COMMENTS OF THE ATLANTIC LEGAL FOUNDATION TO SECURITIES AND EXCHANGE COMMISSION IN REGARD TO STUDY ON EXTRATERRITORIAL PRIVATE RIGHTS OF ACTION
(File No. 4-617; Release No. 34-63174)

The Atlantic Legal Foundation hereby submits these comments in response to the Securities and Exchange Commission's ("Commission") request for public comments, pursuant to Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), regarding a study (the "Study") to determine the extent to which private rights of action under the antifraud provisions of the Securities Exchange Act of 1934 (the "Exchange Act") should be extended to cover transnational securities fraud.

In brief, the Atlantic Legal Foundation strongly agrees with the U.S. Supreme Court's decision last year in *Morrison v. National Australia Bank*[1] that the Exchange Act provides no cause of action to foreign plaintiffs suing foreign and U.S. defendants for misconduct in connection with the purchase or sale of securities abroad. To supersede this decision by statute would have negative repercussions for both international comity and the U.S. and global economies.

The purpose of this letter is to discuss the international law principles and potential consequences that the Commission should consider while conducting the Study. We also suggest an alternative focus on the need, if any, for a disclosure standard to ensure awareness on the part of investors making securities purchase and sale orders through the U.S. for securities traded abroad that non-U.S. law will govern the actual transactions and may determine their rights.

I. Interests of the Atlantic Legal Foundation

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm that provides effective legal advice, without fee, to scientists, educators, parents, and other individuals and trade associations. Among other things, the Atlantic Legal Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and sound policy.

The Atlantic Legal Foundation's leadership includes distinguished legal scholars and practitioners from across the legal community, including members of national and international law firms and general counsel or retired general counsel of major multinational and smaller companies. Atlantic Legal Foundation's leadership has decades of experience in the practice of corporate and commercial law, including securities law. In particular, the Atlantic Legal Foundation has served as *amicus curiae* or counsel for *amicus curiae* in a variety of cases

[1] 130 S. Ct. 2869 (2010).

involving the constitutional implications of corporate civil and criminal liability, as well as the interplay between U.S. and international law.[2]

The Atlantic Legal Foundation consequently understands that the delicate web of international business relations depends in large measure on the respect that nation states show each other. When the government of the United States interferes with the sovereignty of another country, and in doing so also rejects an international consensus, the United States may be considered by its trading partners and diplomatic allies to be an unreliable international partner.

II. Comments of the Atlantic Legal Foundation

The *Morrison* decision accurately reflects the principles of international comity and their interplay with U.S. law and it mitigated "the risk of derailing [international] cooperation by the selfish application of our law to circumstances touching more directly upon the interests of another forum," reflecting how "the interest of the [international legal] system as a whole [in] promoting a 'friendly intercourse between the sovereignties' also furthers American self-interest, especially where the workings of international trade and commerce are concerned."[3]

This comment letter seeks to demonstrate why the Commission and Congress should not seek to supersede *Morrison* by statute or regulation.

The Atlantic Legal Foundation respectfully submits that the Commission should take the following considerations into account while conducting the Study of whether private rights of action in U.S. courts should be extended to alleged misconduct with respect to securities traded on foreign exchanges, non-exchange trading platforms, or other alternative trading systems: First, the exercise of extraterritorial jurisdiction can have negative implications for international comity. Second, major U.S. trading partners, including those who submitted *amicus* briefs supporting the ultimately prevailing respondent in the *Morrison* case (*i.e.*, Great Britain, France, and Australia), have made sufficient remedies available to investors who purchase securities within their territories. Third, these contemplated private rights of action in U.S. courts, if enacted into law, will come with significant domestic and global economic costs. As an alternative, the Atlantic Legal Foundation suggests that the Commission consider the need, if any, for a disclosure standard to ensure that clients of U.S.-domiciled brokers are aware that non-

[2] *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (represented 28 distinguished former public servants—the late President Gerald R. Ford and former Secretaries of State, Defense, Treasury, Commerce, senior members of Congress responsible for United States foreign policy and trade policy, former National Security Advisors, Presidential chiefs of staff, and U. S. Trade Representatives—in submission of *amicus* brief supporting ultimately prevailing respondent in case where Court, on the basis of the preemption doctrine, struck down Massachusetts state law effectively prohibiting state agencies from purchasing goods from companies conducting business in Myanmar (Burma); *Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005), *cert. denied*, 547 U.S.1147 (2006) (*amicus* brief in support of successful appeal by company chief legal officer of decision holding him liable under Delaware business judgment rule for allegedly failing to properly discharge his duties); *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003) (*amicus* brief supporting respondent-appellant in successful appeal of district court's grant of habeas corpus petition of alien convicted felon, citing purported customary international law obligations); *see also United States v. Collins*, No. 10-1048 (2d Cir. Mar. 30, 2010) (*amicus* brief in pending appeal of securities fraud conviction by former outside counsel to defunct commodities brokerage firm Refco Financial).

[3] *In re Maxwell Commc'ns Corp.*, 93 F.3d 1036, 1053 (2d Cir. 1996) (bankruptcy law decision) (citations omitted).

U.S. law will determine redress for harms arising from any securities purchase or sale order effected abroad.

A. Extraterritorial Jurisdiction Can Erode International Comity

The Scope of Extraterritorial Jurisdiction

Customary international law concerning the scope of extraterritorial jurisdiction illustrates the potentially negative implications for international comity that can result from the exercise of such jurisdiction. Customary international law treats the scope of permissible jurisdiction to prescribe and enforce law governing specific foreign conduct as a function of a nation state's (hereafter "state") connection with the conduct and the party engaging in that conduct.[4] The stronger the links, the more reasonable will be the exercise of jurisdiction. The Permanent Court of International Justice noted, in its seminal 1927 decision in the *S.S. "Lotus" Case*, that while states "remain[ed] free to adopt the [jurisdictional] principles" they regarded "as best and most suitable," they still "should not overstep the limits which international law places" on the exercise of jurisdiction.[5] Within these limits, there are five such principles, more than one of which can apply in a given case.

1) *The territorial principle.* States can regulate conduct occurring within their territory, wholly or in substantial part, or conduct outside their territory intended to have a substantial effect within their territory.[6] In U.S. law, this principle is, for example, reflected in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), which immunizes foreign sovereign defendants (*i.e.*, foreign states, their political subdivisions, or their agencies or instrumentalities) from the jurisdiction of U.S. courts, subject to binding international agreements to which the U.S. is a party and

[4] The question of what constitutes binding international law, save for actual international agreements, is admittedly not without contention. Although helpful in discerning customary international law, decisions of the International Court of Justice ("I.C.J.") have "no binding force except between the parties" to a given dispute and have no precedential value in a *stare decisis* sense. *See* Statute of the International Court of Justice, art. 59. Nonetheless, authorities have concluded that customary international law stems from general and consistent practices resulting from a sense of legal obligation on the parts of states affected. *See id*, art. 38(1)(b) (citing "international custom"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (hereafter RESTATEMENT) § 102(2) & cmt. b (practices followed by states out of a "sense of legal obligation," although there is no precise definition regarding how many states must adhere to given practices, nor how long they must do so). Moreover, inconsistent practices by states make discerning a "constant and uniform usage, accepted as law, with regard to [an] alleged rule" a difficult task. *Asylum Case* (Colom. v. Peru), 1950 I.C.J. 266, 277. Evidence of state practice includes official state actions, government statements, and international agreements. *See* RESTATEMENT § 102, cmt. b; GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 15 (4th ed. 2007). A rule of customary international law does not bind a state that declares disagreement with the rule during its formation. *See id.*; *see also Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116, 131 (states may "contract out" of customary international law during its formation by consistently objecting to it).

[5] 1927 P.C.I.J. (ser. A) No. 10, 19.

[6] RESTATEMENT § 402(1).

specified exceptions.[7] The FSIA's exception to foreign sovereign immunity for claims arising from commercial activities applies to commercial activities carried on in the U.S., acts "performed in the [U.S.] in connection with a commercial activity" elsewhere and acts "outside the territory of the [U.S.] in connection with a commercial activity elsewhere" that cause a "direct effect" in the U.S.[8]

2) *The nationality principle.* States can regulate the activities of their nationals both inside and outside their territories.[9] In U.S. law, this principle is, for example, reflected in the Foreign Corrupt Practices Act, itself a part of the Exchange Act, which criminalizes bribery by U.S. nationals and corporations taking place abroad,[10] as well as the treason statute.[11]

3) *The passive personality principle.* A state may apply law — particularly criminal law — to an act committed outside its territory by a foreign national where the victim of the act was its national.[12] This principle "has become increasingly accepted as an appropriate basis for extraterritoriality when applied to terrorist activities and

[7] 28 U.S.C. §§ 1330(a) (establishing subject matter jurisdiction for appropriate civil claims), 1603(a)-(b) (affected foreign sovereign defendants include foreign states, their political subdivisions, and their agencies or instrumentalities), 1604 (specified foreign defendants are immune from U.S. courts' jurisdiction subject to existing international agreements to which the U.S. is a party and enumerated exceptions).

[8] *Id*. at § 1605(a)(2). Although the issue before the Commission is jurisdiction to legislate, it also implicates jurisdiction to enforce. The jurisprudence surrounding these FSIA provisions illustrates how courts have treated extraterritorial jurisdiction in instances where a harm suffered in the U.S. is an "immediate consequence" of some culminating act abroad. *Republic of Argentina v. Weltover*, 504 U.S. 607, 618-19 (1992) (in a case between foreign plaintiffs and Argentine government, failure to make payments on sovereign bonds by deposit to foreign plaintiffs' New York bank account constituted a "direct effect" in the U.S.); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 997-1000 (10th Cir. 2007) (wrongful disbursement of funds to Utah account constituted "direct effect" in U.S.). *Cf., e.g., Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 74-81 (2d Cir. 2010) (U.S. national wife of Turkish citizen was falsely told that she could only open a joint Turkish bank account with husband and husband subsequently withdrew available funds without her permission; suit could not proceed because financial loss stemmed directly from a foreign tort and transfer of money to open account did not directly cause injury); *Guevara v. Republic of Peru*, 608 F.3d 1297, 1308 (11th Cir. 2010) (receiving phone call from abroad and discussing ultimately unpaid reward money did not constitute U.S. act in connection with a commercial activity by a foreign state elsewhere). The Commission may also wish to take potential FSIA considerations into account given how foreign government agencies or instrumentalities are significant equity holders in numerous multinational companies.

[9] RESTATEMENT § 402(2).

[10] *See* 15 U.S.C. § 78dd-1 *et seq.*

[11] 18 U.S.C. § 2321 (refers to giving "aid and comfort" in the U.S. or elsewhere to enemies of the U.S.); *see also Kawakita v. United States*, 343 U.S. 717, 733 (1952) ("We must therefore reject the suggestion that an American citizen living beyond the territorial limits of the United States may not commit treason against them.").

[12] RESTATEMENT § 402, cmt. g.

organized attacks against a state's nationals because of the victim's nationality," but is generally not when applied to ordinary torts and crimes.[13]

4) *The protective principle*. States can exercise jurisdiction over foreign conduct that threatens their security when other developed legal systems also recognize such conduct as a crime (*e.g.*, espionage, counterfeiting of the state's seal or currency, falsification of official documents, as well as perjury before consular officials and conspiracy to violate the immigration or customs laws).[14]

5) *The universality principle*. States may exercise jurisdiction over such acts as piracy, genocide, war crimes, and perhaps terrorism, regardless of their links to such acts or their perpetrators, because these acts are universally dangerous and exceptionally heinous.[15] In the U.S., this jurisdictional principle underlies the Torture Act of 1994,[16] the Torture Victim Protection Act of 1991 ("TVPA"),[17] and, very notably

[13] *United States v. Vasquez-Velasco*, 15 F.3d 833, 841 n.7 (9th Cir. 1994) (affirming convictions under extraterritorial application of 18 U.S.C. § 1959, which criminalizes violent crimes in aid of racketeering enterprises, for the torture and murder of two U.S. tourists and one Drug Enforcement Administration agent in Mexico, but acknowledging that random murders of tourists abroad would probably not justify the same application) (citing RESTATEMENT § 402, cmt. g.); *see also* 18 U.S.C. §§ 2331-2332 (criminalizing acts of terrorism against U.S. nationals abroad); *but see United States v. Neil*, 313 F.3d 419, 421-23 (9th Cir. 2002) (affirming conviction of employee of cruise ship that departed from the U.S. for sexual abuse of a minor pursuant to special maritime jurisdiction, under 18 U.S.C. § 7(8), over offenses committed against U.S. nationals on "any foreign vessel during a voyage having a scheduled departure from or arrival in the [U.S.]"); *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002) (concluding, when U.S. national travelled abroad to avoid U.S. child support obligations, that Deadbeat Parents Punishment Act had extraterritorial effect) (citing 18 U.S.C. § 228(a)(2) (criminalizing "travel[] in . . . foreign commerce with the intent to avoid a [child] support obligation")).

[14] RESTATEMENT § 402(3), cmt. f.; *see also, e.g.*, *United States v. Bin Laden*, 92 F. Supp. 2d 189, 193-97 (S.D.N.Y. 2000) (application of U.S. criminal law to terrorist acts against U.S. embassies in Kenya and Tanzania was most directly a function of the protective principle).

[15] RESTATEMENT § 404; *see also generally* LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (2003); Donald F. Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L. L. 142, 142 (2006). The principle of universal jurisdiction is perhaps best-known for having served as the basis for prosecutions of former foreign heads of state by European countries for human rights violations. *See, e.g.*, *Ex parte Pinochet* (No. 3), [2000] 1 A.C. 147 (UKHL) (denying immunity from Spanish arrest warrant and extradition request for former Chilean president Augusto Pinochet, who was apprehended while recovering from surgery in London); *but see Pinochet Set Free*, BBC NEWS ONLINE, Mar. 2, 2000, http://news.bbc.co.uk/2/hi/uk_news/663170.stm (describing British government's decision to allow Pinochet to return to Chile because he was unfit to stand trial).

[16] 18 U.S.C. §§ 2340-2340A (criminal penalties for anyone outside the U.S. who commits torture); *see also United States v. Belfast*, 611 F.3d 783, 793 (11th Cir. 2010) (defendant son of former president of Liberia was properly convicted of acts of torture committed abroad against individuals in custody who were never charged with crimes or given any legal process).

[17] Pub. L. No. 102-256, 106 Stat. 73 (1993) (codified as note to 28 U.S.C. § 1350) (establishing civil liability for individuals who, under actual or apparent authority, or color of law of any foreign state, commit torture or extrajudicial killing); *see also Samantar v. Yousuf*, 130 S. Ct. 2278, 2283 (2010) (the Court unanimously held that the FSIA did not apply to former Somali prime minister defending against civil lawsuit for allegedly orchestrating the torture and extrajudicial killings of plaintiffs and their families between 1980 and 1990, that FSIA provides immunity to foreign states for their public acts (subject to certain exceptions), but does not apply to foreign officials

given the amount of litigation it has generated over the past thirty years or so, the Alien Tort Statute of 1789 ("ATS").[18] International treaties also establish universal jurisdiction for certain acts.[19]

Viewed together, these principles indicate that perhaps the Dodd-Frank Act's amendments to the Exchange Act regarding criminal liability for transnational securities fraud are justifiable, but that the contemplated private rights of action are questionable under customary international law and practice. Additionally, even if one of the above bases for jurisdiction is present, actually exercising jurisdiction may still be unreasonable.[20]

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sued in their individual capacities and that immunity of foreign officials, as opposed to foreign states, is governed by the common law rather than FSIA).

[18] 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). The ATS largely remained dormant until the 1980 decision by the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Peña-Irala*, where the court ruled that the ATS allowed for jurisdiction over a lawsuit by Paraguayan residents of the U.S. against a Paraguayan police official, who had overstayed a U.S. visa, in regard to his orchestration of the torture-murder of their son in Paraguay. 630 F.2d 876, 890 (2d Cir. 1980) (the holding was, in the court's view, "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence"). Subsequent ATS cases involved parties and conduct with no U.S. connection. *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) (claim regarding atrocities committed in Bosnia orchestrated by Radovan Karadzic, leader of Bosnian Serb forces); *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 495-96 (9th Cir. 1992) (case concerned torture orchestrated by the late Philippine president, Ferdinand Marcos, in the Philippines). The Supreme Court, in *Sosa v. Alvarez-Machain*, held that the ATS was a jurisdictional statute. 542 U.S. 692, 724 (2004). But the Court also held that federal common law might supply causes of private action for international law violations, though there was "no basis to suspect" that Congress had anything in mind other than "violation of safe conducts, infringements of the rights of ambassadors, and piracy" in enacting the statute. *Id*. at 724-25. The Court chose to allow such private claims subject to courts' "vigilant doorkeeping" and caution in "adapting the law of nations to private rights." *Id*. at 728-29.

Illustrating how universal civil jurisdiction risks opening litigation floodgates, however, the ATS has been used, though not always successfully, to obtain jurisdiction over both current and former foreign heads of state and U.S. and foreign companies in U.S. courts for the alleged perpetration of or complicity in human rights violations abroad. *See, e.g.*, *Samantar*, 130 S. Ct. at 2283 (allowing ATS and TVPA lawsuit against former Somali prime minister to proceed); *Presbyterian Church of Sudan v. Talisman*, 582 F.3d 244, 244-56 (2d Cir. 2009) (ATS allowed for accessorial liability if a defendant purposefully assisted a principal in effecting a human rights violation); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1267 (11th Cir. 2009) ("Some acts, such as torture and murder committed in the course of war crimes, violate the law of nations regardless of whether the perpetrator acted under color of law of a foreign nation or only as a private individual."); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007) (dismissing, on political question grounds, ATS claim brought by family members whose relatives were killed or injured when Israeli Defense Forces demolished homes in the Palestinian Territories using bulldozers manufactured by and ordered directly from defendant, but paid for by the U.S. government). The *Sosa* decision, then, may have built a door for ATS claims subject to "vigilant doorkeeping," but plaintiffs have certainly ripped that door from its hinges.

[19] *See, e.g.*, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (U.S. torture laws enacted pursuant to this treaty); United Nations Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

[20] RESTATEMENT § 403(1).

International Comity

International comity principles are based on the concept of reasonableness. Comity, a long-standing tenet of international law, limits "[t]he extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation" because of "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own nationals or of other persons who are under the protection of its laws."[21] In the absence of comity, "nothing would be more convenient in the promiscuous [*sic*] intercourse and practice of mankind, than that what was valid by the laws of one place, should be rendered of no effect elsewhere, by a diversity of law."[22] The existence of national power to prescribe conduct consequently does not mean that exercising such power is wise.[23]

Factors determining whether an exercise of jurisdiction is reasonable include (a) the link of the activity to the territory of the regulating state (*i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct and foreseeable effects upon or in the territory); (b) connections, such as nationality, residence, or economic activity, between the regulating state and the person primarily responsible for the activity to be regulated, or between the state and those whom a law aims to protect; (c) the character of the activity to be regulated, a law's importance to a regulating state, the extent to which other states regulate such activities, and the degree to which a law is generally accepted; (d) the extent to which the regulation is consistent with the international legal system's traditions; (e) the extent to which another state may have an interest in regulating the activity; and (f) the likelihood of conflict with another state's laws.[24] When two or more states can reasonably exercise jurisdiction over an act, but the

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[21] *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (refusing to enforce French judgment because France did not enforce U.S. judgments).

[22] *Emory v. Grenough*, 3 U.S. 369, 370 fn (1797) ("By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect every where, so far as they do not occasion a prejudice to the rights of the other governments, or their citizens.")

[23] Justice Robert Jackson characterized comity as a sort of golden rule in the global community of nations:

> [International law] aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own . . . [I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

Lauritzen v. Larsen, 345 U.S. 571, 582 (1953) (in suit by Danish seaman injured on Danish-flagged vessel in foreign waters and owned by Danish national, although seaman had joined ship's crew in New York but signed ship's articles governed by Danish law, Danish law should govern).

[24] RESTATEMENT § 403(2). The U.S. Supreme Court has cited these factors approvingly. *See F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) (finding unreasonable the application of U.S. antitrust laws to foreign conduct causing foreign harm, where the plaintiff's claim solely stemmed from that harm, because of the

states' pertinent laws conflict, the state with the lesser interest in exercising jurisdiction should defer to the state with the greater interest.[25]

B. Foreign Remedies for Securities Fraud

The Atlantic Legal Foundation is unaware of any state with a developed securities market that does not in some way prohibit securities fraud. It is consequently extremely likely that creation of private rights of action under U.S. law for alleged fraud with respect to securities traded on foreign exchanges or electronic platforms, by foreign nationals, will conflict with foreign laws. The question that the Commission and, ultimately, Congress, will have to consider is why "should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from [securities fraud]," especially when "engaged in significant part by Canadian or British or Japanese or other foreign companies."[26] Does the U.S. have a valid interest in undermining foreign governments' judgments about the best means to combat securities fraud committed in their own countries?

The *amicus* briefs filed by three major foreign allies and trading partners of the U.S.—the United Kingdom of Great Britain and Northern Ireland (the "U.K."), France, and Australia—advocating the limitation of extraterritorial jurisdiction that the Court ultimately adopted unanimously in *Morrison* contained overviews of the states' own securities laws and legal procedures.[27] We will not repeat those descriptions here, but respectfully refer the Commission to those *amicus* briefs. While one can certainly disagree with those states' approach to securities fraud, the question facing U.S. policymakers is whether any such disagreement is worth the risk of foreign governments perceiving a U.S. policy judgment as a unilateral extension of an opportunity for individuals within those states' jurisdiction to bypass their courts and engage in the sort of global forum shopping that may undermine their laws or public policy.

The Commission should bear in mind that in the context of motions to dismiss for *forum non conveniens*, U.S. courts may inquire only if remedies provided by an alternative forum are

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"serious risk of interference with a foreign nation's ability to regulate its own commercial affairs" and how the "justification for that interference seems insubstantial").

[25] *See* RESTATEMENT at § 403(3); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 (1981) (there is a "□local interest in having localized controversies decided at home'") (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)); *In re Banco Santander Securities Optimal Litig.*, No. 09-MD-02073, 2010 U.S. Dist. LEXIS 87580, at *103 (S.D. Fla. July 30, 2010) (dismissal of securities fraud class action on both *Morrison*-based grounds and comity considerations in regard to *forum non conveniens*, where court stated that if "an action is based on facts occurring" in another jurisdiction, the other jurisdiction's interest favors the action's dismissal) (citing *Chazen v. Deloitte & Touche, LLP*, 247 F. Supp. 2d 1259, 1268 (N.D. Ala. 2003) (citing *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1284 (11th Cir. 2001)).

[26] *Empagran*, 542 U.S. at 165.

[27] *See generally* Brief of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Respondents ("U.K. Brief") at 5-13; Brief for the Republic of France as *Amicus Curiae* in Support of Respondents ("France Brief") at 20-30, *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) (No. 08-1191); Brief of the Government of the Commonwealth of Australia as *Amicus Curiae* in Support of the Defendants-Appellees ("Australia Brief") at 5-23, *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) (No. 08-1191).

"so clearly inadequate or unsatisfactory" that they are "no remedy at all."[28] While there may be procedural and substantive differences between the securities laws of the U.S. and its major trading partners, it certainly cannot be said that they provide no protection and no remedy for investors.

C. Repercussions of the Contemplated Creation of Private Rights

The *Morrison* rule is straightforward – a plaintiff can only pursue a civil securities fraud action under the Exchange Act in regard to securities traded in a U.S. market.[29] Courts have already dismissed a number of cases pursuant to this rule.[30]

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[28] *Piper Aircraft*, 454 U.S. at 254.

[29] *See* 130 S. Ct. at 2888.

[30] Courts have dismissed claims regarding securities traded abroad, even when plaintiffs were American or when purchase/sale orders were made in the U.S. *See In re Royal Bank of Scotland Group PLC Securities Litig.*, 2011 U.S. Dist. LEXIS 3974, at *22-34 (S.D.N.Y. Jan. 11, 2011) (securities traded abroad); *In re Celestica Inc. Securities Litig.*, No. 07 CV 312, 2010 U.S. Dist. LEXIS 110630, at *2 & n.1 (S.D.N.Y. Oct.14, 2010) (same); *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, No. 08 Civ. 1958, 2010 U.S. Dist. LEXIS 105720, at *17-27 (S.D.N.Y. Oct. 1, 2010) (U.S. plaintiffs ordered purchases in U.S.); *In re Alstom Securities Litig.*, No. 03 Civ. 6595, 2010 U.S. Dist. LEXIS 98242, at *15-20 (S.D.N.Y. Sept. 13, 2010) (U.S. purchase orders); *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620, 622-27 (S.D.N.Y. 2010) (U.S. plaintiffs and securities traded abroad). One court has held that parties' subjective intent is not relevant to whether a domestic securities transaction took place. *See Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada*, Case No. 09-23248, 2010 U.S. Dist. LEXIS 79445, at 5-11 (S.D. Fla. Aug. 6, 2010). Notably, parties have consented to the dismissal of cases, or revision of proposed classes, where securities trading abroad are concerned. *See In re Imax Securities Litig.*, No. 06 Civ. 6128, 2010 U.S. Dist. LEXIS 135341, at *4 (S.D.N.Y. Dec. 22, 2010) (revising class definition); *Terra Securities ASA Konkursbo v. Citigroup*, No. 09 Civ.7058, 2010 U.S. Dist. LEXIS 84881, at *12-13 (S.D.N.Y. Aug. 16, 2010); *Sgalambo v. McKenzie*, No. 09 Civ. 10087, 2010 U.S. Dist. LEXIS 79688, at *70 (S.D.N.Y. Aug. 6, 2010). But *Morrison* has not precluded foreign plaintiffs from pursuing securities fraud claims when securities at issue were purchased on a U.S. exchange. *See Lapiner v. Camtek, Ltd.*, No. C 08-01327, 2011 U.S. Dist. LEXIS 9985, at *6-8 (N.D. Cal. Feb. 2, 2011); *see also Foley v. Transocean Ltd.*, No. 10 Civ. 5233, 2011 U.S. Dist. LEXIS 1541, at *28 (S.D.N.Y. Jan. 3, 2011) (*dicta*).

In regard to more non-traditional transactions, courts have still used the *Morrison* transaction location test. *See Gannon Int'l, Ltd. v. Blocker*, No. 4:10CV0835, 2011 U.S. Dist. LEXIS 3348, at *44-45 (E.D. Mo. Jan. 13, 2011) (dismissing U.S. plaintiffs' claim arising from allegedly false statements by defendant U.S. national concerning foreign joint venture's ownership structure); *Elliott Assocs. v. Porsche Automobil Holding SE*, No. 10 Civ. 0532, 2010 U.S. Dist. LEXIS 138399, at *22-25 (S.D.N.Y. Dec. 30, 2010) (dismissing claim arising from securities-based swap agreements referencing the price of a security traded abroad); *Absolute Activist Value Master Fund Ltd. v. Homm*, No. 09 CV 08862, 2010 U.S. Dist. LEXIS 137150, at *17-19 (S.D.N.Y. Dec. 22, 2010) (dismissing claims by foreign plaintiffs against a group of primarily foreign defendants arising from private securities transactions abroad); *In re Banco Santander Securities-Optimal Litig.*, 2010 U.S. Dist. LEXIS 87580, at *23-27 (rejecting claim regarding offshore purchases of offshore investment funds closed to U.S. investors); *but see Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 404-405 (S.D.N.Y. 2010) (finding *Morrison*'s application unclear in case concerning investments in offshore funds listed, but not traded, abroad, and for which subscription agreements were accepted in U.S.).

Courts have used *Morrison* to dismiss civil claims seeking extraterritorial application of statutes that have related, or have likely related, to federal securities claims before. *See Norex Petroleum Ltd. v. Access Indus.*, 622 F.3d 148, 149 (2d Cir. 2010) (Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962 *et seq.*); *Norex Petroleum Ltd. v. Access Indus.*, No. 07-4553, 2010 U.S. App. LEXIS 25422, at *6-8 (2d Cir. Sept. 28, 2010)

Morrison also identifies reasoning in prior court decisions that would likely be rejected today.[31]

In our view, the contemplated private rights of action would impede global capital markets and capital formation worldwide, as well as flood U.S. courts with claims from around the world that have little contact with or impact on U.S. markets.

The contemplated private rights would effectively vest the U.S. with a sort of universal civil jurisdiction over the world's securities markets, in effect taking a step more commonly utilized, as discussed previously, for acts of torture and terrorism. It is true that Section 929P of the Dodd-Frank Act allows the Commission and the U.S. to institute actions for violating the Exchange Act's antifraud provisions under the pre-*Morrison* standard of conduct within the U.S. that significantly furthers the violation, even if the actual securities transaction occurs abroad and involves only foreign investors, or conduct abroad that has a foreseeable substantial effect in the U.S. But public authorities, namely the Commission and other sectors of the U.S. government, will decide whether to initiate such actions. They will have discretion over how and whether to pursue such actions and presumably will be able to call upon the advice of the U.S. State Department, the Treasury Department and other federal agencies that are sensitive to the foreign relations impact of such contemplated Commission action.

Private litigants and their lawyers are not sensitive to those factors, or, indeed, might exploit such sensitivities for private advantage.[32] Furthermore, "[d]ifferent courts could reach different conclusions, without incurring reviewable legal error, on identical facts," thereby causing an "unpredictability of outcomes [that] will inevitably lead to more lawsuits and to more uncertainty in the marketplace."[33] These are the dangers of making the U.S., through the enactment of the contemplated rights, the "Shangri-La of . . . litigation for lawyers representing

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(same); *In re Nat'l Century Fin. Enters.*, No. 2:03-md-1565, 2010 U.S. Dist. LEXIS 131724, at *78-84 (S.D. Ohio Dec. 13, 2010) (rejecting out-of-state application of state securities law); *Cedeño v. Intech Group, Inc.*, No. 09 Civ. 9716, 2010 U.S. Dist. LEXIS 88026, at *5-9 (S.D.N.Y. Aug. 25, 2010) (RICO). A split also appears to be developing in regard to whether ADRs traded on U.S. exchanges are predominantly foreign transactions. *Compare In re Société Générale Securities Litig.*, No. 08 Civ. 2495, 2010 U.S. Dist. LEXIS 107719, at *15-20 (S.D.N.Y. Sept. 29, 2010) (ADR purchases on U.S. exchanges are "predominantly foreign securities transactions'") (citation omitted), *with Stackhouse v. Toyota Motor Co.*, No. CV 10-0922, 2010 U.S. Dist. LEXIS 79837, at *1-5 (C.D. Cal. July 16, 2010) (allowing lawsuit where specific plaintiffs held ADRs).

[31] *See Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998); *Robinson v. TCI/US West Commc'ns Inc.*, 117 F.3d 900, 906-907 (5th Cir. 1997); *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995); *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424-25 (9th Cir. 1983); *IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980); *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 421-22 (8th Cir. 1979); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985, 993 (2d Cir. 1975); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017-18 (2d Cir. 1975); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334-37 (2d Cir. 1972); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968).

[32] *Cf. Sosa*, 542 U.S. at 727 (acknowledging concern over whether to "permit enforcement without the check imposed by prosecutorial discretion" in a universal jurisdiction context).

[33] U.K. Brief at 36.

those allegedly cheated in foreign securities markets."[34] The U.S. has no need to become the world's securities law policeman and no interest in the repercussions such a role will bring.

D. Study of an Alternative Disclosure Standard

As an alternative, the Atlantic Legal Foundation suggests that the Commission explore the need, if any, for a disclosure standard to ensure that investors making securities purchases and sale orders in the U.S. are made aware that non-U.S. law will govern those transactions executed abroad. This analysis does not account for the effect, if any, of potentially applicable contractual agreements. We do not concede the need for any such standard and would welcome the opportunity to comment on any proposal to that effect if such a rule were contemplated.

III. Conclusion

For the foregoing reasons, the Atlantic Legal Foundation urges the Commission to skeptically approach the idea of extraterritorially applying the Exchange Act's antifraud provisions in a civil context while conducting the Study. We hope that the perspectives and resources identified in this letter will enable the Commission to more fully understand the international law and other repercussions such an application will likely cause. In addition, we are certainly willing to present testimony at any hearings the Commission may choose to hold regarding the Study.

We thank the Commission for the opportunity to submit these comments. Please contact the undersigned if you have any questions.

Respectfully submitted,

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[34] *Morrison*, 130 S. Ct. at 2886 (citations omitted).