CASE NOTE

MORRISON v NATIONAL AUSTRALIA BANK LTD[*]

ADVENTURES ON THE BARBARY COAST: *MORRISON* AND ENFORCEMENT IN A GLOBALISED SECURITIES MARKET

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[Although efforts have been made to develop international or harmonised regimes for the enforcement of securities law, the global architecture of securities regulation is underdeveloped. In particular, the harmonisation project may be sidelined by nations enforcing their securities laws extraterritorially. Notwithstanding issues of comity, the extraterritorial operation of the anti-fraud provisions in United States securities law has been expansively interpreted by US courts, particularly in multinational securities class actions, and the US has accordingly been portrayed as a securities policeman or, more disparagingly, a legal imperialist. This ended abruptly with the US Supreme Court decision in Morrison v National Australia Bank Ltd*, where it was held that the anti-fraud provisions did not apply in an action brought by an Australian investor against an Australian company listed on an Australian exchange. This case note will examine the context and consequences of* Morrison*, including the legislation passed by Congress in its wake, the tensions caused if US citizens lose the 'protective shield' of US law and the centrifugal effect of the decision that may lead to more securities class actions being commenced in Australia.]*

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[*] 130 S Ct 2869 (2010). For an explanation of the relevance of the Barbary Coast to the issues discussed in this case note, refer to below n 75 and accompanying text.

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I INTRODUCTION

This case note will examine the emergence of the global securities market and its effect upon enforcement of securities laws via an exploration of the United States Supreme Court decision in *Morrison v National Australia Bank Ltd* (‘*Morrison*’).[1] There is an ongoing tension between securities regulation, which is based on national regulatory systems, and the increasingly global nature of securities transactions. Although relatively underdeveloped, various models have been proposed to achieve securities regulation on an international scale, including the establishment of an international regulator, global law, and synchronised or harmonised national or regional regulation. The issue of enforcement has particular salience in this area because political and cultural differences between jurisdictions lead to significant divergences in approaches to enforcement, and harmonisation is accordingly more complex. The diversity of approaches also encourages international actors to ‘shop for law’ and engage in regulatory arbitrage.

To some extent, the difficulties of harmonisation may be sidelined by the exercise of extraterritorial jurisdiction by certain states, but this strategy is limited by the international principles of comity. The use of extraterritoriality has

[1] 130 S Ct 2869 (2010).

allowed the United States ('US') to play a dominant role in both public and private transnational enforcement of securities laws. Increasingly, the multinational securities class action has developed in the US to facilitate private enforcement. An expansive judicial interpretation of the extraterritorial jurisdiction, together with aggressive marketing by US plaintiff lawyers, has led to many claims by foreign investors being litigated in US courts.

This trend has been significantly curtailed by the decision in *Morrison*, where an action by an Australian investor against an Australian company listed on the Australian Securities Exchange ('ASX') for alleged misconduct in breach of Securities and Exchange Commission ('SEC') r 10b-5 ('rule 10b-5')[2] and § 10(b) of the *Securities Exchange Act of 1934* ('*Exchange Act*')[3] (collectively referred to as the 'anti-fraud provisions') was dismissed by the US Supreme Court. The Court in that case established a new transactional test to determine whether § 10(b) of the *Exchange Act* had extraterritorial operation, finding that the anti-fraud provisions only applied in respect of the purchase or sale of securities listed on a US exchange or where the purchase or sale occurred in the US.

Morrison is interesting for several reasons. First, the decision overturned over 40 years of authority where the circuit courts had adopted a wide interpretation of the conduct necessary to invite the extraterritorial operation of § 10(b) of the *Exchange Act*. The decision therefore indicates a reversal of the role of the US as an international securities policeman. Perhaps more disparagingly, it signals an end to the aggressive approach to extraterritoriality adopted by US courts that has been portrayed as legal imperialism by some commentators.[4] This dual portrayal of the US is manifested in several of the amicus briefs filed on behalf of foreign governments in the *Morrison* proceedings before the Supreme Court. This case note will also highlight some of the differences in procedural rules which demonstrate the diversity in enforcement regimes of various nations, and will speculate on the future role of Australia and its developing class action jurisprudence if *Morrison* has a centrifugal effect upon securities litigation.

Although it is early days, the subsequent US case law indicates that the 'bright-line' transactional test for jurisdiction promulgated in *Morrison* will be followed strictly by US courts. However, shortly after the Supreme Court decision was handed down, Congress passed the *Dodd–Frank Wall Street Reform and Consumer Protection Act* ('*Dodd–Frank Act*')[5] which preserves the extraterritorial application of § 10(b) of the *Exchange Act* for public enforcement actions by the SEC and requires the SEC to seek public comment in relation to the future of the extraterritorial jurisdiction in private enforcement actions. The situation is therefore likely to remain dynamic for the foreseeable future.

2 17 CFR § 240.10b-5 (2009).
3 15 USC § 78j (2006).
4 See below Part IV(A).
5 Pub L No 111-203, 124 Stat 1376 (2010).

II *MORRISON* — THE FACTS

HomeSide Lending Inc ('HomeSide') was, at the relevant time, a wholly owned subsidiary of the National Australia Bank Ltd ('NAB'). Domiciled in Florida, HomeSide's core business was the servicing of loan contracts. The plaintiffs alleged that statements by officers of NAB and HomeSide, both within and outside the US and Australia, together with annual reports produced in Australia and other public documents, actively trumpeted the value of HomeSide's assets. Subsequently, the modelling and assumptions that formed the basis of that asset valuation were revealed to be highly inaccurate, and there was also a suggestion that HomeSide's officers had fraudulently manipulated the underlying data and grossly inflated HomeSide's worth. HomeSide's assets were then subject to considerable writedowns which affected the value of NAB's ordinary shares. Those shares were listed only on the ASX.[6]

A group of Australian investors ('the Australian litigants') who held NAB ordinary shares during the class period, together with an individual ('the US litigant') holding American Depositary Receipts ('ADRs')[7] purchased on the New York Stock Exchange ('NYSE'),[8] sought to represent a class of investors and brought suit against NAB, its CEO and several officers of HomeSide for breaches of the anti-fraud provisions, which are detailed later in this case note.[9]

The *Morrison* plaintiffs initially commenced proceedings in the District Court for the Southern District of New York ('District Court'). The defendants moved to dismiss the claim before the District Court for lack of subject matter jurisdiction under *Federal Rules of Civil Procedure* r 12(b)(1) ('rule 12(b)(1)') and for failure to state a claim under *Federal Rules of Civil Procedure* r 12(b)(6) ('rule 12(b)(6)').

Both the District Court[10] and Court of Appeals for the Second Circuit ('Second Circuit')[11] dismissed the claim for lack of subject matter jurisdiction pursuant to rule 12(b)(1) in respect of the Australian litigants, and for failure to state a claim pursuant to rule 12(b)(6) in respect of the US litigant.

Due to the dismissal of the related claim by the ADR holder, by the time the matter reached the Supreme Court all the members of the class were foreign

6 *Morrison*, 130 S Ct 2869, 2875–6 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010). See also Goodkind Labaton Rudoff & Sucharow LLP, 'Consolidated Class Action Complaint', Complaint in *Re National Australia Bank Securities Litigation*, SD NY, No 03 Civ 6537 (BSJ), 30 January 2004, [32]–[110] <http://www.labaton.com/en/cases> for a more thorough overview of the allegations of fact.

7 See US Securities and Exchange Commission, *American Depository Receipts* (31 January 2007) <http://www.sec.gov/answers/adrs.htm>:

> Each ADR represents one or more shares of foreign stock or a fraction of a share. [Owners of ADRs] have the right to obtain the foreign stock it represents, but US investors usually find it more convenient to own the ADR. The price of an ADR corresponds to the price of the foreign stock in its home market, adjusted to the ratio of the ADRs to foreign company shares.

8 *Re National Australia Bank Securities Litigation* (SD NY, No 03 Civ 6537 (BSJ), 25 October 2006) slip op 4 (Jones J).

9 See below Part V.

10 *Re National Australia Bank Securities Litigation* (SD NY, No 03 Civ 6537 (BSJ), 25 October 2006).

11 *Morrison v National Australia Bank Ltd*, 547 F 3d 167 (2nd Cir, 2008).

litigants. In fact, *Morrison* was referred to as a 'foreign-cubed' or 'f-cubed'[12] action because it involved foreign plaintiffs (the Australian litigants) suing a foreign issuer (NAB) and concerned securities trading on a foreign exchange (ordinary shares trading on the ASX).[13]

The *Morrison* litigation generated considerable controversy as it progressed through the US court hierarchy. This was manifested in the amicus briefs filed in the Supreme Court hearing by organisations such as investors, issuers, markets, think tanks and lobby groups. This case note will focus, however, upon the amicus briefs filed by governments, in particular the governments of Australia, France and the United Kingdom ('UK').

III The Context of *Morrison*

Morrison involved a foreign transaction litigated under US domestic law. The question for the Supreme Court was whether the anti-fraud provisions had extraterritorial reach so as to regulate transactions conducted in Australia. However, two questions to ask at the threshold are: first, why were these issues being dealt with by US domestic law and secondly, what are the prospects for an international enforcement regime, either by way of global law, a world regulator or a harmonised/synchronised securities law? These questions form an important backdrop to the *Morrison* litigation and will be ventilated now.

A *The Rise of Global Securities Transactions*

It is a platitude to say that securities transactions are increasingly conducted in a global context. The purchase of financial products frequently takes place on foreign exchanges or over-the-counter ('OTC') where the purchaser, seller and intermediaries may be scattered in different places across the world. In fact, due to the development of technology, physical presence is often either random or unimportant to the transaction.[14] Investors increasingly operate over several time zones, 'eclips[ing] … national transactions as [they] seek to take advantage of emerging markets and to further diversify their holdings.'[15]

Several factors have converged to give investors easy access to foreign exchanges and OTC transactions. These factors include the abolition of exchange controls, the liberalisation of foreign investment restrictions and the consolida-

[12] Ibid 172 (Parker J for Newman, Calabresi and Parker JJ).

[13] A foreign corporation is defined by the origin of its constitution (charter): see American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) § 213. A foreign issuer means 'any issuer which is … a corporation or other organization incorporated or organized under the laws of any foreign country': 17 CFR § 230.405. See also Hannah L Buxbaum, 'Multinational Class Actions under Federal Securities Law: Managing Jurisdictional Conflict' (2007) 46 *Columbia Journal of Transnational Law* 14, 17, citing Stuart M Grant and Diane Zilka, 'The Role of Foreign Investors in Federal Securities Class Actions' in *Corporate Law and Practice Course Handbook Series* (No 1442, Practising Law Institute, 2004) 91, 96.

[14] Donald C Langevoort, '*Schoenbaum* Revisited: Limiting the Scope of Antifraud Protection in an Internationalized Securities Marketplace' (1992) 55(4) *Law and Contemporary Problems* 241, 247.

[15] Kellye Y Testy, 'Comity and Cooperation: Securities Regulation in a Global Marketplace' (1994) 45 *Alabama Law Review* 927, 931.

tion of financial markets.[16] Increasingly, financial markets are merging to create new regional and cross-sectoral financial markets. In 2007, the NYSE Group Inc and Euronext NV commenced trading as NYSE Euronext, which now describes itself as the 'world's leading and most liquid equities exchange group'.[17] Similarly, the ASX is currently seeking a new merger partner after the Australian Treasurer rejected its merger proposal with Singapore Exchange Ltd.[18] This was the first consolidation proposal between two market operators in the Asia-Pacific region.[19] Moreover, there is considerable competition between the established and emerging financial centres and securities markets, such as those in Asia.[20]

The development of technology has allowed the spread of information and a corresponding interpenetration of securities markets.[21] Investors may now 'seek out foreign investments that are not even marketed domestically … [and] participate in foreign-based investment entities.'[22]

B *The Legal Framework and the Law Market*

Although nationality is often irrelevant in securities transactions, securities lawmaking is still essentially focused on the nation-state. The challenge for lawmakers in established markets is determining how to adapt and modernise national regulatory systems, which were conceived when markets were primarily local, to respond to investors and issuers that are already operating on a global level.[23] In the emerging markets of Asia, such as China and India, lawmakers are

[16] Treasury, Australian Government and Australian Securities and Investment Commission, 'Cross Border Recognition: Facilitating Access to Overseas Markets and Financial Services' (Consultation Paper No 98, Australian Securities and Investment Commission, 16 June 2008) 9 <http://www.asic.gov.au/asic/asic.nsf/byheadline/IR+08-15+Joint+treasury+and+ASIC+consultation+on+cross+border+recognition+of+financial+regulation>.

[17] NYSE Euronext, *About Us* (26 July 2011) <http://www.nyse.com/about/1088808971270.html>. See generally Sara M Saylor, 'Are Securities Regulators Prepared for a Truly Transnational Exchange?' (2008) 33 *Brooklyn Journal of International Law* 685.

[18] ASX, 'Treasurer Rejects ASX–SGX Merger Proposal' (Market Announcement, 8 April 2011) <http://www.asxgroup.com.au/asx-market-announcements.htm>; Mitchell Bingemann, 'Analysts Still Hopeful of Another ASX Tie-Up', *Finance*, *The Australian* (Sydney), 11 April 2011, 23.

[19] Alicia Barry, 'Watchdog Clears ASX's Singapore Merger', *ABC News* (online), 15 December 2010 <http://www.abc.net.au/news/stories/2010/12/15/3093598.htm>.

[20] A study by the World Federation of Exchanges of the market capitalisation of exchanges by time zone between 2000 and 2009 shows that the Asia-Pacific sector has grown from 16 per cent to 31 per cent. In contrast, the Americas time zone has declined from 53 per cent to 41 per cent and the EAME (Europe–Africa–Middle East) time zone has remained relatively stable, moving from 31 per cent to 28 per cent: World Federation of Exchanges, *10 Years in Review (2000–2009)* 1 <http://www.world-exchanges.org/statistics>. The 2010 figures regarding investment flows also demonstrate this trend. The five largest exchanges by number of new companies listed through an IPO during the period January to June 2010 show the following order: Shenzhen Stock Exchange (164), TSX Group (now TMX Group) (137), Bombay Stock Exchange (57), Warsaw Stock Exchange (40) and NYSE Euronext (38): World Federation of Exchanges, *Market Highlights for First Half-Year 2010* (July 2010) 8 <http://www.world-exchanges.org/files/file/stats%20and%20charts/July%202010%20WFE%20Market%20Highlights.pdf>. However, in terms of domestic equity market capitalisation, the NYSE Euronext market (with US$11 794 billion) far exceeds its next competitor, the Tokyo Stock Exchange (with US$3277 billion).

[21] Buxbaum, above n 13, 41.

[22] Langevoort, '*Schoenbaum* Revisited', above n 14, 244.

[23] Margaret E Tahyar et al, *Final Report of the Securities Law Subcommittee of the Task Force on Extraterritorial Jurisdiction of the International Bar Association* (2008) 277–8.

developing new internal securities markets at a time when other securities markets are already international in scope.[24]

However, a consequence of the status quo is that transnational actors, both issuers and investors, can shop for law, and nation states often 'take this "law market" into account when they create new laws.'[25] One concern is that issuers will engage in regulatory arbitrage where they engage in fraud in one country but remain unaccountable to investors in other countries with stronger enforcement regimes.[26] This would lead to a race to the bottom.[27]

The evidence provided by research on cross-listing indicates that shopping for law in the securities context does not necessarily lead to such a race to the bottom.[28] Since the 1980s, firms have chosen to trade their shares in markets other than their home countries, even though this obliges them to comply with two or more sets of regulations. The reason for cross-listing is said to be based upon the so-called bonding hypothesis, whereby firms subject themselves to a 'higher level of regulation in the cross-listing countr[ies] [in order to] "bond" their trustworthiness, thereby enabling them to raise money at a lower price all over the world.'[29] Much of the research on cross-listing is based in the US market and demonstrates two empirical trends. First, 'firms with US crosslistings exhibit a valuation premium relative to similar firms without crosslistings';[30] and secondly, 'foreign firms that crosslist on US exchanges incur a reduction in the cost of capital'.[31] Coffee explains that the bonding effect occurs because the listing firm, inter alia,

> becomes subject to the enforcement powers of the Securities and Exchange Commission … [and] investors acquire the ability to exercise effective and low-cost legal remedies, such as class actions and derivative actions, that are … not available in the firm's home jurisdiction.[32]

Therefore 'the level of enforcement intensity … distinguishes jurisdictions in a manner that can explain national differences in the cost of capital'.[33]

The bonding hypothesis assumes that both issuers and investors shop for law, and that investors, in particular, shop for effective enforcement.[34] The question

24 Ibid 279.

25 Erin A O'Hara and Larry E Ribstein, *The Law Market* (Oxford University Press, 2009) 3.

26 See Buxbaum, above n 13, 57.

27 Merritt B Fox, 'The Political Economy of Statutory Reach: US Disclosure Rules in a Globalizing Market for Securities' (1998) 97 *Michigan Law Review* 696, 784–5.

28 Roberta Romano, 'Empowering Investors: A Market Approach to Securities Regulation' (1998) 107 *Yale Law Journal* 2359, 2426–7.

29 O'Hara and Ribstein, above n 25, 30. See also John C Coffee Jr, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications' (1999) 93 *Northwestern University Law Review* 641, 691–2.

30 Natalya Shnitser, 'A Free Pass for Foreign Firms? An Assessment of SEC and Private Enforcement against Foreign Issuers' (2010) 119 *Yale Law Journal* 1638, 1647.

31 Ibid 1648.

32 John C Coffee Jr, 'Racing towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance' (2002) 102 *Columbia Law Review* 1757, 1780. See also Coffee, 'The Future as History', above n 29, 691–2.

33 John C Coffee Jr, 'Law and the Market: The Impact of Enforcement' (2007) 156 *University of Pennsylvania Law Review* 229, 233. See also Shnitser, above n 30, 1647–9.

therefore arises as to whether policymakers and legislators should take this into account when framing domestic laws. Recently, concern has been expressed about capital flight from the US markets in general and the decline in cross-listings in particular. This issue was raised in the amicus briefs filed by issuers and markets in *Morrison* which argued that foreign companies are exiting the US markets due to the uncertainties and costs created by securities class actions.[35] However, other authors argue that the *Sarbanes–Oxley Act of 2002* ('*Sarbanes–Oxley*')[36] is the cause.[37] Such a conclusion is understandable when the data indicates, for example, that since 2002 many US companies have chosen to bypass listing on US markets altogether, preferring to list in the UK instead.[38] In the period 2002 to 2006 the UK increased its global market share of IPOs from five to 25 per cent.[39] However, Pan demonstrates that the movement of companies away from the US markets began in the early 1990s — long before *Sarbanes–Oxley* — as foreign companies took advantage of new ways to raise money from deep pools of capital without having to go to the US.[40] Therefore the evidence as to the causes of these phenomena is unclear. Perhaps the best approach is summed up by O'Hara and Ribstein: 'the actual effect of regulation is seldom clear.'[41]

C *The Prospects for Global Regulation*

Assuming that securities law based on geographic boundaries is becoming increasingly infeasible and that the creation of a global system of securities regulation is desirable, further questions arise as to how such a system would be structured. Based on the observation that '[c]apital has never allowed its aspira-

34 Coffee, 'Racing towards the Top?', above n 32, 1767.

35 Securities Industry and Financial Markets Association et al, 'Brief of Amici Curiae the Securities Industry and Financial Markets Association et al in Support of Respondents', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010, 5, 12, citing Charles Roxburgh et al, 'Global Capital Markets: Entering a New Era' (Research Report, McKinsey Global Institute, September 2009) 8–9, 13–15 <http://www.mckinsey.com/mgi/publications>.

36 Pub L No 107-204, 116 Stat 745.

37 Committee on Capital Markets Regulation, *Interim Report* (2006) 47–8 <http://www.capmktsreg.org/research.html>. For a discussion, see O'Hara and Ribstein, above n 25, 30; Donald C Langevoort, 'US Securities Regulation and Global Competition' (2008) 3 *Virginia Law and Business Review* 191, 195–6; Coffee, 'Law and the Market', above n 33, 290. *Sarbanes–Oxley* was passed in the wake of the collapse of Enron in 2001 and of WorldCom in 2002; the Act tightened standards for, inter alia, corporate reporting and auditing: see Donald C Langevoort, 'The Social Construction of *Sarbanes–Oxley*' (2007) 105 *Michigan Law Review* 1817, 1821; Larry E Ribstein, 'Market vs Regulatory Responses to Corporate Fraud: A Critique of the *Sarbanes–Oxley Act of 2002*' (2002) 28 *Journal of Corporation Law* 1, 11–18.

38 See, eg, Committee on Capital Markets Regulation, above n 37, 3.

39 Ibid.

40 Eric J Pan, 'Why the World No Longer Puts Its Stock in Us' (Working Paper No 176, Jacob Burns Institute for Advanced Legal Studies, Benjamin N Cardozo School of Law, Yeshiva University, 2006) 2 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951705>. See also Coffee, 'Law and the Market', above n 33, 241–2.

41 O'Hara and Ribstein, above n 25, 229 n 26.

tions to be determined by national boundaries',[42] Teubner has speculated about the creation of global law, that is, law without a state. Under this vision, civil society itself will globalise its legal orders.[43] In the securities context, economic actors have strong incentives to create a transnational law of economic transactions (*lex mercatoria*) which would potentially create a legal ordering independent of the nation state.[44] Although the rise and spread of commercial arbitration across international and domestic contexts demonstrates the persuasiveness of these arguments, Teubner argues that *lex mercatoria* will never develop into an authentic legal order because it does not possess an exclusive territory with coercive powers. As Teubner states, '[c]ommercial customs by themselves are incapable of creating law; they can only be transformed into law by a formal act of the sovereign state.'[45] Clearly, private ordering may produce valid enforceable agreements with the authorisation of and control by the state, but enforcement generally occurs through the institutions of the state.[46] This is demonstrated by the fairly extensive debates in Australia and internationally about the enforceability of arbitration agreements.[47]

If it is unrealistic to imagine global law without a state, another option is a world securities regulatory body,[48] that is, a supernational regulator modelled on national agencies such as the SEC or the Australian Securities and Investments Commission ('ASIC'). Choi argues that whilst in theory a 'benevolent and well-informed world securities regulator might provide the best solution to problems that might arise within a global securities market'[49] and would ensure that investors have access to mandatory securities regulation, such a proposal is not

42 Gunther Teubner, '"Global Bukowina": Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global Law without a State* (Dartmouth Publishing, 1997) 3, 5–6, referring generally to the work of Karl Mannheim.

43 Ibid 3.

44 See Hans-Joachim Mertens, '*Lex Mercatoria*: A Self-Applying System beyond National Law?' in Gunther Teubner (ed), *Global Law without a State* (Dartmouth Publishing, 1997) 31.

45 Teubner, above n 42, 10.

46 See ibid 16–17.

47 Chief Justice P A Keane, 'Judicial Support for Arbitration in Australia' (Paper presented at the Financial Review International Dispute Resolution Conference, Sydney, 15 October 2010); Richard Garnett, 'International Commercial Arbitration in Australia: Legal Framework and Problems' (2008) 19 *Australasian Dispute Resolution Journal* 249; Vicki Donnenberg, 'Judicial Review of Arbitral Awards under the Commercial Arbitration Acts' (2008) 30 *Australian Bar Review* 177; Dale Clapperton and Stephen Corones, 'Unfair Terms in "Clickwrap" and Other Electronic Contracts' (2007) 35 *Australian Business Law Review* 152, 173–4; Jeffrey W Stempel, 'Mandating Minimum Quality in Mass Arbitration' (2008) 76 *University of Cincinnati Law Review* 383; Steven J Burton, 'The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate' [2006] *Journal of Dispute Resolution* 469; Judith Resnik, 'Migrating, Morphing, *and* Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts' (2004) 1 *Journal of Empirical Legal Studies* 783, 814–17; Stephen J Ware, 'Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements' [2001] *Journal of Dispute Resolution* 89.

48 Uri Geiger, 'Harmonization of Securities Disclosure Rules in the Global Market — A Proposal' (1998) 66 *Fordham Law Review* 1785, 1800–5, cited in Stephen J Choi, 'Assessing Regulatory Responses to Securities Market Globalization' (2001) 2 *Theoretical Inquiries in Law* 613, 643.

49 Choi, above n 48, 643.

feasible due to political obstacles and the amplification of regulatory errors which would occur with a single global regulator.[50]

In the absence of an international superstructure by way of global law or a world regulator, the next option is coordination or synchronisation between national regulators. A model for such cooperation might be the 'networks' concept developed by Slaughter,[51] which entails 'loose, cooperative arrangements between and among like agencies seeking to respond to global issues.'[52] In the securities context, the networks are transgovernmental[53] or based on clubs.[54] Most commentators agree that it is unrealistic to seek a comprehensive or common set of international regulations; rather, synchronisation of existing national and regional regulation is desirable.[55]

Indeed, the move towards synchronisation of national laws rather than the creation of a global regulator is reflected in the work of the Financial Stability Board ('FSB'), which was created following the G-20's London Summit in March 2009.[56] The FSB emerged as a successor to the Financial Stability Forum in order to broaden membership to include developing economies.[57] Amongst the FSB's mandates is the coordination 'at the international level [of] the work of national financial authorities … [to] address vulnerabilities affecting financial systems in the interest of global financial stability.'[58]

In relation to enforcement, regulators have entered into several bilateral and multilateral agreements to facilitate cross-border enforcement and the exchange of information.[59] This is often conducted under the auspices of the International

50 Ibid.

51 Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004) ch 1.

52 Chris Brummer, 'Post-American Securities Regulation' (2010) 98 *California Law Review* 327, 329–30.

53 This term was coined by Raustiala to describe networks involving 'specialized domestic officials directly interacting with each other, often with minimal supervision by foreign ministries': Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43 *Virginia Journal of International Law* 1, 4–5 (emphasis altered).

54 See generally Brummer, above n 52.

55 See, eg, Tahyar et al, above n 23, 279; Kathleen L Casey, 'The Role of International Regulatory Cooperation and Coordination in Promoting Efficient Capital Markets' (Speech delivered at the Istituto Bruno Leoni, Milan, 12 June 2010) <http://www.sec.gov/news/speech.shtml>.

56 G-20, 'Declaration on Strengthening the Financial System' (Communiqué, 2 April 2009) <http://www.g20.org/pub_communiques.aspx>.

57 See generally Enrique R Carrasco, 'The Global Financial Crisis and the Financial Stability Forum: The Awakening and Transformation of an International Body' (2010) 19 *Transnational Law and Contemporary Problems* 203.

58 FSB, *Charter* (September 2009) art 1 <http://www.financialstabilityboard.org>.

59 Casey, above n 55. See, eg, International Organization of Securities Commissions, *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (May 2002), of which US, UK, French and Australian regulatory authorities are signatories: International Organization of Securities Commissions, *List of Signatories to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (2011) <https://www.iosco.org/library/index.cfm?section=mou_siglist>. The US also has specific bilateral agreements in place with Australia, the UK and France (amongst others) concerning enforcement and regulatory cooperation: see, eg, SEC and ASIC, *Memorandum of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws* (October 1993); SEC and College of Euronext

Organization of Security Commissions ('IOSCO'). One of IOSCO's objectives is to reduce systemic risk,[60] and recent commentary has pointed to market interdependency and exposure to systemic risk — two characteristics brought into sharp relief by the global financial crisis — as factors that make a uniform approach to market regulation and enforcement desirable.[61]

However, it is unwise to overstate 'the transformative potential of regulatory interconnectivity.'[62] In the enforcement context, important practical and cultural differences not only undermine the harmonisation objective but may be a virtue if, as is argued by some commentators, regulatory competition amongst jurisdictions is desirable. Romano argues that a market for securities regimes is superior to a single regulator or a regulatory cartel of internationally harmonised regimes. She posits that issuers should be provided with a choice of regulatory regimes, particularly for disclosure standards.[63] Choi adds that a potential race to the bottom is avoided because investors will purchase securities from issuers that adopt valued investor protections, which in turn reduces the cost of capital for issuers.[64]

IV The Extension of National Jurisdiction by Extraterritoriality

Whilst we are waiting for the global securities enforcement regime to develop, what strategies may be adopted in the meantime? The most common approach, and perhaps the most contentious, is the use of extraterritoriality by nation states to enforce their domestic securities laws in foreign contexts. This allows countries to extend the reach of their securities laws beyond territorial borders. This strategy was at the heart of the controversy in the *Morrison* case. As is discussed below in Part V(C), prior to *Morrison*, US case law had developed to allow US securities laws to be applied to transactions which occurred outside the US but which had a significant effect within the US.

There are several instrumental concerns about the use of extraterritoriality to achieve global securities regulation. For example, Choi doubts whether extraterritoriality achieves socially optimal regulation and argues that it applies haphazardly, creating uncertainty as to the amount of contact necessary to generate jurisdiction.[65] This aspect of the case law that preceded *Morrison* is discussed below in Part V(E). There are also questions as to whether the development of extraterritoriality principles through case law encourages plaintiffs to specula-

Regulators, *Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight* (January 2007).

60 IOSCO, *Objectives and Principles of Securities Regulation* (May 2003) i <http://www.iosco.org/library/index.cfm?section=pubdocs>.

61 Steven L Schwarcz, 'Systemic Risk' (2008) 97 *Georgetown Law Journal* 193, 245–6. See also Langevoort, 'US Securities Regulation and Global Competition', above n 37, 205.

62 Brummer, above n 52, 330.

63 Roberta Romano, 'The Need for Competition in International Securities Regulation' (2001) 2 *Theoretical Inquiries in Law* 387, 389–90.

64 Choi, above n 48, 645.

65 Ibid 642.

tively choose forums after a dispute has arisen, rather than promoting a more predictable *ex ante* arrangement between the parties.[66] In terms of institutional design, Testy argues that courts are ill-equipped to make these judgments on a case-by-case basis since the extraterritorial application of US securities law involves 'difficult market efficiency concerns and political sensitivities'.[67]

A *Imperialism or Policing?*

Clearly political sensitivities are fundamentally important in any debate about extraterritoriality. The grant of extraterritorial jurisdiction may lead to confrontation with a foreign government[68] and raises important questions about the characterisation of the nation that assumes jurisdiction. The authors of a note on this topic published in the *Harvard Law Review* in 1985 referred to two theories of jurisdiction: the power theory, which is based on the capacity of a legal system to coerce, and the fairness theory, where jurisdiction is ultimately based on the consent of the parties.[69] The note argued that the power theory will generate 'an ever-growing laundry list of bases for extraterritoriality', whereas the fairness theory will produce a uniform rule.[70] At that time, the authors argued that the US courts had moved to the fairness test domestically but not internationally.[71] Writing in the 1990s, Testy observed that the overreach of US securities law had been criticised domestically and abroad, including being denounced as a form of legal and economic imperialism.[72] She considered that the application of US securities laws to transactions having only a tenuous relationship to the US 'risks offending other nations by perpetuating an already problematic image of American pomposity.'[73]

Whilst the assumption of extraterritorial jurisdiction might brand the US as a legal and economic imperialist, there is an alternative vision — that of the US as a securities policeman.[74] In this guise, the US uses extraterritoriality to protect its own citizens and to defeat international securities fraud. In a nod to popular culture which, though not contemporary, has some resonance, the Court of Appeals for the Third Circuit illustrated this role in *Securities and Exchange*

[66] O'Hara and Ribstein argue that the unilateral choice of forum by plaintiffs after a dispute has arisen is 'more likely to transfer wealth between the parties than to increase … society's wealth': O'Hara and Ribstein, above n 25, 26.

[67] Testy, above n 15, 929.

[68] Bruce Alan Rosenfield, 'Extraterritorial Application of United States Laws: A Conflict of Laws Approach' (1976) 28 *Stanford Law Review* 1005, 1026.

[69] Note, 'Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction' (1985) 98 *Harvard Law Review* 1310, 1319.

[70] Ibid.

[71] Ibid.

[72] Testy, above n 15, 932–3.

[73] Ibid 957.

[74] John C Coffee Jr, 'Securities Policeman to the World? The Cost of Global Class Actions', *New York Law Journal* (New York), 18 September 2008, 5.

Commission v Kasser ('*Kasser*') as the US protecting citizens from the fraudsters of the Barbary Coast.[75]

It must be conceded that, whilst the characterisation of the US as a legal and economic imperialist may raise more international ire than the benign portrayal of it patrolling the beat as a securities policeman, the latter depiction may be equally as irritating to some foreign governments, as demonstrated by the amicus briefs filed in *Morrison*. This is discussed below in Part IV(E).

B *Comity*

Extending the reach of a jurisdiction's laws by adopting extraterritoriality is limited by the principle of comity. 'Comity' refers to a

> body of rules developed in international law by which the courts of a state demonstrate respect for the rules, customs, and laws of another state. Non-observance of comity does not give rise to strict legal consequences, however, the state affected by the non-observance may reciprocate by retracting its own courteous practices.[76]

Courts commonly refer to comity in a wide range of contexts,[77] but the authors of the *Harvard Law Review* note (referred to above) considered that it was rarely treated by US courts as a crucial enquiry and that the 'nod to foreign interests' was 'rarely more than perfunctory'.[78] However, in an article that was cited by the majority opinion in the US Supreme Court in *Morrison*,[79] Langevoort argued for restraint in applying the principle of extraterritoriality because, inter alia, foreign plaintiff litigation is becoming a drain on US judicial resources and that such forbearance will facilitate the establishment of a cooperative scheme of interna-

[75] 548 F 2d 109, 116 (Adams J for Adams, Weis and Fogel JJ) (3rd Cir, 1977). The term 'Barbary Coast' refers to the northern coast of Africa where Barbary pirates (based on the Berber people of West Africa) and slave traders were said to operate. This meaning is consistent with the concern expressed by the *Kasser* Court regarding 'international securities "pirates"'. However, the authors prefer an alternative meaning referring to a district in San Francisco which became a haven for former Australian convicts during the 1850s. The convicts, known as the 'Sydney Ducks', had come looking for gold after news of the gold rush had reached Australia before the East Coast of the US. Consider this account:

> By the early autumn of 1849 the arrivals from Australia had become so numerous, and so thoroughly dominated the underworld, that the district in which they congregated began to be known as Sydney-Town … It was this area that later became notorious throughout the world as the Barbary Coast … Unquestionably, these foreign felons gave San Francisco's underworld its initial flavour; they were pioneers in the viciousness and depravity for which the Barbary Coast became famous …

Andrew Parkin, 'Australians and New Zealanders' in Stephan Thernstrom, Ann Orlov and Oscar Handlin (eds), *Harvard Encyclopedia of American Ethnic Groups* (Belknap Press, 1980) 163, 163, quoting Herbert Asbury, *The Barbary Coast: An Informal History of the San Francisco Underworld* (Jarrolds Publishers, 1934) 49–50.

[76] LexisNexis, *Encyclopaedic Australian Legal Dictionary* (at 9 May 2011) 'Comity'.

[77] Lawrence Collins, 'Comity in Modern Private International Law' in James Fawcett (ed), *Reform and Development of Private International Law* (Oxford University Press, 2002) 89, cited in Mary Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005) 191.

[78] Note, above n 69, 1324–5.

[79] *Morrison*, 130 S Ct 2869, 2880 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010).

tional securities regulation.[80] Langevoort considered that an aggressive US posture signals to other countries that they can free-ride on US enforcement efforts or are deemed to be inferior regulators.[81]

C *Passionate Disagreement about Enforcement Practices and Procedural Rules*

The primary issue in *Morrison* concerned the appropriate ambit of enforcement of domestic securities laws. Enforcement creates particular difficulties for international cooperation because of the significant cultural, political and economic differences that are reflected in the domestic rules about enforcement and regulatory intensity.[82] It is axiomatic that countries create very different regulatory structures, provide different levels of resources to public enforcement activity and enforce securities laws with varying degrees of intensity.[83] A cross-jurisdictional survey conducted by the International Bar Association in 2004 found that enforcement remained the key area where harmonisation was lacking.[84] The divergences are perhaps most profound in the choices that jurisdictions make about the relationship between public and private enforcement, and policy choices about collective proceedings. As a consequence, this area gives rise to passionate disagreement about enforcement practices and the content of procedural rules.

D *The Multinational Class Action*

In the midst of this passionate disagreement, the multinational securities class action has emerged. Buxbaum defines this as an action brought against a foreign issuer on behalf of a plaintiff class that includes investors who purchased on a foreign securities exchange.[85] These cases, including *Morrison*, are referred to as 'foreign-cubed' or 'f-cubed' because they have three foreign elements: the investor, the issuer and the securities exchange.[86] Apart from what they reveal about extraterritoriality, these cases show the effect of the multinational class action upon other markets, in particular the market for legal services. It is noteworthy that US plaintiff firms are actively recruiting international investors for US securities class actions. In particular, US firms have opened offices in Europe in order to seek out European funds.[87] Others have formed relationships with foreign firms who act as local partners in developing business opportunities.[88] This introduces an additional element of entrepreneurial lawyering which

80 Langevoort, '*Schoenbaum* Revisited', above n 14, 249–50.
81 Ibid 250.
82 Tahyar et al, above n 23, 290.
83 Ibid 288.
84 Margaret E Tahyar and Jake S Tyshow, 'Results of IBA Committee Q Survey on Transparency and Enforcement' (Draft Paper, 2004), cited in ibid 288 n 34.
85 Buxbaum, above n 13, 17.
86 See above n 13.
87 Buxbaum, above n 13, 62.
88 Ibid.

is endemic to US securities class actions but raises opprobrium in other jurisdictions.[89]

It was the remedial and procedural aspects of the US regulations that caused the greatest consternation to the participants in *Morrison*, particularly the governments who participated as amici. The literature and the amicus briefs highlighted aspects of the American system which diverged significantly from those of the onlookers. For example, civil juries, punitive and treble damages, opt out procedures and the 'fraud on the market' theory[90] are well-known features of the US system which have been transplanted to a variable extent, although generally eschewed, by other jurisdictions. It is a commonly held view that these features confer significant advantages upon the plaintiff in US litigation.[91] Whether it is empirically correct or not, the influence of the belief may be sufficient to garner litigation into US courts.[92] As Lord Denning MR pithily observed, '[a]s a moth is drawn to the light, so is a litigant drawn to the United States.'[93]

E *Extraterritoriality and the Amicus Briefs in* Morrison

The amicus briefs filed in the US Supreme Court are fascinating reading because they reveal the range of interests and strongly held views of stakeholders such as investors,[94] markets and issuers,[95] and foreign governments, in particular those of Australia,[96] France[97] and the UK.[98] Although, as discussed below, the amicus briefs filed by foreign governments seem to have had little influence on the Court's decision,[99] they are worth examining to contemplate the broad policy framework within which these views were ventilated.

In its brief, Australia seemed to be demonstrating its credentials as an effective securities regulator to the US Supreme Court. For example, the brief argued that Australia provides appropriate civil remedies for plaintiffs who have suffered

89 Peta Spender, 'The Class Action as Sheriff: Private Law Enforcement and Remedial Roulette' in Jeff Berryman and Rick Bigwood (eds), *The Law of Remedies: New Directions in the Common Law* (Irwin Law, 2010) 695, 699–701.

90 See below Part VIII(B).

91 See, eg, Buxbaum, above n 13, 61.

92 Ibid 60–1.

93 *Smith Kline & French Laboratories Ltd v Bloch* [1983] 1 WLR 730, 733.

94 Alecta Pensionsförsäkring, Ömsesidigt et al, 'Brief for Amici Curiae Alecta Pensionsförsäkring, Ömsesidigt et al in Support of Petitioners', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 January 2010.

95 Securities Industry and Financial Markets Association et al, 'Brief of Amici Curiae the Securities Industry and Financial Markets Association et al in Support of Respondents', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010.

96 Australia, 'Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants–Appellees', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010.

97 France, 'Brief for the Republic of France as Amicus Curiae in Support of Respondents', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010.

98 United Kingdom, 'Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 25 February 2010.

99 See below Part VI(B)(5).

loss from a violation of securities law by showing that that there is a clear statutory basis for private actions for such violations;[100] that class actions are available in Australia and have been brought by shareholders;[101] and that external litigation funding is legally permissible in Australia.[102] The Australian brief pointed out that a class action could have been brought in Australia in relation to the conduct alleged in this case[103] but gave no explanation as to why there was no public enforcement action in Australia in relation to the NAB writedowns. The brief noted that ASIC did not take action vis-a-vis NAB for the writedowns,[104] with the then ASIC Chairman David Knott actually praising NAB for prompt market disclosure of the writedowns, describing the Board's actions as setting 'a new high-water benchmark for disclosure practice'.[105] In contrast, ASIC took successful civil penalty actions shortly thereafter against other unrelated entities for breaches of the continuous disclosure obligations.[106]

After asserting the effectiveness of Australia's substantive securities laws and its enforcement regime, the brief changed tack by emphasising issues of comity. The brief noted that there are significant procedural differences between civil actions in the US and in Australia but that these different approaches reflect public policy choices made by sovereign states and that '[a]dopting appropriate legal processes is a basic … function on which reasonable sovereigns can differ.'[107]

The comity arguments in the briefs filed by France and the UK were perhaps more strident, reflecting the greater degree to which their domestic enforcement regimes differ from those of the US. France argued that comity precludes the application of US securities law in f-cubed actions because 'the US interest [in such cases] is attenuated and the foreign interest is paramount.'[108] The French brief also asserted that nations proscribe securities fraud using incompatible regulatory schemes; for example, 'while the US permits private plaintiffs to enforce the anti-fraud provisions in class actions, France and many other nations

100 Australia, 'Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants–Appellees', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010, 15–16.

101 Ibid 17–21.

102 Ibid 19, citing *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

103 Australia, 'Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants–Appellees', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010, 21–2.

104 Ibid 15.

105 John Breusch and Morgan Mellish, 'ASIC Praises NAB for Quick Disclosure', *The Australian Financial Review* (Sydney), 5 September 2001, 40, cited in ibid.

106 Australia, 'Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants–Appellees', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010, 15, citing *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 130 FCR 406 and *Re Chemeq Ltd; Australian Securities and Investments Commission v Chemeq Ltd* (2006) 234 ALR 511.

107 Australia, 'Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants–Appellees', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010, 22–3.

108 France, 'Brief for the Republic of France as Amicus Curiae in Support of Respondents', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010, 3.

have made a considered policy choice to rely instead on public actions.'[109] To emphasise the point, France argued that aspects of the US approach conflicted with specific foreign legal rules and, in particular, 'the opt-out aspect of US class actions runs afoul of fundamental French public policy and due process principles.'[110]

The UK brief explained that the UK has made a conscious policy choice not to introduce a general opt out class action,[111] but that its Group Litigation Order procedure — an opt in procedure — is an element of a sophisticated legal system available for the litigation of securities claims.[112]

In relation to questions of comity, the UK brief reminded the Supreme Court of its earlier words in *Microsoft Corporation v AT & T Corp*[113] that 'United States law governs domestically but does not rule the world'.[114] The UK brief continued:

> Nations have a strong interest in regulating their own capital markets, developing disclosure rules to govern their own issuers, deciding how and when class action shareholder litigation should occur and determining the penalties for violations of such laws. Such decisions vary among countries[.] … US judicial interference in those decisions risks damaging the mutual respect that comity is meant to protect and could be perceived as an attempt to impose American economic, social and judicial values.[115]

V THE LEGAL BACKGROUND TO *MORRISON*

It is in this context that the *Morrison* litigation wended its way through the District and Second Circuit Courts, culminating in the Supreme Court's decision on 24 June 2010. This part of the case note will examine in more detail the issues of US domestic law that informed the Supreme Court decision.

109 Ibid 3–4.

110 Ibid 4.

111 However, there has been considerable controversy and ongoing policy discussions about this issue in the UK. For an insight into this debate, see John Sorabji, Michael Napier and Robert Musgrove (eds), '"Improving Access to Justice through Collective Actions" — Developing a More Efficient and Effective Procedure for Collective Actions' (Final Report, Civil Justice Council, November 2008) <http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/publications/CJC+papers>.

112 United Kingdom, 'Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 25 February 2010, 10.

113 550 US 437 (2007).

114 Ibid 454 (Ginsburg J for Ginsburg, Scalia, Kennedy and Souter JJ), cited in United Kingdom, 'Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 25 February 2010, 21 n 47.

115 United Kingdom, 'Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 25 February 2010, 22–3.

A *The Anti-Fraud Provisions*

The Supreme Court's decision in *Morrison* centred on alleged breaches of § 10(b) of the *Exchange Act* and rule 10b-5. Due to their prominence within US securities litigation (both in the class action context and as an SEC tool of enforcement) and the emphasis on the text adopted by the Supreme Court in *Morrison*, the anti-fraud provisions are reproduced in part below.

The relevant part of § 10 provides that:

> 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 …
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered … any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[116]

Rule 10b-5, promulgated under § 10(b), makes it unlawful

> for any person … by the use of any means or instrumentality of interstate commerce, or … 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
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit …
>
> in connection with the purchase or sale of any security.[117]

Two preliminary observations may be made here. First, it can be gleaned from the language that the provisions operate as a catch-all[118] in the sense of regulating and proscribing a broad range of corporate behaviours. Secondly, while neither of the provisions expressly provide for a private right of action, it has long been established by US courts that such a right does exist.[119] Described as 'a necessary supplement to [SEC] action',[120] the private right is seen by US federal courts as crucial to preserving the integrity of and promoting confidence in US markets.[121] Indeed, the term 'private Attorney-General' has been coined by

[116] 15 USC § 78j (2006).

[117] 17 CFR § 240.10b-5 (2009).

[118] *Ernst & Ernst v Hochfelder*, 425 US 185, 202–3 (Powell J for Burger CJ, Powell, Stewart, White, Marshall and Rehnquist JJ) (1976). See also Eric C Chaffee, 'Standing under Section 10(b) and Rule 10b-5: The Continued Validity of the Forced Seller Exception to the Purchaser–Seller Requirement' (2009) 11 *University of Pennsylvania Journal of Business Law* 843, 843–4 and the references cited therein.

[119] *Superintendent of Insurance of New York v Bankers Life & Casualty Co*, 404 US 6, 13 (Douglas J for the Court) (1971); *Ernst & Ernst v Hochfelder*, 425 US 185, 196 (Powell J for Burger CJ, Powell, Stewart, White, Marshall and Rehnquist JJ) (1976).

[120] *Bateman Eichler, Hill Richards Inc v Berner*, 472 US 299, 310 (Brennan J for Burger CJ and Brennan J) (1985), citing *J I Case Co v Borak*, 377 US 426, 432 (Clark J) (1964).

[121] See, eg, *Rochelle v Marine Midland Grace Trust Co of New York*, 535 F 2d 523, 532–3 (Hufstedler J for Hufstedler, Wright and Goodwin JJ) (9th Cir, 1976).

observers to reflect the symbiotic relationship between the (sometimes intersecting) aspirations of public and private actors in US securities litigation.[122]

B *The Extraterritorial Operation of the Anti-Fraud Provisions*

In a similar vein to the implied private right of action, an examination of the text of rule 10b-5 and § 10(b) reveals that neither provision expressly refers to any extraterritorial application. Indeed, there has long been curial recognition that where legislative text does not speak of extraterritorial application, a presumption against extraterritoriality arises.[123] Although lower US federal courts have recognised this 'congressional silence',[124] those same courts had overcome this presumption in the anti-fraud context by formulating the 'conduct' and 'effects' tests.

Broadly speaking, application of those tests involved balancing the domestic and foreign elements of a claim to determine the extraterritoriality of the anti-fraud provisions in each case.[125] As will be demonstrated below, *Morrison* represents a radical departure from the earlier norm characterised by the conduct and effects tests — a norm that had survived for 42 years until the Supreme Court handed down its decision in June 2010. The *Morrison* ruling is best understood in the light of what preceded it. Accordingly, the tests, and the difficulty US federal courts had in applying them, will be examined in the following sections.

C *The Effects Test*

In *Schoenbaum v Firstbrook* ('*Schoenbaum*'),[126] a US plaintiff and shareholder of Banff Oil Ltd ('Banff'), a Canadian corporation, brought a derivative suit against Banff and its officers. The plaintiff alleged that Banff, together with its controlling shareholders, had arranged for the acquisition of Banff shares at far below market value in contravention of § 10(b).[127] That transaction took place entirely in Canada. The plaintiff argued that although the transaction occurred outside US territorial borders, it had the effect of artificially diluting the share-pool and diminishing the value of Banff securities trading in the US market.[128]

122 Peta Spender, 'Securities Class Actions: A View from the Land of the Great White Shareholder' (2002) 31 *Common Law World Review* 123, 124. See also Amanda M Rose, 'Reforming Securities Litigation Reform: Restructuring the Relationship between Public and Private Enforcement of Rule 10b-5' (2008) 108 *Columbia Law Review* 1301 (in relation to securities class actions); Spender, 'The Class Action as Sheriff', above n 89 (in relation to class actions generally).

123 *Foley Bros Inc v Filardo*, 336 US 281, 285 (Reed J for Vinson, Black, Reed, Douglas, Murphy, Rutledge and Burton JJ) (1949); *Equal Employment Opportunity Commission v Arabian American Oil Co*, 499 US 244, 248 (Rehnquist CJ for Rehnquist CJ, White, O'Connor, Kennedy and Souter JJ) (1991).

124 See, eg, the discussion in *Bersch v Drexel Firestone Inc*, 519 F 2d 974, 993 (Friendly J for Friendly, Mulligan and Timbers JJ) (2nd Cir, 1975).

125 Margaret V Sachs, 'The International Reach of Rule 10b-5: The Myth of Congressional Silence' (1990) 28 *Columbia Journal of Transnational Law* 677, 678.

126 405 F 2d 200 (2nd Cir, 1968).

127 Ibid 205 (Lumbard CJ for Lumbard CJ and Medina J).

128 Ibid 208.

Despite the conduct occurring outside the US, the Second Circuit asserted jurisdiction. Ultimately, the Court held that acts outside the territorial limits of the US that produce detrimental effects within those limits justify extending jurisdiction of the anti-fraud provisions.[129] Because the sale of undervalued stock in Canada adversely affected Banff securities registered on a US exchange, the Court held that the assertion of jurisdiction was justified.[130]

The general — and perhaps prototypical — expression of the effects test was enunciated in *Securities and Exchange Commission v Berger* ('*Berger*').[131] The *Berger* Court stated the test as: 'whether the wrongful conduct had a substantial effect in the United States or upon United States citizens.'[132] On some occasions, application of the test is relatively straightforward. For example, overseas transactions causing a direct loss for a US citizen and holder of US registered securities would likely satisfy the jurisdictional question under the effects test. Yet the requirement that acts detrimentally affect US investors leaves some unanswered questions regarding the test's specific boundaries and limitations. A fundamental problem with the test is 'developing a neutral limiting principle that clearly delineates … how strong those effects must be.'[133]

D *The Conduct and Admixture Tests*

If the effects test looks to the effect of foreign conduct, the conduct test is its converse. Unlike the effects test, there is no requirement that securities listed on a US exchange be adversely affected, and the inquiry looks instead to conduct within US territorial borders.

The first application of the conduct test occurred in *Leasco Data Processing Equipment Corporation v Maxwell* ('*Leasco*')[134] which involved fraudulent misrepresentations made in the US that induced Leasco, a US plaintiff, to purchase securities listed in London.[135] As the securities were not registered on a US exchange, the effects test had no application. However, the *Leasco* Court held that the parties' conduct within the US (which included the execution of the relevant agreement) together with Leasco's nationality was sufficient to attract jurisdiction.[136]

Much like the difficulty in determining the precise scope of the effects test outlined above, *Leasco* left unanswered the question as to the precise degree of conduct that triggers jurisdiction. In *Bersch v Drexel Firestone Inc* ('*Bersch*')[137] the Second Circuit attempted to resolve this issue by prescribing three tests. Under the first, where overseas fraud causes injury to an American citizen

[129] Ibid 206.
[130] Ibid 208–9.
[131] 322 F 3d 187 (2nd Cir, 2003).
[132] Ibid 192 (Cabranes J for Van Graafeiland, Jacobs and Cabranes JJ).
[133] Gregory K Matson, 'Restricting the Jurisdiction of American Courts over Transnational Securities Fraud' (1990) 79 *Georgetown Law Journal* 141, 149.
[134] 468 F 2d 1326 (2nd Cir, 1972).
[135] Ibid 1330 (Friendly CJ for Friendly CJ, Feinberg and Davis JJ).
[136] Ibid 1334–8.
[137] 519 F 2d 974 (2nd Cir, 1975).

resident in the US, no conduct within the US need be shown.[138] This test can be seen as a natural extension of the effects test. If, on the other hand, a US citizen residing abroad suffers loss, then in order to trigger jurisdiction they must show domestic conduct of material importance that significantly contributed to the injury.[139] The final test — a test that would likely fit the facts in *Morrison* — requires a foreign plaintiff to show that the domestic conduct directly caused the loss.[140] A natural question would then be what type of conduct is materially important or directly causative of loss? The Court in *Bersch* attempted to answer this question, concluding that 'merely preparatory activities' will not satisfy the conduct test where the injury occurs to a foreign plaintiff, but are sufficient when the 'injury is to Americans so resident.'[141]

Muddying the waters further was the introduction of the 'admixture' test which followed the Second Circuit's decision in *Itoba Ltd v Lep Group plc*. In that case, the Court noted that 'an admixture or combination of the [conduct and effects tests] often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction'.[142]

E *Circuit Splits and Criticisms*

Despite the Second Circuit's attempt to engineer a legal rule, application of the conduct test — and by extension the admixture test — has been problematic. Commentators have seized on the tests' haphazard evolution and application. Langevoort lamented that the decisions giving rise to the conduct test were influenced, not by a principled approach to important questions of transnational enforcement, but rather by 'simplistic, ad hoc judgments of whether the conduct was "substantial enough."'[143]

Another somewhat more fundamental criticism concerns the Circuit Courts' approach to the issue of congressional silence. The Circuits crafted the conduct and effects tests by adopting a methodology that rests on three propositions.[144] First, there was an active acknowledgment that textually, the anti-fraud provisions are silent on the issue of extraterritorial application.[145] Normally, the absence of clear and specific textual indicia would end the inquiry into extraterritorial scope. Such an approach would accord with the earlier Supreme Court decision in *Foley Bros Inc v Filardo* ('*Foley Bros*') where it was noted that Congress is mainly concerned with domestic conditions.[146]

138 Ibid 993 (Friendly J for Friendly, Mulligan and Timbers JJ).
139 Ibid.
140 Ibid.
141 Ibid 992.
142 54 F 3d 118, 122 (Van Graafeiland J for Feinberg, Van Graafeiland and Miner JJ) (2nd Cir, 1995).
143 Langevoort, '*Schoenbaum* Revisited', above n 14, 247.
144 This analysis is adapted from Sachs, above n 125, 685–8.
145 *Zoelsch v Arthur Andersen & Co*, 824 F 2d 27, 29–30 (Bork J for Bork and Silberman JJ) (DC Cir, 1987).
146 336 US 281, 285 (Reed J for Vinson, Black, Reed, Douglas, Murphy, Rutledge and Burton JJ) (1949).

However — and despite the absence of clear legislative intent — the Circuits felt it was appropriate to read extraterritorial content into the anti-fraud provisions. Underpinning this was a perception that Congress *would* have intended the *Exchange Act* to have some extraterritorial application and that the silence of Congress was unintentional.[147] Comments by Friendly J in *Bersch* encapsulated and sought to justify this approach. His Honour noted that the anti-fraud provisions were passed in the wake of the Great Depression and that at the time, Congress 'could hardly have been expected to foresee the development of offshore funds thirty years later.'[148]

The second proposition rests on the surrounding text and preamble of the *Exchange Act* that are said to 'implicitly sanction a wide international reach … [that is] derived from ambiguous statutory text'.[149] Finally, for the *Bersch* Court, the underlying purpose of triggering jurisdiction notwithstanding congressional silence was a concern that the US not be used as a base for fraudulent schemes.[150] More colourfully, as discussed above, the *Kasser* Court took an expansive view of the conduct test for fear of the US becoming a Barbary Coast for transnational fraudsters.[151] These comments reflect a body of case law that is laden with judicial policymaking, leading the Supreme Court in 1975 to describe this case law as 'a judicial oak which has grown from little more than a legislative acorn.'[152]

VI *Morrison* — The Supreme Court Decision

As stated above, the *Morrison* plaintiffs' claim was dismissed by both the District Court and the Second Circuit for lack of subject matter jurisdiction.[153] The appellants sought a review of the Second Circuit's decision in the US Supreme Court. The central question presented to the Supreme Court was whether the Second Circuit erred in granting the motion to dismiss the claim for lack of subject matter jurisdiction.

The Supreme Court decision was eagerly awaited. First, as an f-cubed case, it contrasted with all the foundation cases that had had at least one domestic element anchoring them to the jurisdiction of US courts. For instance, *Schoenbaum* — which established the effects test — involved a domestic plaintiff trading in domestic securities, while *Leasco* — which established the conduct test — involved a domestic plaintiff and impugned conduct occurring

147 See, eg, *Schoenbaum*, 405 F 2d 200, 206 (Lumbard CJ for Lumbard CJ and Medina J) (2nd Cir, 1968).

148 *Bersch*, 519 F 2d 974, 993 (Friendly J for Friendly, Mulligan and Timbers JJ) (2nd Cir, 1975). See also Sachs, above n 125, 685–8.

149 Sachs, above n 125, 688, citing, inter alia, *Leasco*, 486 F 2d 1326 (2nd Cir, 1972). Note that Sachs is sharply critical of this approach, especially in light of the legislative history of the *Exchange Act*: Sachs, above n 125, 689–713.

150 *Bersch*, 519 F 2d 974, 987 (Friendly J for Friendly, Mulligan and Timbers JJ) (2nd Cir, 1975).

151 *Kasser*, 548 F 2d 109, 116 (Adams J for Adams, Weis and Fogel JJ) (3rd Cir, 1977).

152 *Blue Chip Stamps v Manor Drug Stores*, 421 US 723, 737 (Rehnquist J for Burger CJ, Rehnquist and White JJ) (1975).

153 *Re National Australia Bank Securities Litigation* (SD NY No 03 Civ 6537 (BSJ), 25 October 2006); *Morrison v National Australia Bank Ltd*, 547 F 3d 167 (2nd Cir, 2008).

within the territorial borders of the US. The Second Circuit expressly recognised that *Morrison* was the first 'foreign-cubed' action to reach a Federal Court of Appeal.[154] By applying the jurisdictional tests to an f-cubed claim, the Supreme Court had an opportunity to probe the jurisdictional limits of the anti-fraud provisions.

Secondly, *Morrison* provided the Supreme Court with an opportunity to resolve a split that had developed amongst the Circuit Courts in relation to the interpretation of the conduct test.[155] Thirdly, this was an opportunity for the Supreme Court to provide further guidance on the operation of comity in dealing with the extraterritorial jurisdiction.

A *The Outcome in the Supreme Court*

The Supreme Court granted a writ of certiorari, but ultimately dismissed the appeal in an 8:0 decision.[156] Scalia J (joined by Roberts CJ, Kennedy, Thomas and Alito JJ) delivered the judgment of the Court ('the majority judgment'), with Breyer J delivering a judgment agreeing with the order and relevantly concurring with the majority's reasoning. Stevens and Ginsburg JJ ('the minority judgment') also dismissed the appeal; however, their Honours' reasoning differed significantly to that of the majority and a brief discussion of that judgment will be presented below.

B *The Majority Judgment*

1 *A Question of Merit*

Before delivering their substantive judgment, the majority addressed what their Honours deemed to be a threshold error in the Second Circuit's and District Court's reasoning in finding that the claim should be dismissed due to the lack of subject matter jurisdiction.[157] For the majority, subject matter jurisdiction — which refers to a court's power to hear a case[158] — was not the locus of inquiry. Instead, the question was one of merits, namely discerning what type of conduct § 10(b) regulates and proscribes (in contradistinction to questioning a forum's capacity to resolve a justiciable controversy).[159] Their Honours concluded that the District Court did, in fact, have the power to adjudicate but declined the appellants' invitation to send the matter back for rehearing to the lower Court, as it would only 'require a new Rule 12(b)(6) label [failure to state a claim] for the

[154] *Morrison v National Australia Bank Ltd*, 547 F 3d 167, 172 (Parker J for Newman, Calabresi and Parker JJ) (2nd Cir, 2008).

[155] The case was described by the plaintiffs as 'an ideal opportunity to resolve the reach of the *Exchange Act* provisions to transnational securities fraud under the "conduct test"': Robert Morrison et al, 'Petition for a Writ of Certiorari', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 23 March 2009, 15.

[156] *Morrison*, 130 S Ct 2869 (2010).

[157] Ibid 2876–7 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ).

[158] *Union Pacific Railroad Co v Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region*, 130 S Ct 584, 596 (Ginsburg J for the Court) (2009).

[159] *Morrison*, 130 S Ct 2869, 2877 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010).

same Rule 12(b)(1) conclusion.'[160] A merits examination would not ask whether the federal courts are possessed of subject matter jurisdiction, but rather would investigate the type of conduct that § 10(b) seeks to regulate.

After addressing this point, the majority proceeded to discern what type of conduct is prohibited by the anti-fraud provisions, and in this context they turned first to the conduct and effects tests outlined above.

2 *The Conduct and Effects Tests and the Presumption against Extraterritoriality*

The majority began with two preliminary but important observations. First, they explored the presumption against extraterritoriality, seeing it as a canon of statutory construction. Their Honours cited with approval the Supreme Court's statements in *Equal Employment Opportunity Commission v Arabian American Oil Co* ('*Aramco*') and *Foley Bros* 'that legislation of Congress, *unless a contrary intent appears*, is meant to apply only within the territorial jurisdiction of the United States.'[161] For the *Morrison* majority, because the legislature is ordinarily concerned with the regulation of domestic matters, only clear legislative intent can rebut the presumption.[162] Secondly, the majority conveyed a stinging criticism of the Circuit Courts' approach to congressional silence, observing that the lower courts had mistakenly regarded silence as an invitation to judicially engineer legislative intent.[163] Their Honours opined that this 'disregard of the presumption against extraterritoriality … produced a collection of tests for divining what Congress would have wanted, complex in formulation and unpredictable in application.'[164] Their Honours observed that the 'Second Circuit never put forward a textual or even extratextual basis for these tests.'[165] In support of this, the majority seized on the Second Circuit's comment in *Bersch* that 'if … asked to point to language in the statutes … that compelled these conclusions, we would be unable to respond.'[166]

The majority judgment then moved on to highlight the difficulty in applying the conduct test by pointing out several of its defining characteristics: the gradations of conduct required by *Bersch* depends on the nationality of a harmed investor;[167] the test is fact rather than rule driven (as acknowledged by the

160 Ibid.

161 Ibid (emphasis added), quoting *Aramco*, 499 US 244, 248 (Rehnquist CJ for Rehnquist CJ, White, O'Connor, Kennedy and Souter JJ) (1991), which in turn quoted *Foley Bros*, 336 US 281, 285 (Reed J for Vinson, Black, Reed, Douglas, Murphy, Rutledge and Burton JJ) (1949).

162 *Morrison*, 130 S Ct 2869, 2877–8 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010), citing *Aramco*, 499 US 244, 248 (Rehnquist CJ for Rehnquist CJ, White, O'Connor, Kennedy and Souter JJ) (1991).

163 *Morrison*, 130 S Ct 2869, 2878 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010).

164 Ibid.

165 Ibid 2879.

166 Ibid, citing *Bersch*, 519 F 2d 974, 993 (Friendly J for Friendly, Mulligan and Timbers JJ) (2nd Cir, 1975).

167 *Morrison*, 130 S Ct 2869, 2879 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010).

Second Circuit);[168] and the test was of uncertain scope, which had led to disparate determinations of the test's limits and Circuit discordance.[169] Finally, the majority cited a swathe of academic criticism regarding the conduct test, its evolution and its inconsistent application.[170] Their Honours concluded that those criticisms were justified and surmised that

> [t]he results of judicial-speculation-made-law — divining what Congress would have wanted if it had thought of the situation before the court — demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, *we apply the presumption in all cases*, preserving a stable background against which Congress can legislate with predictable effects.[171]

3 *Was the Presumption against Extraterritoriality Displaced?*

After dispatching the erroneous approach to subject matter jurisdiction and inviting a merits investigation — that is, an investigation of the type of conduct that § 10(b) seeks to regulate — as well as reasserting the importance of the presumption against extraterritoriality and the role of legislative intent in the operation of extraterritoriality, the majority proceeded to decide whether the presumption had been displaced in this case. Their Honours reached the preliminary conclusion that prima facie, nothing indicated that § 10(b) applied extraterritorially.[172] Notwithstanding this, the appellants together with the US Solicitor-General advanced three propositions that were said to demonstrate an extraterritorial intent.[173]

The first of these related to the definition of particular terms found in § 10(b). Specifically, it was asserted that the extraterritorial operation of § 10(b) could be imputed from the definition of 'interstate commerce' which includes 'commerce … *between any foreign country* and any State'.[174] The majority rejected that submission, referring to *Aramco* where it was stated that the Supreme Court has 'repeatedly held that even statutes that contain broad … definitions of "commerce" that expressly refer to "*foreign* commerce" do not apply abroad.'[175] However, unlike *Aramco*, the majority's conclusion on this point was not preceded by a measured and reasoned analysis. In this respect the judgment was left wanting, as the argument centred on a core definitional term and therefore warranted further exploration. Instead, their Honours cursorily stated that the

[168] Ibid, citing *IIT v Cornfeld*, 619 F 2d 909, 918 (Friendly J for Friendly, Oakes and Newman JJ) (2nd Cir, 1980).
[169] *Morrison*, 130 S Ct 2869, 2880 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010).
[170] Ibid 2880–1.
[171] Ibid 2881 (emphasis added).
[172] Ibid.
[173] United States, 'Brief for the United States as Amicus Curiae Supporting Respondents', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010, 13–23.
[174] 15 USC § 78c(a)(17) (emphasis added) (2006).
[175] *Morrison*, 130 S Ct 2869, 2882 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010), quoting *Aramco*, 499 US 244, 251 (Rehnquist CJ for Rehnquist CJ, White, O'Connor, Kennedy and Souter JJ) (emphasis in original) (1991).

'general reference to foreign commerce … does not defeat the presumption against extraterritoriality.'[176]

The second proposition advanced by the appellants involved a congressional observation regarding the purposes of the *Exchange Act*. Congress had noted that the 'prices established and offered [in transactions commonly conducted on US exchanges and OTC markets] are generally disseminated … throughout the United States *and foreign countries*',[177] and it was said that this observation was supportive of an extraterritorial effect for § 10(b).[178] In a similar vein to their treatment of the appellants' first argument, the majority quickly dispensed with this second proposition, stating that a 'fleeting reference to the dissemination and quotation abroad … of securities traded in domestic exchanges … cannot overcome the presumption against extraterritoriality.'[179] However, unlike the earlier argument which centred on a core definition, the congressional observations here were, at best, tangential to the central question of the extraterritoriality of § 10(b). The reason for this is that the comments were seemingly made only in reference to the daily operation of securities markets, rather than the operative effect of a central term such as § 10(b). In this respect, their Honours had at least some, if not ample, justification for quickly dispensing with the appellants' argument.

The final argument raised in support of extraterritoriality related to §§ 30(a)–(b) of the *Exchange Act*.[180] Broadly speaking, neither provision has a direct connection with § 10(b). Instead, § 30(b) provides for operative exemptions from the *Exchange Act* for rule(s) promulgated under the Act where a person 'transacts a business in securities without the jurisdiction of the United States'.[181] That exception does not apply where the party transacts in violation of SEC rules designed to prevent evasion of the *Exchange Act*.[182] A reading of the provision therefore provides an indirect statement of extraterritorial effect in respect of § 30(b), but § 30(b) only. Conversely, § 30(a) provides for a direct statement of extraterritoriality: it prohibits the use of 'any means … of interstate commerce for the purpose of effecting on an exchange not … subject to the jurisdiction of the United States, any transaction … in contravention of [SEC Rules]'.[183] The argument proffered was that the extraterritorial effect of §§ 30(a)–(b) (through either direct or indirect intention) could be extrapolated to give the entire *Exchange Act* some extraterritorial effect — which would then

176 *Morrison*, 130 S Ct 2869, 2882 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (citations omitted) (2010).
177 15 USC § 78b(2) (emphasis added) (2006).
178 *Morrison*, 130 S Ct 2869, 2882 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010), citing United States, 'Brief for the United States as Amicus Curiae Supporting Respondents', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010, 14.
179 *Morrison*, 130 S Ct 2869, 2882 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010).
180 15 USC §§ 78dd(a)–(b) (2006).
181 Ibid § 78dd(b).
182 *Morrison*, 130 S Ct 2869, 2882 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010).
183 15 USC § 78dd(a) (2006).

flow to § 10(b).[184] For the Court however, the statements evincing extraterritorial application in §§ 30(a)–(b) militated against, rather than supported, a conclusion that the entire Act has extraterritorial application. Central to their Honours' reasoning was that those statements providing for extraterritorial effect 'would be quite superfluous if the rest of the *Exchange Act* already applied to transactions on foreign exchanges'.[185]

Ultimately, rejection of all three arguments raised by the Solicitor-General and appellants led the majority to conclude that § 10(b) does not apply extraterritorially since the *Exchange Act* contains no 'affirmative indication' that it does.[186] The majority bookended this aspect of their judgment by addressing a particular concern found in the minority judgment of Stevens and Ginsburg JJ. The minority stated that the majority had impermissibly 'transform[ed] the presumption from a flexible rule of thumb into something more like a clear statement rule.'[187] The majority responded to this by stating that '[a]ssuredly context can be consulted as well.'[188]

4 *What the Laws Prohibit: The Transactional Test*

After dealing with the anterior issues outlined above, the majority went on to explore the limits of conduct regulated and proscribed by § 10(b). They formulated their analysis around a proposition advanced by the appellants that the location of the deceptive conduct — namely the domestic asset valuation that occurred in Florida — provided a sufficient territorial nexus irrespective of whether or not § 10(b) had extraterritorial application.[189] Their Honours recognised that the issue required further analysis, conceding that very few *if any* such actions lack all contact with the US.[190] However, the majority noted that 'the presumption against extraterritorial application would be a craven watchdog … if it retreated to its kennel whenever *some* domestic activity is involved'.[191] It was against this backdrop that their Honours delivered this facet of the judgment.

Their Honours began by looking carefully at the text, particularly noting that the wording of § 10(b) proscribes deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered'.[192] The phrases 'in connection with the purchase or sale' and 'of any security registered on a national exchange or any security not so registered' led the majority to conclude that the *Exchange Act* does *not* focus on where deception originates, and nor does § 10(b) focus on a prohibition of

184 United States, 'Brief for the United States as Amicus Curiae Supporting Respondents', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010, 14.
185 *Morrison*, 130 S Ct 2869, 2883 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010).
186 Ibid.
187 Ibid 2891 (Stevens J for Stevens and Ginsburg JJ).
188 Ibid 2883 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ).
189 Ibid 2883–4.
190 Ibid 2884.
191 Ibid (emphasis in original).
192 15 USC § 78j(b) (2006).

general deceptive conduct within the US. Instead, it is those purchase and sale transactions *within* the US that 'are the objects of the statute's solicitude.'[193]

Properly construed, the new test ('the transactional test') under the anti-fraud provisions is satisfied only where:

1 the purchase or sale of a security is made in the US; or

2 the purchase or sale is of a security listed on a US domestic exchange.[194]

In the instant case, because the Australian litigants neither transacted in the US nor exercised a transaction in respect of a US registered security, § 10(b) was said to have no application, and the appellant's claim was dismissed.[195]

The US Solicitor-General suggested a different test (effectively a modified conduct test) that would be satisfied where 'the fraud involves significant conduct in the United States that is material to the fraud's success.'[196] The basis for this test was said to be the need to prevent the US 'from becoming a "Barbary Coast" for malefactors perpetrating frauds in foreign markets.'[197]

In the process of rejecting this test, the majority stated that there is no reason to believe that the US has become a Barbary Coast, although 'some fear that it has become the Shangri-La of class-action litigation for lawyers'.[198]

5 *Discussion of Comity*

The majority gave scant regard to the issue of comity. Instead, they again followed *Aramco* and opined that the probability of incompatibility with the securities laws of other countries is so obvious that Congress would have addressed the issue if it had intended extraterritoriality.[199]

The majority did acknowledge that disparate legal systems produce different modes of securities regulation. This was driven in part by the issues raised in the amicus briefs discussed above in Part IV(E).[200] However, the discussion went no further than enumerating some of those differences and pointing out that many governments had filed amicus briefs complaining of 'the interference with foreign securities regulation that application of § 10(b) abroad would pro-

[193] *Morrison*, 130 S Ct 2869, 2884 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010), citing *Securities and Exchange Commission v Zandford*, 535 US 813, 820 (Stevens J for the Court) (2002) and *Superintendent of Insurance of New York v Bankers Life & Casualty Co*, 404 US 6, 12 (Douglas J for the Court) (1971).

[194] *Morrison*, 130 S Ct 2869, 2886, 2888 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010).

[195] Ibid 2888.

[196] United States, 'Brief for the United States as Amicus Curiae Supporting Respondents', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010, 16, quoted in ibid 2886.

[197] *Morrison*, 130 S Ct 2869, 2886 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010), citing United States, 'Brief for the United States as Amicus Curiae Supporting Respondents', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010, 16–17.

[198] *Morrison*, 130 S Ct 2869, 2886 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010).

[199] Ibid 2885, citing *Aramco*, 499 US 244, 256 (Rehnquist CJ for Rehnquist CJ, White, O'Connor, Kennedy and Souter JJ) (1991).

[200] *Morrison*, 130 S Ct 2869, 2885–6 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010).

duce'.[201] The majority did not expand on this point, as it considered that its declaration of the bright-line transactional test was sufficient to provide certainty to nation states.[202]

In this respect, the decision confirmed the comment made by the *Harvard Law Review* in 1985 that comity was treated by the US courts merely as a nod to foreign interests and that the analysis was often perfunctory.[203]

C *The Minority Judgment*

After examining the issue of congressional silence, the minority decision analysed the presumption against extraterritoriality that featured so prominently in the majority judgment. The minority looked at the presumption generally before applying it to the instant case.

First, and unlike the majority who repeatedly and approvingly cited *Aramco* as a basis to adopt a strict presumption against extraterritoriality that could only be displaced by clear legislative language,[204] the minority saw passages within the same decision as justifying a broader inquiry that looks not merely to the text, but also to extra-textual evidence.[205] In particular, their Honours took aim at the majority's strict position that in the absence of clear textual indicia, a statute has no extraterritorial application.[206] For the minority, this 'clear statement rule' represents an overstatement of the principle.[207] Instead, the presumption should be applied as 'a tool for managing international conflict, a background norm, a tiebreaker.'[208]

In this context, their Honours looked to how the presumption applied to § 10(b) specifically, and concluded that even a clear statement rule would only have marginal relevance in this case.[209] In support of this conclusion, the minority considered that the presumption would operate only to the extent that it precludes claims 'with no effects in the United States [that are] hatched and executed entirely outside this country.'[210]

Instead, their Honours saw the real question in *Morrison* as an investigation into how much and what type of '*domestic* contacts … trigger application of § 10(b).'[211] In answering this, their Honours saw the formulation of the conduct test in *Berger* — that § 10(b) applies to transnational frauds 'only when substan-

201 Ibid 2886.
202 Ibid.
203 Note, above n 69, 1324–5.
204 *Morrison*, 130 S Ct 2869, 2877–8 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ) (2010).
205 Ibid 2891–2 (Stevens J for Stevens and Ginsburg JJ).
206 Ibid 2892.
207 Ibid.
208 Ibid.
209 Ibid.
210 Ibid, citing United States, 'Brief for the United States as Amicus Curiae Supporting Respondents', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010, 22.
211 *Morrison*, 130 S Ct 2869, 2892 (Stevens J for Stevens and Ginsburg JJ) (emphasis in original) (citations omitted) (2010).

tial acts in furtherance of the fraud were committed within the United States'[212] — as the appropriate line to draw.[213] The minority then selectively cited excerpts from a variety of cases[214] to support their assertion that the presumption against extraterritoriality applies with even less force where adverse effects or conduct within US borders is established.[215]

The minority cited references in the *Exchange Act* that *did* refer to extraterritoriality.[216] However, unlike the majority who engaged in a technical and thorough investigation of the same provisions, the minority merely pointed out that these aspects of the *Exchange Act* give 'strong clues' that § 10(b) has at least some extraterritorial application.[217] Ultimately, their Honours felt that the majority by 'beginning *and ending*' with the statutory text engaged in an impermissibly narrow inquiry.[218]

Finally, for the minority, it is not transactions on domestic exchanges that are the 'objects of [§ 10(b)'s] solicitude'.[219] Instead, it is the protection of US investors from fraud that the *Exchange Act* seeks to achieve.[220] Their Honours presented the following hypothetical to support their conclusion about § 10(b)'s policy objectives and the drawbacks of the majority's bright-line ruling:

> Imagine … a company listed only on an overseas exchange. That company has a major American subsidiary with executives based in New York City; and it was in New York … that the executives masterminded … a massive deception … which will, upon its disclosure, cause the [share] price to plummet. … [T]hose same executives go knocking on doors in Manhattan and convince an unsophisticated retiree, on the basis of material misrepresentations, to invest her life savings in the company's doomed securities.[221]

For the minority, the majority's narrowing of § 10(b)'s reach under the new test unnecessarily risked 'walling off' such investors by excising their standing under § 10(b), resulting in an 'oddity … that … should give pause.'[222] This policy judgement contrasts markedly with the majority's concern that the US should not become a 'Shangri-La' for plaintiff attorneys.[223]

Ultimately, however, their Honours were neither satisfied that the 'heart' of the fraud occurred in the US, nor satisfied that there were adverse impacts on US

[212] Ibid 2893, citing *Berger*, 322 F 3d 187, 193 (Cabranes J for Van Graafeiland, Jacobs and Cabranes JJ) (2nd Cir, 2003).
[213] *Morrison*, 130 S Ct 2869, 2893–4 (Stevens J for Stevens and Ginsburg JJ) (2010).
[214] Ibid 2893, citing, eg, *Small v United States*, 544 US 385, 400 (Thomas J for Thomas, Scalia and Kennedy JJ) (dissenting) (2005).
[215] *Morrison*, 130 S Ct 2869, 2893 (Stevens J for Stevens and Ginsburg JJ) (2010).
[216] Ibid 2893 n 9.
[217] Ibid 2894.
[218] Ibid (emphasis in original).
[219] Ibid 2894 (Stevens J for Stevens and Ginsburg JJ). Cf at 2884 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ).
[220] Ibid 2894 (Stevens J for Stevens and Ginsburg JJ), citing *Ernst & Ernst v Hochfelder*, 425 US 185, 195 (Powell J for Burger CJ, Powell, Stewart, White, Marshall and Rehnquist JJ) (1976).
[221] *Morrison*, 130 S Ct 2869, 2895 (Stevens J for Stevens and Ginsburg JJ) (2010).
[222] Ibid.
[223] Ibid 2886 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ).

investors or markets sufficient to attract jurisdiction.[224] Instead, the instant case had 'Australia written all over it'[225] and the minority dismissed the appeal.

VII Congress Responds — The *Dodd–Frank Act*

The *Dodd–Frank Act* was signed into law on 21 July 2010, less than a month after the Supreme Court delivered its judgment in *Morrison*. As a whole, the Act is an ambitious regulatory document said to represent 'one of the most wide-ranging legislative efforts at financial reform since the Great Depression.'[226] The Act canvasses many topics which are beyond the scope of this case note — from the regulation of credit rating agencies[227] and OTC swaps, to a prohibition on particular types of short selling.[228]

However, two provisions in the Act feature prominently when seen against the backdrop of *Morrison*. The first of these is § 929P(b)(2), the relevant parts of which provide that (emphasis added):

> (b) … The district courts of the United States … shall have jurisdiction of an action or proceeding *brought or instituted by the [Securities and Exchange] Commission* … alleging a violation of the antifraud provisions … 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.

Section 929P(b)(2) may be seen as a codification of the conduct and effects tests that characterised the earlier jurisprudence on the US anti-fraud provisions, as discussed above in Part V. It may therefore be seen as an attempt to claw back some of the extraterritorial ground lost by *Morrison*. However, § 929P(b)(2) only applies to actions initiated by the SEC. As stated by Coffee, 'Congress' goal was to ensure that the outcome in *Morrison* did not strip the SEC of its traditional authority.'[229]

In terms of private rights of action, § 929Y of the Act requires the SEC to solicit public comment and determine the extent to which private rights of action should be extended to cover the conduct and effects tests.[230] Thereafter, the SEC is to report and recommend to Congress whether or not a provision mirroring

[224] Ibid 2895 (Stevens J for Stevens and Ginsburg JJ).
[225] Ibid.
[226] David S Frankel, Alan R Friedman and Melissa J Prober, '*Dodd–Frank*'s Impact on Securities Enforcement and Litigation' (2010) 18(10) *Metropolitan Corporate Counsel* 12, 12.
[227] *Dodd–Frank Act* § 933.
[228] See, eg, ibid § 929X.
[229] John C Coffee Jr, 'What Hath *Morrison* Wrought?', *New York Law Journal* (New York), 16 September 2010, 5.
[230] See SEC, *Study on Extraterritorial Private Rights of Action: Request for Comments* (25 October 2010) <http://www.sec.gov/rules/other/2010/34-63174.pdf>.

§ 929P(b)(2) of the *Dodd–Frank Act* should be adopted for private rights of action. At the time of writing, the SEC is yet to report to Congress.[231]

VIII The Implications of *Morrison*

A *Within the United States*

The *Morrison* decision was important in bringing the US extraterritoriality debate back to basics by re-examining the textual basis of extraterritoriality and reasserting the presumption against extraterritoriality that had been neglected with the evolution of the conduct and effects tests.

At the time of writing, the early post-*Morrison* case law indicates that the restraint that Langevoort called for[232] has been delivered. The transactional test is being applied diligently[233] and cited frequently,[234] and there are indications that the strict approach to extraterritoriality will extend to other statutes.[235] It is reported that plaintiff lawyers began voluntarily withdrawing f-cubed actions shortly after *Morrison* was decided.[236]

However, the diligent application of the transactional test may have undesirable results for US policymakers in situations where the 'protective shield'[237] of US securities law cannot be provided for one of its citizens. In particular, in the hypothetical advanced in the minority judgment in *Morrison* — broadly speaking, where a US investor acquires foreign securities on an overseas exchange and seeks to bring a non-US citizen to account[238] — the investor will be barred by

231 According to the SEC website, the report to Congress is planned for January to July 2012: SEC, *Implementing Dodd–Frank Wall Street Reform and Consumer Protection Act — Upcoming Activity* (29 July 2011) <http://www.sec.gov/spotlight/dodd-frank/dfactivity-upcoming.shtml>. See generally Richard W Painter, 'The *Dodd–Frank* Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?' (2011) 1 *Harvard Business Law Review* 195.

232 Langevoort, '*Schoenbaum* Revisited', above n 14, 249–50.

233 See, eg, *Re Vivendi Universal SA Securities Litigation* (SD NY, No 02 Civ 05571 (RJH) (HBP), 17 February 2011) ('*Re Vivendi*'). The dictum of Holwell J in *Re Vivendi* demonstrates the diligent application of the bright-line methodology when applied to f-cubed actions. In this context, his Honour dismissed the argument that § 10(b) applied to the purchase or sale of overseas securities that were listed — merely by virtue of an issuer's ADR program — but not traded on a US exchange as 'contrary to the "spirit" of *Morrison*': at slip op 17. See also *Re Royal Bank of Scotland Group plc Securities Litigation* (SD NY, No 09 Civ 300 (DAB), 7 January 2011).

234 Conway wrote in October 2010 that *Morrison* has become 'one of the most frequently cited decisions of the last Court term': George T Conway III, 'Postscript to *Morrison v National Australia Bank*', *New York Law Journal* (New York), 14 October 2010, 5, quoting Andrew Longstreth, 'This Week in *Morrison*: The Supreme Court's Oft-Cited Recent Ruling Is Being Applied Outside the Bounds of Securities Class Actions', *The American Law Litigation Daily* (online), 26 August 2010.

235 See, eg, *Norex Petroleum Ltd v Access Industries Inc*, 631 F 3d 29 (2nd Cir, 2010), where the Second Circuit, following *Morrison*, found that the *Racketeer Influenced and Corrupt Organizations Act of 1970*, 18 USC § 1961–8 (2006) was silent as to any extraterritorial application and therefore did not apply to allegations of a conspiracy which primarily involved foreign actors and foreign acts. The allegations before the Second Circuit were of widespread racketeering and a money laundering scheme with the goal of seizing control over most of the Russian oil industry.

236 Conway, above n 234.

237 Testy, above n 15, 940. Testy argues that the policy behind the extraterritorial application of US securities law is, to some extent, to protect US persons, 'guarding them like a protective shield regardless of their physical location.'

238 *Morrison*, 130 S Ct 2869, 2895 (Stevens J for Stevens and Ginsburg JJ) (2010).

the transactional test from seeking relief under § 10(b) of the *Exchange Act* if the purchase is not regarded as having occurred in the US.[239] This has led some commentators to note that the transactional test extends the operation of *Morrison* to f-squared, not just f-cubed, cases[240] and in some cases would bar actions by US investors who purchased the securities of US issuers on a foreign exchange. As noted by Coffee, such an action is not even an f-squared action.[241]

The speculation about the application of *Morrison* to f-squared actions has been realised by *Plumbers Union Local No 12 Pension Fund v Swiss Reinsurance Co* ('*Plumbers*'),[242] where a class action was brought by US fund managers based in Chicago ('Plumbers') who had placed an order with brokers also based in Chicago to purchase Swiss Reinsurance ('Swiss Re') shares on a foreign exchange (a subsidiary of a Swiss exchange based in London). The US District Court for the Southern District of New York stated that '"the adoption of a clear test that will avoid" "interference with foreign securities regulation" is of paramount concern.'[243] The Court found that, as a general matter, a purchase order in the US for a security that is sold on a foreign exchange is insufficient to subject the purchase to the coverage of § 10(b) of the *Exchange Act*.[244]

Plumbers was a US resident, made the decision to invest in the US and suffered harm in the US. Plumbers' orders for the Swiss Re shares were placed from Chicago, and the traders who executed the purchase orders were located in Chicago. On the other hand, the defendant was a Swiss corporation, the relevant shares were listed on the SWX Swiss Exchange ('SWX'), and the stock market transactions in Swiss Re common stock were executed, cleared and settled on the virt-x trading platform, which was a subsidiary of SWX based in London.[245] The *Plumbers* Court cited the earlier decision of *Stackhouse v Toyota Motor Co* which held that

> because the actual transaction takes place on the foreign exchange, the purchaser or seller has figuratively traveled to that foreign exchange — presumably via a foreign broker — to complete the transaction.[246]

The *Plumbers* Court also referred to earlier authorities that rejected consideration of where the purchase had occurred. For example, *Re Société Générale Securities Litigation* stated that

> [b]y asking the Court to look to the location of 'the act of placing a buy order,' and to … 'the place at the wrong,' [the] Plaintiffs are asking the Court to apply the conduct test specifically rejected in *Morrison*.[247]

239 Andreas Tilp et al, 'AGORA — *Morrison v National Australia Bank*' (2010) 35 *DAJV Newsletter* 116, 121.
240 Ibid.
241 Coffee, 'What Hath *Morrison* Wrought?', above n 229.
242 (SD NY, No 08 Civ 1958 (JGK), 1 October 2010).
243 Ibid slip op 20 (Koeltl J), quoting *Morrison*, 130 S Ct 2869, 2886 (Scalia J for Roberts CJ, Scalia, Kennedy, Thomas and Alito JJ).
244 *Plumbers* (SD NY, No 08 Civ 1958 (JGK), 1 October 2010) slip op 20 (Koeltl J).
245 Ibid slip op 21.
246 (CD Cal, No CV 10-0922 DSF (AJWx), 16 July 2010) slip op 2 (Fischer J) (citations omitted), cited in ibid slip op 23.

The plaintiffs in *Plumbers* noted that they might have a claim under Swiss law, but they did not pursue that avenue.[248] The plaintiffs might naturally be discouraged from pursuing a claim in Switzerland because that jurisdiction has no equivalent to a class action procedure.[249]

Whether the strict application of the transactional test can be sustained may depend upon the extent to which the US courts and Congress can resist the traditional role played by the US as the securities policeman. In a time of declining resources, securities regulation may not be a high priority, particularly public enforcement conducted by SEC. However, this is arguably a bad time to curtail enforcement, since the corporate misbehaviour that created the GFC is only beginning to be redressed. Ideally, private enforcement would complement public enforcement,[250] but the future role of private enforcement in this area remains to be decided in the light of the SEC report commissioned under § 929Y of the *Dodd–Frank Act*.

In particular, it is one thing to portray the securities market as populated by sophisticated investors and issuers, but when the focus shifts to retail investors, the *Morrison* test becomes more problematic. The dual nature of investment is an aspect of securities regulation that has perplexed policymakers for a long time, although it is an entrenched feature of existing Australian securities regulation[251] and plays an important role in new policy being generated in the area.[252] From the US perspective, Langevoort identifies the need to ensure that the risks of foreign investment created by the system of regulatory differences (which have now been emphasised by *Morrison*) are understood by investors.[253]

247 (SD NY, No 08 Civ 2495 (RMB), 29 September 2010) slip op 9–10 (Berman J), cited in *Plumbers* (SD NY, No 08 Civ 1958 (JGK), 1 October 2010) slip op 18 (Koeltl J).

248 *Plumbers* (SD NY, No 08 Civ 1958 (JGK), 1 October 2010) slip op 24 n 5 (Koeltl J).

249 Baumgartner commented in 2007 that 'it is unlikely that the American-style class action will make an appearance in Swiss law … any time soon': Samuel P Baumgartner, 'Class Actions and Group Litigation in Switzerland' (2007) 27 *Northwestern Journal of International Law and Business* 301, 310.

250 However, the optimal relationship between private and public enforcement is 'hotly contested': Michael Legg and Jason Harris, 'How the American Dream Became a Global Nightmare: An Analysis of the Causes of the Global Financial Crisis' (2009) 32 *University of New South Wales Law Journal* 350, 387. See also the discussion in Rose, above n 122.

251 See, eg, the bifurcation in the regulation of prospectuses under ch 6D and financial products under ch 7 of the *Corporations Act 2001* (Cth).

252 See, eg, the draft market integrity rules issued by ASIC in November 2010: ASIC, 'Australian Equity Market Structure: Draft Market Integrity Rules' (November 2010) <http://www.asic.gov.au/cp>. These rules were issued pursuant to the announcements made by the Australian government on 31 March 2010 that indicated its support for competition between exchange markets in Australia, its in-principle support for granting an Australian market licence to Chi-X Australia Pty Ltd, and its decision that ASIC would take over the supervision of real-time trading on Australia's domestic licensed markets. The draft market integrity rules make various provisions for retail investors, for example the best execution obligation under ch G and the pre-trade transparency requirements under ch H. See also ASIC, 'Australian Equity Market Structure: Proposals' (Consultation Paper No 145, November 2010) <http://www.asic.gov.au/cp>.

253 Langevoort, '*Schoenbaum* Revisited', above n 14, 260.

B *The Centrifugal Effect of* Morrison

It is very likely that *Morrison* will have a centrifugal effect on transnational securities litigation, and securities class actions may flow to jurisdictions that have adopted the opt out procedure. One consequence of this might be that more securities class actions will be commenced in Australia. Redwood notes that although 'the US has significantly wound back on the availability of securities class actions … Australia [has] move[d] in the opposite direction toward an environment more conducive to the bringing of large shareholder class actions.'[254] Although many aspects of the US system that the *Morrison* amicus briefs claimed are pro-plaintiff — such as contingency fees, civil juries, the lack of 'loser pays' rules and certain types of punitive damages[255] — are not present in Australia, the principal structural element of the class action, the opt out procedure, is available in the Federal Court of Australia[256] and the Supreme Court of Victoria.[257]

Moreover, the Australian appetite for class actions is demonstrated by the recent enactment of pt 10 of the *Civil Procedure Act 2005* (NSW),[258] which provides for an opt out procedure in the New South Wales Supreme Court modelled on the Federal Court and Victorian Supreme Court equivalents.[259] The participation of New South Wales may give critical mass to the Australian class action regime and lead to further rule changes. For example, the reform of proof of individual reliance in securities class actions is an open question in Australia. The fraud on the market theory allows plaintiffs in securities class actions in the US to rely upon the efficiency of the market to establish the reliance element in § 10(b) of the *Exchange Act* (or more specifically, rule 10b-5), rather than establishing individual reliance. The theory therefore more readily facilitates class certification.[260] Fraud on the market theory was argued in a recent Austra-

254 Jonathon Redwood, 'US Supreme Court Effectively Ends US Securities Litigation against Australian Companies by Australian Plaintiffs for Conduct Which Occurred outside the United States' [2010] (155) *Corporate Law Bulletin* [4.4].

255 Australia, 'Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants–Appellees', Submission in *Morrison v National Australia Bank Ltd*, No 08-1191, 26 February 2010, 22.

256 *Federal Court of Australia Act 1976* (Cth) pt IVA.

257 *Supreme Court Act 1986* (Vic) pt 4A.

258 By the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) sch 6.1, which commenced on 4 March 2011.

259 *Civil Procedure Act 2005* (NSW) pt 10; *Federal Court of Australia Act 1976* (Cth) pt IVA; *Supreme Court Act 1986* (Vic) pt 4A. See also Department of Attorney-General and Justice (NSW), 'Consultation Draft: Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010' (12 October 2010) 1; Department of Attorney General and Justice (NSW), 'Consultation Draft: Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010 — Discussion Paper' (Discussion Paper, 21 October 2010) <http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/pages/lp_policydocuments>.

260 The doctrine gained formal US Supreme Court acceptance in *Basic Inc v Levinson*, 485 US 224 (1988). For an analysis of the doctrine's earlier development, see Barbara Black, 'Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions' (1984) 62 *North Carolina Law Review* 435, 439–46. See also Note, 'The Fraud-on-the-Market Theory' (1982) 95 *Harvard Law Review* 1143. For an overview of the Australian context, see Michael Duffy, '"Fraud on the Market": Judicial Approaches to Causation and Loss from

lian case,[261] although the matter settled before judgment was handed down. The theory has also been discussed in several other Australian cases.[262] As further securities class actions are commenced,[263] the issue will require resolution.[264]

Of course, if the bright-line transactional test in *Morrison* is effective in the long term, then there may be dissemination of litigation across many jurisdictions that have diversified enforcement approaches. However, *Morrison* has left a lot of questions unanswered, particularly questions about comity and the recognition of jurisdictional diversity that were raised in the briefs filed on behalf of foreign governments. Of course, this controversy will be revisited by the SEC's solicitation of public comments under the *Dodd–Frank Act*. Conway (quoting *Le Monde*) observed that the prospect of the SEC's eventual report to Congress '"scares a … number of foreign capitals," which "fear seeing the United States become" a global "financial policeman" through class-action lawsuits.'[265] Conway urged interested parties, in particular the amici in *Morrison* 'who so emphatically urged the Supreme Court to reject extraterritoriality[,] … to make their views known once again, this time to the SEC.'[266] Several of the amici — including the Australian,[267] French[268] and UK[269] governments — have in fact made submissions in response to the SEC's invitation. Unsurprisingly, their position is uniform and consistent: they urge caution against returning to the pre-*Morrison* norm.[270]

Securities Nondisclosure in the United States, Canada and Australia' (2005) 29 *Melbourne University Law Review* 621.

261 *Dorojay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19 (21 January 2009). See also Andrew Watson and Jacob Varghese, 'The Case for Market-Based Causation' (2009) 32 *University of New South Wales Law Journal* 948; Ross Drinnan and Jenny Campbell, 'Causation in Securities Class Actions' (2009) 32 *University of New South Wales Law Journal* 928.

262 See *De Bortoli Wines Pty Ltd v HIH Insurance Ltd (in liq)* [2011] FCA 645 (9 June 2011); *Johnston v McGrath* (2008) 67 ACSR 169; *Johnston v McGrath* [2007] NSWCA 231 (4 September 2007); *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111.

263 For example, proceedings were issued against the NAB on behalf of shareholders on 18 November 2010 to recover losses suffered as a result of alleged non-disclosures relating to the bank's exposure to toxic debt in collateralised debt obligations: Sue Lannin, 'NAB Sued over "Toxic" Investment', *ABC News* (online), 19 November 2010) <http://www.abc.net.au/news/stories/2010/11/18/3070137.htm>.

264 For competing arguments regarding the doctrine's adoption in Australia, compare Watson and Varghese, above n 261 with Drinnan and Campbell, above n 261.

265 George T Conway III, 'Extraterritoriality after *Dodd–Frank*' on *The Harvard Law School Forum on Corporate Governance and Financial Regulation* (5 August 2010) <http://blogs.law.harvard.edu/corpgov/2010/08/05/extraterritoriality-after-dodd-frank>.

266 Ibid.

267 Australia, Submission to the United States Securities and Exchange Commission, *Study on Extraterritorial Private Rights of Action*, 18 February 2011 <http://www.sec.gov/comments/4-617/4-617.shtml>.

268 France, Submission to the United States Securities and Exchange Commission, *Study on Extraterritorial Private Rights of Action*, 17 February 2011 <http://www.sec.gov/comments/4-617/4-617.shtml>.

269 HM Treasury, United Kingdom, Submission to the United States Securities and Exchange Commission, *Study on Extraterritorial Private Rights of Action*, 11 February 2011 <http://www.sec.gov/comments/4-617/4-617.shtml>.

270 Ibid 1; France, Submission to the United States Securities and Exchange Commission, above n 268, 3; Australia, Submission to the United States Securities and Exchange Commission, above n 267, 1.

IX CONCLUSION

The *Morrison* decision swept away over 40 years of expansive interpretation of the extraterritorial operation of the anti-fraud provisions and reversed the burgeoning role of the US as the international securities policeman. The short-term effects of the decision indicate that diligent application by US domestic courts of the majority's transactional test will restrict the extraterritorial operation of the anti-fraud provisions. Whether this is sustained in the long term will depend on whether the US courts can withstand the tension caused by US citizens losing the protective shield of US law when engaging in certain foreign securities transactions. More will be revealed by the SEC report commissioned pursuant to the *Dodd–Frank Act* and intriguing questions about the optimal relationship between private and public enforcement will continue.

In the meantime, *Morrison* will have a centrifugal effect on transnational litigation with the result that securities claims are more likely to be brought in non-US jurisdictions. However, due to political and cultural differences in enforcement practices and regulatory intensity, the migration of securities litigation is likely to be uneven. Australia's adoption of the opt out class action procedure, and its continuing appetite for the same (demonstrated by the recent New South Wales proposals to adopt this procedure), may mean that it is likely to gain a substantial share of this litigation.

In the meantime, questions persist about achieving an international or a harmonised framework for the enforcement of securities law. Whilst the arguments made by proponents of regulatory competition are laudable, the componentry of any proposed international enforcement regime needs to be carefully considered. Constructing an enforcement strategy around geographical boundaries is ultimately conceptually unworkable in a market where national boundaries are meaningless.

Although delivered at a high level of generality, the G-20's 2010 communiqué captured the essence of the task ahead:

> given the high interdependence among our countries in the global economic and financial system, uncoordinated responses will lead to worse outcomes for everyone. Our cooperation is essential.[271]

[271] G-20, 'Meeting of Finance Ministers and Central Bank Governors' (Communiqué, 23 October 2010) 1 <http://www.g20.org/Documents/201010_communique_gyeongju.pdf>.