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Extraterritorial Application of National Securities
Regulation of National Securities Regulation: the Case
of Rule 10b-5 and Morrison v National Australia Bank
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**EXTRATERRITORIAL
APPLICATION OF NATIONAL
SECURITIES REGULATION: THE
CASE OF RULE 10b-5 AND
MORRISON v NATIONAL
AUSTRALIA BANK LTD**

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**LLM IN INTERNATIONAL CORPORATE
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REGULATION AND ECONOMIC LAW**

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INTRODUCTION

The issue of legal jurisdiction is considered an integral part of sovereignty and one in which States naturally assume responsibility to adjudicate on matters and persons within their territorial boundaries. Except by mutual consent, no State is allowed to undermine the sovereign authority of another by enacting and applying its laws to matters and persons within the jurisdiction of that other State except in circumstances permitted under conflict of law principles. However, global expansion of commerce, flourishing of multinational corporations, and technological revolution, has not only increased international transaction in securities, but also market abuses, fraud and manipulative conduct associated with domestic securities markets have spread across borders. So, instead of jurisdiction based on conventional principles, a State justify extraterritorial application of its national securities regulation if the abusive, fraudulent or manipulative conduct of foreign persons imposes negative externalities on the State, its economy, and investors.

United States has applied in other countries, Rule 10b-5 - securities antifraud legislation promulgated under Section 10(b) of the Securities Exchange Act of 1934. US Courts have taken the view that US Congress would have intended the legislation to apply extraterritorially although the parameters of subject matter under which assertion of jurisdiction is predicated, are not explicitly defined. The Courts usually apply two tests - conduct test if the substantial part of the fraudulent conduct occurs in the United States even though certain consequences of the conduct have had an impact upon United States or foreign investors in other nations, and effect

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test if the wrongful conduct outside the United States has substantial effect in United States or on US citizens.

However, the US Supreme Court's decision in *Morrison v National Australia Bank Ltd* has declared that Rule 10b-5 applies only to transactions in securities that take place in the United States or transactions in securities listed on a US securities exchange. The Court takes the view that the antifraud legislation lacks express affirmative clarity and that extraterritoriality is not a matter of subject-matter jurisdiction but rather a question on the merits. So a new test – transactional test, will not allow Rule 10b-5 claims by a US plaintiff purchasing securities abroad of any issuer whether domestic or foreign where the securities are not listed in any stock exchange in the United States.

This case undoubtedly raises a number of interesting questions particularly in relations to its implication on extraterritoriality but more generally on securities regulation and international securities market. Much as there is no exhaustive answer, the following five chapters help to shed light on the fundamental issues critical to the subject matter of extraterritoriality and the application of national securities regulation within the context of both public and private international law. The conclusion is that the reinstatement of presumption against extraterritoriality is a legal milestone but if the Investment Protection and Securities Reform Bill of 2010 pending at the U.S Congress is eventually signed into law it will bring back the regime of uncertainty and unpredictability associated with the conduct and effects test.

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CHAPTER I

INTERNATIONALISATION OF SECURITIES MARKETS

Internationalisation of securities market is not a geographical expression of physical union of participants haggling over investments. It has been shown that the market is not location bound and that participants from different jurisdictions interact simultaneously on securities issued from different countries and in various denominated currencies. It is critical that economic factor, cross-border listing, cross-border-merger and acquisitions of securities exchanges and electronic system of communication have all combined with a number of other variables to create a global securities system which has blurred the line of domestic, foreign and international securities trading. This chapter is all about setting out the nature of internationalisation of securities market and it is far from being exhaustive of all the details that are necessary for the understanding of the processes of securities law or even the subject matter of internationalisation of securities market. It has, however provided the basis for understanding the issues of securities regulation which is the focus of chapter two.

1.1 Securities

According to Withers, 'stocks and shares are a matter of interest to all, and a bewilderment to most, of civilised humanity.'¹ The bewilderment arises essentially from the fact that securities mean different things in different situations so much so that what could be ordinary to a lay man is lost in contextual flexibility. Benjamin

¹ Geoffrey Fuller, *The Law and Practice of International Capital Market*, (LexisNexis Butterworths, 2007), p.1

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sees securities as a type of transferable asset² the original essence of which is that 'repayment of debt obligation is secured on the asset of the issuer.'³ When used in the context of personal security, securities refer to an undertaken by guarantor to bear responsibility for the repayment of debt in the event that the debtor defaults or it could be real security in which case a third party makes available property, which could be disposed of in order to enforce the discharge of the debtor's obligation.⁴ The recent meaning attributed by Benjamin includes 'units in investment funds and other forms of readily transferable investment.'⁵ Fuller states that securities can mean 'security interests (such as mortgages and charges), or guarantees'⁶ but when used in the context of securities market, it comes to be known as 'transferable financial investments.'⁷ Although there may be variations as to the branding of these products according to jurisdictions, the common denominator is that the articles of trade or products traded in securities market are transferable financial investments.

It follows then that securities market can be characterised as a place for the buying and selling of securities 'between subjects of economy on the basis of demand and supply.'⁸ In other words, it is 'a system of interconnection between all participants (professional and nonprofessional) that provides effective conditions: to buy and sell securities.'⁹ The market 'attracts new capital by means of issuance of new security (securitization of debt)'¹⁰ the same way that it 'transfers real asset into financial

² Joanna Benjamin, *Interests in Securities: A Proprietary Law Analysis of International Securities Market*, (Oxford University Press, 2000), p.4

³ *Ibid*, p.4

⁴ Fisher and Lightwood's *Law of Mortgage*, Wayne Clarke as coordinating editor (LexisNexis Butterworths, 2006), p.1

⁵ Joanna Benjamin, no.2, p.4

⁶ Geoffrey Fuller, no.1, p.5

⁷ *Ibid*, p.5

⁸ Wikipedia available at <http://en.wikipedia.org> accessed 30 June 2011

⁹ *Ibid*

¹⁰ *Ibid*

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asset'¹¹ as well as 'invests money for short or long term periods with the aim of deriving profit.'¹²

1.2 Securities Market

The idea of securities market, according to Adam, does not give rise to a physical location which brings participants into physical contact to trade in securities but rather refers to 'a vast amount of capital available from financial institutions, pension funds, and investment funds (and a few high-net worth individuals) which want to buy securities, either to hold as an investment or to trade.'¹³ This is so much that 'references to the 'market' are more accurately references to the borrowing requirements of potential issuers, and the funds available from investors',¹⁴ the size of the market being determined by funds availability and the tradability of the securities issued.¹⁵

The securities are of medium and long term nature, constituting one type of securities market known as capital market which this work is concerned with, the other type being money market dealing with deposits and short term instrument.¹⁶ When capital market is domestic, it means that it is located in one country and the securities issued are 'issued to only the investors in that country, by issuers resident in that country, and denominated in the currency of that country.'¹⁷ Foreign market is everything as domestic market except that issuers of securities reside in country

¹¹ Wikipedia, no.8

¹² Ibid

¹³ David Adams, Banking and Capital Markets, (College of Law Publishing, 2008), p.207

¹⁴ Ibid, p.207

¹⁵ Ibid, p.207

¹⁶ Geoffrey Fuller, no.1, p.1

¹⁷ Ibid, p.1

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other than that where they are issued.¹⁸ In international capital market, 'securities are issued to and traded by investors in different countries simultaneously, and can be in any major currency.'¹⁹ Whatever the type, two types of securities traded are equity securities and debt securities although there exists some kind of hybrid between them.

In equity security a company is the only issuer and the security issued is share. Reference to shares in equity security is that of ordinary shares as opposed to preferred or proposed rights and that gives the idea of residual rights after discharge of prior commitments.²⁰ Equity securities are known to be non-returnable investment, the implication of which is that an investor wishing to realise his investment capital either sells the shares or winds up the company,²¹ and because of this, an investor is not entitled to dividend for the reason that he lacks absolute right to receive a return on its investment.²²

Conversely, the issuer in debt security may be company or anyone else,²³ who is bound in a contract with the investor or holder such that the holder is the creditor of the issuer who can lay claim to principal and interest as well as other entitlements when they become due.²⁴ But the holder of debt security is not a member of the company or the issuer and so does not take any equity in the issuer or assert any rights over the issuer.²⁵ They are either bonds or notes and Fuller maintains that

¹⁸ Ibid, p.1

¹⁹ Geoffrey Fuller, no.19, p.1

²⁰ Ibid, p.9

²¹ David Adams, no.13, p.211

²² Ibid, p.211

²³ Geoffrey Fuller, no.1, p.8

²⁴ Ibid, p.9

²⁵ Ibid, p.9

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'legally, there is no distinction between the two terms both of which mean, essentially, an instrument containing or evidencing a debt obligation on the part of the issuer.'²⁶ If the maturity of debt securities is more than one year, it is known as 'Eurobonds' when issued under a medium term note programme, it is called 'Medium term note', while one with less than a year maturity is referred to as 'Euro-commercial paper'.²⁷ The investor can decide to hold the security until it matures and that means he has to be confined to the primary market. But sometimes, investors do have the need to sell their securities before it matures in order to realise their capital much earlier than maturity date.²⁸ Adams describes this early disposal of securities as secondary market, a place in which investors and traders can buy and sell securities that have already been issued.²⁹ In order to issue securities for sale, the conventional approach is for issuers to list the securities on a stock exchange although they can be traded privately or even electronically. Stock market is a non-physical public entity where securities are traded but the intermediaries between the issuers and investors operate in a stock exchange.³⁰ Therefore, the mechanism of the internationalisation of securities market is such as would involve the issuer, investor, and stock market as major influences in the market processes.

Internationalisation of securities market is the idea that securities are issued to and traded by investors in different countries simultaneously and in as many major currencies as possible.³¹ A number of factors influence the system of internationalization including economic factor, cross-border listing, mergers and

²⁶ Geoffrey Fuller, no.1, p.19

²⁷ 'Access to the International Capitals by Latin American Companies', Part 1, *Mayer, Brown and Platt*, 14 November 2000

²⁸ David Adams, no.13, p.220

²⁹ *Ibid*, p.220

³⁰ Wikipedia available at www.wikipedia.com accessed 4 July 2011

³¹ Geoffrey Fuller, no.1, p.2

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acquisitions of securities exchanges, as well as technological development. The economic factor is the idea that 'world class' companies are becoming de-nationalised in their share-holders, and that traders on any world market may comprise many nationalities³² and so 'equity markets have become more international in complexion.'³³ It is traditional for issuers to have their home jurisdiction as primary listing of choice, but the trend over the years has been for issuers to in addition to listing in their domestic market choose to cross-list in a foreign market. Similarly, cross-border merger of security exchanges has resulted in increased number of international investors and made stock markets competitive.³⁴ It was announced on 9 February 2011 that TMX Group Inc., the operator of the Toronto Stock Exchange and the Toronto Venture Exchange, and the London Stock Exchange Group plc agreed a '£4.3 billion all-share merger of equals to combine Europe's and Canada's diversified exchange groups.'³⁵ When fully materialised, the merger was estimated to create 'the world number one listings venue by number of total listings (over 6,700 companies with an aggregate market capitalisation of approximately £3.7 trillion).'³⁶ It is also reckoned that New York Stock Exchange ('NYSE') acquired Euronext, which operates exchanges in Paris, Amsterdam, Brussels, and Lisbon.³⁷ NYSE Euronext has merged with Germany's Deutsche Borse in a deal that is said to create the world's biggest exchange with a combined revenue of £3.5bn. There is a wide acknowledgement that development in technology has been one of the principle factors that has brought about the internationalisation of

³² Mark Vodicka, *International Securities Trading* (Legal Books, 1992), p.1

³³ *Ibid*, p.1

³⁴ Ioannis Kokkoris and Rodrigo Olavares-Caminal, 'Some Issues on Cross-Border Stock Exchange Merger', *University of Pennsylvania Journal of International Law*, Vol.29.2, 2007-2008, p.456

³⁵ Jonathan Deverill, 'Proposed Merger Of TSX And LSE To Create World's No.1 Listings Venue For Natural Resources And Clean Technology Companies', DMH Stallard, 11 February, 2011, available at <http://www.mondaq.com> accessed 10 July 2011

³⁶ *Ibid*

³⁷ *Ibid*

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securities market. One of the ways it has revolutionarised securities industry is the introduction of online brokerage accounts, which gives ordinary retail investors 'access to the kind of financial research that once was available only to institutions and very wealthy individuals.'³⁸

Summarily, the internalisation of securities market is consistent with the trend of globalisation in which fortunes of global participants have become bound together as nations become more than ever interdependent.

³⁸ Nancy C. Libin and James S. Wrona, 'The Securities Industry and the Internet: A Suitable Match?', *Columbia Business Law Review*, Vol. 2001, p.601

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CHAPTER II

REGULATION OF SECURITIES MARKETS AND INSTITUTIONS

This chapter examines the concept of regulation from the point of view that it is a matter of public law the purpose of which is to intervene in circumstances in which public interest is at stake. Against this background, it sets out securities regulation in a manner that enhances the understanding of rules governing the conduct of business of securities, but it also examines the context of the United States securities regulation and how that prompted the regime of eight statutes that govern different aspects of securities business.

2.1 The Concept of Regulation

The rationalisation of regulation goes into the heart of the familiar tension between the perceived sovereign powers of the state and free market economy. Proponents of the later take the view that instead of getting caught up with the interference of the state, the forces determining prices and quantities – supply and demand in the markets should be harnessed to bring about the needed order and conduct in the system. The proponents of the former believe that the state is and should be at the centre and not market, and therefore it should utilize its sovereign assets to control the behaviour and activities in the market. The premise is that the market lacks the capacity to control itself and that without the intervention of the state the net result would be not just chaos but potentially the collapse of the entire system.³⁹

³⁹ George Friedman, 'States, Economics and Markets: Redefining the Rules', Stratfor Global Intelligence, October 13 2008 available at www.stratfor.com accessed 13 July 2011

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When Selznick describes regulation as ‘a sustained and focused control exercised by a public agency over activities that are valued by a community’⁴⁰, Ogus believes that he seeks to emphasize that “valued activities” serve to exclude from the concept of regulation the traditional areas of criminal law and the concerns of the criminal justice system.⁴¹ Ogus thinks of the need to narrow the subject even further in terms that recognises regulation from a fundamentally politico-economic concept standpoint the best understanding of which is with reference to different systems of economic organisation.⁴² The market system is one that he believes to leave individuals and groups free,⁴³ ‘subject only to certain basic restraints, to pursue their own welfare goals’⁴⁴ through the instrumentality of private law and without any significant role of regulation or public law.⁴⁵ The private nature of the agreements in this system underlines the fact that ‘it is left to individuals and not the state to enforce rights; and obligations are incurred voluntarily in the sense that they can always be displaced by agreements between the affected parties, if they are found to be inappropriate.’⁴⁶ This is remarkably different from the other system that Ogus refers to as collectivist system, one which requires the intervention of the state ‘to correct perceived deficiencies in the market system in meeting collective or public interest goals.’⁴⁷

Prosser identifies two dimensions of the regulatory power of the state. The first according to him is ‘concerned with goods and services provided by the institutions

⁴⁰ P. Scheznick, ‘Focusing Organisational Research on Regulation’ in R. Noll (ed.), *Regulatory Policy and the Social Sciences*, (American Enterprise Institute for public policy research, 1983), p.363

⁴¹ Anthony I. Ogus, *Regulation: Legal Form and Economic Theory*, (Hart Publishing, 2004), p.1

⁴² *Ibid*, p.1

⁴³ *Ibid*, p.1

⁴⁴ *Ibid*, p.1

⁴⁵ *Ibid*, p.1

⁴⁶ *Ibid*, p.2

⁴⁷ *Ibid*, p.2

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between the market and the state, which may include enterprises at arm's length from government.⁴⁸ The second is his normative idea that is based on 'egalitarian rights derived from citizenship rather than an ability to bid in the marketplace.'⁴⁹ Ogus thinks in terms of three characteristics. The first is the idea of control by a superior, which is based on directive function in which individuals are compelled to⁵⁰ 'behave in particular ways with the threat of sanctions if they do not comply.'⁵¹ The second is the idea of public law from the point of view that the state enforces⁵² 'the obligations which cannot be overreached by private agreement between the parties concerned.'⁵³ The third is the idea of centralization arising from the fact that the role of the state in the whole formulation is so fundamental.⁵⁴ He considers the need to approach regulatory questions from the point of view of social regulation and economic regulation. Social regulation is seen by him to concentrate on two types of market failure. In the first category, because 'individuals in an existing, or potential, contractual relationship with firms supplying goods or services often have inadequate information concerning the quality offered by suppliers, the unrestricted market may fail to meet their preferences.'⁵⁵ The second category is that even if there is no gap in information, 'market transactions may have spill over effects (or externalities) which adversely affect individuals who are not involved in transactions.'⁵⁶ In the face of these two problems, it is for the policy-makers to determine appropriate regulatory instruments in accordance with the degree of the required state intervention.⁵⁷

⁴⁸ Tony Prosser, 'Public Service Law: Privatisation's Unexpected Offering', in Colin Scott, Regulation, (Dartmouth/Ashgate Publishing Company, 2003), p.65

⁴⁹ Ibid, p.65

⁵⁰ Anthony I. Ogus, no.41, p.2

⁵¹ Ibid, p.2

⁵² Ibid, p.2

⁵³ Ibid, p.2

⁵⁴ Ibid, p.2

⁵⁵ Ibid, p.4

⁵⁶ Ibid, p.4

⁵⁷ Ibid, p.6

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Economic regulation is prefaced on the need to provide ‘a substitute for competition in relation to natural monopolies⁵⁸ from three broad perspectives, the first perspective bearing upon the expectation that ‘the mechanics of political direction and accountability will be sufficient to meet public interest goals⁵⁹ given that the firm is publicly owned. If the firm is private, the second perspective is to subject it to ‘external constraints in the form of price and quality regulation.’⁶⁰ In the third perspective, ‘firms desiring to obtain a monopoly right may be forced to compete for it⁶¹ on the basis of which ‘they are required to stipulate proposed conditions of supply, relating especially to prices and quality; and those conditions then becoming terms of the license or franchise under which they exercise their monopoly right.’⁶²

2.1 Securities Regulation

Securities regulation sits well within the social regulation context of regulation, the hallmark of which is to enable policy-makers choose appropriate regulatory instruments in order to address two types of market failures. The weaknesses in the quality of information will have negative impact in the preferences for goods and services; and even without these weaknesses it is still possible that activities in the market are capable of imposing negative externalities on individuals who are not directly involved in transactions. The corollary is that securities regulation seeks to ensure that quality of activities associated with securities transaction including the information it generates is of high standard in a way that helps to eliminate or reduce at barest minimum the propensity of any externalities within and outside the

⁵⁸ Anthony I. Ogus, no.41, p.5

⁵⁹ *Ibid*, p.5

⁶⁰ *Ibid*, p.5

⁶¹ *Ibid*, p.6

⁶² *Ibid*, p.6

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securities market. In other words, securities are regulated in order that there is proper conduct of securities business so that it does not have negative consequences on the whole economy or stability of the financial system.

So, securities regulation is prefaced on three closely-related and overlapping objectives including protection of investors; ensuring that markets are fair, efficient and transparent; and the reduction of systemic risk.⁶³ Protection of investors is the idea that 'investors should be protected from misleading, manipulative or fraudulent practices, including insider trading, front running or trading ahead of customers and the misuse of client assets.'⁶⁴ However, there is an issue that interests in the securities market are varied and conflicting and so Johnston and Rockwell suggest that regulation needs to take on board the interest of all the actors in the market including investors, potential investors, the issuer, creditors, employees, investment dealers and advisers, financial institutions, governments, regulators, and even the non-investing public.⁶⁵ To ensure that market is fair, efficient and transparent, regulation should ensure that investors are given unfettered access to market facilities and price information while relevant information should be widely and timely disseminated including pre-trade and post-trade information.⁶⁶ Reduction of systemic risk means that regulation should create disincentive for failure through capital and internal control requirements.⁶⁷ It is remarkable that public interest and protection of investors are very dominant features in the formulation and operation of securities regulation. Jennings and Marsh take the view that 'the securities market vast

⁶³ International Organisation of Securities Commissions (IOSCO), 'Objectives and Principles of Securities Regulation', May 2003, p.5

⁶⁴ Ibid, p.5

⁶⁵ David Johnston and Kathleen Doyle Rockwell, Canadian Securities Regulation, (LexisNexis Butterworths, 2006), p.3

⁶⁶ IOSCO, no.63, p.6

⁶⁷ Ibid, p.6

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resources for marshalling the capital of industrial and institutional investors give corporate enterprise access to large sources of funds that would not otherwise be available.⁶⁸ Therefore, the need for regulation is clearly derived from the very nature of securities market.⁶⁹

2.3 The United States Securities Regulation

The market crash of 1929 and the great depression that followed provided the setting for the legislative regimes associated with regulation of the United States securities market. James notes that the period from 1900 to 1929 transformed the investment picture in the United States with the percentage of tangible wealth in the form of securities rising from 23 percent to over 75 percent between 1908 and 1929, and the total aggregation of new issues in dollar to thirty-seven billion dollars between 1922 and 1929 while stockholders had a record increase from four million four hundred thousand to over eighteen million between 1900 and 1928.⁷⁰ He reckons that following the market crash of 1929 and the continued depression thereafter, the bonds which had a market value of \$47,000,000,000 in January 1931 shrunk to \$31,000,000,000 by April 1933, while stocks with a market value of \$87,000,000,000 in September 1929 was a value less than \$16,000,000,000 in July 1932.⁷¹ Consequently, there was massive decrease in income, land values plummeted, production nose-dived, while public mood was that of despair and anger.⁷²

⁶⁸ Richard W. Jennings and Harold Marsh Jr, *Securities Regulation: Cases and Materials*, (Foundation Press, 1987), p.2

⁶⁹ David Johnston and Kathleen Doyle Rockwell, no.65 p.1

⁷⁰ Laylin K. James, 'Securities Act of 1933', *Michigan Law Review*, Vol.32, 1933-1934, p.628

⁷¹ . Ibid, p.629

⁷² Ibid, p.629

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The legislative response was so massive that there are currently eight statutes regulating the securities market in the United States including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, and to some extent the Securities Investor Protection Act of 1970, and then the Sarbanes-Oxley Act of 2002.⁷³

The Securities Act of 1933 marked the turning point in the United States securities regulation. Concerned with the initial distribution of securities rather than their subsequent trading,⁷⁴ the Act is aimed at achieving two things the first of which made mandatory filing with the Federal Trade Commission full, accurate, and complete statements of all pertinent facts concerning issues of the securities.⁷⁵ The second is that 'instruments of transportation or communication in interstate commerce and the mails shall not be used directly and indirectly to effectuate fraudulent sales.'⁷⁶ The securities that the Act applies to cover just about everything but following criticism about limited exemption or none at all, the National Securities Markets Improvement Act of 1996 was enacted to allow the Securities and Exchange Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons from any provision of the Securities Act.⁷⁷ The inevitable consequence of the pre-1996 Act was the fear of reduction in new financing in the U.S. and the likelihood that the requirement for information to be filed in foreign

⁷³ Louise Loss and Joel Seligman, *Fundamentals of Securities Regulation*, (ASPEN, 2004), p.45

⁷⁴ *Ibid*, p.45

⁷⁵ Laylin K. James, no.70, p.630

⁷⁶ *Ibid*, p.630

⁷⁷ Louise Loss and Joel Seligman, no.73, p.45

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government issues might lead such issuers to look for alternative market for financing.⁷⁸

Securities Exchange Act of 1934, unlike the 1933 Act, is directed at post distribution trading and issuers have continuing obligation to disclose through the registration of all securities traded on exchanges and filing of periodic reports.⁷⁹ With effect from 1964, these provisions became applicable to certain securities traded in the over-the-counter market and in 1968 “tender offers” were added to the list.⁸⁰ Loss and Seligman note that clearly, the Act was framed along three themes including the ‘regulation of the exchange and over-the-counter market; prevention of fraud and market manipulation; as well as control of securities credit by the Board of Governors of the Federal Reserve System as part of its authority over the nation’s credit generally.’⁸¹

The Public Utility Holding Company Act of 1935 ‘regulates electric and gas holding companies and their subsidiaries’, while the 1933 Act is supplemented by the Trust Indenture Act of 1939 when distribution consists of debt securities.⁸² The Investment Company Act of 1940 is directed at companies the primary business of which is investing and reinvesting in securities of other companies while under the Investment Advisers Act of 1940, persons engaged for compensation in the business of rendering advice or issuing analyses or reports concerning securities are required to register with the Securities and Exchange Commission.⁸³ The Securities Investor

⁷⁸ Laylin K. James, no.70, p.635

⁷⁹ Loise Loss and Joel Seligman, no.73, p.46

⁸⁰ Ibid, p.46

⁸¹ Ibid, p.47

⁸² Ibid, p.47

⁸³ Ibid, p.47

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Protection Act of 1940 'insures customers against their broker's insolvency up to \$500,000 for each account, except that the maximum is \$100,000 to the extent that a claim is for cash rather than securities.'⁸⁴ The Bankruptcy Reform Act of 1978 makes SEC party on any issue in a case under Chapter 11 although it has no right of appeal on any judgment order or decree entered in the case.⁸⁵ The Sarbanes-Oxley Act of 2002 otherwise known as the Public Accounting Reform and Investment Protection Act, includes 11 titles title1 of which established the Public Company Accounting Oversight Board (PCAOB), which is a private organisation with power to 'register, set audit standards for, inspect, conduct investigation and disciplinary proceedings for public accounting firms that provide audit reports for issuers whose securities were registered under section 12 of the 1934 Act, that file reports under section 15d of the 1934 Act, or that have filed a registration statement under the Securities Act of 1933.'⁸⁶

In summary, this chapter addresses specific characters that form the basis upon which regulation is formulated. The major goal of securities market regulation is to bring about orderliness and this is achieved by establishing fair market practices and minimum capital requirements in order to minimize the risk of insolvency.

⁸⁴ Louise Loss and Joel Seligman, no.73, p.60

⁸⁵ Ibid, p.61

⁸⁶ Ibid, p.61

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CHAPTER III

NATIONAL REGULATIONS AND INTERNATIONAL MARKETS: EXTRATERRITORIAL ISSUES

3.1 Nature of National Securities Regulation

National securities regulation is the idea that regulation is directed at governing the conduct of securities transaction within a territorial boundary or jurisdiction. The United Kingdom securities regulation governs the United Kingdom securities market the same way that the United States securities regulation governs the United States securities market, and the same goes for just about every other country around the world. Coffee and Sale suggest that the world of securities market was once settled and stable such that securities exchanges were protected by national boundaries from international competition.⁸⁷ The underlying assumption is that the public interest objective being served by these regulations is directed at the activities and participants domiciled in individual jurisdictions so that public law nature of the regulations is understood in terms of protecting investors in a country, ensuring that securities market of that country is fair, efficient and transparent, as well as reduction of systemic risk in the securities market of that country. However, the nature of public law is such that regulation is formulated on the basis of private interest the ultimate objective of which is to preserve economic liberty, the freedom to invest in the securities market without the individual being unduly deprived of their resources.⁸⁸ On the other hand, private law only plays a facilitative role in terms that 'gives security to the processes required for those resources to shift to their most valuable uses.'⁸⁹ But individual autonomy as an ingredient of private law presupposes that

⁸⁷ John C. Coffee Jr. and Hilary A. Sale, *Securities Regulation: Cases and Materials*, (Foundation Press, 2009), p.572

⁸⁸ Anthony I. Oguh, no.41, p.26

⁸⁹ *Ibid*, p.26

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participants in the securities market do not relate with one another on the basis of coercion, they do so by mutual will and consent through the operation of law of contract, the enforcement of which is at the instance of the parties without any involvement of the state unlike the enforcement of national securities regulation which is done through the legal system of the jurisdiction overseeing the market. As long as the offenders are domiciled within the jurisdiction of the forum country no issue arises as to extraterritorial application. However, with the internalisation of securities market, it is inevitable for different legal and regulatory rules to apply. The question that arises is how a participant in one jurisdiction who contravenes anti-fraud regulation of another jurisdiction could be brought to account in that other jurisdiction. The course of action in the circumstances of that case is to subject the offender to the legal system of the country whose regulation they have offended, and doing that will give rise to extraterritorial application of national securities regulation of that country.

There are problems associated with both public and private law enforcements but Bagheri suggests that parties to a contract do make advance choice of law to govern their contractual obligations as a way of avoiding future dispute and for purposes of certainty and predictability although he warns that some externalities may arise from the contract capable of undermining its enforcement.⁹⁰ He notes that the problem is much more complex when it comes to regulated international markets, where private parties are unable to allocate associated risks.⁹¹ In such situations he maintains that there is likelihood of conflict of interest as a result of lack of institutional co-operation

⁹⁰ Mahmood Bagheri, *International Contract and National Economic Regulation: Dispute Resolution through International Commercial Arbitration*, (Kluwer Law International, 2000), p.9

⁹¹ *Ibid*, p.10

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in harmonising national economic regulations.⁹² But the difficulty with application of national securities regulation extraterritorially is associated with what Bagheri refers to as jurisdictional conflicts in international economic law which replicates considerable tension between national and international legal orders.⁹³ Haseltine observes that any attempt to 'enforce one country's laws or rules in the face of another country's different system of regulation, or to adapt many countries' regulatory pattern to that of another'⁹⁴ must take into consideration the fact that there are differences in culture which make such effort extremely difficult.⁹⁵ He also notes that social and economic factors in developed markets may militate against such move the same way that implementation of central system of regulation in developing markets will be counterproductive.⁹⁶ The only way around the problem according to him is negotiation and compromise among countries so that all interests will be taken on board.⁹⁷ Part of that doubt has been prefaced on the inadequacies of public international law to deal with multidimensional problems associated with the contemporary international economic relations.⁹⁸ There is for instance a disparity between the United States system of regulation which is considered comprehensive and pervasive and that obtainable in other countries which is relatively less robust.⁹⁹ It is therefore more beneficial to pursue policy of compromise and negotiation¹⁰⁰ rather than unilateral application of one country's system of regulation to 'those who

⁹² Mahmood Bagheri, no.91, p.10

⁹³ Ibid, p.11

⁹⁴ William B. Haseltine, 'International Regulation of Securities Market: Interaction Between United States and Foreign Laws', *International and Comparative Law Quarterly*, 1987, p.309

⁹⁵ Ibid, p.309

⁹⁶ Ibid, p.309

⁹⁷ Mahmood Bagheri, no.91, p.15

⁹⁸ Ibid, p.16

⁹⁹ John C. Coffee Jr. And Hilary A. Sale, no.87, p.572

¹⁰⁰ Ibid, p.309

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may or may not have the need or desire for such extensive regulations in their own country.¹⁰¹

3.2 Extraterritoriality

In private international law, the determination of a civil case involving more than one country starts with the question of which country's courts have jurisdiction to try the case and once that is settled it is followed by the next question of which country's substantive law is applicable to the case. The principles of conflict of law rules become the operational instrument by which determination is based because choice has to be made about which law should govern a transaction or relationships between parties in terms of enforcement, perfection of interest, and priority of interests.¹⁰² In public international law, cases involving elements in which more than one state is affected do proceed from the determination of the same questions as to whether the courts of states concerned have jurisdiction to try the case, and if so which state's substantive law can apply.¹⁰³ Although the same two sets of questions may arise in both private international and public international law contexts, the same answers do not give rise to the same result.¹⁰⁴ This is because it is a well established principle of public international law that the courts of one state will not enforce the public law of other states.¹⁰⁵ Once a court reaches a conclusion that its state public law is not applicable to a case before it, it is bound to decline jurisdiction over that case, and this gives rise to the idea that the choice of public law is

¹⁰¹ John C. Coffee Jr. And Hilary A. Sale, no.87, p.309

¹⁰² J.J. Fawcett and J.M. Carruthers, Cheshire, North and Fawcett: Private International Law, consulting editor, Sir Peter North; (Oxford University Press, 2008), p.5

¹⁰³ 'Extraterritorial Jurisdiction', Canada Law Reform Commission Working Paper No.37, 1984-85, p.3

¹⁰⁴ Ibid, p.3

¹⁰⁵ Ibid, p.3

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conclusive as to jurisdiction.¹⁰⁶ Meessen suggests that ‘modern customary international legal limitations on a nation’s exercise of extraterritorial authority have their roots in those fundamental principles of territorial sovereignty that still inform much of modern international law.’¹⁰⁷ However, he maintains that the current technological and intellectual revolution taking place around the world not only encourage international economic and social intercourse¹⁰⁸ but also support the proposition that ‘the effect of governmental encroachments upon human liberty often transcend territorial boundaries, thus creating community interest in limiting or preventing such entanglements.’¹⁰⁹

But this is not saying that the idea of territorial sovereignty has been extinguished, but only a recognition that in situation in which a broad interest is to be served or relatively apparent in specific cross border transactions it becomes necessary for a state to be allowed to address under its laws activities that are carried out beyond its territorial borders.¹¹⁰ This idea has been rationalised¹¹⁰ by the Permanent Court of International Justice in the famous Lotus case – *France v Turkey*.¹¹¹ A French steamship – S.S. Lotus collided with a Turkish Steamer – S.S. Boz-Kourt in a region just north of Mytilene on 2 August 1926 as a result of which eight Turkish nationals died. Turkey arrested Monsieur Demons, the French officer on duty at the time of collision and sought to try him for manslaughter under Turkish criminal law of negligence. At issue was whether Turkey could assert jurisdiction to try Demons

¹⁰⁶ Canada Law Reform Commission Working Paper No.37, no.103, p.3

¹⁰⁷ Karl M. Meessen (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, (Kluwer Law International, 1996), p.64

¹⁰⁸ *Ibid*, p.65

¹⁰⁹ *Ibid*, p.65

¹¹⁰ *Ibid*, p.66

¹¹¹ S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) available at <http://www.worldcourts.com> accessed 25 July 2011

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since the collision occurred on the high seas. France objected to the Turkish jurisdiction on the ground that only the state whose flag the vessel flew had exclusive jurisdiction over the matter. The Court went ahead to rule in favour of Turkey stating that even though all Demons acts were carried out in French territory Turkish law could govern. Similar decision was made in *US v Aluminium Co. of America* where U.S. Court declared that: 'any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.'¹¹² The principle in both cases is understood to mean that states may act in any way they like so long as it does not contravene an explicit prohibition but Meessen takes the view that 'the absence of such general prohibition does not, of course, mean that nation states are free to interfere with each other's internal affairs whenever harmful effects might justify such interference.'¹¹³ He thinks rather of situations of co-operation among states connected with a particular case in ways that enable them accommodate their conflicting interest in good faith when each has legitimate cause to assert jurisdiction.¹¹⁴

3.3 The Doctrine of Conduct and Effects

The principle of subject matter jurisdiction upon which extraterritoriality is rationalised is pursued along the theory of conduct and theory of effect. The subject matter action pursued under the conduct theory arises if conduct within the borders of one state has had an impact within that state and or in the case of securities market on investors in other states. The objective of this theory is to ensure that the state is not

¹¹² 148.F.2d 416 (1945)

¹¹³ Karl M. Meessen, no.107, p.67

¹¹⁴ Ibid, p.67

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being used as a launching pad for fraudulent activities. Lange and Born observe three ways in which antifraud provision of the United States is applied extraterritorially on the basis of this theory. The first is about 'sales to Americans resident outside the United States only if the conduct within the United States materially contributes to any loss.'¹¹⁵ The second is concerned with 'sales to non-Americans outside the United States only if the conduct within the United States directly causes the alleged losses.'¹¹⁶ The third concerns 'sales to Americans resident in the United States whether or not there is significant conduct within the United States.'¹¹⁷ The United States Second Circuit Court engaged conduct test in its extraterritorial application of U.S. securities law in *Leasco Data Processing Equipment Corp v Maxwell*.¹¹⁸ The defendant was a British company whose shares were fraudulently sold in England to the publicly owned American company. Judge Friendly asserted jurisdiction over the case on the basis that a significant part of the fraudulent scheme occurred in the United States including planning, meetings, and "substantial misrepresentations".¹¹⁹ But in *Bersch v Drexel Firestone Inc*¹²⁰ the Court found subject matter jurisdiction for the American victims resident abroad on the basis of conduct in the United States which it considered merely preparatory such as drafting of documents but which nonetheless was of material importance to the fraud. The Court found jurisdiction for foreign victims based on the fact that the actual fraud or acts that directly caused the alleged losses must have taken place within the United States. The implication of these two authorities is that the type and

¹¹⁵ Ibid, p.14

¹¹⁶ Ibid, p.14

¹¹⁷ Dieter Lange and Gary Born, (ed) *Extraterritorial Application of National Laws* (International Chamber of Commerce, 1987); p.38

¹¹⁸ 468 F.2d 1326 (2d Cir. 1972)

¹¹⁹ Barbara S. Thomas, 'Extraterritoriality in an Era of the Internationalisation of Securities Market: The Need to visit Domestic Policies', *Rutgers Law Review*, Vol.35 No.3, 1983, p.456

¹²⁰ 519 F 2d 974 (2d Cir.)

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significance of conduct that takes place in the United States as well as the nationality of the victims form important consideration when U.S courts determine subject matter jurisdiction under conduct theory.¹²¹

The effect theory bears upon a different paradigm focusing not on conduct but rather on its impact. According to Lange and Born, ‘the antifraud rules of the United States securities laws are applied to foreign conduct that has a ‘significant impact’ on U.S. securities markets, even if U.S. investors are not specifically harmed.’¹²² In *Schoenbaum v Firstbrook*,¹²³ the plaintiffs alleged that the directors of a Canadian Corporation authorized the sale of the Canadian company’s stock in Canada, at an unfairly low price, which had adverse effect on the value of the company’s securities listed on the American Stock Exchange. Even though all of the alleged fraud took place abroad, the Second Circuit found jurisdiction because the fraud had sufficiently serious effect upon the United States commerce as it diluted the equity interest of the American shareholders.¹²⁴ In *IIT v Vencap Ltd*,¹²⁵ the Second Circuit did not think that U.S. securities laws should be applied extraterritorially because of insufficient effect in the sense of negligible number of Americans defrauded when compared with their foreign counterparts, and coupled with the fact that the foreign company’ securities were not listed on an American stock exchange.¹²⁶

U.S. court rationalised their conduct and effects jurisdiction based on the proposition that Congress would have intended extraterritorial application to American investors

¹²¹ Barbara S. Thomas, no 119, p.457

¹²² Dieter Lange and Gary Born, no.117, p.15

¹²³ 405 F. 2d 200

¹²⁴ Barbara S. Thomas, no.119, p.457

¹²⁵ 519 F. 2d 1001 (2d Circ. 1975)

¹²⁶ Barbara S. Thomas, no.119, p.458

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but critics have argued that intention of congress falls short of clarity as to provide a firm basis for broad interpretation justifying extraterritoriality. Thomas takes the view that ‘the conduct and effects tests are too simple and mechanistic to adequately express the important considerations of policy that should precede assertion of jurisdiction over international transactions.’¹²⁷ Lange and Born argue that disputes that have arisen as a result of extraterritoriality are indicative of the fact that ‘the expansive effects doctrine makes it difficult to predict when relatively stringent U.S. antifraud rules will apply to non-U.S. conduct.’¹²⁸

¹²⁷ Ibid, p.458

¹²⁸ Dieter Lange and Gary Born, no.52, p.15

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CHAPTER IV

THE SPECIAL CASE OF THE UNITED STATES SECURITIES FRAUD

Rule 10b-5 promulgated under Section 10(b) of the Exchange Act represents a ground norm of the United States antifraud legislative effort in securities regulation. It is designed to strengthen antifraud regime in security regulation in relations to sales or purchase of any type of security so long as it is capable of being traded in security market or anything in connection or associated with selling and buying of security. It consists of three disjunctive elements including (1) material misstatement of facts including withholding of information or giving of misleading information; (2) scheme or conduct intended to defraud; and (3) anything else that may directly or indirectly cause fraud. Rule 10b-5 does not accept reliance as a basis of liability, which is a departure from a common law tort of negligence requiring the claimant to show a proof of having relied on the alleged misstatement. A make-up for that under the rule is a rebuttable presumption that fraud in securities market affects security prices so that an upward or downward movement of price does affect collective transactions in the market. Therefore, it is for the defendant to prove that the claimant did not rely in the alleged misleading information or that economic loss would have occurred with or without any reliance on the information.

4.1 Misstatement and Omission

A plaintiff in action based on misstatement and omission is required to prove that there is material misrepresentation or material failure to disclose. The action in *Santa Fe Industries Inc. V Green*¹²⁹ did not succeed because the U.S. Supreme court concurred with the District Court and Court of Appeals that there was no

¹²⁹ 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480

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misstatement or omission in the information statement the minority shareholders were provided with. There was unwillingness on the part of the court to extend the scope of the statute when its history reflects no more expansive intent and it indeed noted that ‘the language of Section 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deceit.’¹³⁰ *Wharf (Holdings) Limited v United International Holdings Inc.*¹³¹ is a confirmation that misstatement and omission can be written or oral. In that case, the Supreme Court held that ‘the deception element can be satisfied when a promisor secretly intends not to honour a promise at the time of making the promise.’¹³² In Rule 10b-5, SEC is thought by Loss and Seligman to believe that the obligation in this provision is a continuing obligation so that an issuer must correct statements made if either that subsequent events have rendered them inaccurate or the statements were later discovered to have been false and misleading from the outset and the issuer has actual or constructive knowledge that there is a continued reliance by persons on all or any material portion of them.¹³³ *Re Time Warner Inc. Securities Litigation*¹³⁴ and *Re Burlington Coat Factory Securities Litigation*¹³⁵ both support the continuing duty to correct but in *Ross v A.H. Robins Co. Inc.*,¹³⁶ the District Court explained that ‘Section 10(b) and Rule 10b-5 are silent as to the effect of time on the duty to correct’ and ‘no general rule of time can be applied to all circumstances.’¹³⁷ However, the Court took the view

¹³⁰ 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480

¹³¹ 532 U.S. 588 (2001)

¹³² Loss and Seligman, no.1, p.937

¹³³ Ibid, p.945

¹³⁴ U.S. Court of Appeals, Second Circuit, 1993, 9 F.3d 259

¹³⁵ U.S. Court of Appeals, Third Circuit, 1997, 114 F.3d 1410

¹³⁶ 465 F. Supp. 904, 908 (S.D.N.Y. 1979), reversed on other grounds, 607 F.2d 545 (2d Cir. 1979)

¹³⁷ 532 U.S. 588 (2001)

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that 'a particular duty to correct a specific prior statement exists as long as traders in the market continue to rely on the statement.'¹³⁸

4.2 Insider Trading

Insider trading is 'the practice of an insider, or related party, trading on material non-public information obtained during the performance of the insider's duties at the corporation, or otherwise misappropriated.'¹³⁹ It is an area that has drawn much of the United States antifraud jurisprudence in securities trading. Loss and Seligman suggest that insider trading involves a duty to disclose or abstain and a plaintiff must show that there is 'purchasing or selling of a security after material information is received.'¹⁴⁰ The court is here invited to decide whether a reasonable investor would have considered the news of the offer made as been important such as to lead him decide whether and at what price to buy the security offered. Secondly, the material information must be non-public.¹⁴¹ In other words, it must be proved to the court that the material information was of a confidential nature or at least not divulged to the public when it was made. Thirdly, it must be proved that the material non-public information was 'obtained or used in breach of fiduciary or similar duty.'¹⁴² All that is needed to show here is that the defendant is a corporate insider (directors, officers, employees or controlling shareholders) or constructive insider - those who by virtue

¹³⁸ 532 U.S. 588 (2001)

¹³⁹ Bertrand C. Sellier and Stacy Ceslowitz, 'Extraterritorial Application of U.S. Laws: Employment and Securities Laws' available at <http://www.proskauerguide.com/law> accessed 17/01/2011

¹⁴⁰ Stephen E. Older and Seth T. Goldsamt, 'The SEC v Mark Cuban Insider Trading Case', *McDermott Will & Emery*, January 5 2009 available at www.mwe.com accessed 7 August 2011

¹⁴¹ *Ibid*

¹⁴² Stephen E. Older and Seth T. Goldsamt, 'The SEC v Mark Cuban Insider Trading Case', *McDermott Will & Emery*, January 5 2009 available at www.mwe.com accessed 7 August 2011

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of professional relationship can give access to non-public information (lawyers, banker, accountants or consultants).¹⁴³

While it may be easy to establish the first and second elements, it is a bit tricky to make out the third element based on the fact that the duty to disclose or abstain appears to be less than straight forward. The interpretation of that duty was much of an issue in *SEC v Mark Cuban*¹⁴⁴ where the Federal District Court appears to suggest that it does not amount to a violation of securities laws to trade on non-public information if the insider agrees to keep it secret and not use it for his own benefit.¹⁴⁵ Mark Cuban is alleged to have avoided \$750,000 in losses by selling off his stakes in mama.com after he learnt that new shares were to be issued.¹⁴⁶ The Federal District Court found for him but the Court of Appeals reinstated the case although it did not reverse the proposition of the lower court. The appellate court suggested that Mr. Cuban understood the situation to mean that 'he was allowed to trade on the information but prohibited from telling others – in effect providing him an exclusive license on material non-public information.'¹⁴⁷ The court was undecided based on limited record of facts but was clear that both sides understood there was to be no trading before the offer was made public.¹⁴⁸ Mark Cuban intends to appeal to the Supreme Court and if he succeeds, the impact is likely to have wide ramifications and if the case can be characterised as a classical theory case, which it appears to be, then there is a realistic prospect of success if the Supreme Court's

¹⁴³ Ibid

¹⁴⁴ *SEC v Mark Cuban* reported in Kara Scannell, 'Appeals Court Reinstates Mark Cuban Insider-Trading Case', *Wall Street Journal*, September 22 2010

¹⁴⁵ Ibid

¹⁴⁶ Ibid

¹⁴⁷ *SEC v Mark Cuban* reported in Kara Scannell, 'Appeals Court Reinstates Mark Cuban Insider-Trading Case', *Wall Street Journal*, September 22 2010

¹⁴⁸ Ibid

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proposition in *Chiarella v United States*¹⁴⁹ is anything to go by. The question in that case is whether ‘a person who learns from the confidential documents of one corporation that it is planning an attempt to secure control of a second corporation violates Section 10(b) if he fails to disclose the impending takeover before trading in the target company’s securities.’¹⁵⁰ The Court of Appeals upheld the trial judge’s view that “a scheme to defraud” amounted to a plan to obtain money by trick or deceit and that ‘a failure by *Chiarella* to disclose material non-public information with the purchase of stock would constitute deceit.’¹⁵¹ The Supreme Court quashed the conviction on the ground that there could be no fraud without a duty to speak as that duty under Section 10(b) and Rule 10b-5 does not arise from the mere possession of non-public market information. However in *United States v O’Hagan*,¹⁵² the Supreme Court observed that *Chiarella* left open misappropriation theory. One of the two questions considered in *O’Hagan* is whether ‘a person who trades in securities for personal profit, using confidential information misappropriated in breach of a fiduciary duty to the sources of the information, guilty of violating Section 10(b) and Rule 10b-5.’¹⁵³ The trial court said yes. The Court of Appeals said no. The Supreme Court said yes, stating that ‘the misappropriation at issue in this case was properly made the subject of Section 10(b) charge because it meets the statutory requirement that there must be “deceptive” conduct “in connection with” securities transactions.’⁵⁹ If *Mark Cuban’s* case is appropriation theory compliant, there is a danger that it may produce *O’Hagan’s* outcome.

4.3 Cause of Action under Rule 10b-5

¹⁴⁹ 445 U.S. 222,100, S. Ct. 1108, 63 L.Ed.2d.348 (1980)

¹⁵⁰ Ibid

¹⁵¹ Ibid

¹⁵² 521 U.S. 642, 117 S. Ct 2199, 138 L.Ed.2d 724 (1997)

¹⁵³ 521 U.S. 642, 117 S. Ct 2199, 138 L.Ed.2d 724 (1997)

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The cause of action for a petitioner in a securities fraud litigation brought under Rule 10b-5 is an implied remedy, in which court is invited to exercise its inherent broad discretion with which it formulates the requirements of recovery.¹⁵⁴ Materiality, reliance, causation and damages are the elements under the rule usually employed on the basis of traditional or market model of investment decision.¹⁵⁵ The traditional model ensures that relevant information is equally available to everyone in the securities market, the idea being that 'if disclosure of information is made sufficiently meaningful and accessible, investors will rely on it in making investment decisions.'¹⁵⁶ Under market model, the issue of equal access to information or any access at all matters not than the question of whether the price of security was artificially high or low at the time of purchase or sale.

4.3.1 Materiality

A petitioner in securities fraud litigation under Rule 10b-5 is required to prove that the information allegedly wrongly withheld or falsely disseminated was material, and there must be substantial likelihood that a reasonable shareholder would consider the information important in making investment decision¹⁵⁷ and the court in *Escott v. Barchris Construction Co*¹⁵⁸ appreciated the difficulty of the test under traditional model, stating that 'since no one knows what moves or does not move the mythical "average prudent investor," it comes down to a question of judgment, to be exercised by the trier of the fact as best he can in the light of all the circumstances.'¹⁵⁹ It is not likely the case that the judicial discretion is amenable under market model as its

¹⁵⁴ Daniel R. Fischel, no.21, p.5

¹⁵⁵ Ibid, p.5

¹⁵⁶ Ibid, p.5

¹⁵⁷ 401 F.2d 833 (2d Cir. 1968)

¹⁵⁸ 283 F. Supp. 643 (S.D.N.Y. 1968)

¹⁵⁹ 283 F. Supp. 643 (S.D.N.Y. 1968) at para. 682

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focus is on what actually caused the security to trade at artificially high or low prices, so that materiality is not determined arbitrarily.¹⁶⁰

4.3.2 Reliance

In *Basic Incorporated v Levinson*,¹⁶¹ the Supreme Court noted that misleading information has the capacity to defraud investors of stock even if they do not directly rely on the misstatements¹⁶², stressing that ‘the causal connection between the defendant’s fraud and the plaintiff’s purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.’¹⁶³ This is a fact based on market model under which it does not matter if the investor is unaware of the misleading information unlike the traditional model in which the investor must prove that he is well aware of the allegedly misleading information.¹⁶⁴ Fischer explained that ‘the difficulty of proof rather than any conceptual difficulty with the requirement itself is what eliminates the need for proof of reliance in omissions cases.’¹⁶⁵ He emphasised that ‘because the rational course for investors (under market model) is simply to accept (rely on) the market price, it is of no consequence whether a plaintiff can demonstrate that he relied upon a particular piece of information.’¹⁶⁶ Coffee and Sale note that Supreme Court has recognised market theory has relieved the plaintiff the burden of having to prove individualised reliance on misstatement on the basis of presumption that he did rely and then it is for the defendant to rebut.¹⁶⁷

¹⁶⁰ Daniel R. Fischel, no.21 p.7

¹⁶¹ 485 U.S. 224, 108 S. Ct. 978, 99 L.Ed.2d 194 (1988)

¹⁶² Ibid

¹⁶³ Ibid

¹⁶⁴ Daniel Fischer, no.21, p.8

¹⁶⁵ Ibid, p.8

¹⁶⁶ Daniel Fischer, no.21, p.8

¹⁶⁷ Ibid, p.8

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4.3.3 Causation and Damages

The important question in damages under market model is the same as in materiality, reliance, and causation relating to the fact of whether the alleged fraudulent conduct had any effect on the price of security. The effect is that the plaintiff is not compensated for losses caused by the forces of supply and demand.¹⁶⁸ This is unlike the traditional model in which not only must the plaintiff prove materiality and reliance but also that the alleged conduct caused the economic loss and the amount lost, and it is an awful lot of trouble to establish proof.¹⁶⁹

4.3.4 Defence

Exercise of due diligence is a defence available to corporate and constructive defendants if they can show that they have done all that is reasonable in the circumstances.¹⁷⁰ For intentional fraud, there is no due diligence because it is illogical to have due diligence for an act that is intentionally fraudulent.¹⁷¹ Standard of what is reasonable is very high and that leaves a thin chance of success.¹⁷²

CHAPTER V

THE CASE OF *MORRISON v NATIONAL AUSTRALIA BANK LTD*

¹⁶⁸ Daniel C. Fischer, no.21, p.9

¹⁶⁹ Ibid, p.9

¹⁷⁰ International Capital Market Law Lecture note, 26 November, 2010

¹⁷¹ Ibid

¹⁷² Ibid

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It is not in doubt that Section 10(b) of the Exchange Act has no explicit indication that it has extraterritorial application. The longstanding principle of American law is that unless a statute expressly provides for extraterritorial application, it has to be concluded that it has none. This has given rise to the presumption against extraterritoriality in which U.S. courts were required to construe Rule 10b-5 as having no application to fraudulent conduct associated with securities transaction outside the United States or transaction in securities not listed on any U.S. stock exchange. However, there seems to have been an age long tradition among Second Circuit Court of Appeals of having always to go down the line of thinking that Congress would have intended the antifraud legislation to apply extraterritorially. However, in *Morrison v National Australia Bank Ltd*, the U.S. Supreme Court decided to set aside the effects and conduct test replacing them with transaction test which restored the presumption against extraterritoriality.

5.1 Facts of the Case

The plaintiffs who were largely Australian residents alleged that National Australia Bank Limited ('the Bank') violated Rule 10b-5 on the basis of their purchases of the ordinary shares of the bank. The allegation concerned misstatements some of which were claimed to have originated from the United States regarding HomeSide – a failed U.S. mortgage business purchased by the bank in Florida. Certain of the bank's instruments known as American Depository Receipts (ADR traded on the New York Stock Exchange but its ordinary shares were not. With the exception of Frank Cicuto who was then the chief executive officer of the bank, the rests of the defendants Hugh Harris, Kevin Race and W. Blake Wilson were HomeSide's chief executive officer, chief operating officer, and chief financial officer, respectively,

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during the relevant period and are collectively referred to as (“Defendants”). From the turn of events, the bank announced on July 5, 2001 that it was writing down the value of HomeSide's assets by \$ 450 million thereby resulting in over 5% drop in price of ordinary shares and ADR in their respective markets. Two months later (September 3) it announced another write down by the tune of \$ 1.75 billion resulting in ordinary share price drop of 13% and ADR price drop of more than 11.5%.

Robert Morrison is the American lead domestic plaintiff whose action became consolidated with those of the foreign plaintiffs as a class action. The plaintiffs claimed that the bank's and HomeSide's officers, in their capacities as controlling persons, allegedly (1) knowingly used unrealistic financial models in order to artificially inflate its Mortgage Servicing Rights (“MSR”) values; (2) the defendants' various statements as to HomeSide's profitability and its contribution to the bank's profitability were consequently false and intentionally misleading; and (3) the alleged fraud, when revealed, caused losses for the owners of the bank's securities.¹⁷³

5.2 Opinion of the U. S. District Court for the Southern District of New York

While the lead foreign plaintiffs based their contention on the basis of their status as investors who purchased the bank's securities at the relevant time, the lead domestic plaintiff purports to represent a class of investors who purchased the bank's ADR during the relevant time. To this effect, the defendants challenged the subject matter jurisdiction of the lead foreign plaintiffs under Rule 12(b)(1) of the Federal Rules of Civil Procedure (“FRC Procedure”) on the basis that ‘the transactions of which these plaintiffs complain is fundamentally foreign in nature, and thus beyond the scope of

¹⁷³ *In Re National Australia Bank Securities Litigation* 03 Civ. 6537 (BSJ), 2006 U.S. Dist. LEXIS 94162 (The facts of the case are much as presented in the opinion of the District Judge)

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this Court's jurisdiction under the Exchange Act.¹⁷⁴ The defendants did not challenge the lead domestic plaintiff on similar ground apparently because theirs is well covered under the Exchange Act; rather they based their contention for failure to state a claim under Rule 12(b)(6) of the FRC Procedure.

Much as the Court felt a sense of overriding principle from the Second Circuit's proposition on the subject matter jurisdiction as one grounded on Congressional policy bound by a standard of reasonableness, it took the view that the presumption in such a case was against extraterritoriality. Therefore, the appropriate cause of action for the Court was to rely on the 'effect test' and 'conduct test' propounded by Second Circuit in *Leasco* and *Schoenbaum* and it believed that a combination of the two gives a better picture as to justification for the extraterritorial application of the Exchange Act. The Court however was of the view that in a class action such as this 'where the effects of an alleged fraud are predominantly foreign, the amount of domestic conduct and its nexus to the alleged injury required to sustain jurisdiction is at its greatest.'¹⁷⁵ Putting everything together, Judge Barbara S. Jones, District Judge who presided over the case, ruled that the action of the lead foreign plaintiffs did not meet the requirements of both effect and conduct tests and so are unable to discharge the burden of proving the existence of subject matter jurisdiction.

The Court saw the case as falling between *Bersch* relied upon by defendants to argue that the securities at issue were predominantly foreign securities traded on foreign exchanges, and *SEC v. Berger*¹⁷⁶ relied upon by foreign lead plaintiffs in

¹⁷⁴ 03 Civ. 6537 at 8

¹⁷⁵ No.2 at 14

¹⁷⁶ 322 F.3d at 188

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which it is ascertainable that the fraudulent conduct was carried out entirely in the United States. The Court found an ice breaker in *Froese v Staff*¹⁷⁷ for similarity of facts in the sense that the corporate defendant was alleged to have (as in this case) prepared and disseminated from Germany an artificially inflated earning statements upon which the plaintiffs incurred losses. Judge Owen declined jurisdiction because the alleged fraudulent statements were conceived, engineered and published in Germany even though it emanated from the United States. In *In re Bayer AG Secur.Litigation*¹⁷⁸, the defendant is a German company which sold its securities primarily in foreign markets and, to a lesser extent, in the form of ADRs in the United States. The plaintiffs' case was that they relied on the fraudulent profit projection issued about the defendant's U.S. subsidiary as a result of which they suffered losses. Judge Pauley declined jurisdiction based on the fact that the dissemination of the alleged false statements embodying the heart of the alleged fraud took place in Germany. It follows then that the District Court in this case the plaintiffs fell short of discharging the burden of demonstrating that Congress intended to extend the reach of its laws to the predominantly foreign securities transactions at issue here.¹⁷⁹

In relations to the claim under Rule 12(b) (6) of the FRC Procedure, upon which the lead domestic plaintiff – Robert Morrison contended that he and other investors purchased the bank's ADR securities traded on the NYSE at the relevant time, the Court agreed with the defendants that there was a clear lack of standing as the plaintiff failed to state a claim of any damage he suffered as a consequence of the alleged fraudulent financial statements. Whereas Mr. Morrison stated that he

¹⁷⁷ 2003 U.S. Dist. LEXIS 11409, No. 02 CV 5744 (RO)

¹⁷⁸ 423 F. Supp. 2d 105 (S.D.N.Y. 2005)

¹⁷⁹ No.2 at 25

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purchased 125 ADRs at \$74 per security on August 11 2000, the mean trading price during the statutory look-back period was \$75, which indeed was one dollar more than what he bought the securities. Mr Morrison needs to have suffered pecuniary loss in accordance with *Commercial Union Assur. Co. v. Milken*¹⁸⁰ and as a private securities fraud action, his claim was bound by the Private Securities Litigation Reform Act of 1995 and so his recovery was 'limited to the amount by which his purchase price exceeds the security's mean price during the 90-day period immediately following correcting disclosure (look-back period).'¹⁸¹ Having fallen short of this statutory requirement, the Court dismissed the complaint accordingly but granted the plaintiffs' counsel leave to substitute a lead domestic plaintiff and to otherwise amend the pleadings with respect to ADR purchasers only.

5.3 Opinion of the Second Circuit Court of Appeals

The lead foreign plaintiffs who became appellants appealed against the District Court's decision dismissing their complaint. Robert Morrison, the lead domestic plaintiff whose case was also dismissed did not appeal but he remained inexplicably listed as a petitioner in this appeal and subsequently. In a unanimous opinion delivered by Judge Parker on behalf of Judges Newman and Calabresi, the Second Circuit dismissed the appeal for a mix of factors including the fact that the alleged fraud was predominantly foreign having originated from the bank's corporate headquarters in Australia, the complete lack of effect on America or Americans, and the lengthy chain of causation between HomeSide's actions and the statements that reached the investors.¹⁸²

¹⁸⁰ 17 F.3d 608, 613 (2d Cir. 1994)

¹⁸¹ No.2 at 27

¹⁸² 547 F.3d 167; 2008 U.S.at 29

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In relations to the first factor of the case being predominantly foreign in nature the Circuit was quick to note the characterisation of the case as ‘foreign-cubed’ not just that it was the first kind of securities class action to reach the Circuit but also how it touched upon the issue of subject matter jurisdiction in a novelty seen by Judge Jones as ‘a set of (1) *foreign* plaintiffs suing (2) a *foreign* issuer in an American court for violations of American securities laws based on securities transactions in (3) *foreign* countries.’¹⁸³ However, the Circuit did not think the novelty was good enough to change what has remained their position to the effect that subject matter jurisdiction could exist only "if the defendant's conduct in the United States was more than merely preparatory to the fraud, and particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad."¹⁸⁴ Of course the Circuit felt bound by their own decision in *Bersch* and *Vencap* as the current standard of determining the subject matter jurisdiction from the perspective of conduct test under which it is possible to identify which action or actions constituted the fraud that directly caused harm. In the case of *Bersch* it would amount to the ‘act of placing the allegedly false and misleading prospectus in the hands of purchasers’¹⁸⁵ and in the case of *Vencap*, it would amount to determining ‘if that act or those actions emanated from the United States.’¹⁸⁶

Curiously, the Circuit’s decision in *Berger* does not appear to be consistent with the proposition that the alleged fraudulent information if emanated from abroad may deprive the court asserting subject matter jurisdiction. In that case, the statement

¹⁸³ 547 F.3d 167; 2008 U.S.at 29

¹⁸⁴ Ibid at 14

¹⁸⁵ Ibid at 18

¹⁸⁶ Ibid at 18

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that ultimately conveyed the fraudulent information to investors were mailed from Bermuda but the Circuit asserted subject matter jurisdiction under conduct test on the ground that the ‘fraudulent scheme was masterminded and implemented by Berger in the United States.’¹⁸⁷ According to them, ‘the critical factor was that the conduct that directly caused loss to investors -- the creation of the fraudulent statements -- occurred in New York.’¹⁸⁸ That was the same argument of the appellants that Florida constituted the place of the improper conduct because the information disseminated by the bank consisted solely of the mechanical insertion of HomeSide’s numbers into the statement and public filings and therefore consistent with the proposition in *Berger*, it would amount to conduct in the United States and not Australia. Yet, the Circuit insisted that ‘the actions taken and the actions not taken by the bank in Australia were, in our view, significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida.’¹⁸⁹

As far as it goes the proposition in *Berger* provides the Circuit with a ground to reject the defendants’ advice for the court to replace conduct and effects tests in foreign-cubed cases with bright-line location because of the former’s potential conflict between U.S. antifraud laws and those of other countries. The Circuit’s attitude is that instead of conflict, there is a widespread consensus that ‘anti-fraud enforcement objectives are broadly similar as governments and other regulators are generally in agreement that fraud should be discouraged.’¹⁹⁰ Therefore, the Circuit declined to

¹⁸⁷ Ibid at 19

¹⁸⁸ 547 F.3d 167; 2008 U.S.at 29

¹⁸⁹ Ibid at 25

¹⁹⁰ Ibid at 23

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place any limits beyond the conduct test on foreign-cubed securities fraud cases because of its potential to balance competing concerns.

On the issue of complete lack of effect of the alleged fraudulent conduct on America or Americans, the appellants did not pursue their claim on the basis of effect test as their interest was solely on behalf of those who purchased the bank's securities on foreign exchanges. So, there was no contention about the fact that the alleged fraud had no any meaningful effect on America's investors or its securities market.

The lengthy chain of events as a factor is the idea that the appellants need to establish a causal link between the part America played in the misstatements and the harm on the investors. The appellant failed to show that HomeSide sent falsified numbers directly to investors. The Circuit's view is that as much as 'HomeSide may have been the original source of the problematic numbers, those numbers had to pass through a number of checkpoints manned by the bank's Australian personnel before reaching investors.'¹⁹¹ It was necessary for the Circuit to get rid of those checkpoints or lengthy chain of events in order to establish a direct link between the misstatements and the losses suffered by the investors.

It is remarkable that beyond these three factors, the Circuit did recognize the long standing proposition about the silence of the Securities Exchange Act as to its extraterritorial application, something which leaves them with a chance to turn to the underlying purpose of the antifraud provisions as a guide to determining if Congress would have wished to devote the precious resources of the United States Courts and

¹⁹¹ 547 F.3d 167; 2008 U.S.at 27

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law enforcement agencies to securities law claim with an international element. Noting that ‘the underlying purpose of Section 10(b) is to remedy deceptive and manipulative conduct with the potential to harm the public interest or the interests of investors’¹⁹², the Court suggested that ‘it is consistent with the statutory scheme to infer that Congress would have wanted to redress harms perpetrated abroad which have a substantial impact on investors or markets within the United States.’¹⁹³ Whether this would augur well with the long standing presumption against extraterritoriality is yet a different matter and it is pertinent that it was a dividing line at the Supreme Court.

5.3 Opinion of the United States Supreme Court

The Supreme Court affirmed the dismissal but faulted the reasoning through which the Second Circuit arrived at their conclusion. Firstly, they held Second Circuit were wrong to have allowed dismissal of the case under Rule 12(b)(1) in their consideration of the extraterritoriality of Section 10(b) raising a question of subject matter jurisdiction. The Supreme Court considered conduct reach of Section 10(b) as a merits question and the subject-matter jurisdiction as the power of a tribunal to hear a case, and so it was their view that the District Court clearly had jurisdiction under 15 U.S.C. Section 78aa to adjudicate on Section 10(b) question. The matter nonetheless would have been dismissed under Rule 12(b)(6) and so the Supreme Court thought it unnecessary to remit the case.

The main issue is the proposition that ‘Section 10(b) does not provide a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in

¹⁹² Ibid at 9

¹⁹³ 547 F.3d 167; 2008 U.S.at 10

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connection with securities traded on foreign exchanges.¹⁹⁴ Both the Second Circuit and District Court were in agreement with this proposition but the Supreme Court amplified it in three ways. The first is a longstanding principle enunciated in *EEOC v. Arabian American Oil Co (Aramco)*¹⁹⁵ that ‘unless there is the affirmative intention of the Congress clearly expressed’ to give a statute extraterritorial effect, the courts must presume that it is primarily concerned with domestic conditions.¹⁹⁶ The second is the fact that the jurisdiction of Rule 10b-5 is subsumed in Section 10(b) so that if section 10(b) is not extraterritorial it logically follows that Rule 10b-5 is not. Thirdly, although the petitioners might have claimed Florida as the place where HomeSide and its executives engaged in the alleged deceptive conduct and where some misleading statements were made, it does not follow that they (petitioners) only seek domestic application of the Act. As they noted, this particular case is very rare in the sense of prohibited extraterritorial application lacking in all contacts with the United States, the focus of the Exchange Act, they explained, is not on the place where the deception originated, but on the purchases and sales of securities in the United States. To that effect, the remit of Section 10(b) is transactions in securities listed on exchanges in the United States and domestic transactions in other securities.

The critical point in this case was the reinstatement of the presumption against extraterritoriality by the Supreme Court, which did not like the fact that the Second Circuit formed the habit over the years of disregarding the principle in determining the Exchange Act particularly Section 10(b) to fraudulent schemes that involve conduct and effects abroad. The Exchange Act does not indicate whether or not

¹⁹⁴ 130 S. Ct. 2869; 177 L. Ed. 2d 535; 2010 U.S

¹⁹⁵ 499 U.S. 244, 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274

¹⁹⁶ 499 U.S. 244, 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274 at 248

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Section 10(b) has extraterritorial application, and so the Second Circuit thought that it was right for the court to ‘discern’ whether Congress would have wanted the Statute to apply. This came to the Supreme Court as a definitive way of exercising presumption against extraterritoriality from the jurisprudence of Section 10(b) in favour of what it described as inquiry whether it would be reasonable, on the basis of what Congress would have wanted, to apply the statute to a given situation. The majority of the panel did not think it was right for the court to pick and choose, and so Justice Antonin Scalia who delivered the lead opinion noted that not only that the Second Circuit did not put forward textual or extratextual basis for its action but also ignored its own confession in *Bersch* that ‘if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond.’¹⁹⁷ The majority thought that rather than courts ‘divining’ what Congress would have wished if it had addressed the problem, a more natural inquiry might be what jurisdiction Congress in fact thought about and conferred. In effect, the Supreme Court is saying that instead of guest work in just about every other case, it is better to apply the presumption in all cases in order to preserve ‘a stable background against which Congress can legislate with predictable effects.’¹⁹⁸ On that basis, the Supreme Court held that there was no affirmative indication in the Exchange Act that Section 10(b) applied extraterritorially, and therefore concluded that it did not.

It is interesting to note that every member of the 8-man panel did agree with the general conclusion but there was some kind of dissent or minority opinion as to

¹⁹⁷ 519 F.2d at 993

¹⁹⁸ No.1 at 25

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the nature of the emphasis the Court has given to the issue at stake. Justice John Paul Stevens with whom Justice Ruth Bader Ginsburg concurred took exception to the new transactional test on the basis that the issue should have been how much and what kinds of domestic contacts would be sufficient to trigger off Section 10(b), and that rather than setting aside conduct and effects test, it should have been made the standard of determining extraterritorial application of Section 10(b).¹⁹⁹ Justice Beyer regretted the fact that the case did not require the Court to consider other circumstances beyond the narrow margins upon which the general conclusion was reached.

5.4 Issues Arising from the Case

Transactional test has replaced the age-long conduct and effects test as a way of determining the statutory limit of Section 10(b) in terms of extraterritorial application. It means that Rule 10b-5 applies to only securities listed on a United States exchange and not on a foreign exchange. It means there is no longer any cause of action on the basis of Rule 10b-5 so long as the plaintiff is a foreigner suing foreign and American defendants in the U.S. for deceptive conduct associated with securities traded on a foreign exchange. This development entails a number of implications worth examining below.

5.4.1 Establishing When a Transaction Takes Place in the United States

The solicitude of transactional test in the context of Section 10(b) is the 'purchase or sale' of any security in so far as they are registered on a U.S. domestic securities exchange or those not so registered. However, when considering what constitutes

¹⁹⁹ 03 Civ. 6537 (BSJ), 2006 U.S

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transaction, it is not clear whether where the money originated in a purchase of securities or to whom it went in a sale of securities determinative.²⁰⁰ Farris suggests that it is for the lower courts to determine when a purchase or sale has taken place in the United States regarding non-U.S. listed securities but then wonders whether it is possible for an underwriter doing a U.S. road show with extensive U.S. directed selling effort, but closing all sales of securities abroad avoid Rule 10b-5.²⁰¹ The deduction from Justice Scalia's opinion is that Rule 10b-5 would not apply to any transactions on foreign exchanges irrespective of the fact that the securities are also listed on a US exchange. That being the case the lower courts may proceed on that proposition but it is not easy to draw the line.

5.4.2 Beneficiaries of Rule 10b-5 in Relations to Purchase or Sale Orders with Brokers from the United States on Non US Exchanges

The Supreme Court's proposition is that 'Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.'²⁰² It is not clear if statutory beneficiaries were intended to be citizens of the United States. It can therefore be said that under Rule 10b-5 U.S. residents purchasing securities abroad will not be protected. Even Justice Steven's concurring opinion alluded to the fact that an American investor who buys shares abroad in a company listed only on a non-U.S. exchange has no cause of action under Rule 10b-5. In the absence of statutory clarity, it is right to agree with Sachs on the need to construe the Act to cover all U.S. domestic investors whether

²⁰⁰ Ted Farris, 'Implications of Morrison v National Australia Bank Ltd'; 30 June 2010, available at www.mondaq.com/unitedstates accessed 3 Jan. 2011

²⁰¹ Ibid

²⁰² No.1 at 27

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or not they are United States citizens²⁰³ 'since distinguishing among domestic traders on the basis of alienage would violate principles of equal protection.'²⁰⁴

5.4.3 Enforcement actions of SEC and the Department of Justice to the new extraterritoriality test

What the Supreme Court has done is to disapprove of private cause of action available under Section 10(b) against persons or corporate organisations found to have violated conduct prohibited by Rule 10b-5. It follows then that claims in relations to Rule 10b-5 may not be made on the basis of purchase or sale of securities on foreign exchanges or securities transactions outside the United States. However, the decision does not seem, as it were, to have extinguished the power of SEC to initiate enforcement proceedings in such a foreign-cubed case as *Morrison*. It is understood from the concurring opinion of Justice Stevens and Justice Ginsburg that 'the Court's opinion does not . . . foreclose the SEC from bringing enforcement actions in additional circumstances, as no issue concerning the SEC's authority is presented by this case.'²⁰⁵ They believe that not only that the 'SEC's enforcement proceedings differ from private Section 10(b) actions in numerous potentially relevant respects'²⁰⁶, but also 'they pose a lesser threat' to international comity.'²⁰⁷

Moreover, things appear likely to take a new shape under what looks like legislative ambush to *Morrison*. The Investment Protection and Securities Reform Bill of 2010 pending at the Congress seeks to strengthen SEC enforcement power as well as

²⁰³ Margaret V. Sachs, 'The International Reach of Rule 10b-5: The Myth of Congressional Silence', *Columbia Journal of Transnational Law*, January 1 1990, p.10

²⁰⁴ Ibid, p.10

²⁰⁵ 03 Civ. 6537 (BSJ), 2006 U.S. Dist. LEXIS 94162 at 67

²⁰⁶ Ibid

²⁰⁷ Ibid

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reinstate right of private action.²⁰⁸ When it is signed into law, the effect of the legislation is that U.S. courts will have jurisdiction over violations of Securities Act of 1933, the Investment Advisors Act of 1940, and the Securities Exchange Act of 1934 concerning either one of the two sets of conducts.²⁰⁹ The first is ‘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.’²¹⁰ The alternative conduct is that ‘occurring outside the United States that has a foreseeable substantial effect within the United States.’²¹¹ Hans and Gill note that SEC would be required to report upon careful study, the extent to which private rights of action under the Exchange Act should be extended to cover the above two sets of conducts.²¹² What the development suggests is that the current denial of private right of action and the conduct and effects test are only temporarily on hold while transactional test and *Morrison* are just living on borrowed times.

²⁰⁸ Richard Hans and Anthony D. Gill, ‘Landmark Morrison Ruling: Supreme Court Rejects Extraterritorial Application of Securities Exchange Act.’ 30 June 2010, available at <http://www.dlapiper.com> accessed 17/01/2011

²⁰⁹ Richard Hans and Anthony D. Gill, no.44

²¹⁰ Ibid

²¹¹ Ibid

²¹² Ibid

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CONCLUSION

Morrison reaffirmed a critical point in international law that securities regulation is a matter for territorial jurisdiction. The Supreme Court did not think that regulation of foreign exchange was within the remit of the Exchange Act and Congress power to do so could never have been rationalised under international law.²¹³ Although, Sachs would argue that Congress do indeed have discretion if they so wish to decide whether and to what extent statutes could apply beyond the United States and there is even an issue that if constitution and international law could stand on the way, their constraints are clearly minimal.²¹⁴ However, in practical terms it is not the case that the Exchange Act or indeed many U.S. statutes are affirmatively indicative of extraterritoriality and *Morrison* clearly confirms that the legislative solicitude of the Congress is domestic conditions.²¹⁵

There are broader conflict of laws issues that arise from the decision upon which extraterritoriality can be limited other than the instrumentality of transactional test. The doctrine of comity, invocation of forum non conveniens, and the propriety of certification can all avail the courts of immense opportunity to restrict the application of Rule 10b-5 remedy particularly in a class-action context.²¹⁶ The doctrine of comity is the idea that extraterritoriality 'creates the potential for particularly severe conflict with other countries on the question of how best to regulate global

²¹³ 130 S. Ct. 2869; 177 L. Ed. 2d 535; 2010 U.S

²¹⁴ Margaret V. Sachs, no.203 p.11

²¹⁵ Ibid, p.11

²¹⁶ Stephen J. Choi and Linda J. Silberman, 'Transnational Litigation and Global Securities Class-Action Lawsuits', *Wisconsin Law Review*, April 7 2009, p.477

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economic activity.²¹⁷ Courts will therefore be disposed on one hand to the question regarding recognition of their judgment abroad such that defendant will not be subjected to multiplicity of suits, and on the other hand to the question of availability of alternative remedies in the defendant's home country and any prospect of conflict of such remedies with an exercise of U.S. jurisdiction.²¹⁸ These two questions provide foreign plaintiffs with opportunity to seek dismissal of securities action on forum non conveniens and Choi and Silberman found that courts have applied that principle in transnational securities actions where the alternative forum is a foreign forum and unlikely to apply U.S. securities laws.²¹⁹ Similar questions are raised in proprietary of certification in international securities class-action suits, and courts must determine 'whether a class of foreign investors is "superior to other available methods for the fair and efficient adjudication of the controversy" pursuant to Federal Rule of Civil Procedure 23(b)(3).²²⁰

There are implications of this decision for the international securities market. The hands of foreign issuers and underwriters are no longer tied by the apron strings of U.S. securities law so long as they sell their non U.S.-listed securities to U.S. institutions and investors in an offshore transaction through a non U.S. affiliate.²²¹ This action would never have been possible under conduct and effects regime without the risk of Rule 10b-5 if fraudulent conduct is alleged to have taken place in the course of the transaction. It is also possible now to structure securities sale to

²¹⁷ Hannah L. Buxbaum, 'Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict', *Columbia Journal of Transnational Law*, Vol. 46, Issue 1, *Indiana Legal Studies Research Paper No.33*, p.1

²¹⁸ Stephen J. Choi and Linda J. Silberman, no.7 p.477

²¹⁹ Stephen J. Choi and Linda J. Silberman, no.7 p.478

²²⁰ Ibid, 479

²²¹ Ted Farris, 'Implications of *Morrison v National Australia Bank Ltd*', 30 June 2010, available at www.mondaq.com accessed 3 January

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take place abroad through contractual means unlike when liabilities under Rule 10b-5 were applicable regardless of intentions of parties and could not be claimed on the basis of contract.²²² It does mean that issuers including private issuers are incentivised to list their securities in non U.S. exchanges but it also may become a disincentive to U.S. institutional investors.²²³

It is important to note that the merit of extraterritorial application of national securities regulation is not at issue. There are indeed ascertainable collateral benefits associated with extraterritorial application of antifraud rules in the context of international fraudulent activities. Extraterritoriality provides as much deterrence as it encourages other nations to tighten their noose against securities fraud in their own jurisdictions because it is of no credit to any foreign nation that its nationals have the ability to engage in fraudulent transactions.¹³²²⁴ However, the contention has been the statutory basis upon which U.S. courts seize themselves of the power to apply the United States national securities regulation to fraudulent activities that have taken place outside the United States. *Morrison* found the approach to be inconsistent with presumption against extraterritoriality, and it can neither be rationalised under territorial jurisdictional principle of international law nor justified under the conflict of law rules of private international law. There is no gainsaying the fact that it also has potential for 'redundant and unnecessarily costly systems of overlapping regulations.'

²²² Ted Farris, no.4

²²³ Ibid

²²⁴ Kun Young Chang, 'Multinational Enforcement of U.S. Securities Laws: The Need for Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction', *Fordham Journal of Corporate and Financial Law*, Vol. 9, Issue 1, Article 2, 2003, p.99

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It is sensible to heed calls for international harmonisation of securities regulation and enforcement in ways that encourage negotiation and compromise among countries so that all interests will be taken on board. However, the viability of such approach is doubtful on the basis of inadequacies of public international law to deal with multidimensional problems associated with the contemporary international economic relations. There is no doubt that *Morrison* will prove to maintain and preserve the balance of territorial jurisdiction in the application of U.S. national securities regulation even if only for a while. However, the status quo is likely to be restored when the Investment Protection and Securities Reform Bill of 2010 pending at the Congress is enacted. With that in place, extraterritoriality will stage a come-back and it will all be business as usual. Until then, the principle of territorial jurisdiction suffices in the context of the presumption against extraterritorial application of the United States national securities regulation.

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