Cross-Border Scope of Private Cause of Action Under the Commodity Exchange Act

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I. Introduction

When the U.S. Supreme Court decided *Morrison v. National Australia Bank Ltd.*, the court reinforced application of the presumption against extraterritoriality under section 10(b) ("SEA Section 10(b)") of the Securities Exchange Act of 1934 (the "SEA").[1] The court also introduced a new domestic transactional test to determine whether a transaction in connection with the purchase or sale of securities involving foreign elements is governed by a domestic statute. This meant an end to the old "conduct and effects" test devised by the Second Circuit and further developed in case law.[2] When deciding cases under the Commodity Exchange Act (the "CEA"), courts traditionally look at the securities laws.[3] Therefore, *Morrison* has had a tremendous impact on the private actions under the CEA.

The focus of this Article is to analyze what is the appropriate standard to determine if the CEA has extraterritorial application to private actions for fraud and manipulation in the derivatives market involving a foreign element. The analysis in Part I presents the "conduct and effects" test first introduced by the Second Circuit in *Schoenbaum v. Firstbrook* and *Leasco Data Processing Equipment Corp. v. Maxwell* and the test's application to private claims under the CEA.[4] Part II focuses on a two-step extraterritoriality analysis of a statutory text, and a two-prong test to determine whether a transaction at issue is domestic, both introduced by *Morrison*. This Article also analyzes the application of these tests to private claims under the CEA.

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1. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 269–70 (2010); 15 U.S.C. § 78j(b) (2012).

2. *See Morrison*, 561 U.S. at 262.

3. Saxe v. E.F. Hutton & Co., Inc. 789 F.2d 105, 109 (2d Cir. 1986); 7 USC § 1, et seq. (2012).

4. *See generally* Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968); *see also* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

Finally, this Article reviews approaches alternative to the existing presumption against extraterritoriality analysis and determines which is the most viable option.

II. Cross-Border Application of the CEA Prior to *Morrison*

A. CEA's Rules For A Private Cause of Action

The implied private cause of action available for futures investors under the CEA was first held by the Supreme Court to exist in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*.[5] The *Curran* court, however, did not address the legal elements of the action, such as "liability, causation and damages," leaving a "private civil action given to futures investors a mere shell."[6] After *Curran*, Congress enacted CEA section 22 ("CEA Section 22"), superseding *Curran.*[7] A private right of action is afforded under CEA Section 22 in the following enumerated circumstances: "(1) receiving of trading advice for a fee, (2) making a contract of sale of any commodity for future delivery or the payment of money to make such a contract, (3) placing an order for purchase or sale of a commodity, or (4) market manipulation in connection with a contract for sale of a commodity."[8] Only those plaintiffs who are able to show that they actually traded in the commodities market will have standing under CEA Section 22.[9] Losses from the transaction subject to the CEA should be trading losses.[10]

Private action can be brought against "persons other than registered entities and registered futures associations," and registered entities and registered futures associations as well as their "officers, directors, governors, committee members and employees."[11] "An owner of an actual commodity who does not trade futures contracts but who experiences a loss in the value of that commodity due to price manipulation in futures markets may not sue market participants."[12] The first category can be further subdivided into two classes. First, an investor can sue entities with whom he or she has privity pursuant to a contractual agreement with such entity (e.g., futures commission merchants or individuals providing trading advice to investors, or brokers of non-exchange options).[13] Second, entities with whom a plaintiff is not in

5. Donna C. Leeker & James J. Moylan, *Private Rights of Action under the Commodity Exchange Act - The Supreme Court Decides*, 16 J. MARSHALL L. REV. 307, 307 (1983); *see generally* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982).

6. Cynthia L. Moore, *An Express Private Right of Action for Futures Investors: Does Section 22 of the Commodity Exchange Act Afford Adequate Protection*, 35 CAS. W. RES. L. REV. 72, 72 (2016); *see also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982).

7. Moore, *supra* note 6, at 73; *see* 7 U.S.C. § 25 (2012).

8. Loginovskaya v. Batratchenko, 764 F.3d 266, 270 (2014) (citing Klein & Co. Futures, Inc. v. Bd. of Trade of N.Y., 464 F.3d 255, 262 (2d Cir. 2006)); *see* 7 U.S.C. § 25 (2012).

9. *Klein*, 464 F.3d at 260; *see also* 7 U.S.C. § 25(b)(1)-(3) (2012).

10. *Klein*, 464 F.3d at 259.

11. *See id.* at 259; *see* 7 U.S. Code § 25(a) (2012).

12. Moore, *supra* note 6, at 86.

13. *Id.* at 86–87.

contractual privity can also be parties to the litigation under CEA Section 22 (e.g., a manipulator of the commodities' prices).[14]

B. The "Conduct and Effects" Test

Prior to *Morrison*, the "conduct and effects" test was used to determine extraterritorial application of the federal securities laws. This test was called "the north star" of the Second Circuit's jurisprudence and was used for years to determine whether protections and remedies contained in SEA Section 10(b) apply extraterritorially to the fraudulent securities transactions occurring abroad.[15]

1. "Effects"

In *Schoenbaum*, the Second Circuit introduced the "effects" prong of the "conduct and effects" test by holding that if wrongful conduct has a substantial effect in the United States or upon the citizens of the United States, a domestic court has jurisdiction to hear the case.[16] The court applied SEA Section 10(b) to fraudulent activities in relation to the treasury shares of a Canadian corporation whose common stock traded both on the American Stock Exchange and the Toronto Stock Exchange, saying that it sufficed to apply SEA Section 10(b).[17] Although the transactions took place in Canada, the transactions affected the value of the common shares publicly traded in the United States so it was necessary to protect American investors.[18]

2. "Conduct"

The "conduct" part of the test was later introduced in *Leasco*.[19] In *Leasco* some of the fraudulent activities occurred in the United States, and the company located in the United States was fraudulently induced to buy shares of the British corporation in excess of their market value.[20] Here, the court ruled that "if Congress has expressly prescribed a rule with respect to conduct outside the United States, even one going beyond the scope recognized by foreign relations law, a United States court would be bound to follow the congressional direction unless that would violate the due process clause of the Fifth Amendment."[21]

"Conduct" was further clarified in *Tamari v. Bache & Co. S.A.L.* as "conduct occurring in the United States" that was "material to the successful completion of the

14. *Id.* at 86–87.
15. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 257 (2010).
16. Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968).
17. *Id.*
18. *Id.*
19. *See generally* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).
20. *Id.* at 1330–31.
21. *Id.* at 1334.

alleged scheme . . . based on the theory that Congress would not have intended the United States to be used as a base for effectuating the fraudulent conduct of foreign companies," and the "effects" element as conduct occurring in foreign countries that had caused foreseeable and substantial harm to interests in the United States.[22]

C. Application of the "Conduct and Effects" Test Under the CEA

Pre-*Morrison* case law relating to the application of anti-fraud and anti-manipulation provisions of the CEA followed the "conduct and effects" test. However, even before *Morrison,* more often than not*,* courts rejected the application of the CEA to the foreign-cubed claims (i.e., claims which are filed by foreign plaintiffs, against foreign issuers), or other eligible parties, arising from purchases or sales on foreign markets[23] or foreign-squared claims (i.e., claims which are filed by U.S. shareholders who purchased stock of foreign issuers on foreign exchanges).[24] To assert jurisdiction, courts look for domestic elements such as the trading of securities and/or the execution of transactions in the United States.

In *Tamari*, Lebanon citizens asserted a claim against a Lebanese corporation wholly owned by a Delaware corporation, alleging fraud and mismanagement of the commodity futures trading accounts in violation of section 6(b) and section 6(c) of the CEA.[25] The trading of the commodity futures took place on a U.S. exchange and the contacts between the parties occurred in Lebanon.[26] The *Tamari* court asserted jurisdiction under the "conduct and effects" test.[27] The court held that "when transactions initiated by agents abroad involved trading on United States exchanges, the pricing and hedging functions of the domestic markets are directly implicated."[28]

Each element of the "conduct and effects" test should be self-sufficient for a court to assert domestic jurisdiction.[29] The conduct occurring in the United States should be "substantial" and cause direct loss for the foreigners suing in domestic

22. Tamari v. Bache & Co. S.A.L., 730 F.2d 1103, 1108 (7th Cir. 1984).

23. *See* ROBERT L. HAIG, 8 BUS. & COM. LITIG. FED. CTS. § 81:4 (Thomson West, 4th ed.); Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934 as Required by Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act, U.S. SEC, at ii (2012), https://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf [hereinafter Cross-Border Study].

24. Jennifer Mitchell Coupland, *A Bright Idea: A Bright-Line Test for Extraterritoriality in F-Cubed Securities Fraud Private Causes of Action*, 32 NW. J. INT'L L. & BUS. 541, 542 (2012) (citing Louis M. Solomon, Court Dismisses Both – Foreign Cubed as Well as – a Foreign Squared Securities Claims Based on Morrison, Cadwalader Int'l Prac. L. Blog (Sept. 19, 2011)).

25. *Tamari*, 730 F.2d at 1104.

26. *Id.*

27. *Id.* at 1107.

28. Tamari v. Bache & Co. S.A.L., 730 F.2d 1103, 1108 (7th Cir. 1984).

29. Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1047 (2d Cir.1983).

courts.[30] "Substantial" conduct should be different from mere preparatory activities in cases initiated by foreigners.[31] The court in *Bersch v. Drexel Firestone, Inc.* indicated that "while merely preparatory activities in the United States are not enough to trigger application of the securities laws for injury to foreigners located abroad, they are sufficient when the injury is to Americans so resident."[32] Implementation of the "conduct and effects" test prevents foreign citizens and corporations from using the United States as a base to implement their fraudulent devices in the securities and commodities market.[33]

D. Reasons *Morrison* Overruled the "Conduct and Effects" Test

There are several reasons why the Supreme Court repealed the "conduct and effects" test. First, the "conduct and effects" test is characterized as unpredictable due to inconsistent application of the test.[34] Lack of predictability discourages investment and capital raising.[35] The court in *Morrison* cautions against attributing too much weight to the test only because it was numbered among Judge Friendly's many fine contributions to the law and nurtured by his successor "under the impression that they nurture the same mighty oak, when in reality tending each its own botanically distinct tree."[36]

Foreign policy concerns also favor strengthening the presumption against extraterritoriality when interpreting laws.[37] The Supreme Court recognizes the importance of deference to foreign laws in order to avoid clashes with foreign jurisdictions, stating that the "probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign applications it would have addressed the subject of conflicts with foreign laws and procedures" in the statute.[38] The extent to which U.S. regulations can interfere with the policy approaches of a foreign sovereign is important because different nations have reached different conclusions about what conduct constitutes fraud, the methods of deterrence, and the prosecution of the same.[39] In *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, the court interprets the Supreme Court's criticism of the "conduct and effects" test as based on the Second Circuit's own perceptions coincided about "whatever the particular court thought to be good 'policy' for the particular case."[40]

30. *Id.*
31. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 992 (2d Cir.1975).
32. *Id.*
33. *Id.* at 1000.
34. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 260 (2010).
35. Cross-Border Study, *supra* note 23, at iii.
36. *Morrison*, 561 U.S. at 259.
37. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2011).
38. *Morrison*, 561 U.S. at 269; *see also Kiobel*, 569 U.S. at 115–16.
39. Cross-Border Study, *supra* note 23, at iii.
40. Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 220 (2d Cir. 2014).

III. Cross-Border Application of the CEA After *Morrison*

A. Presumption Against Extraterritoriality: A Two-Prong Test

The presumption against extraterritoriality is supported by the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" [41] The *Morrison* court not only upheld this presumption against extraterritoriality, but also identified the exceptions to the rule and laid out a roadmap to determine the applicability of extraterritoriality. [42] The court in *RJR Nabisco, Inc. v. European Community* later clarified that *Morrison* introduced a two-step extraterritoriality test comprised of two factors: (1) the analysis of Congress's underlying intent to enact the law, and (2) the review of foreign policy concerns that were on Congress's radar when enacting the law. [43]

First, inquiry is made as to whether the text of the statute provides for the clearly expressed affirmative intention of Congress to extend the scope of the statute beyond domestic application. [44] If there is no express indication of an extraterritorial reach, the statute may not have extraterritorial application. [45] *Morrison* confirmed there was no affirmative indication in the SEA that SEA Section 10(b) applies extraterritorially. [46]

Prior to *Morrison*, well-established case law provided that the CEA did not apply abroad. For example, after analyzing the CEA's text and legislative history, the *Tamari* court concluded there was no direct evidence that Congress intended the CEA to apply to foreign agents, nor was there any indication to the contrary. [47] In *CFTC v. Garofalo*, the court referred back to *Tamari* and concluded that the Seventh Circuit had ruled, after a thorough analysis, that neither the CEA nor its legislative history specifically authorized extraterritorial application of the statute. [48]

After *Morrison*, the courts in *In re LIBOR–Based Financial Instruments Antitrust Litigation* and *Loginovskaya v. Batratchenko* followed earlier case law holding that "the CEA as a whole, and particularly section 4(o) and section 22, is silent as to extraterritorial outreach." [49]

Once it is determined a statute has no clear statement as to whether its provisions can be applied outside the United States, the analysis does not end. The presumption against extraterritoriality is not "self-evidently dispositive" and

41. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).
42. *See generally* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).
43. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016).
44. *Id.*
45. *Id.*
46. *Morrison*, 561 U.S. at 265.
47. Tamari v. Bache & Co. S.A.L., 730 F.2d 1103, 1107 (7th Cir. 1984).
48. CFTC v. Garofalo, No. 10 C 2417, 2010 WL 11245430, at *5 (N.D. Ill. Dec. 21, 2010).
49. *In re* LIBOR–Based Fin. Instr. Antitrust Litig., 935 F.Supp.2d 666, 696 (S.D.N.Y. 2013); Loginovskaya v. Batratchenko, 764 F.3d 266, 271 (2014).

"requires further analysis" because it is a rare case that a transaction or certain conduct has no contact with the United States.[50]

If there is no trace of express congressional intent, then the "focus of congressional concern" must be determined. When enacting a statute, Congress may be concerned with the place of deception, the place of transaction, the location of the entity, the public interest, or the investor's protection.

B. Extraterritoriality: Question of Merits or Jurisdiction

In *Loginoviskaya*, the majority opinion and the dissenting opinion disagreed as to whether the presumption against extraterritoriality is applicable to all provisions of a statute or only to its substantive provisions, i.e., those which regulate the conduct.[51]

Extraterritoriality boils down to whether a domestic statute can regulate conduct which occurs abroad. In other words, the determination of a statute's extraterritoriality depends upon the reach of the statute.[52] The *Garofalo* and *Morrison* courts indicated that the question of extraterritorial application is different from the question of subject-matter jurisdiction.[53] Subject-matter jurisdiction pertains to a court's ability to adjudicate claims under the statute in question.[54] Prior to *Morrison*, the "conduct and effects" test was primarily used to determine whether a domestic court had subject matter jurisdiction to hear a case.[55]

For instance, in *Kiobel v. Royal Dutch Petroleum Co.*, the court looked to whether the Alien Tort Statute (the "ATS") could reach the conduct of corporations occurring in Nigeria.[56] The court held that the question of extraterritoriality is a question of merits, and not of jurisdiction.[57] Therefore, the court held that the presumption against extraterritoriality does not apply to the ATS since the ATS is a jurisdictional statute and "does not directly regulate conduct or provide relief."[58] Therefore, claims under the ATS should be brought under customary international law.[59]

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50. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010).
51. *Loginovskaya*, 764 F.3d at 273; *id.* at 276–77 (Lohier, J., dissenting).
52. *Garofalo*, 2010 WL 11245430 at *4.
53. *Id.*; *Morrison*, 561 U.S. at 254.
54. *Morrison*, 561 U.S. at 254.
55. "We believe it is appropriate to rely on the "conduct" and "effects" tests in discerning whether subject matter jurisdiction exists over this dispute. Both tests were developed in cases brought under the antifraud provisions of the federal securities laws." Tamari v. Bache & Co. S.A.L., 730 F.2d 1103, 1107 (7th Cir. 1984).
56. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115 (2011).
57. *Id.* at 116; *see also* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 254 (2010).
58. *Kiobel*, 569 U.S. at 116.
59. *Id.* (dismissing the claims of the Nigerian residents, finding no rule in the customary international law under which corporations are liable for aiding and abetting a foreign government in human rights violations).

However, contrary to the *Kiobel* holding, the *Morrison* court held that the presumption against extraterritoriality is applicable to *all* provisions of a statute, not only those which regulate conduct or are of a jurisdictional nature.[60] The *Loginovskaya* court subsequently enforced the *Morrison* rule and applied the presumption against extraterritoriality to both CEA Section 22 and section 4(o) of the CEA under which the plaintiff brought her claim.[61] Writing for the dissent, Judge Lohier argued that CEA Section 22 does not regulate any conduct as such.[62] The CEA determines who has standing to bring private actions under the CEA and which entities can be held liable (i.e., defining the categories of persons entitled to seek relief under the CEA).[63] Judge Lohier interprets *Kiobel* as endorsing "the distinction between substantive provisions and those that only create causes of action."[64] In *Loginovskaya* the plaintiff argued that the presumption against extraterritoriality is not applicable to CEA Section 22 and referred to *Blazevska v. Raytheon Aircraft Company*.[65] The *Blazevska* court held that the presumption against extraterritoriality does not apply to procedural statutes which do not regulate any conduct.[66] The *Loginovskaya* court dismissed this argument, stating that *Blazevska* was decided before *Morrison* and has little significance now.[67]

C. Domestic Transactional Test

The court held in *Morrison* that SEA Section 10(b) focuses on the purchase and sale of securities in the United States rather than focusing on the location where the deception took place.[68] A few years after *Morrison*, the *Loginovskaya* court concluded that the focus of CEA Section 22 is clearly transactional because it limits an investor's right to sue to four limited transactions: (1) "receiving trade advice for a fee," (2) "the making of a contract of sale or a deposit in connection with any order to make such a contract," (3) "the purchase, sale, or order for a commodity interest," and (4) "market manipulation in connection with a contract of sale."[69] Even though the defendant corporation was incorporated in New York, the court expressly stated that residency or citizenship were not relevant to the location of the transaction.[70] *Morrison* clarifies

60. *Morrison*, 561 U.S. at 261.
61. Loginovskaya v. Batratchenko, 764 F.3d 266, 277 (2014).
62. *Id.* at 276–77 (Lohier, J., dissenting).
63. *Id.* at 272 (majority opinion).
64. *Id.* at 277 (Lohier, J., dissenting).
65. *Id.* at 269; *see generally* Blazevska v. Raytheon Aircraft Co., 522 F.3d 948 (2008).
66. *Loginovskaya*, 764 F.3d at 272 n.5 (majority opinion) (citing *Blazevska*, 522 F.3d at 953).
67. *See* Loginovskaya v. Batratchenko, 764 F.3d 266, 272 (2014).
68. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 269, 285 (2010) (noting that the executives of the Australian bank's subsidiary made misleading public statements in Florida).
69. *Loginovskaya*, 764 F.3d at 272; *see* 7 U.S.C. § 25 (2012).
70. *Loginovskaya*, 764 F.3d at 273–74; Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F.Supp.2d 166, 178 (S.D.N.Y. 2010). Alternatively, some statutes,

that SEA Section 10(b) seeks to regulate those securities listed on U.S. domestic exchanges and those securities which are the subject of U.S. domestic purchase and sale transactions, thus overruling the "north star" of the Second Circuit's jurisprudence—the "conduct and effects" test—and introducing a two-prong domestic transactional test which applies to the CEA.[71] The domestic transaction test provides that "a commodities transaction will be considered domestic" and governed by the CEA, "if (1) the transaction occurred on a domestic exchange; or (2) the transaction itself is domestic."[72]

1. First Prong: Trading on A Domestic Exchange

As previously mentioned, the first prong of this test, the "domestic exchange" prong, is rather straightforward—unlike the second prong which will be addressed later on. To meet the "domestic exchange" prong, a derivatives contract must be traded on a U.S. designated contract market or trading facility.

An issue which arises under the "domestic exchange" prong of the *Morrison* test is the status of securities, albeit listed on U.S. exchanges, which are listed on foreign exchanges and are traded more frequently on such foreign exchanges.[73] In *City of Pontiac Policemen's and Firemen's Retirement System v. UBS AG,* the court ruled that a bar on extraterritorial application of the U.S. securities laws, as set forth in *Morrison*, precludes claims brought pursuant to the SEA by purchasers of shares of a foreign issuer on a foreign exchange, even if those shares were cross-listed on a U.S. exchange.[74]

Morrison leaves aside application of its provisions to the disputes arising under the CEA. The seminal case which deals with the application of the *Morrison* rule to the cases brought under the CEA is *Loginovskaya*.[75] In *Loginovskaya* the plaintiff, a Russian national, sued under (1) CEA Section 22, which provides for a private cause of action for violations of the CEA generally, and (2) section 4(o) of the CEA, which is the anti-fraud provision of the CEA giving the right to sue commodity pool operators and

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such as the Racketeer Influenced and Corrupt Organizations Act ("RICO"), remain focused on the identity of the defendant. *See* Mitsui O.S.K. Lines v. Seamaster Logistics, Inc., 871 F.Supp.2d 933, 938 (N.D.Cal. 2012) (quoting European Cmty. v. RJR Nabisco, Inc., No. 02–CV–5771 (NGG)(VVP), 2011 WL 843957 at *5 (E.D.N.Y. Mar. 8, 2011)).

71. *Loginovskaya*, 764 F.3d at 272; Myun-Uk Choi v. Tower Research Capital LLC, 890 F.3d 60, 68 (2d Cir. 2018); Sullivan v. Barclays PLC, No. 13-CV-2811 (PKC), 2017 WL 685570, at *28 (S.D.N.Y. 2017).

72. *In re* North Sea Brent Crude Oil Futures Litig., 256 F.Supp.3d 298, 308 (S.D.N.Y. 2017); *see also In re* London Silver Fixing, Ltd. Antitrust Litig., 332 F.Supp.3d 885, 918 (S.D.N.Y. 2018).

73. *See generally* Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 HARV. L. REV. 196 (2011).

74. City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 180 (2d Cir. 2014).

75. *See generally* Loginovskaya v. Batratchenko, 764 F.3d 266 (2014).

commodity trading advisors (and associated persons).[76] The plaintiff alleged that she was solicited to enter into investment contracts with the defendants, a U.S. citizen residing in Moscow, and Thor United, a company which is part of the New York international financial services organization, the Thor Group.[77] The plaintiff also alleged that the defendants misappropriated her funds and used her funds to finance a New York real estate venture in which the defendants had personal interest.[78] The Supreme Court dismissed plaintiff's claim, stating that she failed to prove that the disputed transactions occurred in the United States.[79] If the Supreme Court, however, had applied the "conduct and effects" test, it could have ruled in favor of the plaintiff because the defendants had been using the United States as the platform to promote the "fraudulent devices and contrivances", thus satisfying the conduct element of the test.

To sum up, *Loginovskaya* and *Absolute Activist Value Master Fund Limited v. Ficeto* have created the legal framework for the application of the *Morrison* transactional test to the disputes arising under the CEA.[80] Both cases, however, focused on the second prong of the test, i.e., the occurrence of a "domestic transaction", leaving aside the analysis of the "domestic exchange" prong.

2. Second Prong: A Domestic Transaction

Absolute Activist, a case regarding securities fraud, addresses the "domestic transaction" and is reaffirmed by *Loginovskaya* for transactions governed by the CEA.[81] In *Absolute Activist*, the court explained what it means for the purchase and sale of securities to occur in the United States. The purchase and sale transaction is domestic if either (1) title to the securities is transferred in the United States; or (2) irrevocable liability attaches in the United States, meaning the purchaser incurs the irrevocable liability within the United States to take and pay for a security, or the seller incurs irrevocable liability within the United States to deliver a security.[82] The court looked at the definitions of "purchase" and "sell" in the SEA and concluded that a "sale" consists of the passing of title from the seller to the buyer for a price, and a "purchase and sale" takes place when the parties become bound to effectuate a transaction.[83] The parties to a transaction are bound when each are obligated to perform what they agreed to perform even though their performance follows their obligation after some time.

76. *Id.* at 271–72.
77. *Id.* at 268–69.
78. *Id.*
79. *Id.* at 275.
80. *See generally id.*; *see also* Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60 (2d Cir. 2012).
81. *See generally* Loginovskaya v. Batratchenko, 764 F.3d 266 (2014); *see also Absolute Activist Value Master Fund Ltd.*, 677 F.3d at 60.
82. *Absolute Activist Value Master Fund Ltd.*, 677 F.3d at 69; Myun-Uk Choi v. Tower Research Capital LLC, 890 F.3d 60, 68–69 (2d Cir. 2018).
83. *Absolute Activist Value Master Fund Ltd.*, 677 F.3d at 67.

The court ties "binding" and "irrevocability" with the notion of "commitment" which points to the moment of a meeting of the minds in the classic contractual sense.[84]

In *Myun-Uk Choi v. Tower Research Capital LLC*, the court ruled that the Korean investors made it "plausible" that their transactions were "domestic transactions" and therefore subject to the anti-manipulation provisions of the CEA.[85] The plaintiffs had placed their orders for futures trading on the Korean exchange night market and those orders were matched with counterparties on the CME Globex electronic trading platform located in Illinois.[86] The plaintiffs alleged that the New York high-frequency trading firm and its founder engaged in manipulative spoofing transactions on the Korean exchange night market by trading on the CME Globex.[87] The defendants argued that since the clearing and settlement of the transactions occurred in Korea, the second prong of *Morrison* was not met.[88] The court ruled that the Korean investors and their counterparties assumed the irrevocable liability when their orders were matched on CME Globex but not during the clearing or settlement.[89] In other words, a meeting of the minds occurred in the United States.

When determining whether title transferred or irrevocable liability attached in the United States, the court in *Absolute Activist* looked to, *inter alia*, the facts of "the formation of contracts, the placement of purchase orders, the passing of title, or the exchange of money."[90] The mere transfer of the money to the bank account maintained in the United States was not enough to adequately plead that a "domestic transaction" had taken place.[91] The plaintiffs in *Absolute Activist*, foreign hedge funds which bought securities of the thinly capitalized U.S.-based companies, argued that for the "domestic transaction" prong to be met, the court should consider such factors as the location of the broker-dealer, the identity of the securities and the identity of their issuer, and whether the defendants engaged in any conduct in the United States.[92] The court rejected these factors, saying that the *Morrison* standard focuses on domestic transactions in unlisted securities but not in transactions in domestic securities.[93]

In *City of Pontiac Policemen's and Firemen's Retirement System*, the court, when analyzing whether the irrevocable liability attached in the United States, held that "mere placement of a buy order in the United States for the purchase of foreign securities on a foreign exchange is not sufficient to allege that a purchaser incurred

84. *See id.* at 67–68.
85. *Myun-Uk Choi*, 890 F.3d at 68.
86. *Id.* at 63–64.
87. *Id.* at 64.
88. Myun-Uk Choi v. Tower Research Capital LLC, 890 F.3d 60, 65 (2d Cir. 2018).
89. *Id.* at 67.
90. Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 70 (2d Cir. 2012).
91. Loginovskaya v. Batratchenko, 764 F.3d 266, 275 (2014).
92. *Absolute Activist Value Master Fund Ltd.*, 677 F.3d at 68–69.
93. *Id.* at 69.

irrevocable liability in the United States, such that the Securities Exchange Act governs the purchase of those securities."[94]

In between *Morrison* and *Absolute Activist*, various cases have showed that courts looked at the identity of the securities and the issuer invoking anti-extraterritoriality presumption for private actions involving securities of foreign issuers.[95] In *Cornwell v. Credit Suisse Group*, the court echoed *Morrison*, emotionally calling the "conduct and effects" test "dead letter" and dismissing the American investor's action brought under SEA Section 10(b) against Credit Suisse.[96] The court seemed to be very cautious about misreading the transactional test and restoring the "conduct and effects" test in light of *Morrison*, and concluding that SEA Section 10(b) applies to foreign securities traded on foreign exchanges even if purchased or sold by American investors, or even if some aspects of the transaction occurred in the United States.[97] By doing so, the court seemed to avoid at any cost returning to the "conduct and effects" test and contravened the *Morrison* domestic transaction test, saying "that the Supreme Court considered and was entirely aware that its new test would preclude extraterritorial application of SEA Section 10(b) to foreign securities transactions involving alleged wrongful conduct that could cause harm to American investors in the United States, or that entail the occurrence of some acts in the United States in furtherance of the purchase or sale."[98]

The location of the broker-dealer is important only in the event that it "carries out tasks that irrevocably bind the parties to buy or sell securities."[99] In *Myun-Uk Choi* and *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Company*, the courts interpreted *Morrison* in a way that if there is a domestic transaction in the meaning of the *Morrison* test, this fact alone is sufficient to rebut the presumption against extraterritoriality and invoke the application of the SEA or the CEA, as the case may be.[100]

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94. City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 181 (2d Cir. 2014).

95. "'Domestic transactions' or 'purchases or sales' . . . in the United States means purchases and sales of securities explicitly solicited by the issuer within the United States rather than transactions in foreign-traded securities where the ultimate purchaser or seller has physically remained in the United States." Stackhouse v. Toyota Motor Co., No. CV 10–0922, 2010 WL 3377409, at *1 (C.D.Cal. 2010).

96. Cornwell v. Credit Suisse Grp., 729 F.Supp.2d 620, 622 (S.D.N.Y. 2010).

97. *Id.* at 626.

98. *Id.*

99. Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 68 (2d Cir. 2012).

100. "Morrison clearly provided that the 'domestic transaction' prong is an independent and sufficient basis for application of the Securities Exchange Act to purportedly foreign conduct." Myun-Uk Choi v. Tower Research Capital LLC, 890 F.3d 60, 67 (2d Cir. 2018). "While Morrison held that a domestic purchase or sale is necessary (and, as far as that opinion reveals, sufficient) for Section 10(b) to apply to a security that is not traded on a domestic securities exchange, it did not have occasion to discuss what it means for a purchase or sale to be 'made in the United States." Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., 753 F.Supp.2d 166, 176 (S.D.N.Y. 2010).

D. Application of the Securities Laws to the CEA

Morrison is a seminal case for the extraterritorial application of the securities laws; however, can the *Morrison* test be applied to transactions that are subject to the CEA? Traditionally, the rules established in securities regulation applied to transactions subject to the CEA. For example, in *Saxe v. E.F. Hutton & Co., Inc.,* the court said that "traditionally, courts have looked to the securities laws when called upon to interpret similar provisions of the CEA."[101] Also, the court in *In re North Sea Brent Crude Oil Futures Litigation* stated that the framework and test for determining whether a transaction that does not involve a security listed on a domestic exchange will be considered domestic, and, thus, subject to the SEA, applies to private actions brought for violations of the CEA.[102] However, the application of the *Morrison* test outside the securities context is not immediately clear.

In *Loginovskaya*, Judge Lohier wrote in his dissent that the *Morrison* rule is inapplicable to actions brought under section 4(o) of the CEA (the CEA's primary anti-fraud provision).[103] To review, SEA Section 10(b) provides that, in order to prove fraud, the plaintiff must show that deception took place in connection with a sale and purchase of securities.[104] Section 4(o) of the CEA does not require that the transaction occur, prohibiting fraud without any requirement that it should be in connection with any particular transaction or event.[105] Therefore, in his dissent, Judge Lohier says that the focus of the CEA is on regulated commodity entities, "the market's ambassadors", rather than on the transactions themselves.[106]

E. Extraterritorial Outreach of CFTC's Enforcement Actions After *Morrison*

The *Morrison* transactional test extends to claims of private parties but does not touch upon the Commodity Futures Trading Commission's (the "CFTC") enforcement authority. The approach taken in relation to the securities laws is similar. In reaction to *Morrison*, Congress passed section 929P(b)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which provides "the necessary affirmative indication of extraterritoriality for Section 10(b) actions involving transnational securities fraud brought by [the SEC or the U.S. Department of Justice.]"[107] In particular, section 929P(b)(2) pertains to fraud involving "conduct within the United States that constitutes a significant step in furtherance of the violation, even if the securities transaction occurs outside the United States and

101. Saxe v. E.F. Hutton & Co., Inc. 789 F.2d 105, 109 (2d Cir. 1986).
102. *In re* North Sea Brent Crude Oil Futures Litig., 256 F.Supp.3d 298, 307 (S.D.N.Y. 2017).
103. Loginovskaya v. Batratchenko, 764 F.3d 266, 276 (2014) (Lohier, J., dissenting).
104. *Id.* at 280 n.4.
105. *Id.*
106. *Id.* at 281.
107. Cross-Border Study, *supra* note 23, at i.

involves only foreign investors; or conduct occurring outside the United States that has a foreseeable substantial effect within the United States."[108] The text of section 929P(b)(2) reinforces the "conduct and effects" test devised by the Second Circuit, limiting the test only to the SEC's enforcement actions and leaving private actions aside.[109] The SEC was granted authority to bring actions to rectify violations of the SEA, Securities Act,[110] or Investment Advisors Act[111] stemming from specified extraterritorial conduct.[112]

The Dodd-Frank Act changed the CEA's impact by including the provisions which address the outreach of CFTC's enforcement actions over extraterritorial activities.[113] The Dodd-Frank Act has established the comprehensive regulatory framework to implement the goals established during the Pittsburg G20 summit, such as requiring standardized swaps to be cleared through central counterparties or clearinghouses and traded on transparent, regulated platforms; establishing an oversight system over swap dealers and major swap participants; regularly reporting swaps market data in order to facilitate greater transparency; and enhancing regulatory oversight.[114] The CFTC was granted jurisdiction over swaps,[115] and section 2(i) of the CEA established that the Dodd-Frank Act "shall not apply to activities outside the United States unless those activities have a direct and significant connection with activities in, or effect on, commerce of the United States."[116]

Under the current regulatory regime, the CFTC has authority to bring enforcement actions over a much broader range of issues than private parties. The CEA is "a remedial statute that serves the crucial purpose of protecting the innocent individual investor, who may know little about the intricacies and complexities of the commodities market, from being misled or deceived."[117] A private right of action is an important remedy available for investors.[118] In a statement issued by former

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108. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 929P(b)(2) (2010).

109. *Id.*

110. 15 U.S.C. § 77a et seq. (2012).

111. 15 U.S.C. § 80b-1 et seq. (2012).

112. Michael L. Spafford & Daren F. Stanaway, *The Extraterritorial Reach of the Commodity Exchange Act in the Wake of Morrison and Dodd-Frank*, 37 FUTURES & DERIVATIVES LAW REPORT 1, 2 (2017), *available at* https://www.paulhastings.com/docs/default-source/default-documentlibrary/fdlr_37_7_art1.pdf.

113. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 929P(b)(2) (2010).

114. J. Christopher Giancarlo, Chairman, CFTC, Cross-Border Swaps Regulation Version 2.0. A Risk-Based Approach with Deference to Comparable Non-U.S. Regulation White Paper 5–6 (Oct. 1, 2018), *available at* https://www.cftc.gov/sites/default/files/2018-10/Whitepaper_CBSR100118_0.pdf.

115. 7 U.S.C. § 2(a)(1) (2012).

116. 7 U.S.C. § 2(i)(1)–(2) (2012).

117. Loginovskaya v. Batratchenko, 764 F.3d 266, 270 (2014).

118. "Meritorious private actions have long been recognized as an important supplement to civil and criminal law-enforcement actions." Cross-Border Study, *supra* note 23, at i.

Chairman of the CFTC, Timothy Massad, to the CFTC, Massad opined that "private rights of action have been instrumental in helping to protect market participants and deter bad actors. These actions can also augment the limited enforcement resources of the CFTC, and serve the public interest by allowing harmed parties to seek damages in instances where the CFTC lacks the resources to do so on their behalf."[119] However, the extent to which government authority can bring enforcement actions is broader than the one in disposition of the private parties under the SEA and the CEA.

The CEA contains an affirmative indication that it applies to extraterritorial transactions concerning suits brought by the CFTC itself.[120] The court held in *Sullivan v. Barclays PLC* that the CEA "draws a distinction between the extraterritoriality limits on a private action and enforcement actions brought by the CFTC itself."[121] In *CFTC v. Vision Financial Partners, LLC*, the CFTC brought an action against commodity trading advisors for an alleged fraudulent scheme involving foreign investors in binary options traded through foreign trading platforms.[122] The defendants argued that based on *Morrison* the CFTC could not sue them because the alleged violations concerned transactions between non-U.S. residents and non-U.S. electronic platforms.[123] However, the extraterritorial reach of a private right of action under the CEA is a "different, and somewhat more complicated question" than that of a suit brought by the CFTC.[124] The court ruled that under the CEA the CFTC had authority to sue the commodity trading advisors operating in Florida for alleged fraudulent activities involving foreign investors in binary options traded through foreign trading platforms.[125] The court determined that the CFTC could bring an action under the CEA concerning extraterritorial transactions so long as the fraud was committed by a person located in the United States.[126]

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119. Statement of Chairman Timothy Massad in Support of the Proposed Amendment to the RTO-ISO Order, CFTC (May 10, 2016), https://www.cftc.gov/PressRoom/SpeechesTestimony/massadstatement051016.

120. 7 U.S.C. § 6(b)(2) (2012); *see generally* CFTC v. Vision Fin. Partners, LLC, 232 F.Supp.3d 1287 (S.D. Fla. Mar. 23, 2017).

121. Sullivan v. Barclays PLC, No. 13-CV-2811 (PKC), 2017 WL 685570, at 29 (S.D.N.Y. 2017) (citing *Loginovskaya*, 764 F.3d at 275).

122. *Vision Fin. Partners, LLC*, 232 F.Supp.3d at 1131 (stating that the CFTC "adopts rules and regulations proscribing fraud," and other rules, even if they concern instruments or transactions "made on or to be made subject to the rules of a board of trade, exchange, or market located outside the United States," so long as that fraud or other regulated behavior is committed by "any person located in the United States"); *see also* 7 U.S.C. § 6(b)(2) (2012). The CFTC can bring an action over "any practice constituting a violation of any provision of or any rule, regulation, or order thereunder." 7 U.S.C. 13c (2012).

123. *Vision Fin. Partners, LLC*, at 1131.

124. WOLOWITZ & HOUPT, 6 BUS. & COM. LITIG. FED. CTS. § 71:4 (3d ed.).

125. *Vision Fin. Partners, LLC*, 232 F.Supp.3d at 1131.

126. *Id.*

IV. Alternative Extraterritoriality Tests Under the CEA

A. The "Predominantly Foreign" Exception

Interpreting *Morrison*, the Second Circuit concluded in *Parkcentral* that even though the test's second prong was a necessary element of a domestic SEA Section 10(b) claim, it is not in itself sufficient to invoke a SEA Section 10(b) violation.[127] Emphasizing that the Supreme Court in *Morrison* never said that application of SEA Section 10(b) is deemed domestic whenever the domestic transaction is present,[128] the court came up with the "predominantly foreign" exception.[129] The plaintiffs in *Parkcentral* sued Porsche, a German company, for publicly misleading statements about its takeover of VW, also a German company whose shares were trading on foreign exchanges and did not trade in the United States.[130] The plaintiffs claimed they relied on these statements when making security-based swap agreements.[131] Many facts in *Parkcentral* pointed to the foreign nature of the transactions. For example, the defendants gave the misleading statements abroad and the swap agreements at issue referenced shares of the foreign company traded abroad.[132] Noting that the swap transactions were concluded in the United States, and additionally taking into consideration that some of the plaintiffs' counterparties were New-York based entities, the court held that "on careful consideration of *Morrison's* words and arguments as applied to the facts of this case, we conclude that while that case unmistakably made a domestic securities transaction (or transaction in a domestically listed security) necessary to a properly domestic invocation of SEA Section 10(b), such a transaction is not alone sufficient to state a properly domestic claim under the statute."[133]

The "predominantly foreign" exception was picked up by a New York district court and applied in the context of the CEA. In *In Re North Sea Brent Crude Oil Litigation*, the plaintiffs, residents of the United States, alleged price manipulation of Brent crude oil futures and derivative contracts traded on NYMEX.[134] Even though the first step of the *Morrison* analysis was met (i.e., contracts were trading on the domestic exchange), the court dismissed the plaintiffs' claims as "impermissibly extraterritorial."[135] The fact that the futures traded in the United States was not a sufficient factor to rebut the presumption against extraterritoriality because the price-reporting agency which collected information about the Brent crude oil prices had its

127. Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 215 (2d Cir. 2014).
128. *Id.*
129. *Id.* at 216.
130. *Id.* at 201.
131. *Id.*
132. Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 201 (2d Cir. 2014).
133. *Id.* at 215.
134. *In re* North Sea Brent Crude Oil Futures Litig., 256 F.Supp.3d 298, 302 (S.D.N.Y. 2017).
135. *Id.* at 306.

principal place of business in London, and the defendants provided it with "allegedly manipulative and misleading reporting . . . about physical Brent crude oil transactions conducted entirely outside of the United States."[136] Therefore, the court held that these factors constituted the "predominantly foreign" element which precluded extraterritorial application of the CEA to the claims.[137]

In *In Re London Silver Fixing, Ltd. Antitrust Litigation*, investors claimed price manipulation of physical silver and silver-denominated financial products by foreign exchanges and precious metal traders.[138] The transactions in silver-denominated financial instruments occurred on domestic exchanges, but the court found that the price manipulation did not directly affect the prices for products traded on domestic exchanges.[139] The court looked at the "frequency of manipulation, persistence of impact of episodic manipulation in relevant silver market, or that investors traded close in time to alleged manipulation",[140] and found that the price manipulation's impact on the products and contracts traded on the U.S. exchange was unable to overcome the "predominantly foreign" test.[141] After *Parkcentral*, case law established that, in conducting the extraterritoriality analysis of private actions under the CEA, courts should first look to whether a transaction satisfies any of the *Morrison* transactional test's prongs (i.e., whether the transaction occurred on a domestic exchange or the transaction itself is domestic). If the *Morrison* test is met, the court then should analyze if the plaintiff's claims are so predominantly foreign that they are impermissibly extraterritorial.

In justifying the application of the "predominantly foreign" exception in cases where derivative contracts are traded in the United States and either of the elements of the *Morrison* test is satisfied, the court is cautiously cognizant of the possible conflict between domestic laws and foreign laws.[142] The court is set to avoid individuals and entities from being subject to multiple, and potentially incompatible, laws in the absence of the clear congressional intent to do so.[143]

After *Morrison* but prior to *Loginovskaya*, the court in *LIBOR* came up with a different set of criteria for the transactional test in the context of the CEA.[144] The court said that a claim is within the CEA's domestic application if it involves: (1) commodities in interstate commerce; or (2) futures contracts traded on domestic exchanges.[145] However, the *LIBOR* factors were not used in later decisions of the Supreme Court in *Loginovskaya* and the Second Circuit's cases when locating the domestic elements of

136. *Id.*
137. *Id.* at 309–10.
138. *In re* London Silver Fixing, Ltd., 332 F.Supp.3d 885, 891 (S.D.N.Y. 2018).
139. *Id.* at 892.
140. *Id.* at 919.
141. *Id.* at 920.
142. *See* Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 217 (2d Cir. 2014).
143. *Id.* at 215.
144. *See generally In re* LIBOR–Based Fin. Instr. Antitrust Litig., 935 F.Supp.2d 666 (S.D.N.Y. 2013).
145. *Id.* at 696.

the transactional test. Given the general trend of leaning toward limiting extraterritorial application, the *LIBOR* factors may not have been used by other courts because the first factor is so broad that it would allow private actions every time there is a commodity traded in interstate commerce, which would essentially be every case because commodities market is a predominantly international market. The plaintiff argued in *Morrison*, in favor of the rebuttal of the presumption against extraterritoriality, that the shares were involved in interstate commerce, which is expressly mentioned in SEA Section 10(b). [146] The *Morrison* court rejected this argument, pointing out that the general reference to foreign commerce in the definition of the "interstate commerce" does not defeat presumption against extraterritoriality.[147]

B. Modifying the "Conduct and Effects" Test

An alternative to the *Morrison* domestic transactional test is a modified version which was proposed by a number of comment letters received by the SEC in response to the SEC's request for public comments regarding the application of the transactional test to private causes of action under the securities laws. [148] The modified version is supposed to be limited solely to U.S. resident investors. An advantage of such a limitation would be the elimination of international comity concerns associated with the application of the traditional "conduct and effects" test.[149] Some commentators, such as NASCAT, the Maryland State Retirement and Pension System, New York State, and the Consolidated Retirement Fund underlined that the federal securities laws are designed to protect U.S. investors, just like the foreign nations are interested in protecting their own citizens and determining their own regulatory framework to achieve this.[150] At the same time, both the transactional test and the "conduct and effects" test do not consider the nationality of investors as the relevant factor to determine whether U.S. laws apply because such a differentiated approach would contradict the underlying public policy that the law applies equally to all.[151]

C. Fraud-in-the-Inducement Test

Another alternative to the "conduct and effects" test suggested by some is the fraud-in-the-inducement test.[152] Under this theory investors would have a cause of action if they were in the United States when they were induced to buy or sell the

146. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 262–63 (2010).
147. *Id.* at 263.
148. *See* Cross-Border Study, *supra* note 23, at 55.
149. *Id.* (citing letters from NASCAT, Maryland State Retirement and Pension System, New York State, and Consolidated Retirement Fund).
150. *Id.* at 56.
151. *Id.* (citing letter from Strathclyde).
152. *Id.* at 57 (citing letters from Forty-Two Law Professors; ABA; London Pension Funds).

securities pursuant to misleading statements or fraudulent activities.[153] Similarly, the fraud-in-the-inducement test could be applied to lawsuits brought under the CEA. Thus, if the plaintiff in *Loginovskaya* was induced to invest while in the United States, she could have argued that she had a cause of action against the defendants under the fraud-in-the-inducement theory.

D. Multi-Factor Test

In *Cornwell*, the court placed a lot of hope in the *Morrison* test, naming it a bright-line rule which was devised to solve the inconsistencies associated with the "conduct and effects" test.[154] "The Court manifested an intent to weed the doctrine at its roots and replace it with a new bright-line transactional rule embodying the clarity, simplicity, certainty and consistency that the tests from the Second Circuit and other circuits lacked."[155] However, the appropriateness of the bright-line rule in the context of cross-border regulation is not in itself evident. In *Loginovskaya* the Solicitor General suggested an alternative test that would weigh whether significant domestic conduct was material to the fraud's success.[156] The Second Circuit acknowledged that such a test would be admirable but rejected it as having no justification in the statutory text.[157] The Second Circuit seemed to agree that one of the CEA's purposes is to protect investors but nevertheless leaned toward the uniform, accurate and clear standard rather than a multi-factor case-by-case analysis. The court's decision could have been motived by its desire for the United States to not become "the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets."[158]

Another alternative test that could be used for private litigation under the CEA is a multi-factor test suggested in Judge Leval's concurring opinion in *Parkcentral*.[159] Judge Leval's concurrence in *Parkcentral* rejected the idea that *Morrison* provided only a bright-line, single-factor test.[160] He interpreted *Morrison* as a flexible, multi-factor test and referenced *Kiobel* where the Supreme Court came up with the "touch and concern" test.[161] Under the "touch and concern" test, claims under the ATS could be domestic under *Morrison* even if based on foreign conduct, if the claims touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritorial application.[162] Since it is not clear what conduct

153. *Id.*
154. Cornwell v. Credit Suisse Grp., 729 F.Supp.2d 620, 624 (S.D.N.Y. 2010).
155. *Id.*
156. Loginovskaya v. Batratchenko, 764 F.3d 266, 271 (2014).
157. *Id.*
158. *Id.*
159. Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 218 (2d Cir. 2014) (Leval, J., concurring).
160. *Id.*
161. *Id.* at 219.
162. *Id.*

can be viewed as touching and concerning the territory of the United States, this question can hardly be the question resolved by the bright-line single-factor rule. Judge Leval gave three reasons why he construed *Morrison* as allowing for the multi-factor analysis. First, it is common in the choice-of-laws area to use flexible tests instead of rigid rules because the complexity of the choice-of-law questions does not lend itself to reliable analysis by a bright-line test.[163] Second, Judge Leval argued that the bright-line rule can be either over-inclusive or under-inclusive, i.e., either not protecting the domestic investors and securities market, or interfering with the foreign law jurisdiction by applying domestic laws in cases where the foreign law is more appropriate. [164] Lastly, bright-line rules can allow leeway to bad-faith participants who could devise methods of circumventing the clear rules and staying on the safe side of the line.[165]

V. Conclusion

After-*Morrison* application of the domestic transactional test in the commodity interests context suggests that the courts, while pronouncing the bright-line-rule nature of the test, still steer away from it and seem to be taking a holistic, fact-specific approach. This is evident from the "predominantly foreign" exception in *Parkcentral, In Re North Sea Brent Crude Oil Litigation* and *In Re London Solver Fixing, Ltd. Antitrust Litigation*, which seem to nullify the first prong of the *Morrison* test by establishing that even if the derivative contracts are traded on the domestic exchange in the United States, this factor alone can still be overcome if the nature of the transaction is considered by courts as predominantly foreign. Considering the sensitivity of the cross-border application of U.S. laws caused by the international comity and foreign policy issues, the flexible multi-factor analysis seems to be a better option than the bright-line rigid rule. And as such, the "conduct and effects" test devised by the Second Circuit and representing a holistic, fact-specific approach seems to be the best roadmap so far devised to determine the cross-border application of the CEA.

163. *Id.* at 220.

164. Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 220–21 (2d Cir. 2014) (Leval, J., concurring).

165. *Id.* at 221.