royal Ahold N.V. Sec. Litig., 351 F. Supp. 2d 334, 353 (D. Md. 2004) (noting that 74% of the Dutch corporation's sales were generated in the United States, and calling it "a primarily United States based company" (citing Consolidated Amended Securities Class Action Complaint at ¶ 57, In re Royal Ahold N.V. Sec. Litig., 351 F.Supp.2d 334 (D. Md. 2004) (No. CIV.1:03-MD-01539), 2004 WL 2358943)).


165. In re Bayer AG Sec. Litig., 423 F. Supp. 2d 105, 113 (S.D.N.Y. 2005). See also In re Nat'l Australia Bank Sec. Litig., No. 03 Civ. 6537(BSJ), 2006 WL 3844465, at *4 (S.D.N.Y. Oct. 25, 2006) (no jurisdiction over the foreign claimants, noting that "the aggregate value of the ADRs represented a mere 1.1% of NAB's nearly one-and-a-half billion ordinary shares").

166. In the one counter-example among the set of multinational class actions, a court dismissed the claim of a New York resident purporting to represent all purchasers, noting (a) the absence of any U.S.-based conduct and (b) that the investor had purchased its shares of the foreign issuer through the over-the-counter market rather than on an exchange. Burke v. China Aviation Oil (Singapore) Corp., 421 F. Supp. 2d 649, 653 (S.D.N.Y. 2005).
foreign investor, U.S.-based transactions—present a somewhat weaker case for jurisdiction, as one must assume that in adopting anti-fraud legislation Congress was less concerned with the welfare of foreign investors than with that of Americans. Nevertheless, the United States does have a regulatory interest in such cases. In order to encourage foreign investment in U.S. markets, domestic securities laws must provide all investors with the same level of regulatory protection in the event of fraud. Thus, even though these cases involve significant foreign contacts—particularly when the fraudulent conduct complained of occurs outside the United States—the fact that an investor has transacted on a U.S. exchange invokes a domestic regulatory interest.

Early cases were not entirely consistent in addressing the status of foreign investors in U.S. markets. In considering the application of the effects test when foreign conduct harmed individuals in the United States, the Second Circuit in Bersch seemed to treat the nationality of the investor as relevant. Other decisions viewed residency, not nationality, as the determinative factor, noting the potential Constitutional problems in treating resident aliens differently from citizens. The decisions in the multinational class actions reviewed here reflect a clear assumption that it is the location of the relevant transaction that matters in this context, with the courts affording foreign investors the same protection as U.S. investors if they trade on U.S. exchanges.

3. Assumption #3: All U.S. Investors in a Certain Security Should Be Treated Equally

In cases in which a U.S. investor purchases securities on a

167. See Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975) (stating that the securities laws "[a]pply to losses from sales of securities to Americans resident in the United States whether or not [conduct] of material importance occurred in this country"). But see IIT v. Corfeld, 619 F.2d 909, 918 (2d Cir. 1980) (Judge Friendly, also the author of the Bersch opinion, stated that "[n]one of our cases or any others intimate that foreigners engaging in security purchases in the United States are not entitled to the protection of the anti-fraud provisions of the securities laws.").

168. See, e.g., Europe and Overseas Commodity Traders v. Banque Paribas London, 147 F.3d 118, 128 n.12 (2d Cir. 1998) (noting that while there was no need to protect mere transients, foreign citizens resident in the United States should be afforded the same protection as U.S. citizens).

foreign exchange, the core regulatory interest (protecting U.S. investors who purchase securities on U.S. markets) is not implicated. An investor who purchases on a foreign exchange relies upon the fairness and integrity of that exchange—conditions that cannot be affected by U.S. law. Surprisingly, however, courts that excluded the claims of foreign investors from multinational class actions often permitted U.S. investors to remain in the class although their losses were suffered as a result of foreign trading. These results reveal another assumption courts make in addressing these cases: they are unwilling to discriminate among U.S. investors based on the location of their trading. In other words, once a class action is underway, courts are inclined to extend U.S. law for the protection of all U.S. investors in a certain security.

V. RE-EXAMINING THE STATUS OF FOREIGN CLAIMANTS IN MULTINATIONAL CLASS ACTIONS

This Part reaches three primary conclusions regarding the treatment of claims based on foreign trading. First, as currently formulated, the conduct test does create a jurisdictional basis for at least some foreign-cubed claims. Second, the exercise of that jurisdiction will in many cases create significant conflict with the regulatory regimes of other countries. Third, doctrines that might assist courts in mitigating such conflict are, at least today, not sufficient to that task.

170. It is also difficult to imagine that investors would expect U.S. regulatory law to follow them in their foreign trading, especially given the level of sophistication of investors involved in cross-border investment.

171. See, e.g., In re Indep. Energy Holdings PLC Sec. Litig., 210 F.R.D. 476, 478 (S.D.N.Y. 2002) (defining class to include purchasers of ADSs or residents of the United States who purchased ordinary shares in London); Tri-Star Farms Ltd. v. Marconi, PLC, 225 F. Supp. 2d 567, 581-82 (W.D. Pa. 2002) (allowing claims of U.S. citizens or residents who purchased shares on the London or another foreign exchange); In re Baan Co. Sec. Litig., 103 F. Supp. 2d 1, 4 (D.D.C. 2000) (dismissing claims only of investors who neither resided in the United States nor purchased their securities on U.S. markets); Memorandum of Law in Support of Motion for Class Certification, In re Bayer AG Sec. Litig., 423 F. Supp. 2d 105 (S.D.N.Y. 2005) (No. 03 CV 1546 (WHP)), 2006 WL 1140263 (including in the class all U.S. citizens and residents who had purchased Bayer securities on any exchange, whether in the United States or in another country); In re Philip Servs. Corp. Sec. Litig., Notice of Pendency of Class Action at 2, Proposed Settlement and Settlement Hearing, No. 98 CV 835 (AKH) (S.D.N.Y. Dec. 18, 2006) available at http://securities.stanford.edu/1006/PHV98/20061218_r01n_99835.pdf (including "all persons or entities who . . . purchased the common stock of Philip on any Canadian stock exchange and were residents or citizens of the United States at the time of said purchase").
A. Conduct-Based Jurisdiction Over Foreign-Cubed Claims

U.S. securities regulators and courts recognize that information flows and cross-listings can create an efficient global market, at least in heavily traded securities. They must therefore accept as a factual proposition that fraudulent misrepresentations or nondisclosures in one country can affect market prices in another. On its own terms, then, the conduct test will create a jurisdictional basis for foreign-cubed claims in some cases: that is, investors in foreign markets will sometimes be able to establish that fraudulent conduct occurring within the United States affected the price at which they traded and thereby caused them harm. In order to justify the exercise of jurisdiction over such claims, however, they must also establish that the application of U.S. law to their claims will serve a legitimate regulatory interest of the United States.\textsuperscript{172} While there is no compensatory interest at stake when foreign claimants are involved, some foreign-cubed claims do implicate a deterrence interest of the United States.

The expansive application of the traditional conduct test was grounded in the notion that courts should not permit the United States to be used as a launching pad for fraud directed elsewhere.\textsuperscript{173} As many decisions observe, this policy protects U.S. interests only indirectly—by encouraging reciprocal protection against fraud by regulators in other countries, for example.\textsuperscript{174} However, multinational class actions point to a more compelling reason to regulate fraudulent conduct based in the United States. For issuers that maintain a dual listing, it is possible, given the internationalization of the capital markets, to engage in manipulation in one country in order to reap benefits in another.\textsuperscript{175} Indeed, this possibility is implied by one of the reasons that companies seek cross-listing to begin with: information made available in one country can affect the valuation of an is-

\textsuperscript{172} Cf. Andrew Longstreth, Coming to America, LITIG. 53, 53 (2006) ("As the market for securities becomes more global and more linked, it does become a little artificial to say 'Well, only shares that are purchased in the U.S. exchanges are deserving of compensation and not people who bought on another exchange,' when they're really two portals to the same market." (quoting Merritt Fox)). This point about artificiality is indisputably true, but begs the critical question: should U.S. courts apply U.S. securities law in order to compensate investors who transacted on foreign exchanges?

\textsuperscript{173} See supra text accompanying notes 29–32.

\textsuperscript{174} SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977). \textit{But see} Dodge, supra note 16, at 115–16 (discussing ways in which the policy discourages reciprocity).

\textsuperscript{175} See Plaintiffs' Opposition to Defendants' Motion to Dismiss Amended Complaint at 35, \textit{In re} China Life Ins. Co. Ltd. Sec. Litig., No. 04-CV-02112 (TPG) (S.D.N.Y. Jan. 9, 2006), 2006 WL 551381 (alleging that marketing efforts in the United States resulted in hype that affected the issuer's prices on the Hong Kong market as well, and that "even in its American filings, [the issuer] made statements directed at foreign investors").
suer's securities in other markets as well. If U.S. law extends only to claims arising out of U.S. transactions, such fraud would be insufficiently deterred if the impact of the fraud in other markets outstripped whatever damages were paid to U.S. investors. This would in turn necessitate additional outlays for enforcement activity within the United States, whether through regulatory or judicial action, even if any resulting compensation flowed only to U.S. investors. Thus, there is a specific U.S. interest in addressing foreign-cubed claims arising out of U.S.-based conduct if that conduct also affects the U.S. market.

Additionally, the United States has an interest in serving a goal it shares with other countries: achieving the efficient resolution of disputes that touch multiple jurisdictions. It is important in this connection to recognize that multinational class actions do not implicate, or implicate only to a lesser degree, the Bersch concern regarding U.S. judicial resources. Litigation that goes forward with a class of U.S. investors will use most of those resources whether foreign investors are included or not. In addition, there are two positive benefits to expanding subject-matter jurisdiction to encompass all claims arising out of the same fraudulent conduct. First, it would reduce litigation over jurisdiction itself.


179. See Weintraub, supra note 11, at 1817. Of course, a clear rule excluding all for-
ants chose to add their claims to U.S. class actions rather than initiate separate proceedings in the country on whose market they traded, it would reduce duplicative litigation over the same sets of events.

These regulatory interests support the exercise of subject-matter jurisdiction over all claims within a multinational class under the following circumstances: (a) there is a U.S. market in the securities, (b) that market is part of an efficient global market in the securities, and (c) fraudulent conduct affecting the global market occurs within the United States.

This application of the conduct test would account for the realities of the global marketplace and take seriously the need to address cross-border securities fraud. It would not, however, be easy to implement. It would require investigation into questions including the precise level of integration between particular securities markets, the location at which particular information was first disseminated, and the efficiency of other securities markets in absorbing that information. In addition, the wide variation in listing and trading patterns among issuers will generate further concerns. Finally, whether fairly or unfairly, courts are likely to resist asserting subject-matter jurisdiction in cases that suggest overreaching.

The presence of a U.S. regulatory interest will not diminish the courts' perception that something is awry when a large group of foreign claimants piggybacks on litigation initiated by a small number of U.S. claimants—when, as the Second Circuit put it, "a very small tail may be wagging an elephant." The next section turns to a closer examination of these concerns.

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181. See supra notes 148–52 and accompanying text.


183. For instance, a court might wish to treat differently a foreign issuer whose U.S. shareholders invested through a sponsored and heavily marketed ADR program and one whose U.S. shareholders invested through an unsponsored program maintained by a broker-dealer. See Pinker v. Roche Holdings Ltd., 292 F.3d 361, 371 (3d Cir. 2002) (discussing this distinction in connection with analysis of personal jurisdiction over a foreign issuer based on its solicitation of U.S. investment).

184. See supra Part IV.B.1.a.

185. IIT v. Vencap, Ltd., 519 F.2d 1001, 1018 n.31 (2d Cir. 1975).
B. Creating Jurisdictional Conflict with Other Countries

1. Conflicts with Countries that Recognize Securities Class Actions

Some countries already recognize securities class actions, and more are in the process of developing group litigation procedures. The extension of U.S. subject-matter jurisdiction to cover the claims of investors based on trading in those countries creates the potential for jurisdictional overlap: the possibility that a foreign claimant would be able to join a class action either in its home jurisdiction or in the United States. Such overlap theoretically presents the possibility of duplicate recovery, as a court in one country cannot enforce in other jurisdictions an order to release all future claims as a condition of settlement or judgment. However, systems that themselves use class actions are likely to enforce claim preclusion in such cases. In addition, as some of the multinational class actions illustrate, this difficulty can be overcome through coordination among affected courts. In cases in which parallel actions had already begun in Canada, for example, some U.S. courts have addressed this question directly by seeking approval of settlements from the Canadian courts. In one such case, the settlement notice listed four related actions—one in the Southern District of New York, and one each in Ontario, Quebec and British Columbia—and noted that the settlement was contingent upon approval of all the courts involved. This kind of negotiated settlement could be used to eliminate the possibility of duplicate recovery.

A second and more intractable problem is the possibility of forum shopping. The concern here is that if a U.S. court were to find subject-matter jurisdiction over foreign claims, then a foreign investor would be able to forum shop, choosing which action to join on the


187. See supra pp. 15–16 (discussing claim preclusion).

188. Notice of Certifications in Canada and Proposed Settlement of Class Actions, In re Nortel Networks Sec. Litig, No. 01-CV-1855(RMB), 2002 WL 1492116 (S.D.N.Y. Feb. 4, 2002), available at http://securities.stanford.edu/1017/NT01/2006721_r01n_011855.pdf. See also In re Royal Dutch/Shell Transport Sec. Litig., 522 F. Supp. 2d 712, 715 (D.N.J. 2007) (noting that a settlement agreement filed in the Amsterdam Court of Appeals, which would resolve all claims of non-U.S. purchasers, was “conditioned in part on” the U.S. district court’s decision whether or not to exercise subject-matter jurisdiction over those claims).
basis of probable outcome. Given that the substantive and procedural law of the United States currently provides certain advantages to plaintiffs as compared to the law of other systems, this might lead to the undesirable result of centralizing litigation in U.S. courts. In this regard, it is important that it is partly the central assumption of U.S. courts—that U.S. investors who purchase securities on U.S. markets should not be deprived of a remedy here—that creates the possibility of multiple parallel proceedings. Until the United States is ready to contemplate a system in which even the claims of U.S. investors, based on U.S. trading, are subject to the laws of another country, it is inappropriate to solve the problem of multiple proceedings by suggesting that they all take place in U.S. courts.

2. Conflict with Countries that Do Not Recognize Class Actions

The concerns raised when foreign claims are appended to a U.S. class action are particularly acute when the investments in question took place in a country whose laws do not permit class actions (or, perhaps, private claims generally) under securities law. Although the central concerns addressed by anti-fraud rules may be the same across systems, many differences remain both in specific rules and in the broader cultural approaches that infuse the regulatory choices of other countries. Some countries prefer public proceedings over private litigation as the primary enforcement mechanism; others recognize private rights of action under securities laws but not group litigation. In addition, the United States is unusual in recognizing presumed reliance based on the fraud on the market theory, rather than requiring investors to prove actual reliance on misleading information. Thus, courts and commentators have from time to time worried about the foreign relations implications of extraterrito-

189. See Philip Anisman & Garry Watson, Some Comparisons Between Class Actions in Canada and the U.S.: Securities Class Actions, Certification, and Costs, 3 CANADIAN CLASS ACTION REV. 467, 521 (2006) (discussing some reasons a Canadian investor might choose to join a U.S. class action rather than a Canadian one).
190. For a discussion of the foreign relations implications of such an outcome, see Buxbaum, supra note 174.
191. See Langevoort, supra note 14, at 260 n.70.
192. Id. at 182–83 (noting that the U.S. approach both to the definition of fraud and to possible sanctions will strike other nations as troublesome); id. at 246 (providing specifics on fraud rules).
193. See Bassett, supra note 71, at 625, 628 (describing such systems).
194. Although Canadian courts have declined to establish a presumption of law based on the fraud on the market theory, some have suggested that reliance on market prices might be inferred from the facts in a particular case. See Anisman & Watson, supra note 186, at 500.
rial application of securities law.\textsuperscript{195}

It must be said that, despite such foreboding, the extraterritorial application of U.S. law in the area of securities regulation has simply not generated the same level of difficulty and hostility as extraterritorial regulation in other areas.\textsuperscript{196} I believe this is going to change, particularly in the class action context. Although foreign claimants have long had the ability to seek inclusion in U.S. class actions, they have been exploiting that opportunity more frequently in recent years. Class action complaints increasingly include not merely general allegations broad enough to include foreign claimants, but specific allegations directly addressing their status. In addition, as noted above, foreign investors frequently seek appointment as lead plaintiffs, whether alone or in conjunction with U.S. co-leads. This expanding involvement of foreign claimants may be traced in large part to efforts of the U.S. plaintiffs’ bar to cultivate foreign investors.\textsuperscript{197} As several recent media reports have noted, some of the major plaintiffs’ firms have opened offices in Europe, the better to serve European funds and other institutions interested in participating in U.S. securities litigation.\textsuperscript{198} U.S. firms are also forming relationships with foreign firms who can act as local partners in developing that business.\textsuperscript{199} Although foreign investors of course seek the assistance of U.S. counsel on a wide range of issues, it seems inevitable that the


\textsuperscript{196} This may be in part because the damages awardable in securities cases are only compensatory, as opposed to the treble damages available in antitrust cases, and because the enforcement of anti-fraud provisions has a different resonance than the enforcement of provisions such as registration requirements, or antitrust regulations shaping ex ante behavior. \textit{See} Born, \textit{supra} note 16, at 47 (noting that, in general, extraterritorial application of securities antifraud rules leads to much less conflict with foreign laws than such application of antitrust law).

\textsuperscript{197} \textit{See} Longstreth, \textit{supra} note 172, at 54 ("American class action lawyers are aggressively pursuing foreign clients. Each plaintiffs firm has its own strategy, but the goal is the same: Sign up lead plaintiff contenders as clients, boosting the firm’s chances of being named lead counsel and eventually raking in huge attorneys’ fees.").

\textsuperscript{198} Earlier this year, Cohen Milstein, Hausfeld & Toll, P.L.L.C., a leading plaintiff’s firm, opened its own branch in London. \textit{See} http://www.cmht.com/london.php.

\textsuperscript{199} \textit{See}, e.g., Longstreth, \textit{supra} note 172, at 54 (reporting an alliance formed between Labaton Sucharow & Rudoff, a U.S. firm, and TILP International, a German firm representing institutional investors). Prominent U.S. plaintiffs’ firms, including Lerach Coughlin Stoia Geller Rudman & Robbins LLP, promote their representation of foreign institutional investors and their affiliations with foreign offices on their websites.
increased involvement of plaintiffs' firms in foreign markets will lead to the increased involvement of their clients in U.S. class actions. For these reasons, an expansion of U.S. plaintiffs' firms into foreign markets will draw unfavorable attention to multinational class actions, which have until recently been the subject of only sporadic commentary abroad. 200

As I have argued at greater length elsewhere, 201 this kind of jurisdictional conflict is not one whose consequences U.S. courts should take lightly. They include, first, substantial friction between different litigation procedures and practices. U.S. entrepreneurial-style lawyering is viewed with hostility in many other countries. It depends on procedural mechanisms such as contingency fees that are not permitted in most other legal systems. When coupled with class actions—whose opt-out mechanism is seen as contrary to public policy in most countries—it triggers particularly adverse reactions. Thus, even when there is agreement on the substance of an anti-fraud rule, other countries may not welcome enforcement through application of U.S. law. Secondly, in the securities field in particular, an expansive approach to multinational litigation presents a specific economic risk. Companies considering cross-listing in the United States are already wary of opening themselves to the potential burdens of litigation here. If securities litigation in the United States can encompass even the claims of their non-U.S. shareholders—investors who transacted in countries where they would not be able to mount collective litigation—those companies will be even less enthusiastic about listing in the United States. 202 For those whose primary concern lies with the competitiveness of U.S. financial markets, this is a significant drawback to the application of U.S. law for the protection of foreign claimants. 203 Finally, these cases raise a much wider set of concerns regarding the role of individual legal regimes in regulating global activity: to cast it in broad terms, concerns that an expansive assertion of jurisdiction by U.S. courts plays in other countries as an

200. The likelihood of this emerging conflict is suggested by one incident in 2006 in which a British pension fund was criticized when its involvement in U.S. litigation was publicized. See David Robertson, City of London Pension Fund Caught in Lawsuit Against BP, THE TIMES ONLINE, Oct. 10, 2006, http://business.timesonline.co.uk/tol/business/law/corporate_law/article666940.ece (a U.K. pension fund criticized for participating as a claimant in a U.S. class action against the U.K. petroleum concern BP; noting the concern of some U.K. companies that “[U.S.] lawyers are trying to export their no-win, no-fee system to Britain”).

201. Buxbaum, supra note 174.


instrument of regulatory hegemony. Unless and until some mechanism is developed that assures the full participation of other countries in crafting solutions to global economic misconduct, an aggressive extraterritorial approach to securities fraud remains problematic.

C. Insufficient Means to Manage Conflict

As I have noted above, some courts avoid jurisdictional conflict by simply foreclosing arguments that should in fact be sustainable under the conduct test. Others, however, turn to doctrines more suited to the resolution of jurisdictional conflict. This section addresses the possibility that such doctrines might be applied to screen those claims that, while permitted under the conduct test, would create excessive conflict with other countries.

1. Discretionary Dismissal

As discussed above, claims brought under the U.S. securities laws are subject to dismissal on the basis of forum non conveniens, or, alternatively, of comity. The availability of these doctrines implies an acknowledgment that, as important as it is, the regulatory interest embodied in the antifraud provisions can be outweighed by competing factors. To date, the cases in which such dismissal has been granted have not been cases involving open-market trading. They tend to arise out of private securities transactions, and, often, address claims brought only by investors on foreign exchanges, not by U.S. investors or by mixed classes. Similarly, the one multinational class action that was dismissed on the basis of comity involved U.S. class members who had invested outside the United States: the court emphasized that the stock in question was listed only in Canada, and concluded that any U.S. investors who engaged in transactions there were aware that they were purchasing securities regulated only by the Canadian authorities. But a more vigorous application of these doctrines might be used to steer entire class actions (includ-
ing claims of U.S. investors as well as claims of foreign investors) to a single foreign forum.

In light of the Supreme Court's recent decision in Sinochem, it is possible to imagine a more expansive use of forum non conveniens in multinational class actions. Prior to that decision, most courts assumed that they must establish personal and subject-matter jurisdiction before turning to the question of forum non conveniens. On such a view, the interests of U.S. investors in the application of U.S. law are squarely before the court as it considers the possibility of deferring to another forum. If a court were to consider forum non conveniens first, however, as Sinochem permits, its initial focus would be on the substantial foreign elements that these class actions present. It might therefore be more inclined to view multinational litigation against foreign issuers as belonging more properly in another court, and more willing to dismiss even the claims of investors who purchased on U.S. markets. The question going forward, then, is whether forum non conveniens can develop into a useful tool for avoiding conflict. While this is difficult to predict, the decisions reviewed here suggest that such a development is unlikely. The assumption that U.S. law must be applied to protect U.S. investors is very strong—thus, while courts may seek ways to exclude foreign-cubed claims, they will probably not choose a path that would eliminate U.S. investors' recourse to U.S. law for damages arising out of trading on U.S. securities exchanges.

2. Applying Foreign Law to Foreign-cubed Claims

U.S. courts have typically adhered to the traditional view that establishing subject-matter jurisdiction under the securities laws requires unilateral rather than multilateral analysis. In other words, when considering claims with foreign elements, their inquiry is limited to whether those claims fall within the scope of U.S. securities law. On this view, all claims included in multinational class ac-

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209. See supra note 87.

210. The promotion of forum non conveniens in this sense might have a different effect: encouraging plaintiffs to revert to straight U.S. classes when suing foreign issuers in order to minimize the risk that U.S.-based claims will be swept into a dismissal of the entire case.

211. See supra Part IV.C.1.

212. In addition, where the U.S. market is created by an issuer-sponsored ADR program, the issuer may in the depository agreement have waived its right to object to litigation in the United States on the basis of convenience. See In re Yukos Oil Co. Sec. Litig., No. 04 Civ. 5243(WHP), 2006 WL 3026024 (S.D.N.Y. Oct. 25, 2006).

213. See Harold G. Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 AM. J. INT'L L. 280 (1982) (explaining this approach in terms of the difference between public interests embodied in regulatory
tions, whether based on U.S. transactions or foreign transactions, raise the same yes-or-no question—they either fall within the subject-matter jurisdiction of U.S. law, or they must be dismissed. A multilateral approach would operate differently: with respect to each claim, or each class of claims, a court would engage in choice-of-law analysis to determine whether U.S. law or another country's law should be applied.

Although a shift to a multilateral choice-of-law approach would require a significant theoretical realignment, it would not be impossible. Some courts have in fact already signaled their belief that U.S. courts could apply foreign law to securities claims.\(^{214}\) Under such an approach, a court addressing a multinational class action could create sub-classes, applying U.S. securities law to claims arising out of U.S. transactions in a particular security and applying foreign law to claims arising out of transactions in that security on a foreign exchange. The benefit of such a solution is that it would permit courts to effectuate the central regulatory interest, by applying U.S. law for the protection of U.S. investors, while recognizing that foreign-based transactions do not similarly trigger that interest. Secondarily, it would mitigate the forum shopping problem that arises when foreign claimants seek inclusion in U.S. class actions in order to avail themselves of more favorable law.

While this solution appears technically possible, it presents some major difficulties. It would do nothing to ameliorate the procedural conflicts that transnational securities litigation generates—thus, for example, a plaintiff might shop for a U.S. forum in order to take advantage of liberal discovery rules. It would also strip global actions of their one real advantage: judicial economy. A single case in which the court is called upon to apply the law of multiple jurisdictions to the same set of events sacrifices quite a bit in the way of efficiency. Indeed, the choice of law issues presented might actually prevent the certification of global classes. The potential that claims within a class will be governed by different substantive laws (in this context, U.S. securities law and one or more foreign securities laws) might interfere with two necessary predicates of class treatment: predominance of common questions of law or fact, and superiority of class action as a method of adjudication. Outside of the securities area, some courts have refused broad certification on the basis of ju-

\(^{214}\) See, e.g., DiRienzo v. Philip Servs. Corp., 294 F.3d 21, 31 (2d Cir. 2002) (suggesting that a U.S. court would apply Canadian securities law to the claims of investors who had purchased the securities there); In re Royal Group Tech. Sec. Litig., No. 04 Civ. 9809 HB, 2005 WL 3105341 (S.D.N.Y. Nov. 21, 2005).
dicial management problems; 215 others, on the ground that the laws to be applied were so different from one another that common issues did not predominate. 216 In class actions involving claimants from only two or three jurisdictions, choice of law issues might not be fatal to certification (especially if the securities law of the foreign jurisdiction involved closely resembles U.S. law). In litigation involving claimants from many different countries, however, or countries whose laws vary substantially, class treatment might not be available. All in all, the multilateral approach offers few advantages to prompt its adoption.

3. Conclusion

Given the assumptions that courts make in addressing multinational class actions, it is unlikely that these doctrines will assume a major role in resolving cross-border conflict in securities litigation. Moreover, even their more frequent application would do little to mitigate the unpredictability of the underlying jurisdictional analysis. Thus, as the filing of foreign-cubed claims continues to increase, multinational class action practice will generate excessive levels of conflict with other countries, as well as mounting uncertainty for litigants.

VI. CONCLUSION: THE SECOND-BEST SOLUTION?

In addressing foreign-cubed claims, courts must navigate the intersection of two bodies of law, each entirely judicially created: substantive anti-fraud jurisprudence based on the implied right of action contained in Rule 10b-5, and jurisdictional tests based on assumptions regarding Congressional intent as to the scope of the Exchange Act. The result, outlined above, has created something of a Catch-22. Courts troubled by the prospect of jurisdictional conflict lack clear guidance in resolving it and so are often tempted to draw artificial lines under the conduct test. On the other hand, courts that apply the conduct test fairly, recognizing jurisdiction over foreign-cubed claims in appropriate circumstances, bring the U.S. system of aggressive private enforcement into unacceptable conflict with the regulatory regimes of other nations.

215. For instance, in consumer protection cases where the court would be called upon to apply the laws of all fifty states.

In the absence of a negotiated international solution to this dilemma, the best alternative may be to adopt a rule that simply limits subject-matter jurisdiction under the anti-fraud provisions to claims arising out of transactions on U.S. markets. This solution would improve the current approach in several ways. First, it would conform to a significant degree with the stance the SEC has taken in regulating the disclosure required in cross-border securities offerings. In adopting Regulation S, which created a tiered exemption for the sale of securities outside the United States, the SEC focused on the location of the particular capital market offering,\(^{217}\) noting that "[a]s investors choose their markets, they choose the laws and regulations applicable in such markets."\(^{218}\) While the goals of disclosure laws and the goals of anti-fraud rules differ, and the scope of application of the relevant rules might therefore differ to some extent,\(^{219}\) a primary focus on transaction location would yield a more unified approach to the question of regulatory limits. It would also be consistent with the approach recently adopted by the Supreme Court in addressing regulatory conflicts under antitrust law.\(^{220}\)

Second, as many commentators have noted, a transaction-based approach would account for the fact that the price of a security presumably reflects the level of regulatory protection available in the market on which it is traded—and that investors transact accordingly.\(^{221}\) Limiting jurisdiction to fraud claims arising out of U.S.


\(^{218}\) Offshore Offers and Sales, Securities Act Release No. 6863, Exchange Act Release No. 27,942, 55 Fed. Reg. 18306 (May 2, 1990). See also Testy, supra note 193, at 956 ("Arguably, the same considerations that persuaded the SEC to issue Regulation S should also prompt it to adopt a similar approach" in the anti-fraud context).

\(^{219}\) See Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 123, 125–26 (2d Cir. 1998) (distinguishing the scope of the registration requirements from the scope of the anti-fraud provisions); E.On AG v. Acciona, 468 F. Supp. 2d 559, 573–74 (S.D.N.Y. 2007) (distinguishing the scope of the tender offer rules). But see Testy, supra note 193, at 956–58 (emphasizing the commonalities between the two contexts).


\(^{221}\) Chang, supra note 14, at 123 (noting "the recent approach of the SEC" to protect U.S. markets over U.S. investors: "Investors who transact abroad would expect protection from the laws of the country in which the transaction took place.").
trading would eliminate the ability of investors to purchase securities under one regime and then take advantage of the more rigorous enforcement regime in the United States by obtaining compensation in private litigation.\textsuperscript{222} Moreover, as Professors Choi and Guzman have argued, U.S. investors may be better off when they have a more diverse array of investments from which to choose.\textsuperscript{223}

Implementing a transaction-based approach in a fair and consistent manner would require some adjustment of current practice. Courts would need to discard the assumption that all U.S. investors must be treated alike regardless of the market on which they purchased. While jurisdiction would extend to the claims of U.S. investors who purchased in the United States, it would not encompass the claims of those who chose to invest in foreign markets.\textsuperscript{224} Similarly, only foreign investors who invested in foreign markets should be excluded from multinational class actions. A foreign investor who purchases securities in the United States (for instance, in the form of ADRs) should not be excluded from resulting litigation on the basis that a judgment might lack preclusive effect in that investor’s home country.\textsuperscript{225}

While this approach would add clarity to jurisdictional analysis and ameliorate regulatory conflict with other nations, it is nevertheless a second-best solution. It fails to address the central dynamic of cross-border securities fraud, which multinational class actions present with such particular clarity: the more integrated the securities markets, the more likely it is that wrongdoers can take advantage of that integration in order to reap financial benefit—and the less feasible it is to achieve effective regulation with systems, whether regulatory or judicial, built around geographic boundaries. A better solution, however, will not be achieved through the unilateral application by domestic courts of national regulatory law. It must wait on a higher degree of conformity in both substantive and procedural law relevant to private securities enforcement, and on the increased op-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{222} Choi & Guzman, supra note 14, at 221. See also Testy, supra note 193, at 957 (noting that in that case investors might receive “a windfall in the form of more protection than that for which they actually bargained”).
\item \textsuperscript{223} Choi & Guzman, supra note 14, at 226.
\item \textsuperscript{225} Cf: In re Vivendi Universal, S.A. Sec. Litig., 242 F.R.D. 76 (S.D.N.Y. 2007) (excluding all German and Austrian investors regardless of where they actually invested).
\end{itemize}
\end{footnotesize}
portunity for coordination among affected states that will flow there-
from.
### APPENDIX

#### ISSUERS INVOLVED IN U.S. CLASS ACTIONS INCLUDING FOREIGN-CUBED CLAIMS

* Class action proceeded including all or some of the foreign-cubed claims
† Class action proceeded but excluded all foreign-cubed claims
# No specific resolution reached on the question of jurisdiction over foreign-cubed claims at the time of writing

| # Adecco S.A. | # Infineon AG |
| # Alstom, S.A. | * Intershop Communications |
| # Asia Pulp & Paper Co. | * Laidlaw Inc. |
| # AstraZeneca plc | # Lipman Electronic Engineering |
| † Baan N.V. | * Livent Inc. |
| † Bayer AG | * Loewen Group |
| * Bennett Environmental | * Mamma.com Inc. |
| † Biovail Corporation | † Marconi plc |
| † Bre-X Minerals | † National Australia Bank |
| # Bridgestone Corp. | # Nokia Corporation |
| * Cable & Wireless plc | * Nortel Networks Corp. |
| † China Aviation Oil | † Parmalat Finanziaria |
| # China Life Insurance | † Philip Services Corp. |
| # Converium Holding AG | # Rhodia S.A. |
| † Daimler-Chrysler AG | * Royal Ahold N.V. |
| * Danka Business Systems plc | † Royal Dutch/Shell Transport |
| † Dominion Bridge Corp. | † Royal Group Technologies Ltd. |
| # Elan Corporation | # Sierra Wireless |
| * Gaming Lottery Corp. | * Tee-Comm Electronics |
| # GlaxoSmithKline plc | * Vivendi Universal S.A. |
| * Golden Rule Resources | † YBM Magnex International |
| † Hugo Boss AG | † Yukos Oil Co. |
| † Independent Energy Holdings |  |