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REMEDIES FOR FOREIGN INVESTORS UNDER U.S. FEDERAL SECURITIES LAW

HANNAH L. BUXBAUM*

I

INTRODUCTION

The public regulation of global securities markets has become more effective in recent years as a result of improved cooperation among national regulators,[1] as well as increased harmonization of disparate legal rules.[2] The *private* enforcement of securities law, by contrast, remains an area of dissensus. This is due in part to the practice in the United States of applying U.S. antifraud rules liberally to cases involving significant foreign elements. Such extraterritorial application of law often creates conflict with other regimes whose substantive and procedural rules differ from ours.

Historically, courts determined the reach of U.S. antifraud law—that is, its applicability to securities fraud claims with foreign elements—by applying the "conduct" and "effects" tests.[3] On that analysis, U.S. law governed claims arising out of fraudulent conduct that either occurred within the United States or caused significant effects within the United States. These tests were not invented in the securities area: they are simply instantiations of the broader international jurisdictional principle that a country has the authority to apply its law to particular acts only if those acts have a recognized jurisdictional nexus with the country (for instance, in the form of conduct, effects, or the actor's nationality).[4] As such, the tests called for case-by-case examination of whether the appropriate jurisdictional nexus was present in any given dispute. As applied in securities litigation, they have yielded some fairly unpredictable, and

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1. This cooperation is reflected in bilateral agreements between regulatory agencies in different countries, as well as the work of multilateral organizations, particularly the International Organization of Securities Commissions (IOSCO). For a recent survey of such instruments, see Michael D. Mann et al., *Developments in the Internationalization of Securities Enforcement*, *in* GLOBAL CAPITAL MARKETS & THE U.S. SECURITIES LAWS 2009, 789 (PLI Corp. Law and Practice, Course Handbook Series No. 1743, 2009).

2. *See, e.g.*, International Disclosure Standards, 64 Fed. Reg. 53,900 (Sept. 30, 2000) (to be codified in title 7 of the C.F.R.) (adopting for the United States the standards endorsed by IOSCO).

3. *See* Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968) (seminal effects decision); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972) (seminal conduct decision).

4. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987) (outlining the bases of legislative jurisdiction recognized under international law).

also somewhat expansive, results. The conduct test, in particular, was used to support the application of U.S. law to claims that seemed quite far removed from any U.S. regulatory interest—including claims brought by foreign investors who had purchased securities of a foreign issuer on a foreign exchange.[5]

In 2010, the Supreme Court for the first time addressed the extraterritorial reach of Exchange Act section 10(b).[6] In *Morrison v. National Australia Bank Ltd.*,[7] the Court rejected the long-standing conduct and effects tests in favor of a single transactional-nexus approach. Concluding that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States,"[8] it held that section 10(b) applies to fraud only in connection with "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[9] The test therefore has two prongs: the first covers transactions that take place on U.S. securities exchanges, and the second covers non-exchange-based transactions made within U.S. borders.[10] The investment transactions at issue in *Morrison* had taken place on a foreign securities exchange, and the Court therefore concluded that section 10(b) did not govern the plaintiffs' claims.[11]

The *Morrison* lawsuit raised particularly thorny issues that counseled against application of U.S. law. First, it was a "foreign-cubed" case: the claims were brought by foreign investors against a foreign issuer, and arose out of foreign investment transactions. In such cases, the application of U.S. law would serve not the core regulatory interest of protecting U.S. markets and investors, but only the substantially weaker interest of preventing the United States from becoming a "launching pad" for fraud directed elsewhere.[12] The foreign regulatory interest, by contrast, was particularly strong.[13] Second, it was a class action, and the claims therefore invoked group litigation processes under U.S. procedural law that are themselves the subject of significant criticism in many

5. For a review of these "foreign-cubed" cases, see Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14 (2007).

6. 15 U.S.C.A. § 78j(b) (West 2011).

7. 130 S. Ct. 2869 (2010).

8. *Id.* at 2884.

9. *Id.*

10. The decision did not place any geographical restrictions on the location of prohibited fraud, implying that section 10(b) applies to any deceptive act, wherever located, that is done in connection with a U.S.-based transaction. This holding is consistent with the effects test's focus on where the harm caused by the fraudulent conduct is suffered. *See* William S. Dodge, Morrison*'s Effects Test*, 40. SW. L. REV. 687 (2011) (arguing that *Morrison* ratifies an effects-oriented interpretation of the presumption against extraterritoriality).

11. 130 S. Ct. at 2888.

12. *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975) ("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.").

13. This is what prompted Justice Ginsburg to remark, at oral argument, that the case "ha[d] Australia written all over it." *Morrison*, 130 S. Ct. at 2894.

other countries.[14] Finally, the plaintiffs in *Morrison* used the fraud-on-the-market theory to establish presumptive reliance;[15] in most countries, however, investors are required to prove actual reliance on misleading information in order to sustain a fraud claim.[16] The rule adopted in *Morrison* was nevertheless not limited to foreign-cubed class actions. It applies across the board, including in cases in which the U.S. regulatory interest is significantly stronger (such as those involving the foreign transactions of U.S. rather than foreign investors),[17] or the conflict with other regimes significantly milder (such as those involving individual rather than class claims).

The benefits that the Supreme Court believed would follow from this new transaction-based test were twofold: first, consistency in the application of U.S. law,[18] and second, the avoidance of interference with other countries' regulatory systems.[19] The *Morrison* test has already been applied in quite a number of securities fraud cases, and so it is possible to engage in an initial assessment of whether the transaction-based test is achieving these goals. The first part of this article engages in such a review. It examines the cases and analyzes the approaches that courts have used in applying the *Morrison* test, both under its first prong (exchange trading) and its second prong (non-exchange-based transactions). This review reveals certain fault lines in the *Morrison* test. It demonstrates that the Court's dual objectives in adopting that test are in certain respects in tension with one another, and lack the sensitivity of the old conduct and effects tests.

The article then turns to the landscape post-*Morrison*. Because the result of that case is to preclude the vast majority of claims brought by foreign investors, the question remaining is whether defrauded foreign investors will find any remedy in the United States going forward. This is a particularly interesting question for investors from countries whose regulatory regimes do not, either by rule or in practice, provide ready remedies for those harmed by securities fraud. Part III of the article considers two potential paths for foreign investors: litigation brought in U.S. federal courts under foreign securities law, and participation in FAIR fund distributions ordered by the Securities and Exchange Commission.

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14. The U.S.-style "opt out" is a particular problem, as it is viewed as contrary to public policy in many other jurisdictions. *See* Rachael Mulheron, *The Case for an Opt-Out Class Action For European Member States: A Legal and Empirical Analysis*, 15 COLUM. J. EUR. L. 409, 412 (2009) (describing the concept as "an anathema" in most European countries).

15. *See* Consolidated Class Action Complaint, Morrison v. National Austl. Bank Ltd., 130 S. Ct 2869 (2010).

16. *See* Buxbaum, *supra* note 5, at 61.

17. Justice Stevens' concurring opinion criticizes the decision on this basis. *See Morrison*, 130 S. Ct. at 2895 (Stevens, J., concurring). Recall that the first decision articulating the conduct test, *Leasco v. Maxwell*, involved allegations that the defendant had engaged in fraudulent conduct within the United States in order to induce a U.S. investor's purchase of securities abroad. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1331 (2d Cir. 1972).

18. *Morrison,* 130 S. Ct. at 2880–81.

19. *Id.* at 2885–86.

II
POST-*MORRISON* CASE LAW

A. Application of *Morrison*'s First Prong: Exchange-Based Trading

1. General Approach to Exchange-Based Transactions

The first prong of the *Morrison* rule is relatively straightforward in application. The decision states that section 10(b) applies to claims arising out of transactions in securities listed on U.S. exchanges, noting the strength of Congress's interest in regulating American markets.[20] Further, making the parallel point that foreign governments have a strong interest in regulating their markets, it states that claims arising out of transactions on foreign securities exchanges will *not* be covered by U.S. antifraud law.[21] And indeed, after *Morrison*, courts have dismissed all claims arising out of foreign exchange transactions.[22] This is true even if the buyer is American; that is, *Morrison*'s holding has not been restricted to foreign-cubed cases, but applies regardless of the purchaser's nationality.[23] It is also true regardless of where the investment decision originates—thus, if a buyer purchases securities trading on a foreign exchange, it is irrelevant whether the buy order was initiated in the United States.[24] The latter approach resists the expansion of section 10(b)'s scope to cover foreign trading on the basis of subsidiary contacts with the United States.

2. Foreign Exchange Transactions in Securities also Listed in the United States

In some cases immediately following *Morrison*, investors argued that the application of U.S. law to their claims arising in connection with foreign exchange transactions should be permitted as long as the securities in question were *also* listed on U.S. exchanges.[25] In other words, the argument was that once an issuer had listed in the United States, then *all* transactions in those securities

20. *Morrison*, 130 S. Ct. at 2884 (referring to the "primacy of the domestic exchange").

21. *Id.* at 2885.

22. *See In re* Elan Corp. Sec. Litig., No. 08 Civ. 8761(AKH), 2011 WL 1442328 (S.D.N.Y. Mar. 18, 2011); *In re* Celestica Inc. Sec. Litig., No. 07 CV 312(GBD), 2010 WL 4159587 (S.D.N.Y. Oct. 14, 2010); Terra Sec. ASA Konkursbo v. Citigroup, Inc., 740 F. Supp. 2d 441 (S.D.N.Y. 2010); Sgalambo v. McKenzie, 739 F. Supp. 2d 453 (S.D.N.Y. 2010).

23. *See, e.g.*, *In re* Société Générale Sec. Litig., No. 08 Civ. 2495(RMB), 2010 WL 3910286 (S.D.N.Y. Sept. 29, 2010) (holding that U.S. law did not apply to the claims of American investors who had purchased securities on a French exchange).

24. Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166, 178 (S.D.N.Y. 2010). Because the geographic location of the investment decision is irrelevant, arguments that the proposed takeover of the New York Stock Exchange by the Deutsche Börse will complicate the application of the *Morrison* test seem less than compelling. Although an electronic trading platform might result in orders being placed through offshore systems, it would nevertheless be clear whether the securities in question were trading on a U.S. exchange or not.

25. *E.g.*, *In re* Royal Bank of Scotland Grp. PLC Sec. Litig., 765 F. Supp. 2d 327, 335 (S.D.N.Y. 2011) (referencing plaintiffs' argument that the "plain reading" of the *Morrison* holding permits such claims).

were subject to U.S. laws. This argument was based on the following language in the Court's opinion, which seemed to speak to the categorical question of whether the issuer's securities were listed in the United States: "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."[26]

The Court's apparent intention, however, was to limit the reach of section 10(b) to claims of purchasers whose particular investment transactions had taken place within the United States. The Court emphasizes this intention elsewhere in its opinion: "Nothing suggests that [the United States'] *national* public interest pertains to transactions conducted upon *foreign* exchanges and markets."[27] The case law has followed that approach, foreclosing the application of U.S. law to any claims arising out of foreign exchange transactions.[28] As the Southern District of New York stated in one recent decision,

> [t]he idea that a foreign company is subject to U.S. Securities laws everywhere it conducts foreign transactions merely because it has "listed" some securities in the United States is simply contrary to the spirit of *Morrison*. . . . [T]he Court makes clear its concern is on the true territorial location where the purchase or sale was executed and the particular securities exchange laws that governed the transaction . . . . Plaintiffs' interpretation would be utterly inconsistent with the notion of avoiding the regulation of foreign exchanges.[29]

Thus, the fact that a class of securities has been listed in the United States is not enough to trigger the application of section 10(b)—the plaintiff's own investment must have been made in the United States.[30] This approach forecloses most claims by foreign investors, as they will arise in connection with foreign exchange trading.

3. Exchange Transactions in American Depositary Receipts

The one category of exchange-based transactions that has created some confusion post-*Morrison* is trading in American Depositary Receipts (ADRs). An ADR represents an ownership interest in a certain number of the ordinary shares of a foreign issuer.[31] ADRs may be listed and traded on public securities

26. *Morrison*, 130 S. Ct. at 2888.

27. *Id.* at 2882; s*ee also id.* at 2884 ("[T]he focus of the Exchange Act is . . . upon purchases and sales of securities in the United States . . . ."); *id.* at 2885 (referring to the "focus on domestic transactions" in the U.S. regulation of securities trading).

28. *See, e.g.*, *In re Royal Bank,* 765 F. Supp. 2d at 327; *In re* Vivendi Universal, S.A. Sec. Litig., 765 F. Supp. 2d 512, 530 (S.D.N.Y. 2011) ("[P]erhaps Justice Scalia simply made a mistake."); *In re* Alstom SA Sec. Litig., 741 F. Supp. 2d 469 (S.D.N.Y. 2010).

29. *In re Royal Bank*, 765 F. Supp. 2d at 336.

30. This test is consistent with the Court's holding in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), a case considering the extraterritorial reach of U.S. antitrust law. In its decision, the Court held that U.S. antitrust law sought to forbid conduct only to the extent that it caused harm to purchasers engaged in U.S. transactions, not to the extent that it also caused independent harm to purchasers engaged in foreign transactions.

31. For a general description of ADRs, see Additional Form F–6 Eligibility Requirement Related to the Listed Status of Deposited Securities Underlying American Depositary Receipts, 68 Fed. Reg. 54,644, 54,644 (proposed Sept. 17, 2003) (to be codified at 17 C.F.R. pt. 239) [hereinafter *Additional*

exchanges in the United States, or traded in the over-the-counter market.[32] Where fraud claims arise in connection with ADRs purchased on a U.S. exchange, one would expect section 10(b) to apply, because such transactions fall within the scope of *Morrison*'s first prong. While several post-*Morrison* decisions have indeed treated ADRs like other securities,[33] a handful of decisions cast doubt on this analysis.

Pre-*Morrison*, some decisions had characterized U.S. exchange transactions in ADRs as "more foreign" than transactions in other securities. In a 2008 decision involving the securities of a Swiss issuer, for instance, the court began with the classic formulation that "[w]hen . . . 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 . . . to be devoted to them rather than leave the problem to foreign countries."[34] It then "[a]ssum[ed] that the purchase of [the issuer's ADRs] on the [New York Stock Exchange] and the purchase of [the issuer's] shares by U.S. residents on the SWX [Swiss Exchange] may be viewed as predominantly foreign securities transactions,"[35] and proceeded to hold under the then-applicable jurisdictional tests that U.S. law did not reach such transactions. Another case, *Cornwell v. Credit Suisse Group*,[36] followed this analysis, suggesting that "purchases of [issuer's] shares through ADRs might still be considered 'predominantly foreign securities transactions.'"[37]

These cases were decided pre-*Morrison*, and were therefore not focused explicitly on the question of characterizing the location of a transaction in ADRs. In one post-*Morrison* case, however, the Southern District of New York imported this line of reasoning into the new transaction-based jurisdictional framework. In *In re Société Générale Securities Litigation*,[38] the court considered the claims of U.S. investors who had purchased ADRs on the over-the-counter market in New York (having already dismissed the claims of investors who purchased ordinary shares of the issuer on a French exchange).[39] It decided to dismiss those claims, on the theory that because an ADR represents the right to receive a certain number of the issuer's foreign shares, a transaction in ADRs does not qualify as a U.S.-based transaction.[40] *Société Générale* itself involved

Form F-6 Eligibility Requirement].

32. *See generally* J. WILLIAM HICKS, INTERNATIONAL DIMENSIONS OF U.S. SECURITIES LAW § 9:146–49 (2011 ed.).

33. *See In re Royal Bank*, 765 F. Supp. 2d at 327; *Vivendi*, 765 F. Supp. 2d at 512.

34. *In re* SCOR Holding (Switzerland) AG Litig., 537 F. Supp. 2d 556, 561 (S.D.N.Y. 2008) (quoting Bersch v. Drexel Firestone Inc., 519 F.2d 974, 985 (2d Cir. 1975)).

35. *Id.*

36. 666 F. Supp. 2d 381 (S.D.N.Y. 2009).

37. *Id.* at 395 (quoting *SCOR Holding*, 537 F. Supp. 2d at 561).

38. No. 08 Civ. 2495(RMB), 2010 WL 3910286 (S.D.N.Y. Sept. 29, 2010).

39. *Id.* at *5.

40. *Id.* at *6–7. While the holding foreclosed the claims of U.S. investors, the logic of the decision would certainly apply to claims of foreign investors as well (should foreign investors choose to purchase ADSs rather than the underlying ordinary shares).

ADRs traded in the over-the-counter market; however, its characterization of the transactions as non-U.S.-based is grounded in an assumption about the securities themselves, and might in the future be extended to exchange-based transactions.

The holding in *Société Générale* is difficult to square with the *Morrison* test—and surely the United States has a regulatory interest in transactions in ADRs, both on exchanges and over-the-counter. If a foreign issuer has chosen to establish an ADR program in the United States, and is then charged with perpetrating a fraud in order to inflate the value of the U.S.-traded securities, it would be reasonable to apply U.S. antifraud law to resulting claims.[41] It may be that the court's reasoning flowed from *Morrison*'s policy focus on avoiding conflict with foreign regulatory systems, as the regulation of transactions in ADRs does create the potential for such conflict. What result, for instance, if a foreign issuer engages in fraudulent conduct in its home country that has an effect both on the prices of its ordinary shares and also on the prices of related ADRs? In such a case both the home country regulator and the U.S. regulator would have legitimate interests in regulating, in order to protect the functioning of their own securities markets. Yet perhaps the foreign regulatory interest should be given primacy, on the basis that the ADRs are merely receipts for the right to obtain those foreign shares?[42] (This seems to have been the thinking of the court in the *Société Générale* litigation.)

The *Morrison* test itself simply leaves no room to consider such questions. What these difficulties suggest is that the test may in some contexts be insufficiently nuanced. The fact that a transaction takes place on a U.S. market does signal the presence of a U.S. regulatory interest—but in some circumstances that interest might be outweighed by another U.S. interest, such as the need to avoid conflict with other regulatory regimes.

B. Application of *Morrison*'s Second Prong: Non-Exchange-Based Transactions

Although the *Morrison* opinion linked the applicability of section 10(b) to the location of the relevant investment transaction, it did not offer specific guidance on how to determine that location. The holding summarizes the test simply as "whether the purchase or sale is made in the United States."[43]

Determining the location of non-exchange-based transactions has proved quite complicated. Not surprisingly, many investment transactions involve

41. This analysis becomes much more complicated in the case of unsponsored ADR programs, in which a foreign issuer has not sought to avail itself of the U.S securities markets. *See Additional Form F–6 Eligibility Requirement*, *supra* note 31 (describing such programs, which "[do] not involve the formal participation, or even require the acquiescence of, the foreign company whose securities will be represented by the ADRs").

42. Regulatory conflict would also arise whenever a foreign issuer listed its shares directly on a U.S. exchange. In that case, however, the primacy of the foreign regulatory interest would be more questionable.

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

touches with multiple countries or are executed by electronic or other means to which it is difficult to assign a location at all. As the post-*Morrison* cases illustrate, plaintiffs have pointed to a variety of factors in arguing that a particular transaction was made in the United States. These include the issuance in the United States of notes evidencing the purchase of securities,[44] the dissemination of offering materials in the United States,[45] the solicitation of investors in the United States,[46] the wiring of money to the United States,[47] and the location of the transaction's closing.[48] In one of the many cases arising out of the Madoff fund scandal, plaintiffs who had purchased shares in foreign investment funds through offshore transactions argued that their claims should fall within the scope of section 10(b) because the ultimate purpose of those transactions was investment in listed U.S. securities through Madoff's firm.[49]

The following discussion uses two brief case studies to explore the confusion that has followed the *Morrison* holding on this point. The first is *Elliott Associates v. Porsche Automobil Holding SE*,[50] a case involving a swap agreement referencing foreign securities. The second is a proceeding brought by the SEC against Fabrice Tourre, a former Goldman Sachs executive.[51] Taken together, these examples reveal not only inconsistency in the standards that courts use to approach the question of transaction location, but, more importantly, serious limitations with that test as a means of identifying

44. *See In re* Optimal U.S. Litig., No. 10 Civ. 4095(SAS), 2011 WL 1676067 (S.D.N.Y. May 2, 2011).

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

46. SEC v. Goldman Sachs & Co., 790 F. Supp. 2d 147 (S.D.N.Y. 2011).

47. *Cascade*, 2011 WL 1211511, at *7.

48. Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada, 645 F.3d 1307, 1310 (11th Cir. 2011).

49. *In re* Banco Santander Sec.-Optimal Litig., 732 F. Supp. 2d 1305, 1317 (S.D. Fla. 2010). In that case, the court declined to consider the "unpredictable and subjective criterion" of investor intent in this way. Interestingly, in a similar case arising out of the Madoff scandal, *In re* Kingate Mgmt. Ltd. Litig., No. 09 Civ. 5386(DAB), 2011 WL 1362106 (S.D.N.Y. Mar. 30, 2011), the court characterized the situation differently. The plaintiffs in that case had invested only in foreign feeder funds—and apparently could not argue that the investment transactions had been made in the United States. They therefore dropped their federal securities claims following *Morrison*, and sought to proceed with only common law claims. *Id.* at *4. For that argument to succeed, however, they had to establish that their claims were not precluded by the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) [hereinafter SLUSA] (codified as amended at 15 U.S.C.A. § 78–80 (West 2011)). That legislation had preempted certain categories of state law securities actions, including class actions that involve a "covered security." "Covered securities" included any security that was listed or authorized for listing on a U.S. securities exchange, which, plaintiffs argued, did not cover their shares in the feeder funds, none of which were listed or authorized for listing in the United States. *Kingate*, 2011 WL 1362106, at *7. The court rejected this argument, holding the claims to be preempted by SLUSA. It found that according to the plaintiffs' own allegations, the funds in which they had invested were "essentially cursory pass-through vehicles by which investors could place their assets with Madoff." *Id.* at *8. Thus, the sole objective of investing in the foreign funds was to invest with Madoff, and "[p]laintiffs' claims are brought in connection with the covered securities Madoff pretended to purchase, bringing them within SLUSA's purview." *Id.* at *9.

50. 759 F. Supp. 2d 469 (S.D.N.Y. 2010).

51. *Goldman Sachs & Co.*, 790 F. Supp. 2d at 147.

transactions of regulatory interest to the United States.

1. *Elliott*: Swaps

The plaintiffs in *Elliott* are hedge funds—some organized under U.S. law, some under foreign law, but all run by managers located in New York—that had entered into swap agreements referencing the price of shares in Volkswagen, a German corporation.[52] The defendant is Porsche, also a German corporation. The claims allege that Porsche, through a number of misrepresentations, concealed its plans to take over Volkswagen while accumulating nearly seventy-five percent of Volkswagen's shares. When Porsche's position in Volkswagen was revealed, the price of Volkswagen's shares rose; under the terms of the swap agreements, the plaintiffs had to make substantial payments to their counterparties. The claims allege nearly two billion dollars in resulting losses.[53] Although the plaintiffs did not identify the counterparties to the swap agreements, they alleged that "all steps necessary to transact the swap agreements were carried out in the United States,"[54] and therefore that the single predicate established by *Morrison* for the application of U.S. law—a U.S.-located transaction—had been met. Because section 10(b) explicitly covers swap agreements, this allegation would seem facially sufficient to bring the claims within the scope of that section under *Morrison*.

The court concluded that section 10(b) did not reach the claims. It focused its analysis by reference to one of the policies underpinning the *Morrison* decision—the need to avoid interference with foreign securities regulation.[55] Describing Volkswagen's shares as foreign securities, the court stated that the swap agreements referencing Volkswagen shares were "economically equivalent" to the purchase of those shares (although swap agreements include not only investment risk in the reference securities but also counterparty risk), and therefore that the swaps "were the functional equivalent of trading the underlying Volkswagen shares on a German exchange."[56] Thus, in the court's view, the policy of noninterference with foreign regulation was squarely applicable. In service of that policy, it went on to restate the second prong of the *Morrison* decision: "Although *Morrison* permits a cause of action by a plaintiff who has concluded a 'domestic transaction in other securities,' this appears to mean 'purchases and sales of securities explicitly solicited by the

52. *Elliott*, 759 F. Supp. 2d at 471–72.

53. *Id.* at 473.

54. *Id.* at 471.

55. *Id.* at 474.

56. *Id.* at 476. The court also asked "whether there is any distinction . . . between a domestic 'buy order' for securities traded abroad and one party's execution in the U.S. of a swap agreement that references foreign securities." *Id.* at 475. Its purpose in making this analogy was to align the case with others in which U.S. buy orders were held insufficient to bring claims within the ambit of section 10(b). *See, e.g.*, Plumbers Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F. Supp. 2d 166 (S.D.N.Y. 2010). In those cases, however, the actual transactions in question were made on foreign securities exchanges—a different situation, in that it involves the easier case of exchange-based transactions.

issuer in the U.S.'"[57]

There is nothing in *Morrison* to suggest that solicitation in the United States is required for the application of U.S. law, much less solicitation by the issuer itself. Indeed, as the analysis in the following section demonstrates, other decisions have held that solicitation in the United States is irrelevant under *Morrison*, on the ground that it constitutes the kind of conduct that the test was meant to reject.[58] The decision states simply that section 10(b) applies to domestic transactions—and, according to the allegations of the *Elliott* plaintiffs, their swaps were domestic. Yet it is easy to understand why the *Elliott* court took the path it did. The allegedly fraudulent conduct took place in Germany, and its direct impact was on the price of a foreign company's shares on a German securities exchange. (The effect on the plaintiffs was not only unrelated to the safety of a U.S. exchange, it also amounted to a harm that was unknowable to the defendants, because the swap agreements referencing the Volkswagen shares were themselves private.) It is therefore German regulators, not U.S. regulators, who have the primary interest in regulating that conduct; as *Morrison* warned, the application of U.S. law in such a situation would run the risk of interfering with the foreign regulatory prerogative.[59] The fact that the conduct in question had an indirect impact on the plaintiffs, in connection with a domestic securities transaction, does not diminish the status of the German regulatory interest and therefore cannot eliminate this jurisdictional conflict. The bright-line test simply did not give the court a tool to address that conflict; hence the perceived need to reformulate it.

On the facts of *Elliott* itself, this conflict seems relatively easy to resolve in favor of German regulation. First, the conduct's effect on the plaintiffs is indirect, in contrast to its direct effect on the foreign share price. Second, the transaction from which the claims arose was located in the United States as a result of actions taken by the plaintiffs themselves (in structuring a private agreement that referenced particular foreign shares) rather than through any action of a foreign issuer. Other cases, however, may present more difficult versions of this conflict. One has been discussed above: the situation involving investors in ADRs that are listed and traded on American exchanges.[60] Unfortunately, there are endless permutations of this kind of conflict—where there is a U.S. transaction (triggering application of U.S. law under *Morrison*'s second prong) and *also* some foreign transaction or trading that under *Morrison*'s overarching policy of avoiding foreign conflict would counsel against application of U.S. law. The *Morrison* test does not give courts tools to deal with such situations.

What the *Elliott* case demonstrates is that the "bright line" test established by *Morrison* may be over-inclusive, permitting the application of U.S. law in

57. *Elliott*, 759 F. Supp. 2d at 476.

58. *See infra* notes 66–68 and accompanying text.

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

60. *See supra* note 41 and accompanying text.

circumstances in which that application would appear unreasonable.[61] Courts will therefore be inclined to add interpretive gloss to the bright-line test in an effort to utilize it sensibly. The consequence will likely be precisely the same "proliferation of vaguely related variations"[62] on the test that the Supreme Court criticized as a failing of the old conduct and effects tests. Here, the policy interest of avoiding conflict with foreign systems is at odds with the policy interest of achieving predictability and clarity in the application of U.S. law.

2. Tourre

Securities & Exchange Commission v. Goldman Sachs & Co.[63] involved allegations of securities fraud in connection with the sale of ABACUS, a collateralized debt obligation structured and marketed by Goldman Sachs. Because the purchasers were foreign banks, the question arose whether the transactions in question had taken place in the United States. The court in this case began with the definition of "purchase" and "sale" in the Exchange Act itself, noting that these definitions include the act of contracting to purchase or sell.[64] Citing an earlier decision, it found that a transaction should be considered to be completed at the moment when a purchaser incurs "irrevocable liability" to take and pay for the security.[65] The court ultimately concluded simply that the SEC had not alleged sufficient facts to establish that this irrevocable liability had arisen in the United States. In doing so, though, it rejected some possible approaches for determining the location of a transaction. First, it stated that the location of selling activity in general should not be determinative. The SEC had referred to marketing efforts conducted in the United States, as well as conversations originating in the United States.[66] The court characterized this as "just conduct,"[67] stating that the point of *Morrison* was to *reject* U.S.-based conduct as a predicate for application of U.S. law, replacing it with the transaction test.[68] The court also held that the closing of the transaction, which

61. Similarly, the test may in some contexts be perceived as *under*-inclusive. In another recent case, the Southern District of New York considered the applicability of U.S. securities laws to claims arising out of an investor's purchase of "contracts for difference" (CFDs) that were linked to the NYSE-traded securities of an American issuer. SEC v. Compania Internacional Financiera S.A., No. 11 Civ. 4904(DLC), 2011 WL 3251813 (S.D.N.Y. July 29, 2011). Although the investment transaction occurred overseas, the court nevertheless held that U.S. laws reached the transaction, on the ground that the CFDs were linked to U.S.-traded securities and therefore "involved securities listed on a domestic exchange." *Id.* at *6. In explaining this holding, the court claims that "*Morrison* . . . never states that a defendant must itself trade in securities listed on domestic exchanges or engage in other domestic transactions," *id*. This characterization is seemingly in tension with the court's earlier opinions in cases involving foreign exchange-based trading. *See supra* notes 28–30 and accompanying text.

62. *Morrison*, 130 S. Ct. at 2880.

63. 790 F. Supp. 2d 147 (S.D.N.Y. 2011).

64. *Id.* at *8.

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

66. *Id.* at 158.

67. *Id.*

68. *See also* Cascade Fund, LLP v. Absolute Capital Mgmt. Holdings Ltd., No. 08–cv–01381–MSK–CBS, 2011 WL 1211511, at *7 (D. Colo. Mar. 31, 2011) ("Morrison expressly rejected both the

had taken place in the United States, was not sufficient to establish that the purchases were domestic.[69]

The implication of this approach is that the location of an investment transaction hinges on the location of the final act that gives rise to liability to purchase and sell.[70] Yet that may be manipulable by the parties—or, even more troubling, by one of them. In one recent case, *Absolute Activist Value Master Fund Ltd. v. Homm*,[71] a group of defendants (some foreign and some domestic) allegedly induced a group of foreign hedge funds to purchase shares of worthless U.S. companies. Although the shares were quoted on the over-the-counter market in the United States, the securities in question were purchased directly from the companies.[72] Therefore, despite allegations of marketing activity and misrepresentations occurring within the United States,[73] the court concluded that "the plain language of the 'transaction test' established in *Morrison* precludes [the] action from moving forward. . . . By all accounts, Plaintiffs took great pains to avoid the regulations imposed by federal securities laws that apply to domestic market transactions."[74]

One way to understand this approach is as an extension of the principle that parties to a securities transaction may use forum-selection and governing-law clauses to select the securities regime governing that transaction. The enforceability of such clauses—and therefore the right of parties to structure their investments in a way that removes them from the scope of U.S. antifraud law—was confirmed by many circuit courts in cases following the collapse of Lloyd's of London.[75] Yet that principle has in fact operated in a quite limited way. First, it has not been extended broadly following the *Lloyds* cases themselves, and those involved highly sophisticated investors. Second, the chosen law in those cases was held to be substantively similar to U.S. antifraud law. Presumably, the courts would not have enforced the clauses and removed the claims from the purview of U.S. law had the foreign law in question been

Second Circuit's 'conduct test' . . . and a test proposed by the Solicitor General that located the fraud in the United States if it 'involved significant conduct in the United States.' This rationale strongly suggests that inquiry into the location of solicitation is irrelevant to the inquiry.") (quoting Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2886 (2010)).

69. *Goldman Sachs*, 790 F. Supp. 2d at 158–59.

70. *See, e.g.*, *Cascade*, 2011 WL 1211511, at *7 ("[T]he transaction was not completed until ACM finally accepted an application—presumably in its Cayman Islands offices."); Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 372, 405 (S.D.N.Y. 2010) (considering plaintiffs' argument that "no transaction actually occurred until Plaintiffs' subscription agreements were accepted by the Funds, and that this approval occurred in New York City, where FGG had an office").

71. No. 09 CV 08862(GBD), 2010 WL 5415885 (S.D.N.Y. Dec. 22, 2010).

72. *Id.* at *2.

73. *Id.* at *4.

74. *Id.* at *5.

75. *See, e.g.*, Richards v. Lloyd's of London, 135 F.3d 1289 (9th Cir. 1998); Roby v. Corp. of Lloyd's, 996 F.2d 1353 (2d Cir. 1993); Bonny v. Soc'y of Lloyd's, 3 F.3d 156 (7th Cir. 1993). I discuss these cases in detail in Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 VA. J. INT'L L. 931, 959–62 (2002).

less similar.[76] Finally, such clauses are of course the product of an actual agreement, whose negotiation must be fair and clear.[77] A view that the seller of securities can simply situate itself outside the United States when formally engaging in an act of acceptance, and thereby avoid the application of U.S. law, goes much further. That act is not only manipulable but can be non-transparent to the other party. Permitting it to determine the applicability of U.S. regulatory law may therefore remove certain transactions from the protection of that law without the safeguards that ordinarily attend the contractual exercise of party autonomy.

C. Conclusion

The bright-line rule established in *Morrison* is in my view a good solution to the specific kind of case presented there: a foreign-cubed class action. In such a case, the need to avoid international conflict is very great, and not balanced by sufficient countervailing interests. But in extending a bright-line test to all forms of investment transactions, the Court ignored the substantial variability of such transactions. In certain kinds of cases, the foreign interest is simply less, or the U.S. interest more, compelling. It is indisputable that the old conduct and effects tests gave rise to unpredictability, and were vague enough to permit the application of U.S. law in cases where it simply should not have been applied. But it would have been preferable for the Court to chip away at that unpredictability in the clearest cases of abuse—such as in the foreign-cubed class actions—rather than to sweep away the tests completely. As the cases post-*Morrison* already reflect, the variety of investment transactions in the global market, and the manipulability of transaction formation, resist the easy characterization that such an unnuanced conflicts rule relies upon. The virtue of the old conduct and effects tests was their grounding in principles of international comity, which focused attention on how our domestic interests coincide with, overlap with, and indeed sometimes conflict with the interests of other nations.

III
ALTERNATIVE ROUTES TO RECOVERY FOR FOREIGN INVESTORS

Because *Morrison* places most claims of foreign investors outside the scope of section 10(b), the question left open is whether there may be a route to recovery in the United States that does not depend on the application of U.S. securities law. This part outlines two possibilities: first, recovery in U.S. courts for claims arising under foreign securities law, and second, recovery through

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76. *See e.g.*, *Bonny*, 3 F.3d at 162 (emphasizing "the availability of remedies under British law that do not offend the policies behind the [U.S.] securities laws").

77. In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972), the source of modern law on the enforceability of forum selection clauses, the Supreme Court adopted a rule of presumptive validity of private agreements that were "freely negotiated" as well as "unaffected by fraud, undue influence, or overweening bargaining power."

public enforcement mechanisms. I set aside for purposes of this discussion a third possibility: Congress might choose to restore the conduct and effects tests for private litigation, as it did for public enforcement in the Dodd–Frank Act.[78]

A. Foreign Law Claims

Historically, the claims of foreign investors in U.S. courts have alleged violations only of U.S., not of foreign, securities law. This approach is consistent with the so-called "public law taboo," which bars domestic courts from applying the regulatory law of another jurisdiction.[79] On that view, the inquiry of a U.S. court addressing securities fraud claims is limited to whether those claims fall within the scope of U.S. securities law.[80] If U.S. law is found not to reach the claim in question, the court will not go on to apply the regulatory law of another country more closely connected with the dispute, as it would in a private law claim; rather, it will simply dismiss the claim.[81] Absent the public law taboo, a U.S. court might use ordinary conflict-of-laws analysis: with respect to each claim, or each class of claims, a court would apply choice-of-law rules to determine whether U.S. law or another country's law should be applied.

As a number of commentators have noted, the public law taboo is weak. First, its theoretical underpinnings have always been somewhat confused. The taboo derives from two related principles—the prohibitions against enforcing the penal laws and the revenue laws, respectively, of foreign sovereigns—the extension of which to private claims based on regulatory law is questionable.[82] Second, justifications for adhering to the taboo appear increasingly inadequate in the international global regulatory environment. As Professor Muir Watt has argued, the "monopolistic view" of sovereign regulatory authority is difficult to sustain given the economic interdependency of today's markets.[83] Perhaps recognizing that point, tribunals in both private attorney general–type litigation and in arbitration have diluted the strength of the taboo by privileging party

78. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929Y, 124 Stat. 1376 (2010) (requesting the SEC to conduct a study of that possibility).

79. *See generally* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW 3–5 (1996); F.A. Mann, *The International Enforcement of Public Rights*, 19 N.Y.U. J. INT'L L. & POL. 603 (1987); F.A. Mann, *Conflict of Laws and Public Law*, 132 RECUEIL DES COURS 107, 166–81 (1971).

80. *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 law and ordinary private law rules).

81. William S. Dodge, *Breaking the Public Law Taboo,* 43 HARV. INT'L L.J. 161, 185 (2002) ("It is generally assumed that courts should neither entertain suits under foreign . . . securities laws nor enforce judgments rendered under those laws even when the plaintiff is a private party.").

82. *See generally id. But cf.* Philip C. McConnaughay, *Reviving the Public Law Taboo*, 35 STAN. J. INT'L L. 255 (1999) (arguing for preservation of the prohibition against application of foreign regulatory law in private claims).

83. Horatia Muir Watt, *Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy*, 9 COLUM. J. EUR. L. 383, 402 (2003) (arguing for the extension of choice-of-law approaches into the regulatory sector).

autonomy over public regulatory interests in contract-based disputes.[84]

Several courts have already signaled their belief that U.S. courts could apply foreign law to securities claims. References to that possibility arise primarily in the context of motions to dismiss claims brought in U.S. courts on the basis of *forum non conveniens*. In order to grant such a motion, a U.S. court must first establish the availability of an adequate alternative forum outside the United States, and must then conclude that the balance of public and private interest factors at stake in the litigation tilt decisively in favor of that foreign forum.[85] One of the relevant public interest factors is the difficulty that might arise should the U.S. court be called upon to apply foreign law. In multiple decisions, courts have considered the difficulty they would face if required to apply foreign securities law—implying that they believed they had the authority to apply foreign securities law to antifraud claims, contra the public law taboo.[86] In another case outside the *forum non conveniens* context, the Southern District of New York directly considered applying French law to investor claims, ultimately rejecting that possibility on the basis of statute of limitations problems under French law rather than on the basis of the public law taboo.[87]

In sum, it appears both theoretically and doctrinally possible that U.S. courts in the future might consider applying foreign securities law to fraud claims, thus opening an avenue for recovery by investors injured in foreign investment transactions. In pursuing such relief, however, investors will face several procedural obstacles. First, they will need to establish a U.S. court's subject matter jurisdiction over their claims. Second, they will need to argue successfully against any motion to dismiss on the basis of *forum non conveniens*. Finally, for plaintiffs proceeding with class actions, they will need to meet the criteria for class certification.

1. Subject Matter Jurisdiction Over Claims of Foreign Investors

Claims based on securities violations may fall within the original jurisdiction of the federal district courts on the following bases: federal question jurisdiction, diversity jurisdiction, or supplemental jurisdiction.[88] If those claims are governed by foreign securities law rather than U.S. securities law, however,

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84. *See* Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219 (2001); Muir Watt, *supra* note 83, at 404–05 (offering the intermingling of public and private interests in such cases as another justification for abandoning the public law taboo).

85. *See* Piper v. Reyno, 454 U.S. 235 (1981) and Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) (together setting out the parameters of the law on *forum non conveniens*).

86. *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); Howe v. Goldcorp Invs., Ltd., 946 F.2d 944, 952 (1st Cir. 1991) ("Canadian courts will either apply American law; or they will apply Canadian laws that offer shareholders somewhat similar protections . . . .") (citation omitted); *In re* Royal Grp. Techs. Sec. Litig., No. 04 Civ.9809 HB, 2005 WL 3105341 (S.D.N.Y. Nov. 21, 2005).

87. *In re* Alstom SA Sec. Litig., 741 F. Supp. 2d 469, 473 (S.D.N.Y. 2010).

88. The other Constitutional bases for jurisdiction, such as admiralty and treaty violations, are not relevant in securities cases. *See* U.S. CONST. art. III § 2, cl. 1.

no federal question is presented; thus, that basis of jurisdiction is eliminated.[89] Foreign investors asserting claims based on foreign law would therefore have to establish either diversity jurisdiction ("alienage" jurisdiction, where a foreign party is involved) or supplemental jurisdiction.

a. Alienage jurisdiction over claims brought by foreign investors. Under 28 U.S.C. § 1332(a)(2), federal district courts have original jurisdiction over disputes between "citizens of a [U.S.] State and citizens or subjects of a foreign state."[90] This would cover claims brought by a foreign investor (including a foreign lead plaintiff in representative litigation) against a U.S. issuer. The section does not, however, create original jurisdiction over claims brought by one alien against another.[91] Therefore, U.S. district courts would not have jurisdiction on this basis over claims of foreign investors against foreign issuers—a category that captures most claims arising out of foreign investment transactions. Combining the claims of foreign investors with those of U.S. investors—for instance, through the use of co–lead plaintiffs, one foreign and one U.S.—will not cure this deficiency, as courts addressing multiparty litigation have held that the requirement of complete diversity among adverse parties bars claims in which a U.S. citizen and an alien together sue another alien.[92] (Foreign investors might simply seek to be included as unnamed plaintiffs in a class action brought against a foreign issuer by a U.S. lead plaintiff. That would meet the requirements for alienage jurisdiction, but would face challenges due to the requirements for class certification, which I will address below.)

The Class Action Fairness Act of 2005 (CAFA) introduced an alternative standard for diversity jurisdiction for class actions above a certain claim threshold, which is now included in 28 U.S.C. § 1332(d)(2). That section permits minimal rather than complete diversity, conferring jurisdiction over

> any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which . . . (B) any member of a class of plaintiffs is . . . a citizen or subject of a foreign state and any defendant is a citizen of a State; or (C) any member of a class of plaintiffs is a citizen of a State and any defendant is . . . a citizen or subject of a foreign state.[93]

89. The *Morrison* holding clarified the relationship of prescriptive jurisdiction (the question whether U.S. law reaches particular conduct) and subject matter jurisdiction (the question whether a U.S. court has jurisdiction to hear a particular claim). *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878–79 (2010).

90. The provision further requires that the amount in controversy must exceed $75,000. 28 U.S.C § 1332(a) (2006).

91. *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 21 (4th ed. 2007) and cases cited at note 147 therein.

92. *See, e.g.*, Universal Licensing Corp. v. Paola del Lungo S.P.A., 293 F.3d 579 (2d Cir. 2002). *See generally* 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 1780–82 (3d ed. 2005) (stating that if principal parties are aliens, presence of a U.S. party does not create jurisdiction).

93. 28 U.S.C. § 1332(d)(2)(B)–(C). The minimal diversity requirement was adopted in order to draw more class actions from state court into federal court; its expansion of jurisdiction over claims brought by foreign plaintiffs was probably an unintended consequence.

However, the Act also included an exemption[94] for class actions involving "covered securities" as defined by the Exchange Act—a definition that includes securities listed on a national securities exchange, including the New York Stock Exchange.[95] The definition of "covered security" does not appear to include securities that are listed exclusively outside the United States. Thus, some class actions against foreign issuers that would not satisfy the complete diversity requirements of section 1332(a)(2) might meet the minimal diversity requirements sufficient under CAFA. Where the security in question is listed on U.S. as well as foreign markets, however, it might be argued that all claims arising out of transactions in that security—wherever the investment transaction is located—fall within the scope of CAFA's exemption.[96]

b. Supplemental jurisdiction over foreign law claims. Pursuant to 28 U.S.C. § 1367, federal courts have the authority to hear additional claims substantially related to a claim over which they have original jurisdiction, even if they would not have subject matter jurisdiction to hear those additional claims independently. This mechanism might establish an alternative basis of jurisdiction over claims arising out of foreign transactions; however, because after *Morrison* such claims are no longer governed by U.S. securities law, they would have to be brought under *foreign* securities law.[97] Supplemental jurisdiction is potentially available in circumstances in which foreign law claims arise from the same conduct that gives rise to "anchor" claims brought by U.S. investors. In other words, where fraudulent activity gives rise to claims both under U.S. law (that is, claims of investors who transacted in U.S. markets) and also under foreign law (claims of investors who transacted in foreign markets), investors who transacted abroad might seek to have a U.S. court adjudicate their claims along with those of investors who transacted domestically.[98] Their argument would be that although the two sets of claims would be governed by different laws, they nevertheless fit within the same case or controversy in that they arose from a single instance of fraudulent activity.[99] This approach would

94. *Id.* § 1332(d)(9)(A).

95. 15 U.S.C. § 77r(b)(1)(B).

96. This appears to have been the conclusion of the court in the *Toyota* litigation, which concluded that it lacked original jurisdiction over the Japanese law claims (arising out of transactions in Japan) because Toyota common stock is listed on the New York Stock Exchange. The court did not specifically address the question whether a security might be a "covered security" only to the extent of its trading in the United States.

97. *See, e.g.*, *In re* SCOR Holding (Switzerland) AG Litig., 537 F. Supp. 2d 556, 569 n.19 (S.D.N.Y. 2008), City of Edinburgh Council v. Vodafone Grp. Pub. Co., 2008 WL 5062669, at *7 (S.D.N.Y. 2008) (pre-*Morrison* cases, both rejecting the exercise of supplemental jurisdiction over the claims of foreign plaintiffs, apparently in the belief that U.S. law would remain applicable to those claims should supplemental jurisdiction be asserted).

98. 28 U.S.C. § 1367(a) (2006).

99. This might differentiate securities litigation from other contexts in which the foreign claims might differ substantially from the domestic ones. *See, e.g.*, Mars, Inc. v. Kabushiki-Kaisha Nippon Conlux, 24 F.3d 1368, 1375 (Fed. Cir. 1994) (concluding on the basis of substantial differences between a U.S. patent infringement claim and a British patent infringement claim that the assertion of

recognize the judicial efficiency to be gained by having a single proceeding to address particular fraud, without requiring the application of U.S. law to all claims. Procedurally, this result could be achieved through the creation of sub-classes of claims, some (those arising out of U.S.-based trading) subject to U.S. securities law, and the others (those arising out of foreign-based trading) subject to foreign law.[100]

However, the judicial authority to exercise supplemental jurisdiction is discretionary. Section 1367(c) provides that courts may decline the exercise of supplemental jurisdiction where

> (1) The claim raises a novel or complex issue of State law,
>
> (2) The claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) The district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) In exceptional circumstances, there are other compelling reasons for declining jurisdiction.[101]

A court considering claims based on foreign regulatory law therefore has multiple bases on which it might choose to decline jurisdiction.

Although the availability of supplemental jurisdiction has not been tested extensively post-*Morrison*, the ongoing litigation against Toyota can be used as a roadmap of the issues that will be raised in cross-border securities litigation. In a preliminary ruling in that litigation, a federal district court held that *Morrison* precluded the application of U.S. securities law to claims by foreign plaintiffs based on harm suffered in connection with foreign exchange transactions.[102] In that ruling, the court also expressed its belief that claims by *domestic* plaintiffs based on foreign exchange transactions would also be barred.[103] It therefore appointed the Maryland State Retirement and Pension System (MSRPS), the largest holder of Toyota's American Depositary Shares (ADSs), lead plaintiff.[104] The complaint subsequently filed by the MSRPS, however, was not limited to the claims of ADS holders. Rather, it included three categories of claims: (1) claims based on transactions in ADSs, (2) claims based on domestic transactions in Toyota's common stock, and (3) claims based on all other (that is, foreign) transactions in Toyota's common stock.[105] With respect to the third category, which under *Morrison* could not be brought under U.S. law, the complaint alleges violations of Japan's Financial Instruments and

supplemental jurisdiction "would in effect result in the trial court having to conduct two separate trials at one time").

100. And if jurisdiction were established on the basis of supplemental rather than alienage jurisdiction, the presence of a foreign lead (or co–lead) plaintiff would be unproblematic.

101. 28 U.S.C. § 1367(c).

102. Order re Appointment of Lead Plaintiff at *1, Stackhouse v. Toyota Motor Corp., No. CV 10–0922 DSF (AJWx), 2010 WL 3377409 (C.D. Cal. July 16, 2010).

103. *Id.*

104. *Id.* at *2.

105. Consolidated Class Action Complaint, *In re* Toyota Motor Corp. Sec. Litig., No. CV 10-922 DSF (AJWx), 2010 WL 3940921, (C.D. Cal. Oct. 4, 2010).

Exchange Law.[106] The complaint asserts that the U.S. district court has supplemental jurisdiction over those claims on the grounds that they "arise from the same nucleus of operative facts alleged in [the] Complaint and are so related to the Exchange Act claims over which [the] Court has original jurisdiction that they form part of the same case or controversy."[107]

The defendants' motion to dismiss the complaint contests supplemental jurisdiction on three separate grounds: (1) the claims raise complex or novel issues of foreign law, (2) the foreign claims substantially predominate over the claims over which the court has original jurisdiction, and (3) considerations of comity and international relations create "exceptional circumstances" that should cause the court to decline jurisdiction.[108] Again, while these issues have not been exhaustively explored in the securities context, the arguments made in the Toyota pleadings, as well as cases in other areas such as antitrust and patent law, provide some hints as to likely judicial treatment of such claims.[109]

(1) Complex or novel issues of foreign law.

The Toyota defendants point out that the Japanese law governing the foreign claims was only relatively recently enacted, and that it has not yet been interpreted by Japan's highest court. On this basis, they argue that the assertion of supplemental jurisdiction over those claims would require a U.S. court to address novel issues without sufficient guidance.[110] In one recent case, *In re Urethane Antitrust Litigation*,[111] a district court explored this issue under antitrust law. Addressing the availability of supplemental jurisdiction over claims brought under European antitrust law, the court emphasized the complex and "unsettled" nature of that law, stating that "the law of the EU and its member nations governing private antitrust actions is sparse and varies widely among nations."[112] This factor might therefore be analyzed differently

106. *Id.*

107. *Id.* ¶ 28. The complaint also asserts diversity jurisdiction over those claims on the ground that "there are members of the Class who are citizens of a different State than the Defendants or at least one of the parties is a citizen of a foreign state." *Id.* ¶ 27. This argument relies on the minimal diversity standard for class actions created by CAFA. *See supra* note 93 and accompanying text. As noted, the success of that argument will depend on whether the fact that Toyota securities are listed (in the form of ADSs) in the United States as well as abroad triggers the securities class action exemption with respect to *all* litigation concerning those securities.

108. Notice of Motion and Motion to Dismiss Plaintiffs' Consolidated Class Action Complaint; Memorandum of Points and Authorities in Support Thereof, *In re* Toyota Motor Corp. Sec. Litig., No. CV-10-0922 DSF (AJWx), 2011 WL 270118, at *4 (C.D. Cal., Jan. 20, 2011) [hereinafter *Toyota Motion to Dismiss*]. The motion also argues that the minimal diversity rule introduced by CAFA is inapplicable in this securities litigation, and that 28 U.S.C. § 1332(d)(2), relied upon by the plaintiffs, therefore does not confer diversity jurisdiction over the claims.

109. The following material on supplemental jurisdiction in antitrust cases draws on Hannah L. Buxbaum & Ralf Michaels, *Concentration in International Antitrust: Lessons From US Law*, *in* INTERNATIONAL ANTITRUST LITIGATION: CONFLICT OF LAWS AND COORDINATION 225, 235–37 (J. Basedow, S. Francq & L. Idot eds. forthcoming 2011).

110. *Toyota Motion to Dismiss*, 2011 WL 270118, at *4.

111. 683 F. Supp. 2d 1214 (D. Kan. 2010).

112. *Id.* at 1221.

depending on the maturity of the foreign regulation and the information available regarding its interpretation and application. In the antitrust context, for instance, additional complexity is introduced by the intersection of regional (EU) and national law—a factor absent in securities regulation.

(2) Foreign claims predominate.

In the Toyota litigation, the defendants argued that the foreign claims predominated over the U.S. claims not with respect to issues presented, but simply with respect to their number. They pointed out that less than three percent of Toyota's common stock outstanding was held in the form of ADSs, and therefore that the claims of the foreign investors outweighed the "anchor" claims of the U.S. investors.[113] It is unclear that this argument is responsive to the section 1367 factor. In other cases, the focus has been on whether pleading and proving the additional claims would raise significant factual or legal issues not present in the anchor claims—a factor linked less to the relative amounts in controversy and more to the underlying similarity of the relevant laws. In *In re Urethane*, for example, the court noted that multiple foreign laws would require consideration, causing the foreign claims to predominate.[114] The argument does, however, resonate with the traditional reluctance of U.S. courts to permit large numbers of foreign claimants to piggyback on small numbers of domestic ones.[115] The success of this argument in securities litigation may therefore depend on the relative balance of U.S. and foreign claimants as well as the number of different jurisdictions involved.[116]

(3) Exceptional circumstances.

The motion to dismiss in the Toyota litigation lists a number of circumstances militating against the exercise of supplemental jurisdiction, including comity; judicial economy; fairness; the Japanese interest in regulating its own securities markets; and the risk that any judgment or settlement reached in a U.S. court would not be enforced in Japan, raising the specter of duplicative litigation. These arguments too find an echo in litigation outside the securities context. In *Voda v. Cordis Corp.*,[117] for example, a court considering whether supplemental jurisdiction existed over a foreign patent infringement claim—brought by the same plaintiff as U.S. patent infringement claims—drew on issues of international comity and coordination in declining to assert jurisdiction. The court there identified "no reason why American courts should

113. *Toyota Motion to Dismiss*, 2011 WL 270118, at *31.

114. 683 F. Supp. 2d at 1222 (noting that "the Court would be required to engage in conflict-of-laws analyses involving up to 27 member nations' laws").

115. *Cf.* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996 (2d Cir. 1975) ("Since the relatively few purchasers with federal claims will almost inevitably rely on the stricter standard of the federal securities laws, entertaining the state law claims of the foreign purchasers would, as a practical matter, introduce a whole new set of issues including issues of choice of law . . . .").

116. *See also* Buxbaum, *supra* note 5, at 53–54 (discussing the balance of foreign and domestic claims in pre-*Morrison* cases).

117. 476 F.3d 887 (Fed. Cir. 2007).

supplant British, Canadian, French, or German courts in interpreting and enforcing British, Canadian, European, French, or German patents."[118] Cases involving antitrust claims have also mentioned comity concerns as a factor in this "exceptional circumstances" category.[119]

In July 2011, a memorandum opinion was issued in the Toyota litigation in which the court declined to exercise supplemental jurisdiction over the foreign law claims.[120] This decision rested on a brief analysis in which the court concluded that the Japanese law claims would substantially predominate over the U.S. law claims—both because the "vast majority" of the class members had Japanese law claims, and also because the differences between Japanese law and U.S. law were "extraordinarily significant" in the context of the case.[121] It also noted that the "exceptional circumstance of comity to the Japanese courts" militated in favor of declining jurisdiction, noting the need to respect local securities regulation.[122] While the opinion therefore did not exhaustively consider the question, it does support the inference, drawn from cases in other areas of law, that U.S. courts will not readily grant supplemental jurisdiction over foreign law securities claims.

2. Discretionary Doctrines for Dismissal of Foreign Claims

Even if a court should establish subject matter jurisdiction over foreign securities claims—whether pursuant to alienage jurisdiction or supplemental jurisdiction—it would still have at its disposal all of the other procedural doctrines customarily used to decline jurisdiction over claims more closely connected to other jurisdictions. Another recent decision in the antitrust area, *In re Air Cargo Shipping Services*,[123] contains an extensive analysis that illustrates the reluctance of U.S. courts to apply foreign regulatory law. In that case, the court dismissed claims brought under EU antitrust law on the basis of *forum non conveniens*. First, the court invokes the long-standing principle that a foreigner's choice of a U.S. forum deserves less deference than a domestic plaintiff's choice would.[124] Second, it invokes the difficulty of the choice-of-law analysis and the multitude of potentially applicable foreign laws as a reason for *forum non conveniens* dismissal:

> [T]he court will likely need to decide which national member state's laws should apply to each set of claims arising out of the shipping routes. It appears certain that the court will need to choose and apply the laws of over thirty foreign jurisdictions. The

118. *Id.* at 901.

119. *See In re* Urethane Antitrust Litig., 683 F. Supp. 2d 1214, 1221 (D. Kan. 2010) (discussing the need to defer to the European framework of antitrust regulation, as well as the U.S. interest in such deference).

120. *In re* Toyota Motor Corp. Sec. Litig., No. CV 10-922 DSF (AJWx), 2011 WL 2675395 (C.D. Cal. July 7, 2011).

121. *Id.* at *6.

122. *Id.* at *7.

123. *In re* Air Cargo Shipping Servs. Antitrust Litig., No. MD 06-1775(JG)(VVP), 2008 WL 5958061, at *24 (E.D.N.Y. Sept. 26, 2008).

124. *Id.* at *25 (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)).

> complexity inherent in the determination and application of foreign law weighs in favor of dismissal.[125]

Cases in other fields—and often presenting substantially less complexity—likewise reflect the inclination of U.S. courts to use *forum non conveniens* as a way to avoid applying foreign law.[126] Finally, many securities class actions predating *Morrison* were dismissed on this basis,[127] and there is no reason to expect that courts will decrease their use of that device in the future. Particularly where the foreign-law claims come from multiple jurisdictions, and would necessitate the application of multiple securities rules, dismissal on this basis is not unlikely.

International comity provides another potential ground for dismissal of foreign-law claims. This is a somewhat looser doctrine than *forum non conveniens*, and correspondingly vaguer in application. Many cases implicating foreign regulatory law have invoked comity concerns by noting that other countries have the stronger interest in applying their own regulatory law to claims tightly connected with their territory.[128]

3. Requirements for Class Certification

Many cross-border securities claims are brought in the form of class actions. There, the choice-of-law issues presented by claims brought under foreign securities law create additional obstacles in the form of certification requirements. 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 judicial management problems;[129] others, on the ground that the laws to be applied were so different from one another that common issues did not predominate.[130] 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.

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125. *Id.* at *30.

126. *See, e.g.*, Da Rocha v. Bell Helicopter Textron, Inc., 451 F. Supp. 2d 1318, 1325–26 (S.D. Fla. 2006).

127. *See* Buxbaum, *supra* note 5 (discussing the use of *forum non conveniens* to dismiss foreign-cubed class actions).

128. *See, e.g.*, *Air Cargo,* 2008 WL 5958061, at *31 ("[A]pplying European antitrust law in American courts undermines the European Union's stated interest in the development of its own laws, and undermines our country's interest in promoting the development of strong antitrust regulations [abroad] . . . .").

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

130. *See* WRIGHT ET AL., *supra* note 92.

All in all, the prospects for asserting claims arising out of foreign transactions on the basis of foreign governing law seem slim. It may be in cases where quite substantial shareholdings are in the form of ADRs, and where the application of foreign law will not be unduly complicated, that supplemental jurisdiction would be exercised. Certain pre-*Morrison* cases suggest this possibility. In *In re Gaming Lottery Securities Litigation*,[131] for example, the Southern District of New York considered a claim in which over fifty percent of the Canadian issuer's common shares were held in the United States. Under the then-applicable jurisdictional analysis, the court concluded that the application of U.S. law was justified. After *Morrison*, a court considering such a claim might conclude that the factors militating against the exercise of supplemental jurisdiction were not present, permitting consideration of the foreign investors' claims under foreign securities law.

B. Public Enforcement Mechanisms

Should remedies for foreign investors become unlikely in private litigation, the question may become whether any public enforcement mechanisms can fill that gap. The Dodd–Frank Act invites attention to this question in section 929P, which reinstates the conduct and effects tests in public enforcement claims:

> The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 17(a) involving—
>
> (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
>
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.[132]

This provision gives the SEC authority to pursue claims, via section 17(a),[133] against persons involved in cross-border securities fraud even if section 10(b) claims brought by foreign investors would be precluded under the more restrictive *Morrison* test. If it successfully establishes the presence of prohibited conduct, the SEC may pursue a number of remedies, including monetary penalties as well as the equitable remedy of disgorgement.[134]

For the most part, public enforcement action of course does not benefit harmed investors directly. It is true that amounts sought as disgorgement can be distributed to injured investors, but that distribution is not always feasible or practical, and sums obtained in this way often remain with the U.S. Treasury.[135]

131. 58 F. Supp. 2d 62 (S.D.N.Y. 1999).

132. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P, 124 Stat. 1376 (2010) (codified as amended at 15 U.S.C.A. § 78aa(b) (West 2011)).

133. *See* 15 U.S.C.A. § 78 (West 2011) (prohibiting fraud in the offer and sale of securities).

134. The Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (1990) dramatically expanded the remedies available to the SEC, particularly by authorizing the SEC to seek civil monetary penalties.

135. Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 FLA. L. REV 1103, 1113 (2008); *see also* James D. Cox, Randall S. Thomas, & Dana Kiku, *SEC Enforcement*

And monetary penalties, which the SEC may seek through either judicial or administrative proceedings, are by law paid into the Treasury alone.[136] Under section 308 of the Sarbanes–Oxley Act, however, the SEC has the power to establish so-called FAIR (Federal Account for Investor Restitution) funds, the proceeds of which may be used to compensate investors.[137] The FAIR Funds provision achieves this goal by allowing the SEC at its discretion to distribute amounts recovered as penalties to injured investors. This can be done only when there is also a disgorgement order against the defendant in question—but nominal disgorgement will suffice.[138]

As commentators have noted, the FAIR funds mechanism is particularly well suited to enable claims that cannot be brought through private litigation—the primary example in the domestic context being claims for aiding and abetting securities violations.[139] This logic may extend to claims based on foreign investment transactions as well, since such claims can no longer be brought in private litigation.[140] Like claims for aiding and abetting, such claims must be brought by the SEC or not at all.

Importantly, distributions from FAIR funds may be used to compensate foreign claimants as well as domestic ones. In the settlement of the claim brought by the SEC against Vivendi, for instance, the SEC obtained combined civil penalties and disgorgement, from the issuer and its former CEO and CFO, in the amount of fifty-one million dollars. The approved distribution plan encompassed the claims of investors who had purchased the issuer's ordinary shares (regardless of where those shares were purchased), not just those who had purchased ADSs.[141] Similarly, the SEC settled its claims against Royal Dutch/Shell Transport for $120 million; there, too, the distribution plan benefited investors who had purchased ordinary shares on foreign securities exchanges as well as investors in ADSs.[142] While these Funds were distributed prior to the *Morrison* decision, there is nothing in the decision that would preclude distribution to investors injured in foreign investment transactions in the future.

Heuristics: An Empirical Study, 53 DUKE L.J. 737, 755–56 (2003) (noting that profits disgorgements alone are unlikely to compensate investors sufficiently).

136. 15 U.S.C. § 77t(d)(3)(A) (2006).

137. 15 U.S.C.A. § 7246(a) (West 2011). For general discussion, see Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 BUS. LAW. 317 (2008).

138. Professor Black notes that "[t]he SEC . . . has consistently evaded section 308's limitation by including a nominal $1 disgorgement amount to allow distribution of corporate penalties to investors." *Black*, *supra* note 137, at 330.

139. *See id.*; Winship, *supra* note 135, at 1132–33.

140. As noted above, the SEC is currently undertaking a study on whether such jurisdiction should be extended legislatively to private actions as well, but at the moment only public proceedings are enabled by the Dodd–Frank Act.

141. Distribution Plan Notice at 1, available at http://www.vivendisecsettlement.com.

142. *See* Distribution Plan, http://www.ktmc.com/pdf/RoyalDutchPetroleumShellTransport(SEC)NOTICE.pdf, at Appendix II (listing as "eligible securities" Royal Dutch Petroleum (Amsterdam) and The Shell Trading and Transport Company (London)).

As a public enforcement alternative, the FAIR funds mechanism may be more capable than private enforcement of successful integration into the overall scheme of international securities regulation—and the SEC's use of this mechanism to compensate investors based on foreign as well as domestic trading confirms (contrary to the Court's observation in *Morrison*) that the U.S. regulatory interest does extend into the cross-border space. Still, the SEC may wish to preserve its authority to enforce in situations involving substantial cross-border elements (as it made clear in the argument it briefed in the *Morrison* case itself) without committing itself to obtaining compensation for defrauded investors.[143] It is therefore hard to predict whether the SEC will continue to use this mechanism to the benefit of private foreign claimants. In addition, commentators have raised some concerns regarding the overall effectiveness of this distribution mechanism.[144]

C. Conclusion

The prospects for foreign investors seeking recovery in the United States for harm suffered in cross-border securities fraud are dim. On the one hand, that conclusion reflects significant progress in thinking about international enforcement efforts. U.S. courts are markedly more responsive today than they were in past decades to the special challenges posed in international civil litigation—those that flow from the differences across legal systems not only in substantive regulatory regimes but also in ordinary procedural processes. On the other hand, it reflects a disengagement of U.S. courts from the challenges that global capital markets create: regulatory gaps, particularly in developing economies, and the fact that systematic under-enforcement in some regions can cause under-deterrence in others.[145] Unless these regulatory challenges can be satisfactorily addressed through public enforcement alone, the downside of accepting a shift away from private enforcement capacity is clear.

The ability of public regulators adequately to police securities fraud in the international context is debatable. In its 2009 report, the Commission on Capital Markets Regulation stated that

> [a]ny vision of financial reform must grapple with the globalization of both finance and its regulation. . . . The international dimensions of the financial crisis, and the events leading up to it, are so important that it is difficult to characterize the crisis as anything but global. The markets underlying this regulatory overlay are also global. U.S. gross trading activity in foreign securities alone is $7.5 trillion, up from $53 billion three decades ago. Approximately two-thirds of U.S. investors own securities of non-

143. *See* Black, *supra* note 137, at 341–44 (analyzing the mission of the SEC and the question of deterrence versus compensation).

144. *See, e.g.*, Cox et al., *supra* note 135, at 779 (concluding an empirical study of securities enforcement with the observation that "even after the enactment of the Fair Fund provision, the SEC is not armed in most instances with authority to recover from the wrongdoers sums equal to those that can be recovered in private suits"); *see also, e.g.*, Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. Rev. 500, 530–33 (2011) (criticizing the FAIR funds mechanism for its failure to provide investors with adequate procedural safeguards in the distribution of funds).

145. *See* Buxbaum & Michaels, *supra* note 109, at 57–58.

> U.S. companies—a 30% increase from just five years ago. And foreign trading activity in U.S. securities now amounts to over $33 trillion. The resulting impact of this globalization on the regulators who oversee U.S. markets has been enormous, as the SEC has exemplified.[146]

In this environment, it is implausible that national securities regulators have resources sufficient to police the markets adequately.[147] And while it is true that cooperation among these agencies has promoted enforcement efforts in addition to other regulatory activities, those efforts too are limited. Consider the 2005 statement by the International Organization of Securities Commissions (IOSCO):

> Yet despite years of work by IOSCO in [promoting cross-border enforcement cooperation], not all securities regulators have the ability to provide enforcement cooperation to their foreign counterparts. This inability is not necessarily limited to smaller, less developed markets. The inability to offer enforcement cooperation—particularly by regulators in larger markets—can present difficulties not only for investor protection and undermine other regulators' efforts to police their own markets, but may also have an impact on international financial stability.[148]

It is striking in this regard that the United States is moving away from private enforcement at the same moment that regulators in other countries are stepping up efforts to implement effective private enforcement measures.[149] In the current climate, what is needed is an approach that does not *avoid* all conflicts but rather takes them seriously, translating the debates over optimal enforcement strategy to the international arena.

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146. COMM. ON CAPITAL MKTS. REGULATION, THE GLOBAL FINANCIAL CRISIS: A PLAN FOR REGULATORY REFORM 211 (2009) (footnotes omitted). *See also* Natalya Shnitser, Note, *A Free Pass For Foreign Firms? An Assessment of SEC and Private Enforcement Against Foreign Issuers*, 119 YALE L.J. 1638 (2010) (arguing that the SEC has been less rigorous in enforcement efforts against foreign issuers than against domestic ones).

147. This is not to suggest that public enforcement efforts in this context are unimportant—*see, e.g.*, Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207 (2009) (arguing that public enforcement measures correlate significantly with financial market development)—but merely that in a climate of limited resources they still require the complement of private enforcement. *See id.* at 32 (concluding that "the two main enforcement mechanisms . . . must be improved, not scrapped").

148. TECHNICAL COMM. OF THE INT'L ORG. OF SEC. COMM'NS, STRENGTHENING CAPITAL MARKETS AGAINST FINANCIAL FRAUD 29–30 (2005). *See also* Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 146 (2009) (analyzing the limitations of multilateral cooperative organizations such as IOSCO in filling these enforcement gaps).

149. *See generally* Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 J. TRANSNAT'L L. & POL'Y 281 (2006) (surveying such efforts); Mulheron, *supra* note 14.