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EXTRATERRITORIALITY OF SECURITIES LAW REDUX: LITIGATION FIVE YEARS AFTER *MORRISON V. NATIONAL AUSTRALIA BANK*

Yuliya Guseva*

In the famous Morrison v. National Australia Bank *case, Justice Scalia mounted an attack on plaintiffs with tenuous connection to U.S. capital markets and attempted to rein in class actions against international corporations. Despite* Morrison*'s broad implications, there is no consensus on its ultimate impact. This Article contributes to this discussion by examining the risk of litigation faced by foreign firms before and after* Morrison*. The research reviews securities class actions between 2005 and 2015. The timeframe of the reported filings is from January 2005 through December 2015, i.e., about five years before and five years after* Morrison*. The Article reports data obtained from the filings and related court decisions, updated as of November 30,*

* Associate Professor of Law, Rutgers Law School, yguseva@kinoy.rutgers.edu. The author is grateful to Steven Davidoff Solomon, Douglas S. Eakeley, Arthur Laby, Chrystin Ondersma, and the participants of the National Business Law Scholars Conference, the University of Chicago Law School, June 23–24, 2016; Faculty Workshop, George Mason University Antonin Scalia Law School, September 6, 2016; the ASIL International Economic Law Interest Group, Georgetown University Law Center, September 30–October 1, 2016; Faculty Colloquium, Rutgers Law School, October 19, 2016; the ASIL Research Forum 2016, University of Washington School of Law, November 12, 2016; and the Ninth Annual Junior Faculty Federal Courts Workshop, Emory Law School, April 1, 2017, for their comments, suggestions, and criticisms of this paper. The author would like to thank Cornerstone Research and NERA Economic Consulting, which separately provided preliminary data for this research. The views expressed in this Article are the views of the author and do not represent the views of either Cornerstone Research or NERA Economic Consulting. The author thanks Corey Scher and Kyle Valente for their research assistance.

2016. The Article concludes that, first, the actual risk of litigation has become more ascertainable and slightly lower than before Morrison. *Second,* Morrison *affected the composition of the plaintiffs' class. Based on mean and median settlement values,* Morrison *may be associated with lower litigation costs. Third, the results suggest that when firms select a cross-listing mode (i.e., an exchange listing or OTC trading), they effectively choose their level of commitment to U.S. markets through not only the ex-ante known reporting costs, but also projected litigation costs. Fourth, the research reviews the timing of settlements and dismissals vis-à-vis the types of cross-listing programs. Although more research is needed in this area,* Morrison *may have enabled foreign firms to rule out inflated assessments of the risk of litigation and to more precisely determine the expected value of their cross-listing programs net of litigation.*

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I. INTRODUCTION

In 2010, the U.S. Supreme Court overturned about forty years of case law regarding foreign companies listed and trading their securities in the United States. In the famous *Morrison v. National Australia Bank* case,[1] the late Justice Scalia mounted an attack on plaintiffs with tenuous connection to U.S. capital markets and attempted to rein in class actions against international corporations. The new judicial test discarded the old "conduct" and "effects" tests and transformed the extraterritorial application of section 10(b) of the Securities Exchange Act and Rule 10b-5.[2]

The old approach was originally developed by the Court of Appeals for the Second Circuit in a series of cases including *Schoenbaum*, *Leasco*, *Bersch*, and *Vencap*.[3] Under the now abandoned tests, courts focused on the following two inquiries: (1) whether the significant culpable conduct that had caused harm to investors took place in the United States, and/or (2) whether a predominantly foreign activity of an international corporate defendant caused a detrimental

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1 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

2 *See generally* Merritt B. Fox, *Securities Class Actions Against Foreign Issuers*, 64 STAN. L. REV. 1173, 1233–63 (2012) (discussing the old tests and the new test); 15 U.S.C. § 78j(b) (2012); 17 C.F.R. § 240.10b-5 (2010).

3 Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975); IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968).

effect in the United States, upon U.S. investors, or upon American exchanges.[4]

By contrast, the Supreme Court in *Morrison* required that a security at issue be either listed in the United States or that a transaction take place in the United States.[5] The focus of the inquiry has thus shifted from fraudulent conduct, its repercussions, and direct effects to purchase and sale transactions as such,[6] which in the opinion of the Supreme Court are the primary "objects of the statute's solicitude."[7]

One of my previous articles examined the philosophy behind antifraud liability rules, namely, section 10(b) and Rule 10b-5, the securities disclosure regime, and their effect on foreign private issuers. The research sought to determine whether *Morrison* was necessary and to what extent the extraterritorial application of U.S. law created unwarranted risks for foreign companies and thus deterred cross-listings in the United States.[8] Five years after *Morrison,* this Article continues the task of examining the effect of the U.S. liability regime on international issuers and on corporate behavior.

This research will examine the impact of *Morrison* on a foreign company's decision to list its securities in the United

[4] *See* SEC, STUDY ON THE CROSS-BORDER SCOPE OF THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934 10–13 (2012), https://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf [https://perma.cc/6JMT-9WEN] [hereinafter 2012 SEC STUDY].

[5] 561 U.S. at 273 ("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.").

[6] *Id.* at 266–67 ("Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.' 15 U.S.C. § 78j(b) . . . And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.").

[7] *Id.* at 267.

[8] *See* Yuliya Guseva, *Cross-Listings and the New World of International Capital: Another Look at the Efficiency and Extraterritoriality of Securities Law,* 44 GEO. J. INT'L L. 411 (2013).

States. Foreign firms' cross-listing calculus is complex. A cross-listing candidate must consider the value added of the U.S. regulatory regime and take into account uncertain costs of future securities class action lawsuits, which are uniquely specific to U.S. law and jurisprudence. By analyzing class action lawsuits against foreign issuers five years before and five years after *Morrison,* this Article will attempt to demonstrate that *Morrison* should help issuers make a more informed choice with respect to listing and trading their securities in the United States.

The economic impact of this Supreme Court decision remains understudied, even though the doctrinal consequences of *Morrison* have been broad, spanning securities, derivatives, and antitrust issues, and have recently culminated in a June 2016 Supreme Court decision on the extraterritorial reach of the Racketeer Influenced and Corrupt Organizations Act.[9] Moreover, the protection crafted by Justice Scalia for corporate issuers may cover not only

9 *See* RJR Nabisco, Inc. v. European Community, 136 S.Ct. 2090, 2100 (2016) (discussing *Morrison* in the context of a RICO case); *see also* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013) (citing *Morrison* in interpreting the Alien Tort Statute); Amir N. Licht et al., *What Makes the Bonding Stick? A Natural Experiment Involving the U.S. Supreme Court and Cross-Listed Firms* 15 (Harvard Business School Strategy Unit, Working Paper No. 11-072, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1744905 [https://perma.cc/A6C5-Z37S] (referencing some debates); Loginovskaya v. Batratchenko, 764 F.3d 266, 268 (2d Cir. 2014) (citing the case in commodity disputes); Kelley Morris White, Comment, *Is Extraterritorial Jurisdiction Still Alive? Determining the Scope of U.S. Extraterritorial Jurisdiction in Securities Cases in the Aftermath of* Morrison v. National Australia Bank, 37 N.C. J. INT'L L. & COM. REG. 1187 (2012) (discussing the statutory and judicial reaction to *Morrison* in antitrust, racketeering, trade secrets, bankruptcy clawbacks, and other cases); Robert J. Giuffra, *Extraterritorial Application of Section 10(b) to Security-Based Swap Agreements,* HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 25, 2011), http://corpgov.law.harvard.edu/2011/01/25/extraterritorial-application-of-section-10b-to-security-based-swap-agreements/ [https://perma.cc/3H75-FZSG]; Luis A. Aguilar, *Statement by Commissioner: Defrauded Investors Deserve Their Day in Court*, SEC (Apr. 11, 2012), http://www.sec.gov/News/PublicStmt/ Detail/PublicStmt/136517 1490204 [https://perma.cc/2YVF-P6DZ].

foreign issuers listed in the United States, but also American companies either issuing securities abroad or offering and selling securities to foreign investors.[10] Despite *Morrison*'s broad implications, there is no consensus on its ultimate impact on capital markets and foreign issuers.

Consider first that in their amicus briefs, investors, particularly various institutional investors, urged the Supreme Court to preserve the conduct and effects tests. Later on, they admonished the Securities and Exchange Commission ("SEC") and Congress about inefficiencies and under-enforcement problems that might follow if some variations of the tests were not reinstated.[11] Some Commissioners prophesized the same.[12] In the 2012 Study mandated by Dodd-Frank, the SEC itself cautiously prompted Congress to reinstate an abridged standard with elements of the conduct and effects tests,[13] even though its empirical study did "not show a statistically significant stock price reaction to [*Morrison*]."[14]

10 *See, e.g.*, Nicholas Calcina Howson & Vikramaditya S. Khanna, *Reverse Cross-Listings—The Coming Race to List in Emerging Markets and an Enhanced Understanding of Classical Bonding,* 47 CORNELL INT'L L. J. 607, 622–24 (2014) (on reverse cross-listing and *Morrison*); *see also* Joseph A. Grundfest, Morrison*, the Restricted Scope of Securities Act Section 11 Liability, and Prospects for Regulatory Reform*, 41 J. CORP. L. 1 (2015); Edward Greene & Arpan Patel, *Consequences of* Morrison v NAB, *Securities Litigation and Beyond*, 11 CAP. MKTS. L. J., 145, 145–50 (2016).

11 *See* 2012 SEC STUDY, *supra* note 4, at 18–19, 39, 42–53; Licht et al., *supra* note 9, at 4 (citing comments submitted by twenty-six pension funds to the SEC); CHRISTIAN J. WARD & J. CAMPBELL BARKER, COUNCIL OF INST. INV'RS, MORRISON V. NATIONAL AUSTRALIA BANK: THE IMPACT ON INSTITUTIONAL INVESTORS (2012), http://www.cii.org/files/publications/governance_basics/Report_Morrison_v_National_Australia_Bank.pdf [https://perma.cc/6CW9-4CD3].

12 Aguilar, *supra* note 9 (criticizing the 2012 SEC study on extraterritoriality, underscoring the value of the private right of action and observing that "[i]n the United States we have a strong belief that, whether rich or poor, we are all entitled to our day in court. Sadly, for many American investors this is no longer true").

13 2012 SEC STUDY, *supra* note 4, at 58–68.

14 2012 SEC STUDY, *supra* note 4, at B1.

In contrast to that study, Gagnon and Karolyi, undoubtedly leading authorities on cross-listings, demonstrated that the markets for U.S.-listed and non-U.S.-listed foreign stocks reacted differently to the decision and that, by implication, U.S. litigation had value to investors.[15] More recent evidence is also indicative of an external side effect of *Morrison*—a reduction in corporate reporting. Namely, "there is a positive relation between disclosure and litigation."[16] Thus, *Morrison* may have had negative implications for capital markets.

There is, of course, a panoply of opposing arguments. From a foreign issuer's perspective, for instance, it is self-evident that if the decision has reduced the overall risk of litigation and the depth of reporting, by extension, it has also decreased international issuers' costs of reporting. This new firm-level disclosure may or may not be optimal at a social level. The efficient level of information production should occur when an individual firm's marginal benefits are equal to its marginal costs. Firms may also under produce information and disclose below the socially optimal level of reporting when they cannot internalize the benefits of additional voluntary disclosure.[17] However, it is not obvious that the pre-*Morrison* threat of litigation was the most efficient way to achieve a desirable level of disclosure and to

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15 *See* Louis Gagnon & G. Andrew Karolyi, *The Economic Consequences of the U.S. Supreme Court's* Morrison v. National Australia Bank *Decision for Foreign Stocks Cross-Listed in U.S. Markets* (Johnson School Research Paper Series, No. 50-2011, 2012).

16 James P. Naughton et al., Private Litigation Costs and Voluntary Disclosure: Evidence from the Morrison Ruling 3 (Feb. 6, 2017) (unpublished manuscript), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2432371 [https://perma.cc/E2SC-BJUT] (finding that firms less linked to U.S. exchanges in terms of their trading volume and riskier companies with high litigation risk "experience[d] greater reductions in the incidence and frequency of both bad news management forecasts and other news forecasts . . . following *Morrison*").

17 *See generally* Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment*, 85 VA. L. REV. 1335 (1999) (on the cost and benefits of disclosure); Fox, *supra* note 2, at 1200–04.

force issuers as producers of information to internalize a possible externality. Neither does a post-*Morrison* decrease in voluntary disclosure conclusively indicate that the new level of transparency is suboptimal.

For instance, investors, the primary litmus test for capital markets, may be indifferent to the new disclosure approach *and* the new litigation rules. A detailed 2015 survey by Bartlett suggests that investors are not particularly worried about *Morrison*. The study indicates that despite the outcry, traders and fund managers did not change their investment strategies after *Morrison*.[18] It is possible that investors assigned little value to the decision and denounced it in their initial statements and briefs only on principle.[19] Another group of leading experts, Licht, Poliquin, Siegel, and Li, similarly failed to find either changes in trading strategies or a negative market reaction by "disgruntled individual investors."[20] They also generally concluded that U.S. private securities litigation did not increase firm value.[21] In a similar vein, the Chamber of Commerce and some leading scholars and practitioners seem to lean toward either a neutral view or a somewhat positive position on *Morrison*, primarily because of its litigation-reducing connotation.[22]

18 Robert P. Bartlett III, *Do Institutional Investors Value the Rule 10b-5 Private Right of Action? Evidence from Investors' Trading Behavior Following* Morrison v. National Australia Bank Ltd., 44 J. LEGAL STUD. 183 (2015).

19 *See id.* at 223–24. In the alternative, there is an information loss among departments within financial institutions.

20 Licht et al., *supra* note 9, at 25–31.

21 *Id.* at 28–31.

22 2012 SEC STUDY, *supra* note 4, at 40–42 nn.148, 150, 151 & 153; Brief of *Amici Curiae* the Sec. Indus. & Fin. Mkts. Ass'n, the Ass'n for Fin. Mkts. in Europe, the Chamber of Commerce of the U.S., the U.S. Council for Int'l Bus., the Ass'n Française des Entreprises Privées, and GC100 in Support of Respondents at 5–6, Morrison v. Nat'l Austl. Bank, 561 U.S. 247 (2010) (No. 08-1191), 2010 WL 723005; George T. Conway III, Morrison *at Four: A Survey of Its Impact on Securities Litigation, U.S. Chamber Institute for Legal Reform*, *in* U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, FEDERAL CASES FROM FOREIGN PLACES 4 (2014), http://www.instituteforlegalreform.com/uploads/sites/1/federal-cases.pdf [https://perma.cc/2K4C-T693]; Hal S. Scott & Leslie N. Silverman,

Consider also that international issuers apparently did not change cross-listing strategies and that the United States did not become a meaningfully more attractive listing venue immediately after *Morrison*. For example, the crude numbers of global American Depositary Receipt ("ADR") programs of international issuers in 2006, the year preceding the financial crisis, and in 2011 do not differ significantly. London still ruled the ADR market in 2011, i.e., after *Morrison*. By 2015, however, the New York Stock Exchange and Nasdaq decisively gained ground against their major competitor.[23] By the same token, the ranks of registered and reporting foreign private issuers ("FPIs") have been slowly dwindling for years, and the cohort of registrants has only recently stabilized.[24]

Another confusing trend is the increased frequency of filings and a new avalanche of lawsuits brought against foreign companies. The numbers have been rising for some years, i.e., with or without *Morrison,* and seem to have foiled Justice Scalia's anti-global-litigation intent.[25] For instance, in 1996, the percentage of claims lodged against foreign

Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes, 36 HARV. J. L. & PUB. POL'Y 1187, 1204–05 (2013).

23 According to the BNY Mellon DR Database, in 2006, there were 98 sponsored ADR programs, of which only in 12 cases issuers listed their securities on U.S. exchanges, and in 31 cases, securities were traded on the London Stock Exchange. In 2011, there were 90 sponsored ADR programs globally, 13 ADRs were listed on the three major U.S. exchange (NYSE, Nasdaq, and Amex), and 13 ADRs were listed on the London Stock Exchange alone. In 2015, the number of sponsored programs was 100, with 36 securities listed on U.S. exchanges, and 3 ADRs listed on the London Stock Exchange. *See Depositary Receipts*, BNY MELLON, https://www.adrbnymellon.com/directory/dr-directory (last visited Apr. 28, 2017).

24 *See International Registered and Reporting Companies*, SEC, https://www.sec.gov/divisions/corpfin/internatl/companies.shtml (last updated June 24, 2016) (providing annual market summaries); SEC, FOREIGN COMPANIES REGISTERED AND REPORTING WITH THE U.S. SECURITIES AND EXCHANGE COMMISSION (1998), https://www.sec.gov/divisions/corpfin/internatl/foreignissuers1998.pdf [https://perma.cc/5AYM-MG8C].

25 *See, e.g.,* Morrison*,* 561 U.S. at 270.

issuers was as low as 5.4% of the total claims.[26] It reached about 12.3% of annual filings in 2010 and has risen since.[27] Cornerstone estimates that class action filings against FPIs constituted 19% of all actions filed in 2015 against both U.S. and foreign issuers,[28] while PwC gives the highest number—22% of the total.[29] *Morrison* has failed to singlehandedly dampen class action filings.[30]

In this sense, it is possible that from an efficiency, predictability, and global capital markets perspective, as Merritt Fox persuasively demonstrated, the *Morrison* Court offered a mediocre remedy against potentially wasteful litigation.[31] It is also possible that numerous economic variables, such as global market changes, the recent recession, the relative stability of the U.S. economy, the volatility of trading results on foreign exchanges compared to American exchanges, firms' growth opportunities, and many others, drive class action filings and listings.[32]

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26 *See, e.g.*, CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2011 YEAR IN REVIEW 10 fig.9 (2011).

27 SVETLANA STARYKH & STEFAN BOETTRICH, NERA ECONOMIC CONSULTING, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2015 FULL-YEAR REVIEW 4 fig. 3 (2016). According to NERA Economic Consulting, in 2011, "a record 23.9% of cases were filed against foreign issuers, considerably higher than the 16.4% of foreign issuers listed," and in 2015, the claims dropped to 14.8%. *Id.* at 4.

28 CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2015 YEAR IN REVIEW 16 (2015).

29 PWC, SMALL COMPANIES, BIG TARGETS: 2015 SECURITIES LITIGATION STUDY 12 (2016) (including in its analysis both listed and OTC-traded FPI securities).

30 Hal Scott and Leslie Silverman observe, for instance, that "[s]ecurities class actions are also a serious problem for the attractiveness of the U.S. public capital markets" and that *Morrison* did not raise sufficient barriers to securities litigation in the United States. Their suggestions regarding wasteful class action litigation are simple—resolving securities law violations through other means such as arbitration. Scott & Silverman, *supra* note 22, at 1190, 1203–06.

31 Fox, *supra* note 2, at 1272–73.

32 For instance, the percentage of filings against Chinese issuers shadowed their active entry into U.S. capital markets. *See, e.g.*, STARYKH & BOETTRICH, *supra* note 27, at 4 (mentioning a surge in filings against

So, what did *Morrison* do? This Article seeks to contribute to this discussion by examining the pre- and post-*Morrison* regimes from an issuer's perspective and by exploring the following research topics: (1) the benefits foreign issuers typically seek from cross-listing programs; (2) the theoretical explanations of those presumptive benefits; (3) the factors that a specific issuer may consider when making a cross-listing decision; and (4) the impact of *Morrison* on that calculus.

In terms of the first two issues, most scholars concur that cross-listings and international trading generate tangible economic benefits, particularly for those issuers that list their securities on U.S. exchanges.[33] Theory explains that this economic effect is influenced by the high quality of U.S. law (i.e., legal bonding); bonding to the market's institutional environment and reputational signaling; and an increased ability to raise capital and attract investor attention.[34] Cross-listing in a jurisdiction such as the United States also carries considerable costs because of the extensive disclosure obligations imposed on reporting companies and a

Chinese companies in 2011). The statistics on filings are also not conclusively linked to increases or decreases in listings in the United States because the flow of foreign securities may be predetermined by other trends, such as firms' growth opportunities, expanding sales patterns, industry characteristics, or even cultural preferences. *See, e.g.*, Marco Pagano et al., *The Geography of Equity Listing: Why Do Companies List Abroad?*, 57 J. FIN. 2651, 2652 (2002) [hereinafter Pagano et al., *The Geography of Equity Listing*]; Marco Pagano et al., *What Makes Stock Exchanges Succeed? Evidence from Cross-Listing Decisions,* 45 EUR. ECON. REV. 770, 780–81 (2001) [hereinafter Pagano et al. *What Makes Stock Exchanges Succeed?*]; *see also* Richard Dobbs & Marc H. Goedhart, *Why Cross-Listing Shares Doesn't Create Value*, 29 MCKINSEY ON FIN. 18, 18–19 (2008) (observing parallel declines in cross-listings on the LSE and the New York Stock Exchange ("NYSE") by issuers from developed economies beginning in 2000 and 2002, respectively). The number of foreign IPOs suddenly went up only in 2013. Michal Berkner et al., *Will 2014 Be the 'Year of the Foreign Private Issuer'?*, *in* SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP 2014 INSIGHTS (2014), https://www.skadden.com/insights/will-2014-be-year-foreign-private-issuer [https://perma.cc/TG4X-QJV6].

33 *See infra* Section II.B.1.

34 *See infra* Section II.B.2.

formidable enforcement and litigation apparatus faced by cross-listed firms. When making a cross-listing decision and determining the expected value of a cross-listing program, a foreign executive must subtract those costs from the economic benefits of international trading.

Self-evidently, some costs are known and quantifiable before cross-listing. Others are ex-post factors, ascertainable only upon occurrence of some reasonably foreseeable events in the future. *Morrison* specifically concerns the second set of variables—the unknown costs of potential litigation. A crucial component of a decision to cross-list thus involves assessing the probabilities and costs of ex-post enforcement and private litigation.

To examine the ex-post risk of litigation, this Article reviews securities class actions five years before and five years after *Morrison*. It suggests that the *Morrison* decision has not significantly altered the actual risk of litigation. Instead, the decision has provided certainty with respect to the ex-ante assessment of that risk. *Morrison* also affected the composition of the plaintiffs' class membership and, based on post-*Morrison* mean and median settlement values, it may also be associated with lower settlement values, reduced litigation costs, and fewer resultant losses to a corporate defendant.[35] However, descriptive statistics do not indicate that *Morrison* has significantly altered the actual ratio of settlements to dismissals, decisions that mainly occur at early stages in litigation. With or without the new test, courts dismissed about a half of the filed class action lawsuits.

The data also indicate that both before and after *Morrison* the majority of securities litigation defendants consisted of companies listed in the United States, while firms trading their securities on the over-the-counter ("OTC") market were sued less than exchange-listed issuers. These results suggest that when a firm selects a cross-listing mode, it internalizes and possibly incorporates in its decision not only the ex-ante known reporting costs associated with

[35] *See infra* Section IV.B.2.

trading on U.S. exchanges, but also the higher projected litigation costs.[36]

To summarize, the results imply that *Morrison* may have value to international companies in at least one area—the projected costs of litigation and enforcement associated with cross-listings in the United States have become more ascertainable. The Supreme Court decision may be associated not only with the actual size of possible settlements as related to class membership, but also with a better ability of a foreign firm to assess the expected value of a cross-listing program net of litigation. These findings contribute to our understanding of the deterrence effect of securities law and the possible bonding motivation behind cross-listings.[37]

The rest of the Article is structured as follows: Part II briefly sets the stage for the discussion of cross-listings by foreign corporations in the United States. It explores the mechanics and economic benefits of cross-listing and reviews possible explanations. Part III sets forth a decision-making model circumscribing the variables that a foreign issuer may take into account in making a listing decision. Part IV reviews private enforcement before and after *Morrison*.

II. THE ECONOMIC BENEFITS OF CROSS-LISTINGS

A. Cross-Listing Programs, Foreign Issuer Liability, and Disclosure

U.S. securities law does not apply to a foreign private issuer[38] with the same force as it applies to a domestic reporting company. Throughout the years, the SEC has made several crucial concessions to foreign issuers. It has become comparatively lenient with respect to FPI

36 This suggestion is consistent with economic research on bonding and cross-listings. *See infra* Section II.B.2.

37 *See infra* Section II.B.

38 See*, e.g.*, 17 C.F.R. § 230.405 (2016) (defining “foreign private issuer”).

regulations and now requires less disclosure from foreign companies compared to the level of detailed reporting provided by domestic firms.

To give a few examples, the SEC does not require reporting FPIs to file quarterly reports; FPIs submit annual reports on a separate simplified form, Form 20-F, and current reports on Form 6-K;[39] Regulation FD does not apply to FPIs;[40] some strictures of the Sarbanes-Oxley Act do not impact FPIs with the same force as they affect domestic reporting issuers;[41] FPIs following International Financial Reporting Standards ("IFRS") need not reconcile their reports with U.S. GAAP;[42] and the 2007 version of Rule 12h-6 simplified the deregistration process and termination of reporting status.[43] Even in terms of enforcement, the SEC

39 *See, e.g.*, *Accessing the U.S. Capital Markets—A Brief Overview for Foreign Private Issuers*, SEC (Feb. 13, 2013), https://www.sec.gov/divisions/corpfin/internatl/foreign-private-issuers-overview.shtml [https://perma.cc/BSF4-5NVV] [hereinafter *Accessing the U.S. Capital Markets*]; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Listed Company Manual to Adopt a Requirement that Listed Foreign Private Issuers Must, At a Minimum, Submit a Form 6-K to the Securities and Exchange Commission Containing Semi-Annual Unaudited Financial Information, Exchange Act Release No. 77,198, 81 Fed. Reg. 9563 (Feb. 19, 2016); SEC, FORM 20-F (2012), https://www.sec.gov/about/forms/form20-f.pdf [https://perma.cc/UM55-KXPD].

40 Selective Disclosure and Insider Trading, Securities Act Release No. 7881, Exchange Act Release No. 43,154, Investment Company Act Release No. 24,599, 65 Fed. Reg. 51,716, 51,719 (Aug. 24, 2000); 17 C.F.R. §§ 243.100–103 (2016).

41 For an overview, see, for example, *Accessing the U.S. Capital Markets*, *supra* note 39. *See also* LATHAM & WATKINS LLP, THE LATHAM FPI GUIDE: ACCESSING THE US CAPITAL MARKETS FROM OUTSIDE THE UNITED STATES 18 (2015).

42 Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards Without Reconciliation to U.S. GAAP, Securities Act Release No. 8879, Exchange Act Release No. 57,026, 73 Fed. Reg. 986 (Jan. 4, 2008). On IFRS and pertinent debates, see generally Martin Gelter & Zehra G. Kavame Eroglu, *Whose Trojan Horse? The Dynamics of Resistance Against IFRS*, 36 U. PA. J. INT'L L. 89 (2014).

43 17 C.F.R. § 240.12h-6 (2016).

does not commence enforcement proceedings against FPIs as often as it does against domestic reporting companies.[44]

The two ultimate pillars of securities law—the disclosure rules and the liability regime—apply to international corporations in varying degrees depending on how a foreign issuer cross-lists its securities. This implies that a foreign firm may choose its level of involvement in the U.S. market and legal environment.

Foreign firms enter U.S. securities markets in four principal ways. First, they can issue shares of stock and trade both in their primary market abroad and in the United States. Second, firms can issue ADRs, which are traditionally divided into three "levels." Level I ADRs trade on the OTC market. Level II ADRs are listed on an exchange but do not represent newly issued securities. Instead, Level II ADRs often are linked to shares of stock of a foreign issuer. Hence, an issuer cannot raise capital in the United States in that scenario and only lists existing securities in the form of ADRs on a U.S. exchange. In contrast to Level II ADRs, Level III ADR programs allow an issuer to raise capital in connection with a public offering in the United States and to list its securities on an American exchange.[45]

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44 *See generally* Natalya Shnitser, *A Free Pass for Foreign Firms? An Assessment of SEC and Private Enforcement Against Foreign Issuers*, 119 YALE L.J. 1638, 1660–84, 1693 (2010) (discussing the theoretical expectations and literature suggesting that the SEC is expected to devote more resources to domestic companies compared to extraterritorial enforcement, reviewing enforcement actions between 2000 and 2008, and concluding that the SEC "brought enforcement actions against [foreign companies] at a rate lower than the rate for domestic issuers and focused either on high-profile, hard to miss FCPA cases or low-profile, easy to enforce infractions"); Jordan Siegel, *Can Foreign Firms Bond Themselves Effectively by Renting U.S. Securities Laws?*, 75 J. FIN. ECON. 319, 342, 349 (2005) (suggesting that "the SEC had taken few enforcement actions against cross-listed foreign firms during 1934–2002" and "that the SEC has not been able and/or willing to be the world's governance enforcement agency"); Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, 4 CHI. J. INT'L L. 141, 151 (2003) (reviewing Siegel's and other arguments on the "hands-off" policy of the SEC).

45 *See, e.g.*, LATHAM & WATKINS LLP, *supra* note 41, at 40; *see also* Michael Gruson, *Global Shares of German Corporations and Their Dual*

In terms of mandatory disclosure requirements, launching Level II and Level III ADR programs and directly listing securities entail a higher level of compliance with the U.S. disclosure rules. By contrast, Level I ADRs and Rule 144A transactions do not give rise to the same disclosure requirements as Levels II and III.[46]

The liability regime operates through several provisions, the application of which depends on whether an offering is public or private and whether the plaintiff is a private party or the government. Excepting the liability of controlling persons, private plaintiffs usually bring actions for fraud under section 10(b) of the Exchange Act and sections 11 and 12(a)(2) of the Securities Act.[47] Section 11 focuses on misstatements in registration statements, and section 12(a)(2) covers prospectuses in *public* offerings.[48] Hence, privately placed ADRs and Rule 144A securities may fall outside the ambit of some Securities Act prohibitions.

In public enforcement proceedings, the SEC and the Department of Justice typically rely on section 10(b) of the Exchange Act and section 17 of the Securities Act.[49] Congress promptly attempted to reestablish the pre-*Morrison* tests in public enforcement. The Dodd-Frank Act, approved by a congressional conference committee only one

Listings on the Frankfurt and New York Stock Exchanges, U. PA. J. INT'L ECON. L. 185, 188–98 (2001) (describing specifics of ADR and Global Shares programs).

46 *See generally Accessing the U.S. Capital Markets*, *supra* note 39; JAMES R. TANENBAUM ET AL., MORRISON & FOERSTER LLP, FREQUENTLY ASKED QUESTIONS ABOUT FOREIGN PRIVATE ISSUERS 20 (2016), http://media.mofo.com/files/uploads/Images/100521FAQForeignPrivate.pdf [https://perma.cc/2SZA-PV38]. Some OTC markets, however, may require issuers to follow the disclosure rules voluntarily. *See, e.g.*, FINRA, RULE 6530(B) (2012) (describing rules for OTCBB-eligible securities).

47 15 U.S.C. § 78j(b) (2012); 15 U.S.C. § 77k (2012); 15 U.S.C. § 77l(a)(2) (2012).

48 *See generally* Gustafson v. Alloyd Co., 513 U.S. 561, 584 (1995) ("In sum, the word 'prospectus' is a term of art referring to a document that describes a public offering of securities by an issuer or controlling shareholder.").

49 15 U.S.C. § 77q (2012); 15 U.S.C. § 78j(b) (2012).

day after *Morrison,* includes pertinent sections that potentially reinstate the old conduct and effects tests.[50] However, in contrast to the Supreme Court decision, which considers the reach of section 10(b) "a merits question,"[51] the statutory language of Dodd-Frank merely provides that U.S. courts have jurisdiction regarding public enforcement and does not explicitly extend the reach of the statute.[52] A few courts have already declined the invitation to definitively address and resolve this potentially thorny jurisdictional issue.[53]

50 15 U.S.C. § 78aa(b) (2012).

51 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 254 (2010) ("But to ask what conduct §10(b) reaches is to ask what conduct §10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, 'refers to a tribunal's power to hear a case.'") (quoting Union Pac. R. Co. v. Bhd. of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67, 69 (2009)).

52 *Id; see also* Conway, *supra* note 22, at 14 (discussing, *inter alia*, the effect of Section 929P(b)). The practical results, therefore, may be mixed, and there is no explicit consensus on whether Dodd-Frank has overruled *Morrison* for the purposes of public enforcement proceedings. For instance, post-*Morrison* courts have emphasized "the presumption that United States law governs domestically but does not rule the world." United States v. Vilar, 729 F.3d 62, 72 (2d Cir. 2013) (citing Kiobel v. Royal Dutch Co., 133 S. Ct. 1659, 1664 (2012)). "*Morrison* does apply [even] to criminal cases brought [by the government] pursuant to Section 10(b) and Rule 10b–5." *Id.* at 70.

53 *See, e.g.*, SEC v. Battoo, 158 F. Supp. 3d 676, 692 (N.D. Ill. 2016) ("It is not necessary to decide whether Section 929P(b) does indeed overrule *Morrison* for actions brought by the SEC, because the Court concludes that Section 929P(b) does *not* apply retroactively to any pre-Dodd-Frank enactment conduct, which makes up the bulk of the alleged conduct committed by Sunderlage in this case."); SEC v. Sabrdaran, No. 14-cv-04825-JSC, 2015 WL 901352, at *14 (N.D. Cal. Mar. 2, 2015) ("In light of the Court's decision that the allegations in the complaint sufficiently meet the transactional test, it need not resolve the debate over whether the Dodd–Frank Act overruled *Morrison,* as the SEC contends."); SEC v. Brown, No. 14 C 6130, 2015 WL 1010510, at *5 (N.D. Ill. Mar. 4, 2015) ("This Court, consistent with *Chicago Convention Center,* concludes that it is unnecessary to resolve at this time the difficult question of the Dodd–Frank Act's impact on *Morrison*."). On the jurisdictional and substantive nature of Dodd-Frank, see, for example, SEC. v. Chicago Convention Ctr., LLC, 961 F. Supp. 2d 905, 910, 917 (N.D. Ill. 2013)

Morrison involved a class action brought by foreign *private* plaintiffs under section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. Justice Scalia did observe, however, that the Securities Act and the Exchange Act are animated by the same spirit.[54] This, as some lower courts have already pointed out, suggests that the logic behind the limited reach of the civil liability regime under the Exchange Act similarly permeates sections 11 and 12 of the Securities Act.[55]

The fulcrum of all allegations in civil actions under section 10(b) and Rule 10b-5 is the fact of listing on American exchanges and the "domestic" nature of a securities transaction at issue.[56] The concept of "domestic transactions" is often interpreted as involving either a passage of title or parties' incurring "irrevocable" liability to pay for or to deliver securities within the United States.[57]

(providing an extensive statutory analysis of "a tension created by Section 929P(b), namely that the plain language of the Section 929P(b) seems purely jurisdictional—particularly in light of its placement in the jurisdictional section of the Exchange Act—yet the Congressional intent behind that provision supports a conclusion that the provision is substantive."); *cf.* SEC v. Gruss, 859 F. Supp. 2d 653, 664 (S.D.N.Y. 2012) ("Entitled 'Strengthening Enforcement by the Commission,' Section 929P(b) amends the Securities Act, the Exchange Act, and the IAA to allow the SEC or the U.S. Justice Department to commence civil and criminal enforcement actions extraterritorially in certain cases. Therefore, Section 929P(b) restores the SEC's extraterritorial authority over the IAA and its passage suggests that Congress intended for the extraterritorial application of the IAA during Gruss' alleged violations.").

54 *Morrison,* 561 U.S. at 268 ("The same focus on domestic transactions is evident in the Securities Act of 1933, 48 Stat. 74, enacted by the same Congress as the Exchange Act, and forming part of the same comprehensive regulation of securities trading.").

55 *See, e.g.*, *In re* Smart Techs., Inc. S'holder Litig., 295 F.R.D. 50, 56 (S.D.N.Y. 2013) ("Accordingly, to the extent that a plaintiff seeks to impose liability under sections 11 or 12(a)(2), that individual must have purchased a security listed on a domestic exchange or engaged in a 'domestic transaction in other securities.'").

56 *See, e.g.*, *Vilar*, 729 F.3d at 76–77.

57 *Id*. at 76 (citing Absolute Activist, 677 F.3d at 68–69); *see also* United States v. Mandell, 752 F.3d 544, 548 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1402 (2015); Absolute Activist Value Master Fund Ltd. v. Ficeto,

To conclude, first, foreign issuers choose a certain desired level of disclosure obligations by selecting a specific cross-listing program and trading venues. Second, the specifics of that program may help them limit their liability under the securities law's "listing" and "domestic transaction" prongs.

B. Why Do International Companies Cross-List in the United States?

1. The Economic Benefits of Listing in the United States

Firms cross-list their securities and thereby voluntarily subject themselves to the U.S. liability regime and disclosure rules for a variety of reasons. Some of those reasons may be related to identifiable characteristics of the United States as a host market. For instance, poor institutional environment in a home country could paralyze capital markets and investments. In that case, the United States could provide access to better disclosure and institutional monitoring, as well as external capital. Other objectives and the ensuing benefits are endogenous and depend on operations of an individual firm.[58] Germane examples would be pending M&A transactions for which a cross-listed foreign company may

677 F.3d 60, 62, 67 (2d Cir. 2012) ("Put another way, these definitions suggest that the 'purchase' and 'sale' take place when the parties become bound to effectuate the transaction."); *In re* Petrobras Sec. Litig., 152 F. Supp. 3d 186, 192–93 (S.D.N.Y. 2016) (discussing the application of the tests); Kobi Kastiel, *Important Decisions Regarding Morrison and Extraterritoriality*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG (May 16, 2014), http://corpgov.law.harvard.edu/2014/05/16/important-decisions-regarding-morrison-and-extraterritoriality/ [https://perma.cc/CGR4-48UG] (discussing City of Pontiac Policemen's & Firemen's Ret. Sys. et al. v. UBS AG et al., No. 12-4355 (2d Cir. May 6, 2014) and focusing on the irrevocable liability theory as opposed to the listing theory).

58 *See, e.g.,* Licht et al., *supra* note 9, at 2 ("Potential endogeneity of cross-listing and unobserved firm heterogeneity poses a challenge to identifying the impact of legal bonding."). The external institutional benefits of host markets are discussed in *infra* Section II.B.2.

use equity consideration[59] or specific investment projects and the corresponding need for capital.

International companies often increase share offerings within and outside the United States after listing in the United States.[60] The trend to issue more securities after cross-listings is also observable in debt offerings.[61] Overall, it appears that after cross-listing, foreign companies, particularly those from countries with inadequate protection of investors, do not need to rely primarily on internally generated funds and enjoy better access to external capital and credit.[62]

Growth companies from both developed and developing markets routinely raise capital through Level III ADRs and direct listings on U.S. exchanges. For instance, younger

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59 *See, e.g.*, Pasi Tolmunen & Sami Torstila, *Cross-Listings and M&A Activity: Transatlantic Evidence*, 34 FIN. MGMT. 123 (2005) (reviewing a sample of European companies and suggesting that large cross-listed firms are likely to use equity in M&A transactions).

60 *See* G. Andrew Karolyi, *The World of Cross-Listings and Cross-Listings of the World: Challenging Conventional Wisdom*, 10 REV FIN. 99, 117–18, 132 (2006) (discussing, *inter alia,* J.A. Fanto & R.S. Karmel, *A Report on the Attitudes of Foreign Companies Regarding a US Listing*, 3 STAN. J.L. BUS. & FIN. 3 (1997), 51–83; William A. Reese Jr. & Michael S. Weisbach, *Protection of Minority Shareholder Interests, Cross-Listings in the United States, and Subsequent Equity Offerings*, 66 J. FIN. ECON. 65 (2002)). Cross-listing programs per se, such as Level III ADRs and directly listed securities, may also be useful ways to raise more equity capital. *See generally* Audra L. Boone et al., The Information Environment of Cross-Listed Firms: Evidence from the Supply and Demand of SEC Filings (May 11, 2015) (unpublished manuscript), https://www.business.uq.edu.au/sites/default/files/events/files/cross-listing-disclosures-may-2015.pdf [https://perma.cc/357E-ZNW2] (discussing the investor recognition theory and cross-listing modes such as Level II, Level III, and direct listing programs).

61 Ryan T. Ball et al., *Equity Cross-Listings in the U.S. and the Price of Debt* 3–4, 16–17 (ECGI—Finance Working Paper No. 274/2010, 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1426586 [https://perma.cc/8S44-S9CQ] (finding more frequent debt offerings and lower bond yields after cross-listings).

62 Karolyi, *supra* note 60, at 139 (citing Karl V. Lins et al., *Do Non-U.S. Firms Issue Equity on U.S. Stock Exchanges to Relax Capital Constraints?*, 40 J. FIN. & QUANTITATIVE ANALYSIS 109 (2005)).

growth companies from Canada tend to tap into the U.S. capital markets by directly listing their securities on Nasdaq.[63] Similarly, Chinese firms with growth opportunities, i.e., growth firms domiciled in a more opaque market, seek Level III ADR offerings.[64]

Historically, the conventional wisdom underlying cross-listings was as follows. Foreign companies wanted to increase investor exposure in the United States and to raise capital, while U.S. investors used cross-listed securities as an easy way to diversify their portfolios.[65] Cross-listings helped to achieve both.

Another typically cited reason to cross-list was increased liquidity and trading volume of a foreign issuer's securities.[66]

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63 Boone et al., *supra* note 60, at 15–16.

64 Lee-Hsien Pan et al., *Corporate Governance, Growth Opportunities, and the Choices of Cross-Listings: The Case of Chinese ADRs*, 24 PACIFIC-BASIN FIN. J. 221 (2013) (documenting that Chinese firms seeking cross-listings generally had better performance, growth opportunities, and internal governance compared to similar domestic firms and that companies with higher growth opportunities preferred Level III ADR offerings). Firm-specific and industry characteristics similarly drive cross-listings of European firms. *See* Pagano et al., *What Makes Stock Exchanges Succeed?*, *supra* note 32; Pagano et al., *The Geography of Equity Listing*, *supra* note 32.

65 American Depository Receipts, Securities Act Release No. 6894, Exchange Act Release No. 29,226, 56 Fed. Reg. 24,420, 24,421 (May 30, 1991); J.P. MORGAN, DEPOSITARY RECEIPTS: YEAR IN REVIEW 3–9 (2011) (on the record DR trading volume in 2011); *see also* Christine X. Jiang, *Diversification with American Depositary Receipts: The Dynamics and the Pricing Factors*, 25 J. BUS. FIN. & ACCT. 683 (1998).

66 On the pertinent arguments and findings, see, for example, Usha R. Mittoo, *Managerial Perceptions of the Net Benefits of Foreign Listing: Canadian Evidence*, 4 J. INT'L. FIN. MGMT. & ACCT. 40 (1992); Franck Bancel & Usha R. Mittoo, *European Managerial Perceptions of the Net Benefits of Foreign Listings*, 7 EUR. FIN. MGMT. 213, 223–26 (2001) (citing higher liquidity as one of the most important benefits of cross-listings according to executives and also observing that about 25% of managers reported changes in post-listing trading volume); Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, 4 CHI. J. INT'L L. 141, 144 (2003) (summarizing liquidity arguments); Seha M. Tinic & Richard R. West, *Marketability of Common Stocks in Canada and the U.S.A.: A Comparison of Agent Versus Dealer Dominated Markets*, 29 J.

Firms vary in this respect along multiple dimensions. For instance, the hunger of issuers from emerging economies for global capital markets, manifested, *inter alia*, through the total trading volume of cross-listed securities and future security offerings, could dwarf the volume and offerings of companies from more developed economies with stronger institutions.[67]

In the past twenty years, a substantial body of research has also demonstrated that cross-listings may be beneficial to a company in a variety of ways. Through cross-listings, foreign companies may pursue such objectives as better international visibility, more attention from journalists, and greater analyst coverage.[68] Such publicity is generally good for business, including more accurate forecasts, higher valuations,[69] better investor recognition,[70] and a more

FIN. 729, 729, 734, 737, 744–45 (1974) (examining bid-ask spreads and liquidity of cross-listed Canadian firms); Stephen R. Foerster & G. Andrew Karolyi, *Multimarket Trading and Liquidity: A Transaction Data Analysis of Canada–US Interlistings*, 8 J. INT'L FIN. MKTS., INSTITUTIONS & MONEY 393 (1998) (analyzing changes in trading costs and bid-ask spreads for cross-listed firms listed on the Toronto Stock Exchange).

67 Dobbs & Goedhart, *supra* note 32, at 19, 22–23 (estimating that the trading volume for companies from developed economies is about 3% and is much higher for firms from emerging markets). *See also* Reese & Weisbach, *supra* note 60, 67–73 (examining, *inter alia,* equity issuances after cross-listings by companies from weak and strong investor protection jurisdictions); Karolyi, *supra* note 60, at 117.

68 *See, e.g.*, Mark H. Lang et al., *ADRs, Analysts, and Accuracy: Does Cross Listing in the United States Improve a Firm's Information Environment and Increase Market Value?*, 41 J. ACCT. RES. 317 (2003) (finding that cross-listed firms have more extensive market analyst coverage). *But see* Karolyi, *supra* note 60, at 144 (observing that "little is still known about the composition of the analysts, whether they are local or based in the new market, and whether this affects the dispersion or accuracy of their forecasts or the capital market participant's reactions to their forecast skills"); Dobbs & Goedhart, *supra* note 32, at 19–20 (finding that the difference for European companies is about two more analysts and that "the average number of analysts covering the 300 largest European companies is 20 [and s]uch a small increase is unlikely to have any economic significance").

69 Lang et al., *supra* note 68; H. Kent Baker et al., *International Cross-Listing and Visibility*, 37 J. OF FIN. & QUANTITATIVE ANALYSIS 495

diversified investor base.[71] It is even associated with increased exports.[72]

A host of studies also identified a comparative cross-listing premium, often measured in terms of Tobin's q, i.e., a ratio of the market value of a company and its asset replacement costs. In short, this means that cross-listed firms may be worth more to investors.[73] Evidence seems to

(2002); Mark H. Lang et al., *Concentrated Control, Analyst Following, and Valuation: Do Analysts Matter Most When Investors Are Protected Least*?, 42 J. ACCT. RES. 589 (2004).

70 Michael R. King & Dan Segal, *The Long-Term Effects of Cross-Listing, Investor Recognition, and Ownership Structure on Valuation*, 22 REV. FIN. STUD. 2393, 2394–96 (2009) (discussing prior studies and showing that benefits of investor recognition are not uniform for all firms).

71 *Id.* at 2394–96; *see also* Reena Aggarwal et al., *Portfolio Preferences of Foreign Institutional Investors* 3–4, 24–26 (World Bank Policy Research, Working Paper No. 3101, 2003) (discussing research on the preferences of institutional investors to invest in foreign issuers from countries with stronger laws and better accounting standards, and finding that "size and visibility of the firm as proxied by firm size, number of analysts following the firm, and ADR dummy are significant and positively associated with U.S. mutual fund investments").

72 Shahrokh M. Saudagaran & Gary C. Biddle, *Foreign Listing Location: A Study of MNCs and Stock Exchanges in Eight Countries*, 26 J. INT'L BUS. STUD. 319 (1995) (finding a correlation between international listings and, *inter alia*, foreign exports); Pagano et al., *The Geography of Equity Listing*, *supra* note 32, at 2685 (examining firms' characteristics, sales, listings, and other factors).

73 Craig Doidge et al., *Why Are Foreign Firms Listed in the U.S. Worth More?*, 71 J. FIN. ECON. 205, 208–09, 218–29 (2004) [hereinafter Doidge et al., *Foreign Firms*] (explaining cross-listing premiums and reviewing the literature on cross-listings); Craig Doidge et al., *Has New York Become Less Competitive Than London in Global Markets? Evaluating Foreign Listing Choices over Time*, 91 J. FIN. ECON. 253 (2009) [hereinafter Doidge et al., *Evaluating Foreign Listing Choices over Time*]; *see also* Bailey et al., *supra* note 69, at 180–90 (comparing returns and trading volume before and after cross-listings); Karolyi, *supra* note 60, at 118–20 ; Kate Litvak, *Sarbanes-Oxley and the Cross-Listing Premium*, 105 MICH. L. REV. 1857, 1860–62 (2007) (discussing the literature and providing evidence on the effect of Sarbanes-Oxley on premiums); King & Segal, *supra* note 70, 2395–96, 2419 (summarizing the theory and suggesting that benefits are not constant and uniform). *But see* Kate Litvak, The Relationship Among U.S. Securities Laws, Cross-Listing Premia, and Trading Volumes 4–5, 11 (Aug. 7, 2009) (CELS 2009 4th

confirm that "U.S.-traded FPI equities command a premium of about 0.9 percent on average over similar equities traded on the home market."[74] Overall, scholars have documented both higher equilibrium prices for shares of cross-listed companies[75] and a lower cost of capital enjoyed by cross-listed FPIs.[76] Cross-listing in the United States and, in particular, on national securities exchanges is associated with considerable premiums.[77]

Annual Conference on Empirical Legal Studies Paper) [hereinafter Litvak, The Relationship] (analyzing the liquidity and bonding explanations and demonstrating that the premiums are temporary, decline after six years, and depend on U.S. trading volume); Juan Carlos Gozzi et al., *Internationalization and the Evolution of Corporate Valuation*, 88 J. FIN. ECON. 607 (2008) (challenging the valuation benefits and emphasizing that cross-listings facilitate corporate expansion).

74 Licht et al., *supra* note 9, at 29.

75 Karolyi, *supra* note 60, at 103–04, 126–28 (discussing previous studies on the effect of cross-listings on the cost of capital, share price, and the role of cross-listings in price discovery). There is also research evidencing positive average abnormal returns around ADR announcement dates for foreign issuers' securities. *See* Darius P. Miller, *The Market Reaction to International Cross-Listings: Evidence from Depositary Receipts*, 51 J. FIN. ECON. 103 (1999).

76 Karolyi, *supra* note 60, at 100, 103–04; Vihang R. Errunza & Darius P. Miller, *Market Segmentation and the Cost of Capital in International Equity Markets*, 35 J. FIN. & QUANTITATIVE ANALYSIS 577, 579 (2000) (finding evidence of the lower cost of capital after U.S. cross-listings); Ball et al., *supra* note 61, at 18–20; Luzi Hail & Christian Leuz, *Cost of Capital Effects and Changes in Growth Expectations Around U.S. Cross-Listings*, 93 J. FIN. ECON., 428, 429 (2009) (finding "strong evidence that cross-listings on U.S. exchanges (Amex, Nasdaq, and NYSE) significantly reduce the cost of equity capital and that the effects are larger than for the other types of cross-listings" and "that cross-listings in the OTC markets reduce the cost of capital"); *see also* René M. Stulz, *Globalization, Corporate Finance, and the Cost of Capital*, J. APPLIED CORP. FIN. 8, 12–17 (1999).

77 Doidge et al., *Evaluating Foreign Listing Choices over Time*, *supra* note 73 (comparing premiums and changes in capital raising activities associated with U.S. and U.K. cross-listings). Naturally, some scholars have found that cross-listing premiums are associated with listings on global markets located not only in the United States, but also in other jurisdictions. *See, e.g.*, Sergei Sarkissian & Michael J. Schill, *The Nature of the Foreign Listing Premium: A Cross-Country Examination*, 36 J.

To summarize, cross-listings may allow an FPI to achieve specific corporate objectives and expand its business in the United States, as well as to enjoy external benefits associated with better institutions, higher visibility, and improved valuation. Various companies, obviously, would assign different values to those external and firm-specific benefits and considerations.

2. Principal Theories Explaining the Economic Benefits

How does cross-listing generate the foregoing economic benefits? Several principal theories have been advanced as explanations. The major hypotheses include the reputational bonding hypothesis, the legal bonding hypothesis, and the investor recognition hypothesis. Even without assigning a certain value to each hypothesis, foreign managers may acknowledge that legal and institutional features of U.S. capital markets complement firm-specific objectives. For instance, a firm may pursue a global marketing strategy and simultaneously engage in capital raising, enjoy the prestige of the NYSE, improve share liquidity, and tap into other "exogenous" rewards associated with U.S. institutions.[78]

a. Reputational Bonding

The reputational bonding theory recognizes that investors prefer companies with good reputation and that cross-listing securities in a more transparent institutional framework *and*

BANKING & FIN. 2494 (2012); Marcelo Bianconi & Liang Tan, *Cross-Listing Premium in the US and the UK Destination*, 19 INT'L REV. ECON. & FIN. 244, 256–57 (2010) (documenting a higher premium for listings in the United States as opposed to the United Kingdom, but also finding that the difference is not robust); Yen Hou Ng et al., *The Long- and Short-Run Financial Impacts of Cross Listing on Australian Firms,* 38 AUSTL. J. MGMT. 81 (2013) (investigating short-run and long-run performance of shares of cross-listed firms versus other firms and comparing abnormal returns for different host markets).

[78] *See, e.g.*, Bancel & Mittoo, *supra* note 66, at 216–20, 224–32 (summarizing the debates and providing comparative assessments of managerial perceptions in Europe and Canada).

investing in reputational assets help an issuer build that reputation.[79] Often, another typical mechanism is adopting better disclosure practices voluntarily—"voluntary disclosure and subsequent following that result from a cross-listing enable many firms to bond themselves by building their reputation."[80]

Consider the following examples. As discussed in Section II.A, lower-level ADRs are not burdened by the same mandatory disclosure rules as Levels II and III or direct listings. Yet, there is evidence that "ADRs that list on organized exchanges are less likely to issue [earnings] guidance than those that do not list on an exchange."[81] Hence, the companies in the latter group may voluntarily disclose more information to build their reputations among investors without reliance on the mandatory SEC rules or exchange regulations. It is as if those firms deliberately attempted to compensate for the ostensible lack of disclosure and signaling associated with a formal listing on an exchange by means of signaling and bonding through voluntary disclosure.[82]

A similar example is voluntary commitment to better accounting standards, mainly, IFRS. Research shows that exchange listings, which trigger the full scope of mandatory

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79 *See generally* Siegel, *supra* note 44; Yaqi Shi et al., *Do Countries Matter for Voluntary Disclosure? Evidence from Cross-Listed Firms in the US*, 43 J. INT'L BUS. STUD. 143 (2012) (finding evidence of both reputational and legal bonding theories).

80 Siegel, *supra* note 44, at 321.

81 Ole-Kristian Hope et al., *Voluntary Disclosure Practices by Foreign Firms Cross-Listed in the United States*, 9 J. CONTEMP. ACCT. & ECON. 50, 62 (2013).

82 A foreign company may select among several routes to send a verifiable signal. It may subject itself to the full force of the U.S. securities law, which forces companies not only to follow certain disclosure policies, but also to improve corporate governance. *See, e.g.*, Pan et al., *supra* note 64. Some companies, particularly smaller firms, may ab initio prefer a cheaper option—a Level I ADR Program. After that, they follow up with disclosing more information voluntarily, thus building a better reputation while avoiding costly mandatory disclosure and compliance costs. *See, e.g.*, Hope et al., *supra* note 81.

disclosure, and voluntary IFRS adoption command similar premiums.[83] The findings thus suggest that a voluntary commitment to better disclosure practices and IFRS matters, underscoring the value of reputational bonding.

The conclusions of the reputational bonding theory are generally aligned with the scholarship emphasizing the importance of voluntary disclosure by U.S. issuers, the issuer choice theory, and the criticisms of the mandatory disclosure regime of the Securities Act and the Exchange Act.[84] Presumably, the value of voluntary disclosure and reputation building is important to domestic U.S. firms and foreign issuers alike. The market will and does punish an issuer's disobedience in the form of a reputational penalty in a much harsher way than a regulator or private plaintiffs could.[85] In the long term, a healthy reputation may allow an entrepreneur to raise more funds. Thus, informal reputational mechanisms, such as contractual commitments or voluntary adoption of IFRS, may be as important as law and can sometimes be implemented without direct reliance

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83 Irene Karamanou & George P. Nishiotis, An Examination of the Comparative Valuation Effects of Enhanced Disclosure and Cross-Listing in the US (July 15, 2012) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968230 [https://perma.cc/PBL8-DZXX].

84 *See generally* Fox, *supra* note 17; Merritt B. Fox, *The Issuer Choice Debate*, 2 THEORETICAL INQUIRIES L. 563 (2001); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998); Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEORETICAL INQUIRIES L. 387 (2001); Stephen J. Choi, *Promoting Issuer Choice in Securities Regulation,* 41 VA. J. INT'L L. 815 (2001).

85 Siegel, *supra* note 44, at 351 (discussing, *inter alia*, J. Karpoff & J. Lott Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757 (1993), 757–802); Amar Gande & Darius P. Miller, Why Do U.S. Securities Laws Matter to Non-U.S. Firms? Evidence from Private Class-Action Lawsuits (Apr. 2012) (unpublished manuscript) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1939059 [https://perma.cc/8LQC-9X6B] (discussing the reputational penalties levied by the market following filings).

on a legal system[86]—"the entrepreneur could choose bonding mechanisms and governance mechanisms that would make it more difficult for her to renege on her commitments [to investors]."[87]

b. Legal Bonding

A connate theory is legal bonding.[88] It is plausible and reasonable that "securities laws can help resolve some—but not all—of the problems the entrepreneur faces in credibly committing to the buyers of equity through mandatory disclosure."[89] In addition, an issuer's subjecting itself to the U.S. securities law is just another signaling mechanism creating a separating equilibrium—foreign "oranges" do not want to be treated as "lemons."[90]

The legal bonding theory postulates that by voluntarily subjecting itself to U.S. *legal* institutions, including mandatory disclosure rules, exchange self-regulation, SEC enforcement, private antifraud suits, and others, an issuer enhances its value in the eyes of investors. A cross-listing issuer effectively borrows quality institutions that, from the perspective of an investor, are designed to monitor and keep in check the management and other control persons. The underlying idea is that "[w]hen it comes to firms, their value,

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86 René M. Stulz, *Securities Laws, Disclosure, and National Capital Markets in the Age of Financial Globalization*, 47 J. ACCT. RES. 349, 367 (2009) (mentioning relevant studies).

87 *Id.* at 365.

88 *See generally* John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 NW. U.L. REV. 641 (1999); John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757 (2002).

89 Stulz, *supra* note 86, at 367; *see also* Fox, *supra* note 2, at 1199.

90 Similar to the choice of corporate domicile, a firm may wish to signal to the global market through a cross-listing program and all related corporate and disclosure changes that its current and future earnings are healthy and that it is committed to good corporate governance. *See, e.g.,* Edward M. Iacobucci, *Toward a Signaling Explanation of the Private Choice of Corporate Law*, 6 AM. L. & ECON. REV. 319 (2004).

the distribution of their ownership between insiders and outsiders, the extent of ownership by foreign investors, and the expected return of their equity all depend on the securities laws these firms are subject to."[91]

Every international company comes from a home market and is subject to its rules and regulations. Consequently, comparative research naturally combines the effects of cross-listings with the variations among foreign investor protection regimes and securities laws: "[f]irms may seek to improve on their home countries' institutions by listing on markets with better enforcement institutions, using the latter as institutional substitutes."[92]

An obvious case is a firm in need of external capital that may choose to cross-list in the United States if its domestic securities law and institutional framework are deemed inadequate, and if the issuer cannot efficiently raise capital at home.[93] Investors may be more willing to acquire securities of such issuer after a cross-listing and to forego certain risk premiums, thus reducing its cost of capital. A cross-listing firm does not necessarily have to issue securities in the United States per se in the future—an increase in issuances following the launch of a cross-listing program and the lower cost arguments appear to hold for

91 Stulz, *supra* note 86, at 383.

92 Licht et al., *supra* note 9, at 3 (also discussing Rafael La Porta et al. *What Works in Securities Laws?,* 61 J. FIN. 1, 1–32 (2006)); Stulz, *supra* note 86, at 352–53 ("In a world with free capital flows, differences in securities laws across countries can have a large impact, but these differences are mitigated when firms can choose to subject themselves to the securities laws of countries other than their own. In some countries, firms can issue securities abroad and, in some cases, even opt out of the securities laws of their country. The resulting equilibrium of where a firm issues securities and where its common stock trades depends on the discretion firms have and the costs they bear to subject themselves to the securities laws of a different country from the one in which they are located.").

93 As discussed, this may enable the company to follow up with more equity and debt issuances. Reese & Weisbach, *supra* note 60; Ball et al., *supra* note 61.

various geographical venues of offerings.[94] This implies that not only American investors, but also investors in foreign markets value cross-listings.

A related theory is investor recognition, which suggests that cross-listings, the choice of a specific type of a cross-listing program, post-listing policies, and exit are predetermined by the need to raise external funds on the cheapest terms possible.[95] This need for capital may predispose a company to cross-list, subject itself to the U.S. legal regime, and disclose more information in order to improve valuation and to reduce the cost of capital.[96]

Investors value the information disclosed by FPIs. Against the anecdotal presumption that investors do not read long and tedious disclosure documents, there is evidence confirming that the market does pay attention to current reports furnished by reporting FPIs.[97] Not only do investors read such reports promptly upon filing, but they also crosscheck the recently filed reports on Form 6-K with lengthy annual reports on Form 20-F.[98] It is fair to suggest that by dint of the U.S. disclosure requirements, cross-listings should reduce adverse selection and agency costs.[99]

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94 Reese & Weisbach, *supra* note 60; Ball et al., *supra* note 61.

95 Boone et al., *supra* note 60, at 1, 7–8; King & Segal, *supra* note 70 (discussing the relationship among investor recognition, valuation, and capital raising).

96 When a firm no longer has growth opportunities and generally does not need to raise external capital, the firm may leave. Thereby it reduces its law-related costs. For an extensive discussion of the costs and benefits, see Craig Doidge et al., *Why Do Foreign Firms Leave U.S. Equity Markets?*, 65 J. FIN. 1507 (2010). The universe of firms, however, is diverse. Some use Level II ADR listings (i.e., a listing mode that does not allow a foreign company to issue new securities publicly in the United States to raise capital) and routinely comply with the expensive American reporting requirements. Boone et al., *supra* note 60, at 7–8 (finding no initial evidence of the investor attention hypothesis and capital raising in terms of disclosure but also observing that capital-raising needs may be related to the countries of domicile).

97 Boone et al., *supra* note 60, at 31.

98 *Id.*

99 *See, e.g.*, Stulz, *supra* note 86; Doidge et al., *Foreign Firms*, *supra* note 73; Craig Doidge et al., *Private Benefits of Control, Ownership, and*

Investors also differentiate among filings based on issuers' countries of domicile. Recent research demonstrates greater abnormal trading and cumulative abnormal returns documented around current filings by firms from developing economies and jurisdictions with low transparency and disclosure, including those that do not follow IFRS.[100] While investors promptly react to new current reports on Form 6-K, causing a surge in clicks on EDGAR, the SEC's reporting system, investors do not read and react to all foreign issuers' reports in the same way.[101] The extent of reviews of reports furnished by issuers from emerging markets, possibly suffering from greater information asymmetry and higher agency costs, surpasses the reviews of their cross-listed peers from other jurisdictions.[102] In sum, even though the disclosure and reading effects are significant for all issuers, including firms from comparatively more developed and

the Cross-Listing Decision, 64 J. FIN. 425 (2009) [hereinafter Doidge, *Private Benefits of Control*].

100 Boone et al., *supra* note 60, at 6 ("For example, our regressions indicate that 6-Ks provided by firms from emerging economies generate over 13% greater abnormal trading volume than 6-Ks provided by firms from developed economies during the three-day period centered on the 6-K filing date. Similarly, cross-listed firms from emerging economies generate 0.5% greater absolute CARs than those from developed countries during the same period.").

101 As noted earlier, investors also simultaneously reread other filings and compare the new current reports with previously filed annual reports. Boone et al., *supra* note 60, at 8–9 ("In response to a new 6-K filing, we find a 66% surge in clicks on the SEC's website for the cross-listed firm's 6-K disclosures. . . . For example, the average new 6-K filing leads to an approximately 20% increase in the number of clicks on the firm's most recently filed annual report, and this spike is even greater in response to 6-K disclosures involving *Operations and Results* and for cross-listing firms from emerging economies where the home country information environment is likely opaque.").

102 *Id.*

transparent economies such as Canada,[103] the effects are more pronounced for firms from emerging markets.[104]

Investors treat firms from emerging markets or more opaque markets differently vis-à-vis issuers from more established and transparent economies for a good reason. Corporate culture and disclosure policies are sticky.[105] Evidence indicates that firms tend to follow disclosure and accounting rules in relation to their home environment, even against the backdrop of mandatory reporting rules.[106]

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103 The underlying explanations may be multifaceted. Some research suggests, for instance, that a cross-listing in the United States reduces "the information asymmetry between controlling and minority shareholders." King & Segal, *supra* note 70, at 2400.

104 Boone et al., *supra* note 60, at 8–9.

105 *See, e.g.*, Ana C. Silva et al., *Earnings Management, Country Governance, and Cross-Listing: Evidence from Latin America*, 7 GLOBAL J. EMERGING MKT. ECON. 4 (2015) (observing, *inter alia*, that cross-listed firms may be less prone to engage in earnings management, although country-based differences persist). The market "discriminates" against certain firms. *See, e.g.*, Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets,* 48 UCLA L. REV. 781, 820 (2001) (discussing an example of Russian companies whose cross-listed securities were traded in the United States at a discount); *see also* Boone et al., *supra* note 60, at 10 (underscoring the value of home-country disclosure rules).

106 Boone et al., *supra* note 60, at 2 (observing that "[d]espite SEC reporting requirements, prior work indicates that the propensity of cross-listed firms to follow the rules with regard to accounting data is a function of their home environment"). Disclosure and related benefits depend on not only the type of a U.S. cross-listing program and accompanying reporting rules, but also home-country institutions and local ownership structure. Yaqi Shi et al., *supra* note 79; Karamanou & Nishiotis, *supra* note 83, at 3–4 (suggesting that the benefits of IFRS adoption are greater for firms from countries with weak investor protection and local firms; that "US exchange listing valuation premium is mostly related to market integration benefits"; finding "no evidence that cross-listing on a US exchange is valued more for firms with weak home country investor protection;" and that there is "a valuation premium for exchange cross-listed firms relative to IFRS firms as any potentially positive valuation effects related to the US legal system appear to be subsumed by the costs of abiding by it"). Perhaps for these reasons, firms from home jurisdictions with poor disclosure requirements gravitate towards larger and more liquid trading venues, which are often located in the countries following

In a similar vein, while evidence suggests that liquidity improves and spreads narrow through cross-listings in general,[107] these benefits are not distributed equally and seem more pronounced for companies from more transparent institutional milieus with stronger shareholder protection.[108] As the market is hungry for information supplied by firms from emerging economies, their current filings are also

better accounting standards, after their home countries adopt IFRS, i.e., after their home countries have narrowed the disclosure gap with more transparent economies. Long Chen et al., *The Effect of Mandatory IFRS Adoption on International Cross-Listings*, 90 ACCT. REV. 1395 (2015). Another plausible explanation, of course, is that issuers following IFRS do not have to reconcile their financial statements with U.S. GAAP. *See* Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards Without Reconciliation to U.S. GAAP, Securities Act Release No. 8879, Exchange Act Release No. 57,026, 73 Fed. Reg. 986 (Jan. 4, 2008). In any case, those FPIs combine the benefits of the newly adopted home accounting requirements with the advantages of international trading.

107 This is a result of improvements in disclosure. Licht et al., *supra* note 9, at 11 ("Prior research has shown that the spread narrows for firms that are subject to higher disclosure requirements and to better corporate governance in general.").

108 For instance, "price informativeness following cross-listing increases the most for firms from developed markets." Boone et al., *supra* note 60, at 5 (citing Nuno Fernandes and Miguel A. Ferreira, *Does International Cross-listing Improve the Information Environment*, 88 J. FIN. ECON. 216 (2008); Warren Bailey et al., *The Economic Consequences of Increased Disclosure: Evidence from International Cross-listings*, 81 J. FIN. ECON. 175 (2006)). Transaction costs and the spreads differ depending on, *inter alia*, such variables as domestic financial reporting requirements, home-country shareholder protection rules, which are often stronger in common law countries, or local judicial efficiency. *See, e.g.*, Venkat Eleswarapu & Kumar Venkataraman, *The Impact of Legal and Political Institutions on Equity Trading Costs: A Cross-Country Analysis*, 19 REV. FIN. STUD. 1081 (2006). "Despite the fact that US listing may provide potential improvements in the area of information disclosure, and thus mitigate the problem of information asymmetry, [studies] reveal that the ADRs of firms operating in good investor protection environments tend to have both lower information asymmetry costs and higher liquidity levels." Huimin Chung, *Investor Protection and the Liquidity of Cross-Listed Securities: Evidence from the ADR Market*, 30 J. BANKING & FIN. 1485, 1503 (2006).

associated with greater trading volume and price reaction.[109] There is also a larger ADR announcement-date price response for a cross-listed company from an emerging economy, particularly for exchange-listed ADR programs, which signal more future (mandatory) disclosure by a cross-listing issuer.[110]

Another practical by-product of bonding is corporate governance improvements. For instance, exchanges' investor protection and governance standards are associated with terminations of poorly performing executives, particularly in firms from poor investor protection markets.[111] Moreover, the presence of large U.S. and international investors helps to bring about positive changes in firms' governance.[112]

The process is circular—as international and U.S. shareholders increase their ownership stakes in international companies after cross-listings, which is a common, documented trend,[113] their presence influences corporate governance of such foreign firms and entails changes in the management.[114] Importantly, analysts are more willing to follow better-governed firms and their

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109 Boone et al., *supra* note 60, at 10 ("Our work reveals that firms from less rigorous home information environments experience greater trading volume and price response to 6-K filings.").

110 Miller, *supra* note 75, at 121.

111 Ugur Lel & Darius P. Miller, *International Cross-Listing, Firm Performance and Top Management Turnover: A Test of the Bonding Hypothesis* (Bd. of Governors of the Fed. Reserve Sys., International Finance, Discussion Paper No. 877, 2006), http://ssrn.com/abstract=926606 [https://perma.cc/2SF5-C6UW] (generally supporting the bonding theory).

112 *See generally* Reena Aggarwal et al., *Does Governance Travel around the World? Evidence from Institutional Investors*, 100 J. FIN. ECON. 154 (2011).

113 Aggarwal et al., *supra* note 71, at 3 (finding that "firm-level characteristics such as greater growth options, size, and analyst following and policies such as ADR listing and better accounting disclosures are associated with greater U.S. mutual fund investment"); John Ammer et al., *Why Do U.S. Cross-Listings Matter?* (Bd. of Governors of the Fed. Reserve Sys., International Finance, Discussion Paper No. 930, 2008), https://www.federalreserve.gov/pubs/ifdp/2008/930/ifdp930.pdf [https://perma.cc/6P3D-Y875].

114 Aggarwal et al., *supra* note 112.

increased coverage is associated with higher valuation.[115] Evidence suggests that some of these positive firm-level effects of cross-listings are more pronounced for companies from countries with opaque informational environments and accounting requirements,[116] as well as from jurisdictions with weak shareholder protection.[117]

Finally, a liability regime supposedly serves as a bulwark protecting investors.[118] Private and public enforcement also transmits reputational information and alerts the market that an issuer is less trustworthy and that an additional risk premium may be needed in future transactions with that firm.[119] Consider a relevant natural event study of foreign managers (or insiders in general) being "kept in check"—a financial crisis. Pertinent research on the Asian crisis of the 1990s suggests that the market valued cross-listed issuers higher than their non-cross-listed peers.[120] In turbulent markets, investors appreciate the protection afforded by U.S. law and enforcement.

Consequently, if a foreign firm's agency costs are high and corporate governance poor, delisting and deregistering in the United States, and thus breaking the bond with the U.S. legal and self-regulatory requirements, may cause a

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115 Lang et al., *supra* note 69.

116 Ammer et al., *supra* note 113.

117 Aggarwal et al., *supra* note 71 at 28 (noting that "the marginal effect of both firm-level policies—ADR and accounting quality—is significant in countries with below-average outside shareholder protection laws. In general, we can conclude that funds invest a larger proportion of their assets in firms with more disclosure and transparency and this effect is most pronounced in countries with weak shareholder rights"); Aggarwal et al., *supra* note 112.

118 *See, e.g.*, Doidge et al., *Private Benefits of Control*, *supra* note 99, at 426–29 (emphasizing the significance of enforcement and also discussing the value of disclosure rules and institutional framework of the U.S. market); Gagnon & Karolyi, *supra* note 15.

119 Siegel, *supra* note 79, at 351; Gande & Miller, *supra* note 85.

120 Todd Mitton, *A Cross-Firm Analysis of the Impact of Corporate Governance on the East Asian Financial Crisis*, 64 J. FIN. ECON. 215, 217 (2002) (finding that during the Asian crisis firms with ADR programs had higher stock price performance).

negative market reaction.[121] For some firms, in spite of considerable costs of compliance with U.S. law, the respective savings from deregistration may not offset a concurrent decline in security prices and other bonding benefits.[122] This also implies that while there is a risk that too many bonding restrictions may be obviously costly, too little bonding and too simple an exit are inefficient and may reduce cross-listing premiums and other benefits.[123] Firms that need bonding the most, i.e., firms from jurisdictions with inadequate investor protection, should bear the brunt of the diminished bonding benefits.[124]

Consider, for instance, the costs and benefits of an exit option, i.e., the termination of the registration and reporting obligations under U.S. law. As noted above, in 2007, the new SEC rule provided that an FPI traded on a foreign primary market could more easily terminate the registration of securities and/or its reporting obligations with respect to a class of equity securities traded in the United States.[125] Upon filing of Form 15F, suspension of the reporting obligations occurs immediately.[126] While scholars generally failed to identify a negative effect of the new rule on cross-listed

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121 *See, e.g.*, Peter Hostak et al., *An Examination of the Impact of the Sarbanes–Oxley Act on the Attractiveness of U.S. Capital Markets for Foreign Firms*, 18 REV. ACCT. STUD. 522 (2013) (finding that voluntarily deregistering foreign firms had weaker corporate governance, documenting a considerable price decline after the deregistration announcement, and suggesting that not only Sarbanes-Oxley compliance costs, but also agency costs motivate FPIs to withdraw from the United States); Doidge et al., *supra* note 96, at 1528–29, 1547.

122 *See, e.g.,* Hostak et al., *supra* note 121; Doidge et al., *supra* note 96, at 1514, 1526, 1528–34.

123 Reducing exit costs by simplifying deregistration rules, as did Rule 12h-6, which was promulgated by the SEC in 2007, may simultaneously reduce cross-listing premiums and other benefits of cross-listing and bonding to U.S. law. Fan He & Chinmoy Ghosh, *The Diminishing Benefits of U.S. Cross-Listing: Economic Consequences of SEC Rule 12h-6*, J. FIN. & QUANTITATIVE ANALYSIS (forthcoming) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2753397 [https://perma.cc/56JH-NVWS].

124 *Id.* at 41–42.

125 17 C.F.R. § 240.12h-6 (2016).

126 *Id.*

issuers, they also suggested that firms which promptly availed themselves of the new rule were "poor performers" and "that the market generally react[ed] negatively to deregistration announcements."[127]

There is further evidence that the market particularly "disliked" the fact that FPIs from jurisdictions with weak investor protection were allowed to more easily leave U.S. markets, reduce reporting, sever ties with exchanges, and possibly avoid liability in U.S courts.[128] Some researchers detected a corresponding general reduction in both equity raising and cross-listing premiums with a significantly greater decline for firms from poor investor protection domiciles.[129]

c. A Holistic Approach

Even though theory generally suggests that the international listing game is worth the candle, researchers merely offer some vague guidance to a firm's management, leaving it without specific metrics for evaluating the costs and benefits of international trading. First, an individual issuer is hardly capable of breaking down the medley of complementary hypotheses into certain percentage points with precise assigned values. Second, its risk assessment and the resultant choice of a cross-listing mode should be confounded by scholarly disagreements.

Various explanatory theories of cross-listing have been called into question on several fronts. Scholars, for example, disagree whether the documented valuation premium is common for firms cross-listing mainly in the United States[130] or generally for firms listing in foreign jurisdictions.[131]

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127 Doidge et al., *supra* note 96, at 1548; *see also* Hostak et al., *supra* note 121, at 522–24.

128 *See generally* He & Ghosh, *supra* note 123, at 41–42.

129 *Id*. at 42.

130 Doidge et al., *Evaluating Foreign Listing Choices over Time*, *supra* note 73; Bianconi & Tan, *supra* note 77.

131 Sarkissian & Schill, *supra* note 77.

Another schism is about the role of law per se. The valuation premium and cross-listing decisions may primarily depend not on investor protection, disclosure rules, and enforcement policies, but instead on prelisting valuation.[132] Some scholars argue that there is no permanent premium associated with global listings and that international trading is driven by firm-specific objectives such as corporate expansion.[133] Scholarship also points out that a lot hinges on an individual firm's behavior and characteristics. A cross-listing firm, for instance, must maintain investor recognition. Those who fail to do so will have lower valuation and lose the original benefits of a cross-listing program faster than their peers, which have expanded their investor base in the United States.[134]

Researchers also suggest that premiums may be secondary to such factors as liquidity, trading volume, and visibility.[135] These benefits are related in the first place to the economics of exchange listings and trading, not merely securities law *qua* law. In this sense, liquidity, exchange policies, and exchange valuations are important to issuers.[136] Similarly, trading on Nasdaq or the NYSE, more visible and prestigious venues in the eyes of investors, is not equivalent to Level I ADRs traded OTC.[137]

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132 *Id.*

133 Gozzi et al., *supra* note 73; Litvak, The Relationship, *supra* note 73.

134 King & Segal, *supra* note 70, at 2419.

135 *See generally* Litvak, The Relationship, *supra* note 73.

136 *Id.* at 14–16; *see also* Nuno Fernandes & Mariassunta Giannetti, *On the Fortunes of Stock Exchanges and Their Reversals: Evidence from Foreign Listings* 5–7, 28 (European Central Bank, Working Paper No. 1585, 2013), https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1585.pdf [https://perma.cc/67XM-LK5V].

137 *See, e.g.*, Litvak, The Relationship, *supra* note 73; Nicola Cetorelli & Stavros Peristiani, *Firm Value and Cross Listings: The Impact of Stock Market Prestige*, 8 J. RISK FIN. MGMT. 150, 177 (2015) (discussing the role of exchange reputation and also suggesting that "any policies that lower regulatory or exchange listing standards might be counterproductive and backfire over the long run. The empirical evidence suggests that investors attach a high value to a stock market's ability to

For the purposes of this research, it is of crucial importance that many of the benefits of firm visibility, better corporate governance, lower capital costs, and better information disclosure discussed above are consistent with legal explanations as well as with listings on prestigious markets *and* individual firms' strategies for maintaining investor recognition. In fact, an individual manager may view these benefits and strategies holistically.

By way of example, when an issuer chooses the level of an ADR program and a trading venue, it also selects an accompanying institutional framework and evaluates its prestige.[138] An exchange is a self-regulatory organization,

certify listed companies"). Investors generally seem to separate and value issuers based on their voluntary commitment to trading venues, leading to exchange-prestige-based segregation among cross-listing firms. Evidence supports that this separation works not only in the United States, but also in foreign markets like London, where switching a listing to a more regulated exchange is associated with positive abnormal returns on the announcement day. For instance, in London, the Main Market is the London Stock Exchange's "flagship market for larger, more established companies," *see Main Market*, LONDON STOCK EXCHANGE, http://www.londonstockexchange.com/companies-and-advisors/main-market/main-market/home.htm [https://perma.cc/GV26-8QT3] (last visited Apr. 22, 2017), while its Alternative Investment Market (AIM) is specifically oriented towards smaller and growth companies, *AIM*, LONDON STOCK EXCHANGE, http://www.londonstockexchange.com/companies-and-advisors/aim/aim/aim.htm [https://perma.cc/T9R8-H28A] (last visited Apr. 22, 2017). The former, therefore, has stricter listing, disclosure, and corporate governance requirements. Evidence indicates that switching from the less regulated AIM to the more regulated Main Market is associated with positive abnormal returns on the announcement day. Bonding to the Main Market and a reduction in the agency costs may be at play here. Kevin Campbell & Isaac T. Tabner, *Bonding and the Agency Risk Premium: An Analysis of Migrations Between the AIM and the Official List of the London Stock Exchange*, 30 J. INT'L FIN. MKTS. INSTITUTIONS & MONEY 1 (2014). Similarly, when an issuer is cross-listed on an exchange, investors may assign a higher value to classes of assets, such as an FPI's cash reserves, that may be easily appropriated by foreign insiders. *See* Laurent Frésard & Carolina Salva, *The Value of Excess Cash and Corporate Governance: Evidence from U.S. Cross-Listings*, 98 J. FIN. ECON. 359 (2010).

138 Such decisions would include selecting a specific exchange or an OTC market and the respective regulatory framework. *See, e.g.*, Frésard &

whose rules must be in compliance with federal securities law and are approved by the SEC.[139] Listed ADRs and directly listed securities entail *a priori* greater disclosure, monitoring, and corporate governance requirements through both exchange rules and SEC regulations. To an issuer, exchange trading is in fact a combination of legal and regulatory, as well as reputational and institutional, bonding and signaling mechanisms. To conclude, a cross-listing company should evaluate (1) a combination of proven external benefits generated by its commitment to both legal and institutional frameworks, and (2) its internal firm-specific strategies and business objectives.

d. Confounding Factors: Regulatory Costs, Agency Costs, and Exit Strategies

This analysis is further complicated by the differences between the benefits to the firm as such and the effect of cross-listing on its insiders. A firm's insider may prefer to avoid the United States entirely or to terminate an issuer's commitment to U.S. law and enforcement where agency costs (and her private benefits) outweigh the firm-level benefits of a cross-listing.[140]

The decision to unbind, or "de-bond," also may be driven by the potentially prohibitive costs associated with U.S. regulations. An example is avoiding the post-Sarbanes-Oxley regulatory costs.[141] A practical snare is that it is unclear

Salva, *supra* note 137 (generally comparing enforcement and disclosure arguments for exchange listings, OTC trading, and Rule 144A listings); Cetorelli & Peristiani, *supra* note 137 (measuring exchange prestige).

139 15 U.S.C. § 78s (2012).

140 Doidge et al., *Evaluating Foreign Listing Choices over Time*, *supra* note 73; Doidge et al., *Private Benefits of Control*, *supra* note 99, at 464; Craig Doidge, *U.S. Cross-Listings and the Private Benefits of Control: Evidence from Dual-Class Firms*, 72 J. FIN. ECON. 519 (2004) [hereinafter Doidge, *U.S. Cross-Listings and the Private Benefits of Control*] (documenting that private benefits of control decrease through cross-listings). On the cost-benefit analysis of firms, *see also* Fox, *supra* note 2, at 1211.

141 Scholars differ sharply on the effect of statutory reforms such as Sarbanes-Oxley. *Compare* Doidge et al., *supra* note 96, *and* Hostak et al.,

whether the "bonding" benefits of cross-listings, including, *inter alia*, the premiums and the reduction in agency costs, are cancelled out by regulatory compliance costs.[142]

Another confounding factor is that the avoidance may be driven by the home country characteristics—firms from poor investor protection jurisdictions are likely delisting candidates.[143] Evidence also indicates that a propensity to exit U.S. markets is exhibited by low-growth firms, companies with weak corporate governance, and poor performers.[144]

Deregistration and the separating effect of cross-listings are thus driven by several factors, including not only regulatory costs of compliance, but also agency costs and other factors.[145] These findings underscore that the causal

supra note 121, *with* Litvak, *Sarbanes-Oxley and the Cross-Listing Premium*, *supra* note 73 (finding a negative reaction to SOX, particularly vis-à-vis non-cross-listed foreign companies and home markets, but also suggesting that SOX's effect was mixed and that results depend on country-level and firm-level characteristics), *and* Kate Litvak, *The Effect of the Sarbanes-Oxley Act on Non-U.S. Companies Cross-Listed In The U.S.*, 13 J. CORP. FIN. 195 (2007) [hereinafter Litvak, *The Effect of the Sarbanes-Oxley Act*].

142 *See* Litvak, *The Effect of the Sarbanes-Oxley Act*, *supra* note 141; Doidge et al., *supra* note 96; Hostak et al., *supra* note 121; Licht et al., *supra* note 9, at 10 ("Whether the U.S. legal regime works to support bonding or deter from it is ambiguous.").

143 *See, e.g.,* Jon Witmer, Why Do Firms Cross-(De)List? An Examination of the Determinants and Effects of Cross-Delisting 28–29 (Nov. 15, 2005) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=885503 [https://perma.cc/44GM-79NP]. *But see* Licht, *supra* note 66, at 162–63 (discussing the "avoidance theory;" observing that, for instance, "Israeli US-listed issuers staunchly resisted any increase in their corporate governance-related disclosure beyond the sub-optimal level they are subject to in the US;" and suggesting that "[i]nstead of bonding, most issuers may actually be avoiding better governance").

144 Doidge et al., *supra* note 96, at 1548; Marcelo Bianconi et al., *Firm Value, the Sarbanes-Oxley Act and Cross-Listing in the U.S., Germany and Hong Kong Destinations*, 24 N. AM J. ECON. & FIN. 25 (2013); Hostak et al., *supra* note 121.

145 *See, e.g.*, Doidge et al., *supra* note 96, at 1510–11; Hostak et al., *supra* note 121; Nuno Fernandes et al., *Escape from New York: The*

nexuses of listings and delistings are multifaceted and must differ from firm to firm.

e. Conclusion: Cross-Listing as an Investment Decision

Consequently, most of the theories discussed above offer complementary—and not necessarily contradictory—explanations of the same economic benefits and costs of cross-listings.[146] Those costs and benefits predetermine the motivations driving foreign firms to cross-list and to select a suitable level of an ADR program and a trading venue. It is fair to say that an individual firm and its management are faced with a typical investment decision when making this choice. The firm approaches a cross-listing as an investment project, whose expected return not only depends on the firm's operations, but also can be law-generated, reputation-generated, institutions-generated, or a combination thereof.

III. TO CROSS-LIST OR NOT TO CROSS-LIST?

The best way to reconcile the discussed theories and put them together in a coherent picture is to present the choice to cross-list as a balancing test, a cost-benefit analysis that determines whether commitment to the U.S. institutional and regulatory environment would improve a firm's valuation, bring forth other bonding advantages of cross-listings, and simultaneously allow the company to pursue firm-level business objectives. We may presume that only an individual company can assess the effect of a chosen cross-listing program on the firm value.[147] Additionally, only the

Market Impact of Loosening Disclosure Requirements, 95 J. FIN. ECON. 129 (2010).

146 For instance, "[m]uch of the evidence is consistent with both legal bonding and reputational bonding." Licht et al., *supra* note 9, at 10 (discussing and citing Frésard & Salva, *supra* note 137; King & Segal, *supra* note 70, and other studies).

147 For instance, research shows that involuntary cross-listings, i.e. ADR programs, which are opened by third parties and not by an issuer, are associated with lower firm values, which, possibly, is due to the risk of

issuer has the full information that enables it to assess the home-country benefits and to compare them with cross-listing abroad in light of some firm-specific reasons to launch an ADR program.

It should be comparatively easy for an issuer to determine the value of home-country institutions. By contrast, measuring the value added of a foreign market may prove more complicated. Based on the theories discussed above, there are four sets of factors that an average firm's management (or other control persons) is likely to incorporate in its decision-making.[148]

At the outset, a firm assesses the expected value of a cross-listing program as a combination of firm-specific and external variables. Firms with growth opportunities, specific capital raising needs, marketing strategies, acquisition targets, corporate expansion plans, and other similar endogenous characteristics may seek access to external capital sources and issue foreign securities.[149] For those firms, the bonding benefits and law-related costs, although important, are secondary to firm-specific reasons to trade securities on international exchanges. Compare, for instance, younger growth companies from Canada, which often list their equity securities in the United States, with more established firms from Europe, which, on average, prefer Level II ADRs (i.e., a program that does not allow them to raise capital in the United States) and whose trading volume in the United States is typically low.[150] On balance, the latter stratum of firms are possibly more motivated by the marginal benefits of the prestige of U.S exchanges, better

litigation. Peter Iliev et al., *Uninvited U.S. Investors? Economic Consequences of Involuntary Cross-Listings*, 52 J. ACCT. RES. 473 (2014). A firm's cost-benefit analysis matters for an efficient cross-listing.

148 A version of the model was originally suggested in Guseva, *supra* note 8, at 469 (referring to Doidge et al., *Foreign Firms*, *supra* note 73, at 211–15, and adding more "legal" variables).

149 *See supra* Section II.B.

150 Boone et al., *supra* note 60, at 15–16 (on the modes of listings by Canadian firms and firms from developed economies in general); Dobbs & Goedhart, *supra* note 32, at 22–23 (on the trading volume of firms from developed economies).

visibility, international transparency, and reputational and legal bonding, while the former falls under the growth and "investor recognition" explanations of cross-listings—they need capital.

After the projected benefits are identified, the firm should appropriately discount those benefits and determine the net benefits. It also subtracts the costs of regulatory compliance and probable litigation and enforcement costs. The firm (i.e., its insiders, including managers and other control persons) should also deduct from the firm-level benefits any decrease in insiders' private benefits incidental to loss of control.[151] The greater their private benefits are, the lower the incentives to cross-list in a transparent environment.[152]

A decision to cross-list, therefore, may be described as a balancing of financial benefits and costs of listing in a more regulated, transparent, and possibly litigious foreign environment,[153] idiosyncratic strategic benefits to the firm,

151 As noted above, private benefits of control are lower in the case of more transparent issuers, which are subject to the discipline of capital markets. *See generally* Doidge et al., *Evaluating Foreign Listing Choices over Time*, *supra* note 73; Doidge et al., *Foreign Firms*, *supra* note 73.

152 Doidge et al., *Evaluating Foreign Listing Choices over Time*, *supra* note 73; Doidge et al., *Private Benefits of Control*, *supra* note 99; Michal Barzuza, *Lemon-Signaling in Cross-Listing* (Univ. of Va. Sch. of Law, Law and Legal Theory Working Paper Series, No. 2012-03, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022282 [https://perma.cc/84DR-JGP7] (discussing in detail the motivations of managers versus controlling shareholders and related private benefits); Allen Ferrell, *The Case for Mandatory Disclosure in Securities Regulation Around the World*, 2 BROOK. J. CORP. FIN. & COM. L. 81, 86–91 (2007) (discussing insiders' incentives and diversion of corporate resources).

153 Enforcement should be an important factor in cross-listing decisions. A firm, particularly, a company from a jurisdiction with poor investor protection and disclosure policies, may voluntarily adopt better accounting and corporate governance standards and thus become more valuable in the eyes of investors. Such mechanisms, however, are less likely to generate a desired valuation premium and cheaper access to capital if investors cannot easily verify that that foreign firm does not and will not renege on its private commitments. Stulz, *supra* note 86, at 367. The same is true if it is unlikely that investors can successfully seek legal recourse either in foreign courts or through a foreign public enforcement action. On the role of public and private enforcement in capital markets,

and agency costs. A firm would not choose to cross-list if the difference between the firm-level benefits of a cross-listing did not sufficiently exceed the private losses[154] *and* law-related costs.

To summarize the arguments, let us assume that "CLB" stands for "cross-listing benefits," including the discussed advantages associated with the host country's institutional and legal environment, i.e., valuation premiums or cheaper access to external capital, and firm-specific reasons and benefits of listings. This value should be determined at the outset and discounted by the probability that a firm would not receive the full benefit due to factors beyond its control.[155]

From this value, a firm needs to subtract a number of costs. First, there is a certain price tag associated with the legal and regulatory costs of foreign law. Those costs comprise two groups. The first is the ex-ante ascertainable outlays for mandatory registration and deregistration, periodic reporting, auditing, and changes in corporate governance required by Sarbanes-Oxley and Dodd-Frank, as well as by listing venues. Let us label them "ex-ante costs," or "EAC."

A second type of regulatory outlays is uncertain at the time of cross-listing. It cannot be precisely estimated in advance and requires a probabilistic assessment. These potential costs are associated with future litigation and regulatory actions, which may or may not occur after launching a cross-listing program. These are "ex-post costs"

see generally Rafael La Porta et al., *What Works in Securities Laws?,* 61 J. FIN. 1 (2006); Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207 (2009).

154 *See generally* Doidge et al., *Foreign Firms*, *supra* note 73. In the alternative, the influence of insiders may be weaker than the will of the management combined with the need to improve valuation or to access external capital, for instance, in order to finance growth opportunities and receive other benefits of international trading.

155 *See* Litvak, *The Relationship*, *supra* note 73 (documenting a decline in premiums over time); King & Segal, *supra* note 70 (finding evidence that changes in valuation are not always permanent).

or "EPC." To external and in-house counsel of an issuer, a crude test to assess these future costs may be similar to a Probabilistic Risk Assessment or the test in *Basic v. Levinson*;[156] a firm's advisors may take the probability of litigation and of a judgment for plaintiff or settlement, multiply that probability by the expected magnitude of that judgment or settlement, and add the expected value of market reputational penalties and the costs of defending the dispute. The legal fees, obviously, depend on the stage in litigation at which a dispute is resolved (i.e., before or after the motion to dismiss or the motion for summary judgment, or after trial).[157]

This litigation factor ("L") consists of two components. The first is the probability of a filing and the costs of defending against a lawsuit in the early stages of litigation ("M"). For instance, an issuer may believe that it has meritorious defenses to the plaintiff's allegations or believes that the lawsuit should be promptly dismissed. These are sunk costs associated with any filed suit. The second is the probability of an adverse outcome for a defendant ("D"), i.e., additional costs incurred in the form of settlement if a case is not dismissed. In theory, D may also include a verdict against the issuer. In practice, however, as discussed in Section IV.B.2, securities class actions usually do not lead to trials.

The other subtype of these costs is the risk of a public enforcement action initiated by the SEC ("enforcement" or "E"). This risk should be discounted by the projected probability that in case there is a violation, the resource-constrained SEC would not detect the alleged violation and would fail to commence a prosecutorial action.[158]

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156 Basic, Inc. v. Levinson, 485 U.S. 224 (1988).

157 *See, e.g.*, STARYKH & BOETTRICH, *supra* note 27, at 18, 36–37 (documenting that settlement amounts depend on litigation stages and how attorneys' fees in turn depend on settlement amounts).

158 In evaluating both risks, a firm takes into account not only a typical amount of civil penalties and potential settlements, but also reputational ramifications of an action. On the value of reputation, see, e.g., Karpoff & Lott, *supra* note 85; Siegel, *supra* note 44.

Finally, there is the loss of control factor ("C"). The value of private benefits enjoyed by control persons is ex-ante identifiable and is evaluated before a cross-listing program's announcement.

Hence, in a very simplistic form, it would be profitable to cross-list if:

$$CLB - EAC - EPC - C > 0$$

$$EPC = L + E$$

The whole purpose of this elementary math is to emphasize that, at first glance, as long as the difference remained positive, a rational firm should choose to cross-list.[159] At the same time, the ex-post factors represent risks that a firm cannot easily evaluate. Logically, a crude expected value of a cross-listing program may be presented as follows:

$$\text{Expected Value (Cross-Listing)} = CLB - C - EAC - P(M)\times M - P(D \mid M)\times D - P(E)\times E.$$[160]

Out of these ex-post and ex-ante determinable costs, the factor that should worry a prospective foreign issuer the most is the probability of future litigation. Several arguments support this conclusion. First, take the ex-post-listing enforcement risk ("E"). Research suggests that the probability of SEC enforcement may be deemed reasonably

159 This simple summation applies not only to direct compliance costs and expected litigation fees, but also to the private benefits extracted by control persons before cross-listing. *See, e.g.*, Doidge, *U.S. Cross-Listings and the Private Benefits of Control, supra* note 140 (suggesting that listings on U.S. exchanges lower the private benefits of control); Doidge et al., *Foreign Firms*, *supra* note 73, at 235 ("[C]ontrolling shareholders of firms that list have more incentives to limit their consumption of private benefits from control . . . If controlling shareholders do not have such incentives, they are unlikely to let the firm list in the U.S. because a listing threatens their ability to extract private benefits from the firm.").

160 $P(M) + P(E) < 1$. There is, of course, always a chance that a firm will not be sued either by the SEC or by private investors.

small and, in any case, lower than enforcement against domestic issuers.[161] Accordingly, a foreign issuer would assign a low value to the costs of enforcement.

Second, an individual foreign firm may be indifferent to the changes in the ex-ante determinable costs for several reasons. One of them is possible collinearity. Many values in our rudimentary equation may be correlated. Recall that if the bonding theorists are correct, then higher disclosure costs ("EAC") *may* simultaneously decrease control benefits ("C") and increase cross-listing benefits such as premiums ("CBL").[162] Put another way, whenever the cost burden of mandatory disclosure declines below some optimal level, the law-related component of the cross-listing benefits ("CLB") may also go down in tandem with the costs.[163] It may be a wash.

A firm may still wish to proceed with a cross-listing program notwithstanding these simultaneous decreases or increases in law-generated costs and benefits. By way of example, substantial firm-specific reasons to cross-list, such as a forthcoming corporate expansion or an expected increase in exports, would make cross-listing desirable regardless of marginal changes in bonding benefits. Put differently, bonding premiums may serve as additional benefits and not

161 On the likelihood and expectations regarding SEC enforcement, see generally Shnitser, *supra* note 44. For further discussion, see, for example, Siegel, *supra* note 44; Erica Gorga, *Is U.S. Law Enforcement Stronger Than That of a Developing Country? The Case of Securities Fraud by Brazilian Corporations and Lessons for the Private and Public Enforcement Debate,* 54 COLUM. J. TRANSNAT'L L. 603 (2016). The SEC also may tend to prosecute companies that the private plaintiffs' bar ignores. *See, e.g.*, James D. Cox, *Securities Class Actions as Public Law*, 160 U. PA. L. REV. PENNUMBRA 73, 80–81 (2011) (summarizing a number of supporting studies on SEC enforcement targets); James D. Cox et al., *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737, 764 (2003) (observing, *inter alia*, that within their sample, "the SEC targeted companies with an average market capitalization $735 million less than those sued by the private plaintiffs' bar alone").

162 *See supra* Section II.B.

163 *See, e.g.*, He & Ghosh, *supra* note 123, at 2–9 (discussing, *inter alia*, literature on bonding and disclosure); Doidge et al., *supra* note 96, at 1528–34.

primary reasons to cross-list. Some firms would internalize the reduced costs of disclosure and the possible concomitant decrease in premiums generated by the regulatory environment, market institutions, and overall exogenous forces.

Another reason why an FPI may be indifferent to the ex-ante *known* regulatory costs ("EAC") concerns a number of identifiable regulatory trends. As discussed in Section II.A, for years the overarching policy of the SEC has been to create a comparatively lenient reporting regime for foreign issuers. Their cross-listing costs have thus become lower.[164] If the probability of a drastic reform in foreign issuer regulation seems low—as it currently does—and depending on a firm's "investment horizon" in a cross-listing program, a foreign firm may view many of the regulatory cost components as fixed for the foreseeable future. Most importantly, recall that after the 2007 reform, an FPI may promptly exit when necessary.[165] Even if the SEC unexpectedly upsets the balance of costs and benefits of a cross-listing "investment," an FPI may speedily exit at a relatively low cost.

In contrast to these easily ascertainable, more controllable, and presumably fixed costs, a rational foreign firm must assess the probability distribution of litigation outcomes. The historical distribution and range of outcomes would guide a rational actor and serve as the basis for her analysis. At the same time, the uncertainty of ex-post risks related to future litigation and the need to make a cross-listing decision under uncertainty may trigger a number of "fears" from the realm of behavioral economics. Loss aversion and additional disutility from losses; certainty and possibility effect, viz., a propensity to overestimate small probabilities; and regret avoidance, i.e., a reaction where an unfavorable outcome of an action is "bewailed" more than a similar outcome of an inaction, feature prominently in our

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164 *See supra* Section II.A.

165 *See supra* Sections II.A., III.B. (describing the simplified exit rules, Form 15F, and the 2007 reform).

decisions.[166] Even though when making decisions under uncertainty, firms should be less risk averse than individuals, individual executives in charge of cross-listings still may pay too much attention to the news of a high-profile case in the United States[167] and overestimate the probability and costs of future litigation.

To illustrate this point, compare the following findings. Some time ago, the SEC had reduced compliance costs for foreign firms trading ADRs OTC. The reform did not produce a surge in OTC cross-listings. Instead, some financial intermediaries availed themselves of the newly reduced costs of compliance and created "unsponsored" (involuntary) ADRs, i.e., ADR programs bypassing an issuer as such. Consequently, many issuers were inadvertently pulled into the orbit of U.S. law and enforcement. Those "involuntary" cross-listings have had a negative impact on firm values.[168] Consider next, however, that the actual litigation risk faced by FPIs because of those unsponsored cross-listings by depositary banks is trivial.[169] The market may react even when the actual risk is nearly infinitesimal or has little economic significance. In the same vein, a risk-averse manager may overestimate the future market reaction (or overreaction) and the actual risk of litigation.

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166 *See generally* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981); CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); Daniel Kahneman & Amos Tversky, *The Psychology of Preferences*, 246 SCI. AM. 160 (1982); *see also* David E. Bell, *Regret in Decision Making Under Uncertainty*, 30 OPERATIONS RES. 961 (1982).

167 *See, e.g.*, Karolyi, *supra* note 60, at 119 (citing Coffee, *Racing Towards the Top?*, *supra* note 88).

168 Iliev et al., *supra* note 147 (generally finding a negative effect, particularly for liquid securities and securities meeting listing standards).

169 Eugene Soltes, *Incorporating Field Data into Archival Research*, 52 J. ACCT. RES. 2 (2014) (suggesting that the risks are low partially due to *Morrison* and its progeny); *see also* Greene & Patel, *supra* note 10, at 158–59 (discussing liability issues in the context of unsponsored and sponsored OTC ADRs).

Even if there is a perfectly rational manager and that manager learns about an unusually high settlement amount or the generally unique U.S. class actions regime, she may incorporate in her assessments a broader range of probable losses.[170] In either case, the managers will reduce the ex-ante net benefits of their cross-listing programs.[171] The need to assess the probability of litigation and the uncertainty around excessive ex-post costs of judicial proceedings is what makes *Morrison* so essential to cross-listing programs and to foreign executives and boards contemplating an association with U.S. markets.

IV. *MORRISON* AND LITIGATION

A. *Morrison* and the Risk of Litigation

Justice Scalia and leading academics expressed concerns that the old tests germinated considerable uncertainty and excessive deterrence and were applied inconsistently.[172]

170 *See infra* notes 177–184 and accompanying text.

171 Admittedly, D&O insurance should play an important role in a manager's analysis. *See, e.g.*, Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors' and Officers' Liability Insurer*, 95 GEO. L.J. 1795, 1832–34 (2007) (discussing the protection without monitoring resulting from D&O insurance and observing that "[b]uying D&O insurance without monitoring increases the freedom of managers to take financial reporting and other risks that improve accounting measures of performance and, hence, their compensation, but not the long-term value of the firm"). However, managers may still hesitate and not take the risk in certain circumstances. Their reasons may include an erroneously inflated assessment of the risk, possible reputational repercussions to the managers and to their incentive compensation through a share price reduction caused by litigation, etc. There are, obviously, exceptions. An example would be the last period problem, where a manager is exiting his or her company or even the industry.

172 *See, e.g.*, John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 303–04 (2007); Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM J. TRANSNAT'L L. 14, 67 (2007) (arguing that "as the filing of foreign-cubed claims continues to increase, multinational class action practice will generate excessive levels of conflict

Morrison, with its straightforward transaction and listing tests, purported to operate as a counterweight to that uncertainty.[173] Recall that the Supreme Court extended the reach of section 10(b) of the Exchange Act only to "domestic" transactions and listed securities, i.e., it centered the statute's application on the geographic location of trade execution and of exchanges.[174]

The second coexistent undertone of the Court's decision was related to the probability of litigation and the fundamental maxim that the United States should not open doors to unfettered litigation involving foreign markets and benefiting foreign parties operating in the now globalized economy. Neither should it become the "Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets."[175] Commentators indeed suggested that the plaintiffs' bar was marketing "global" foreign actions[176] and that foreign plaintiffs flocked to the United States, at the risk of turning the country and

with other countries, as well as mounting uncertainty for litigants"); Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 467, 489–90, 506 (2009) (criticizing uncertainty of the rules and suggesting a bright-line approach); Erez Reuveni, *Extraterritoriality as Standing: A Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. DAVIS L. REV. 1071, 1071–76 (2010) (discussing the tests and the effect of their uncertainty on foreign issuers); Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207, 228–29 (1996) (emphasizing the uncertainty of the conduct and effect tests).

173 Fox, *supra* note 2, at 1184 (observing that "[c]ompared to restoring the conduct/effects test, using the *Morrison* test would reduce confusion and likely lead to more consistent court decisionmaking," but generally proposing an alternative test); STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 123–24 (2015) (emphasizing that a need for a "more definite" territorial scope of the statute was recognized by the Court).

174 *See supra* notes 5, 56.

175 Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S 247, 270 (2010).

176 Buxbaum, *supra* note 172, at 16–18, 29–34, 62–63, 70 (discussing new trends in class action complaints, the efforts of U.S. counsel to assist foreign plaintiffs in bringing claims, and the inconsistency of the application of the tests).

its courts into a possible "policeman to the world"[177] and dissuading some FPIs from listing.

There were two principal types of international actions. One was "foreign-cubed" (also "f-cubed") actions initiated by foreign plaintiffs who purchased securities abroad. The other one was "foreign-squared" (also "f-squared") claims brought by U.S. purchasers for fraud in securities transactions executed in foreign markets. Securities law practitioners and the investment community suggested that such "global" actions were feared most and served as a cross-listing deterrent.[178] *Morrison* and its construction by federal courts de facto reflect concerns raised in connection with "global" actions, i.e., class actions brought by foreign and domestic security holders regardless of trading venues where they acquired or sold the securities at issue.[179]

As discussed in Part III, from a practical perspective the probability and risk of litigation may be embedded in a bipartite analysis—the probability of an event and the magnitude of subsequent losses.[180] With respect to the magnitude prong, economic studies varied widely on the detrimental impact of the U.S. liability regime in FPI cases. For instance, before *Morrison,* the U.S. Chamber of

177 Coffee*, supra* note 172, at 303–04.

178 *See* Howell E. Jackson, *Summary of Research Findings on Extra-Territorial Application of Federal Securities Law*, *in* GLOBAL CAPITAL MARKETS & THE U.S. SECURITIES LAWS 2009: STRATEGIES FOR THE CHANGING REGULATORY ENVIRONMENT 1243, 1253–54 (2009); Courtney Haraguchi & Howell Jackson, Extraterritorial Application of the U.S. Securities Laws and the F-Cubed Plaintiff Problem, manuscript at 8 (March 16, 2009) (unpublished manuscript) (on file with author).

179 George Conway, an attorney who argued *Morrison,* noted that the decision, as interpreted by federal courts, cut off f-cubed and f-squared actions, which constituted the "*bulk*" of international litigation. Conway, *supra* note 22, at 15–16 ("[T]he once-burgeoning foreign-cubed and foreign-squared claims that constituted the bulk of transnational securities cases before *Morrison* . . . have become easy"); *see also* Greene & Patel, *supra* note 10, at 150 (discussing how *Morrison* bars plaintiffs in f-squared and f-cubed transactions).

180 *See supra* Part III.

Commerce publicly lamented some very large settlements.[181] Scholarship also suggested that "[p]rior to *Morrison*, foreign companies listed in the US faced an expected annual average class action litigation settlement cost of approximately $940,000,"[182] although that number was a conjecture partially based on the filing rates at the time.[183] Other scholars found that in addition to the direct costs, corporate defendants experienced a significant negative stock price reaction to the filing of a lawsuit, which would reflect a considerable reputational penalty levied by the market.[184] More recent research has also highlighted that the market reaction to a filing spills over to the securities of companies domiciled in the jurisdiction of the defendant.[185]

Regarding the actual probability of litigation, some studies viewed private litigation against FPIs as relatively

181 U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, SECURITIES CLASS ACTION LITIGATION: THE PROBLEM, ITS IMPACT, AND THE PATH TO REFORM 12 (2008), http://www.instituteforlegalreform.com/uploads/sites/1/SecuritiesBooklet.pdf [https://perma.cc/Z8HP-C63J].

182 Elaine Buckberg & Max Gulker, *Cross-Border Shareholder Class Actions Before and After* Morrison 30 (NERA Economic Consulting, Working Paper, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973770 [https://perma.cc/K7V5-XKV4].

183 There is also evidence suggesting a lower probability of a new lawsuit. *See, e.g.*, William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market,* 160 U. PA. L. REV. 69, 114 (2011) (discussing studies documenting that "a company subject to securities litigation is highly unlikely to be subject to further securities litigation for the three years following the suit. Learning is implied—the company now takes compliance more seriously. But other inferences can also be drawn. Perhaps securities fraud tends to be one-off because the market learns from the experience").

184 Gande & Miller, *supra* note 85, at 3–4.

185 Yi Ding et al., Spillover Effects from US Class Action Lawsuits: Evidence from Foreign Firms Cross-Listed in the US 1–2, 31 (Jan. 31, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400510 [https://perma.cc/62VR-FK3N] (discussing the literature and suggesting, *inter alia*, "that US cross-listed firms domiciled in countries with poor investor protections, firms subjected to weaker external market monitoring, as well as firms exhibiting more limited financial slack are especially vulnerable to these adverse return spillovers").

common.[186] Canadian firms were in a league of their own; they frequently dually listed their securities at home and in the United States and, thus, opted for a high level of bonding. Corporations from Canada generally faced a greater risk of litigation in the United States,[187] although the number of actions against Canadian companies dropped in 2015 and was consistent with the high ratio of Canadian issuers cross-listed in the United States.[188]

These interpretations were counterbalanced by arguments that the anxiety about global litigation and the uncertainty might be exaggerated as the pre-*Morrison* probability and magnitude of litigation, including "global" actions against FPIs, were neither overreaching in general nor without merit in the eyes of foreign issuers. For instance, in his concurrence in *Morrison,* Justice Stevens begged to differ and suggested that the odds of foreign-cubed actions "having a substantial connection to the United States [were]

186 Gande & Miller, *supra* note 85, at 5; Beiting Cheng et al., Securities Litigation Risk for Foreign Companies Listed in the U.S. 30–32 (June 18, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2163864 [https://perma.cc/CKP5-FYZY] (finding a generally lower rate of litigation but also finding that "when foreign companies do experience litigation triggers such as accounting restatements, missing management forecasts, or sharp drops in stock prices they are as likely to be sued as U.S. firms that experience the same trigger events").

187 Buckberg & Gulker, *supra* note 182, at 14 (finding that "[i]n 27 of 41 cases (66%), courts found that subject matter jurisdiction existed over F^3 investors' trades"; the majority of cases involved Canadian defendants); Gande & Miller, *supra* note 85, at 10. One reference point for measuring this risk is D&O insurance. Liability insurance premiums of cross-listed Canadian firms were significantly higher than premiums paid by their peers listed solely in Canada. Stuart L. Gillan & Christine A. Panasian, *On Litigation Risk and Disclosure Complexity: Evidence from Canadian Firms Cross-Listed in the US*, 49 INT'L J. ACCT. 426 (2014).

188 *See* CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2015 YEAR IN REVIEW 17 (2016); *see also International Registered and Reporting Companies*, SEC, https://www.sec.gov/divisions/corpfin/internatl/companies.shtml [https://perma.cc/NPW7-PXRB] (last updated June 24, 2016) (providing 2015 Market Summary).

low."[189] Similarly, on the effects test side, courts were apparently relatively consistent in its application and policy implications.[190] As "global" claims tenuously related to the U.S. market were cut off, the probability of an unfavorable litigation outcome was low.

Consider also the costs and benefits of litigation and U.S. securities law. For instance, Professor Jackson documented that managers feared global securities liability the most and that those concerns could lead to delisting decisions. Yet, he and his students also found that the actual percentage of such actions was low and that the "discussion of anti-fraud rules is complicated by the fact that many of the same interviewees readily acknowledged the benefits of the U.S. standards."[191] Moreover, Siegel's 2005 study suggested that most cases against FPIs resulted in settlements in which shareholders only received the amount of insurance policies.[192] A more recent article also found that class actions against foreign companies are generally brought in about half the cases compared to U.S. firms with similar litigation risk.[193]

To summarize, even though, as mentioned in the Introduction, the filings against FPIs have been on the rise for almost a decade, i.e., both before and after *Morrison*,[194] there is evidence that cross-listed companies normally face a

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189 Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S 247, 283 n.11 (2010) (Stevens, J., concurring).

190 *See, e.g.*, John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 SW. L. REV. 635, 640 (2011) (suggesting that courts "saw less disagreement over the effects test" due to its simplicity and understandable policy rationale).

191 Jackson, *supra* note 178, at 1255; *see also* Haraguchi & Jackson, *supra* note 178, at 4, 8.

192 Licht et al., *supra* note 9, at 9 (commenting on "Siegel's (2005) field work on cross-listed firms [which] confirmed that virtually all cases end in settlement and that shareholders often only received the value of the insurance").

193 Cheng et al., *supra* note 186, at 4, 32; *see also* Boone et al., *supra* note 60, at 1 (citing studies that suggest that FPIs "face few regulatory or litigation consequences if they fail to properly disclose information").

194 *See supra* notes 25–30 and accompanying text.

comparatively lower litigation risk. The pre-*Morrison* uncertainty prevented foreign companies from accurately assessing that risk and could have stoked unnecessary fears.

B. Principal Findings

1. The Sample

This Section examines the impact of *Morrison* on securities class actions against FPIs and, by extension, on their ability to predict the risk of litigation, i.e., the most important risk factor that alters the expected value of a cross-listing program. To identify legal decisions against foreign private issuers, first, my assistants and I searched Westlaw, LexisNexis, and Bloomberg Law databases.[195] I also requested data on filings from Cornerstone and NERA Economic Consulting. The data shared by Cornerstone and NERA Economic Consulting included filings against foreign private issuers five years before and five years after *Morrison,* from January 2005 through December 2015. All results were reviewed and compared to create one database of all filings.

NERA Consulting and Cornerstone use slightly different definitions of the term “foreign private issuer.” Consequently, the principal challenge was to classify the companies based on several coherent criteria. The first criterion was the regulatory definition. The results include filings against defendants falling within the “foreign private issuer” definition under Rule 405 of the Securities Act[196] and Exchange Act Rule 3b-4.[197] The research also includes a second category of issuers—issuers that had either their principle place of business or a principal executive office abroad. Some of those issuers were registered in the United States and traded securities predominantly on U.S.

[195] To identify the decisions, I used the following terms: “foreign issuer,” “foreign private issuer,” “ADR,” “ADS,” “depositary receipt,” “depositary share,” and “Morrison.”

[196] 17 C.F.R. § 230.405 (2016).

[197] 17 C.F.R. § 240.3b-4(b) (2016).

exchanges. Others were domiciled in other jurisdictions but traded shares of stock in the United States. Self-evidently, this was a gray area, which called for a holistic inquiry and a substantive analysis of the defendants' businesses, location of their executive offices, and their places of domicile, among other factors.

Compare, for instance, the following two examples. In *Jason Moomjy, et al. v. HQ Sustainable Maritime Industries, Inc.,* the defendant was headquartered in Seattle, WA, filed periodic reports mandated by securities law as a U.S. public corporation, i.e., it filed 10-Ks and other disclosure forms, was listed only on a U.S. exchange, was registered in Delaware, and had major business operations in China.[198] The "center of gravity" of the company was unclear—it could equally be either the United States or China. In contrast to *HQ Sustainable Maritime Industries*, in *North Port Firefighters' Pension-Local Option Plan v. Fushi Copperweld, Inc.*, the defendant was a Nevada corporation listed on Nasdaq. However, its principal place of business and headquarters were in Dalian, China.[199] We classified only the latter example as a "foreign private issuer" and included this and similar cases in the results. Many of those foreign issuers entered U.S. capital markets through reverse mergers.[200]

After excluding pending cases, we included 222 cases in the final sample. We reviewed the corresponding complaints, decisions, and procedural histories. In many cases, plaintiffs brought several almost simultaneous actions against a foreign defendant. Cornerstone classifies such filings

198 *See, e.g.*, Lead Plaintiff's Class Action Complaint at 5, Moomjy v. Sustainable Mar. Indus., Inc., No. 11-cv-726 (W.D. Wash. Nov. 22, 2011), 2011 WL 7653469; *see also* Moomjy v. HQ Sustainable Mar. Indus., Inc., No. C11-0726RSL, 2011 WL 4048792 (W.D. Wash. Sept. 12, 2011).

199 *See* N. Port Firefighters' Pension-Local Option Plan v. Fushi Copperweld, Inc., 929 F. Supp. 2d 740, 746 (M.D. Tenn. 2013).

200 *See, e.g.*, First Amended Class Action Complaint at 1, *In re* Sinohub. No. 112-cv-8478 (S.D.N.Y Sept. 16, 2013), 2013 WL 6714522; Second Consolidated Amended Class Action Complaint for Violation of the Federal Securities Laws at 5, Feyko v. Yuhe Int'l, Inc., No. 11-cv-5511 (C.D. Cal. Apr. 4, 2013), 2013 WL 6435800.

according to the date of a first identified complaint against the same corporate defendant. The classification in this Article remains the same. Many separate cases were ultimately consolidated by the same court, transferred to a federal court in a different district and thereafter consolidated, or voluntarily dismissed due to a similar action pending in a different court. Our results are based on court decisions in lead cases.

The timeframe of the reported filings is from January 2005 through December 2015, i.e., about five years before and five years after *Morrison*. This Article reports data obtained from the filings and related court decisions, updated as of November 30, 2016. The results include section 10(b) and Rule 10b-5 cases. Because the Court in *Morrison* and, later on, some trial courts have combined the interpretation of the presumption against extraterritoriality in the context of the Exchange Act and the Securities Act, the sample also includes sections 11 and 12(a)(2) claims.[201]

For each case, I identified several categories (also "subclasses") within plaintiff classes. The first category includes "local" *Morrison* plaintiffs. These cases cover disputes involving securities acquired by U.S. residents and by foreign plaintiffs in the United States, i.e., securities purchased in domestic transactions and on U.S. exchanges. Often, courts and settlement agreements simply identify this class as "all purchasers of ADRs" of a defendant.

The second plaintiff subclass is "foreign-squared." It consists of suits involving securities purchased by U.S. plaintiffs abroad, usually on foreign exchanges.[202] The third category is "foreign-cubed," i.e., cases where securities at issue were purchased abroad and, often, listed on a foreign exchange and where the members of a subclass were foreign purchasers.

The results are reported and interpreted as pre-*Morrison* cases and post-*Morrison* cases. The pre- and post-*Morrison*

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[201] *See*, *e.g.*, *In re* Smart Techs., Inc. S'holder Litig., 295 F.R.D. 50, 56 (S.D.N.Y. 2013).

[202] This category of cases does not include purchases of foreign securities of *domestic* U.S. issuers by U.S. plaintiffs.

classification is based on the dates of the first identified filings against individual corporate defendants. As discussed above, many cases were consolidated. Filing dates allowed me to track changes in the number of f-cubed and f-squared complaints filed before and after *Morrison*.

Some cases were brought before *Morrison* but dismissed or settled after *Morrison*. Unfortunately, this overlap may have affected not only the reported average settlements and the composition of plaintiff classes between December 2009 (i.e., after the Supreme Court granted the petition for writ of certiorari) and June 24, 2010, but also the willingness of the plaintiffs' bar to pursue f-cubed actions in the first six months of 2010.[203]

The presented results also include the following information: (1) the levels of ADR Programs; (2) whether defendants traded shares of stock in the United States; and (3) exchanges, such as the NYSE and Nasdaq, and OTC trading platforms at the time of filing. I obtained data from pertinent complaints; court decisions; the listed company databases of the New York Stock Exchange, the American Stock Exchange or its successor, and Nasdaq; and the DR Directory of BNY Mellon.[204]

The primary limitation of the research is sample selection. We did not select cases randomly, but rather based on the availability of complaints and published decisions in the databases indicated above and the availability of information on ADRs and shares. The following tables report only descriptive data and identify *possible* trends and the implications of *Morrison* in light of the issuers' perception of the expected litigation risk.

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[203] Morrison v. Nat'l Austl. Bank Ltd., 558 U.S. 1047 (2009) (granting petition for writ of certiorari).

[204] *See Depositary Receipts: DR Directory*, BNY MELLON, http://www.adrbnymellon.com/directory/dr-directory [https://perma.cc/SM2F-W9SB] (last visited Dec. 27, 2016); *Listings Directory*, NYSE, https://www.nyse.com/listings_directory/stock [https://perma.cc/LPT2-3B2N] (last visited Apr. 16, 2017); *Company List (NASDAQ, NYSE, & AMEX)*, NASDAQ, http://www.nasdaq.com/screening/company-list.aspx [https://perma.cc/77UE-PUNN] (last visited Apr. 16, 2017).

2. Findings

a. Global Actions

To assess the magnitude of the risk of global actions and the frequency of adverse decisions and settlements, I reviewed how many cases actually involved multiple initial subclasses of plaintiffs, including U.S. plaintiffs ("Local" plaintiffs, which satisfy the *Morrison* criteria), foreign plaintiffs in foreign-cubed actions ("F-cubed"), and local plaintiffs in foreign-squared actions ("F-squared"). Those claims are indicated as "3-in-1" and "2-in-1." These numbers are contrasted with the suits initiated solely by local plaintiffs and solely by f-squared or f-cubed plaintiffs both before and after *Morrison*.

Our review of filings indicates that many plaintiffs gradually expanded the original definition of a class and added jurisdictional linkages to the United States. The germane evolution of the complaint against Swiss Reinsurance is illustrative. The first complaint defined the nature of the action as follows:

> This is a class action for violations of the anti-fraud provisions of the federal securities laws on behalf of all U.S. residents or citizens who purchased Swiss Reinsurance Company ("Swiss Re" or the "Company") stock between May 8, 2007 and November 19, 2007 (the "Class Period"), who were damaged thereby (the "Class").[205]

The defendant was described as "the world's largest reinsurer with its headquarters located in Zurich, Switzerland. Swiss Re's stock is traded under the symbol RUKN on the Swiss Exchange, which is an efficient market."[206] In the Second Amended Complaint, the plaintiff added that:

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[205] Complaint for Violation of the Federal Securities Laws at 1, Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Company, No. 8-cv-1958 (S.D.N.Y. Feb. 27, 2008), 2008 WL 609645.

[206] *Id.* at 2.

> The Court may properly exercise subject matter jurisdiction over this case because the wrongful conduct alleged herein had a substantial adverse effect on U.S. investors. U.S. investors own a substantial portion of Swiss Re's outstanding stock. The Company's shares are listed on the SWX under the ticker symbol "RUKN" and on the Over-the-Counter national securities market under the ticker symbol "SWCEY."[207]

In contrast to the language of the first complaint, which could be read to suggest that the class included primarily f-squared plaintiffs who purchased shares on the Swiss Exchange, the Second Amended Complaint clearly was a "2-in-1" action including f-squared *and* local plaintiffs.

When faced with such extensive amendments, I used the broadest class definition for the purposes of case classification. Table 1 summarizes the findings.

TABLE 1: SUBCLASSES OF PLAINTIFFS

	Total Number of Filings	**Plaintiffs' Class**				
		3-in-1	**2-in-1**	**Local**	**FC**	**FS**
Post-Morrison	127	3	0	124	0	0
Pre-Morrison	95	30	9	53	1	2
Total	**222**	**33**	**9**	**177**	**1**	**2**

Table 1 highlights that both before and after *Morrison*, the plaintiff class was predominantly composed of investors purchasing securities within the United States. Out of the 222 cases in the sample, "local" plaintiffs (i.e., *Morrison*

207 Second Amended Complaint for Violation of the Federal Securities Laws at 4, Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Company, No. 08-cv-1958 (S.D.N.Y. Aug. 14, 2009), 2009 WL 2523992.

purchasers) acting as the sole plaintiff class brought approximately 80% of the cases. Actions brought exclusively by foreign-cubed plaintiffs were rare, as were suits filed only by foreign-squared plaintiffs.

The data are consistent with previous research findings on a possible piggybacking effect achieved through marketing of U.S. securities litigation to foreign plaintiffs.[208] Namely, combined actions ("3-in-1" and "2-in-1") filed by not only local plaintiffs, but also f-cubed and f-squared plaintiffs in the pre-*Morrison* sample constituted about a third of all actions.

Self-evidently, the numbers do not necessarily suggest that the risk of "global" actions was considerable. First, the following discussion demonstrates that courts often dismissed f-cubed and f-squared claims. Second, the below results also imply that that risk existed mainly at the filing stage.[209]

b. Dismissals and Settlements

Consider the following summary of dismissals vis-à-vis settlements. I excluded the following outcomes from the count: when a default judgment was entered against a defendant and when all proceedings were stayed because of the bankruptcy of a defendant. In six instances in our sample, circuit courts of appeals reversed and remanded district court decisions. Those six cases are classified as "dismissed" and "settled" based on the court decisions on

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208 This effect was documented by Buxbaum, *supra* note 172, at 17, 39, 41 (observing that "the U.S. plaintiffs' bar is taking deliberate steps to cultivate potential foreign claimants" and asking "what result would one expect if foreign-cubed claims were brought alone? It is hard to imagine that a U.S. court would exercise subject-matter jurisdiction over the claims of foreign investors, brought against foreign issuers, for losses suffered in foreign market transactions. Indeed, courts considering such claims have rejected them with little difficulty. Yet when such claims are appended to a class action including plaintiffs whose claims are based on U.S.-market transactions, they frequently survive jurisdictional challenge").

209 Here, I make no statement regarding the reputational penalties, market overreaction, or the spillover effect associated with filings.

remand. The category "dismissed" includes (1) claims that were dismissed on a motion to dismiss, (2) summary judgments for defendant,[210] and (3) other instances of dismissal prior to trial.[211] Table 2 presents the totals.

TABLE 2: DISMISSED AND SETTLED CASES

	Dismissed	**Settled**
Post-Morrison	52	62
Pre-Morrison	54	40
Total	**106**	**102**

In general, around half of all cases settle. Although a stickler for accuracy would note that the pre-*Morrison* cases were dismissed in 56% of the sample cases, while after *Morrison* only 45% were dismissed, this change in and of itself does not explain much. Later in this Section, the Article will return to this number and suggest additional avenues for future research. For now, it is pertinent to examine a more unambiguous result of *Morrison,* which is its impact on foreign plaintiffs.

Table 3 summarizes the dismissal of cases brought by various subclasses of plaintiffs, including local *Morrison* plaintiffs, f-cubed subclasses, and f-squared plaintiffs, and combined cases involving two or three subclasses.

[210] I found and included in the sample only one summary judgment for defendant. The defendant's motion to dismiss was denied. After the close of discovery, the defendant moved for summary judgment. The motion was granted. Billhofer v. Flamel Techs., S.A., No. 07 Civ. 9920, 2013 WL 866778, at *2–3 (S.D.N.Y. Mar. 8, 2013).

[211] This primarily includes the motion for class certification. Most class actions are settled or dismissed before a motion for class certification is filed. *See, e.g.,* STARYKH & BOETTRICH, *supra* note 27, at 19. In addition, in several cases in the sample parties voluntarily dismissed cases pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.

TABLE 3: DISMISSED

Dismissed	3-in-1	2-in-1	Local	F-cubed	F-squared	Total
Post-Morrison	1		51			52
Pre-Morrison	18	6	27	1	2	54
Grand Total	**19**	**6**	**78**	**1**	**2**	**106**

Within the sample, courts dismissed the majority of foreign-cubed, foreign-squared, and combined ("3-in-1" and "2-in-1") actions before *Morrison* and every single one after *Morrison*.[212] A textual analysis of court decisions reveals that dismissal is nearly guaranteed on a motion to dismiss since all federal courts have strictly followed the Supreme Court's guidance in *Morrison*.[213]

Next, compare this case result summary with the settlement numbers broken down by plaintiff subclasses. To define the "settlement class," i.e., local, f-cubed, or f-squared plaintiffs, I reviewed complaints, including amended complaints, and class definitions in settlement agreements. Before *Morrison,* plaintiffs often drafted the definition of a class and described the listing and trading markets for defendants' securities in the broadest terms possible.[214] For

212 An important exception would be the Vivendi litigation, which ended up in a trial in 2009 and resulted in a jury verdict against the defendant. *Morrison* helped the defendant cut off "global" claimants. *See In re* Vivendi Universal, S.A., Sec. Litig., 842 F. Supp. 2d 522, 526, 529 (S.D.N.Y. 2012). The case was filed in 2002, extended for almost a decade, and was not included in the sample.

213 This conclusion is consistent with the review by Conway, *supra* note 22, at 6, 16.

214 *See, e.g.*, Consolidated Amended Class Action Complaint at 4–5, *In re* Imax Corp. Sec. Litig., No. 06-civ-6128 (S.D.N.Y. Nov. 2, 2007), 2007 WL 4844994; *see also* Plaintiff's Consolidated Class Action Complaint at 8–9, *In re* GPC Biotech AG Securities Litigation, No. 1:07-cv-06728-DC (S.D.N.Y. Mar. 12, 2008) ("28. Lead Plaintiff, Axxion, is an investment firm established under the laws of Luxemburg… Axxion is proceeding in this case on behalf of its Akrobat Fund-Value, which purchased GPC

instance, in the IMAX Amended Consolidated Class Action Complaint, the plaintiffs brought:

> [A] class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3) on behalf of all persons and entities who purchased or otherwise acquired IMAX common stock (the "Class") from February 27, 2003 through July 20, 2007, inclusive (the "Class Period") . . . The members of the Class are so numerous that joinder of all members is impracticable. Throughout the Class Period, IMAX's common stock was actively traded on the Nasdaq Stock Exchange (the "NASDAQ") and the Toronto Stock Exchange ("TSX") in a well developed and efficient market.[215]

The language of the complaint, therefore, included not only U.S. investors who purchased the securities at issue on the Nasdaq, but also investors who purchased securities on the TSX. In contrast to the Complaint, the ensuing Settlement Agreement split the class, taking into account a similar class action in Canada.[216] The settlement class was defined as follows:

> "Class" or "Settlement Class" means all persons and entities who purchased or otherwise acquired IMAX shares on the NASDAQ from February 27, 2003

common stock during the Class Period. 29. Named plaintiff, Agamemnon Chua, is a citizen of the United States who purchased shares of GPC securities during the Class Period. 30. Defendant, GPC Biotech AG, is a publicly traded biopharmaceutical company founded in 1997, focused on the development of anticancer drugs… Its principal offices are located in Munich, Germany… 31. The Company's sponsored American Depositary Receipts evidencing American Depositary Shares ("ADSs") are registered and traded on the NASDAQ Global Market… The Company's common stock trades on the Frankfurt Stock Exchange.").

215 Consolidated Amended Class Action Complaint, *In re* Imax Corp. Sec. Litig., No. 06-civ-6168 (S.D.N.Y. Nov. 2, 2007), 2007 WL 4844994.

216 Amended Stipulation and Agreement of Settlement Between Settlement Class Members and IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce, Kathryn A. Gamble and PriceWaterhouseCoopers LLP at 9–10, No. 1:06-cv-06128-NRB (S.D.N.Y. Mar. 26, 2012).

> through July 20, 2007 (the "Class Period"), inclusive, excluding the Defendants in the U.S. Action and Canadian Action, members of those Defendants' immediate families, all individuals who are either current officers and/or directors of any Defendant, or who served as officers and directors of any Defendant at any time during the Class Period.[217]

Consequently, the filed complaint covered all three classes of plaintiffs, while the stipulation of settlement narrowed down the class to only local, *Morrison,* plaintiffs.

Table 4 summarizes these results and juxtaposes the subclasses of plaintiffs identified from the complaints with the settlement classes obtained from the settlement agreements.

TABLE 4: SETTLEMENTS AND PLAINTIFF CLASS

Settled	**Local**		**F-cubed**		**F-squared**	
	Filed	Settled	Filed	Settled	Filed	Settled
Post-Morrison	127	62	3	0	3	0
Pre-Morrison	92	40	32	3	41	8
Grand Total	**219**	**102**	**35**	**3**	**44**	**8**

First, the results suggest that local claims settled more often than either f-cubed or f-squared claims both before and after *Morrison*. Within the subsample of claims filed before *Morrison,* not surprisingly, f-squared plaintiffs were included in the settlement class more often than f-cubed plaintiffs.

In terms of complaints filed after *Morrison* and including f-squared or f-cubed plaintiffs, the percentage of settlements is zero. Recall, however, that for the purposes of case classification I used filing dates. Table 4 does not indicate that as many as four "global plaintiffs" cases filed before *Morrison* settled after the Supreme Court decision and that

217 *Id.* at 9–10.

the relevant settlement agreements covered f-squared plaintiffs.[218] It was a somewhat surprising discovery that *Morrison* has not entirely eliminated this class of plaintiffs to date.

Individual reasons to settle f-squared claims, which the Exchange Act did not reach after *Morrison*, were manifold. In *Credit Suisse Group,* for instance, the dismissal of f-squared claims was not certified as final.[219] Several other cases involved Canadian companies. Canada already has

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218 *See, e.g.*, Stipulation and Agreement of Settlement with Defendant Satyam Computer Services Ltd. at 3, *In re* Satyam Computer Servs. Ltd. Sec. Litig., No. 1:09-md-02027-BSJ (S.D.N.Y. Feb. 16, 2011) (No. 252-1) ("Class" means "all persons and entities who: (a) purchased or otherwise acquired Satyam ADSs traded on the NYSE; and/or (b) were investors residing in the United States at the time they purchased or otherwise acquired Satyam ordinary shares traded on the Indian Exchanges, during the Class Period and who were damaged thereby."); Settlement Agreement at 4, Cornwell v. Credit Suisse Group, No. 08-cv-03758-VM (S.D.N.Y. Mar. 10, 2011), 2011 WL 841027 ("1.3 "Settlement Class" means: (a) all purchasers of CSG American Depository Shares ("ADS") on the New York Stock Exchange during the Class Period, and (b) all U.S. residents who purchased CSG securities on the Swiss Stock Exchange during the Class Period."); Settlement Agreement at 12, In re Gildan Activewear, Inc. Sec. Litig., No. 08-cv-05048-HB (S.D.N.Y. Aug. 10, 2010) (No. 57) ("(61) U.S. Class or U.S. Class Members means all persons who purchased or otherwise acquired Eligible Shares and either: (i) are now or were at the time of the purchase or acquisition U.S. residents or (ii) purchased or otherwise acquired such shares on the New York Stock Exchange; other than (i) Excluded Persons; and (ii) members of the Quebec Class."); U.S. Order and Final Judgment at 1, In re NovaGold Res. Inc. Sec. Litig., No. 08-cv-7041-DLC (S.D.N.Y. Sept. 10, 2010) (No. 107) ("the U.S. Action is hereby finally certified as a class action on behalf of all Persons, other than Excluded Persons, who: (i) purchased NovaGold Resources Inc. ("NovaGold" or the "Company") common stock on the American Stock Exchange ("AMEX")' during the period from October 25, 2005 to and including January 16, 2008 (the "Class Period"); (ii) are United States residents that purchased NovaGold common stock on the Toronto Stock Exchange ("TSX") during the Class Period; or (iii) are United States residents that purchased publicly traded NovaGold common stock by any other means during the Class Period, and were allegedly damaged thereby.").

219 *See, e.g.*, Settlement Agreement, Cornwell v. Credit Suisse Group, No. 08-cv-03758-VM (S.D.N.Y. Mar. 10, 2011), 2011 WL 841027.

well-developed class action mechanisms and in many respects has followed in the footsteps of U.S. class actions. Cases against Canadian companies trading their shares on a U.S. exchange and on the TSX may be brought both in Canada and in the United States.[220] Indeed, several settlement agreements covered a U.S. class and a Canadian class of plaintiffs separately. The members of such a U.S. class could include not only *Morrison* plaintiffs, but also U.S. residents who had purchased shares on a foreign exchange, i.e., f-squared plaintiffs.[221]

To summarize, both before and after *Morrison*, the settled sample cases mostly included U.S. plaintiffs or plaintiffs that bought securities in the United States or on U.S. exchanges, i.e., local *Morrison* plaintiffs. Second, *Morrison* claims were dismissed and settled *almost* as often as before *Morrison*. Slightly more claims filed after *Morrison* settled.

Finally, more local, i.e., *Morrison,* complaints were filed in the past several years, while the ranks of f-squared and f-cubed plaintiffs dwindled. Hence, the primary outcome of *Morrison* seems to be the changed composition of the class and the virtual absence of f-squared and f-cubed claims. This is not surprising since investors and the plaintiffs' bar should be aware that post-*Morrison* courts consistently dismiss those suits.

c. Unusual "Global" Complaints

Several remaining cases with a foreign flavor are creative and unusual enough to merit a short discussion. Some resourceful plaintiffs brought f-cubed and f-squared actions under sections 11 and 12(a)(2) of the Securities Act. The arguments run as follows: Justice Scalia created an

[220] *See, e.g.*, Settlement Agreement, In re Gildan Activewear, Inc. Sec. Litig., No. 08-cv-05048-HB (S.D.N.Y. Aug. 10, 2010) (No. 57); Order and Final Judgment, U.S. Order and Final Judgment, In re NovaGold Res. Inc. Sec. Litig., 08-cv-7041-DLC (S.D.N.Y. Sept. 10, 2010) (No. 107).

[221] *See, e.g.*, Settlement Agreement at 6, 12, In re Gildan Activewear, Inc. Sec. Litig., No. 08-cv-05048-HB (S.D.N.Y. Aug. 10, 2010) (No. 57), ("(10) Class and Class Member(s) means the Ontario Class, the Quebec Class and the U.S. Class.").

ambiguity by drawing parallels between the extraterritorial reach of the Securities Act and the Exchange Act.[222] This uncertainty was readily exploited by ultimately unsuccessful plaintiffs who averred that the holding in *Morrison* should be limited to Exchange Act section 10(b).[223]

Another ingenious but ineffectual argument concerned market infrastructure and exchange ownership. For instance, if securities traded on a foreign exchange, such as Euronext, which was owned by a Delaware company, the plaintiff argued it was a U.S. exchange falling squarely under the requirements of *Morrison*.[224] Other plaintiffs focused on the location of large clearing corporations. Many

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222 Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 268 (2010) (observing in dicta that the "same focus on domestic transactions is evident in the Securities Act of 1933").

223 See*, e.g.*, *In re* Royal Bank of Scotland Grp. PLC Sec. Litig., 765 F. Supp. 2d 327, 338 (S.D.N.Y. 2011) ("Under *Morrison,* the Securities Act, like the Exchange Act, does not have extraterritorial reach.") (citing *Morrison,* 130 S. Ct. at 2885); *In re* Vivendi, 842 F. Supp. 2d 522, 529 (S.D.N.Y. 2012) ("The Court agrees with those decisions and concludes that *Morrison* permits Securities Act claims 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.") (citing *Morrison,* 130 S. Ct. at 2888); *In re* Smart Techs., Inc. S'holder Litig., 295 F.R.D. 50, 57 (S.D.N.Y. 2013) ("Thus, to the extent that putative class members purchased, incurred 'irrevocable liability,' or obtained 'title' to securities in Canada—or anywhere else outside the United States—they do not have a viable cause of action under the Securities Act, and may not be included in the class certified here.") (citing Absolute Activist Value Master Fund Ltd. v. Ficeto*,* 677 F.3d 60, 69 (2d Cir. 2012)).

224 Phelps v. Stomber, 883 F. Supp. 2d 188, 207 (D.D.C. 2012) ("Plaintiffs contend that by contrast, this case involves a "'U.S. purchaser, a U.S. issuer, and a foreign stock exchange.' They argue that CCC was actually a U.S. company, even though it was incorporated under the laws of Guernsey, and that Euronext was actually a U.S. exchange because while it is located in the Netherlands, it was owned by a Delaware company. Although plaintiffs acknowledge that other courts have extended *Morrison* 's holding to 'foreign-squared transactions (those involving a U.S. purchaser, foreign issuer, and foreign stock exchange'), they state that 'no court has yet extended *Morrison* to a fact pattern involving a U.S. purchaser, a U.S. issuer, and a foreign stock exchange.'"). Many of the defendants were registered in Delaware and were residents of the United States. *Id.* The case was excluded from the sample.

securities transactions are cleared through U.S. clearing agencies, such as the Depository Trust Company ("DTC"), and many issuers' securities are eligible for clearing and settlement there. The plaintiffs thus leveraged this domestic link to argue that the actual completion of sales was on U.S. soil and that the transfer of legal title officially held by the DTC's nominee in that "domestic" transaction occurred in the United States.[225] Courts discarded all of these arguments as inconsistent with *Morrison*.

I also found two complaints against Japanese companies in which plaintiffs asserted claims under Japanese law. In *In re Toyota Motor*, the complaint included securities law claims of purchasers of ADS traded in the United States, as well as purchasers of Toyota common stock, and similar claims under Japanese law.[226] The District Court for the Central District of California granted in part and denied in part defendants' motion to dismiss, partially sustained the claims under federal securities law, and dismissed the add-on claims under Japanese law. The resultant Settlement

[225] *In re* Petrobras Sec. Litig., 150 F. Supp. 3d 337, 341–42 (S.D.N.Y. 2015) ("Moreover, assuming the parties are correct that most securities transactions settle through the DTC or similar depository institutions, the entire thrust of *Morrison* and its progeny would be rendered nugatory if all DTC-settled transactions necessarily fell under the reach of the federal securities laws. The laws would reach most transactions, not because they occurred on a domestic exchange but because they settled through the DTC. This result cannot be squared with the plain language and careful reasoning of *Morrison* . . . ."). *In re* Petrobras Sec. Litig. was still pending as of the date of this writing. Therefore, it was excluded from the sample.

[226] Consolidated Class Action Complaint at 1, *In re* Toyota Motor Corp. Sec. Litig., No. 2:10-cv-00922 (C.D. Cal. Oct. 4, 2010), 2010 WL 3940921 ("This is a class action on behalf of a Class as follows: (1) with respect to Plaintiffs' claims under the Securities Exchange Act of 1934, (a) all persons and entities who purchased or otherwise acquired Toyota American Depositary Shares ("ADSs") between May 10, 2005, and February 2, 2010, inclusive (the "Class Period"), and (b) all persons and entities who purchased or otherwise acquired Toyota common stock in domestic transactions during the Class Period; and (2) with respect to Plaintiffs' claims under Japanese law, all persons and entities who purchased or otherwise acquired Toyota common stock during the Class Period.").

Agreement included only ADS purchasers.[227] In a 2016 decision citing *Morrison*, the same district court dismissed similar claims against Toshiba Corporation.[228] Consequently, even though there were some f-cubed and f-squared complaints in the immediate aftermath of *Morrison*, going forward the decision should cut off those claims entirely.

Cumulatively, the results imply that, within the sample, pre- and post-*Morrison* courts were generally more sympathetic to U.S. and foreign purchasers of securities traded in the United States *and* to U.S. purchasers of foreign securities, i.e., local *Morrison* plaintiffs and f-squared purchasers.[229] The latter category shrank after *Morrison*, although in several cases defendants settled f-squared claims.

d. Average Settlement Values

Since the post-*Morrison* class composition has changed, and "global" plaintiffs have been more effectively cut off, one would expect settlements to be reduced accordingly. The below data demonstrate that the average settlement values, as well as the median values, within the sample have both decreased. The actual settlement costs, obviously, should fluctuate from year to year.[230] Table 5 also indicates that the

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227 Order Preliminarily Approving Settlement, Certifying Class, Providing For Notice And Scheduling Settlement Hearing at 2, *In re* Toyota Motor Corp. Sec. Litig., 2:10-cv-00922-DSF, (C.D. Cal. Jan. 3, 2013) (No. 311), ("[A] Class defined I as follows: All Persons (other than those Persons who timely and validly request exclusion from the Class) who purchased or otherwise acquired the American Depositary Shares of Toyota Motor Corporation during the period from May 10, 2005, through and including February 2, 2010, excluding the Defendants and their Related Persons.").

228 Stoyas v. Toshiba Corp., 191 F. Supp. 3d 1080 (C.D. Cal. 2016) (generally finding that plaintiffs failed to plead § 10(b), Rule 10b-5, and § 20(a) causes of action based on *Morrison* test and dismissing the Japanese law cause of action).

229 This trend was generally in compliance with the views of the major academic commentators. *See* Fox, *supra* note 2, at 1263–64.

230 For instance, "[o]n the foreign securities litigation activity front, federal securities class actions filed against foreign private issuers (FPIs)

coefficient of variation, i.e., the variability relative to the mean, has changed in the pre-*Morrison* and post-*Morrison* subsamples.[231]

TABLE 5: AVERAGE SETTLEMENT VALUES

	Comparative Settlement Values		
	Pre-Morrison	**Post-Morrison**	**% Difference**
Average	$19,500 K	$8,352 K	-57%
Median	$7,750 K	$3,000 K	-61%
St. Dev	33,705 K	18,503 K	-45%
CV	1.729	2.215	28%

To ensure consistency, Table 5 classifies pre- and post-*Morrison* cases based on the filing dates. However, as many as fifteen cases were filed before *Morrison* and settled after the decision. Out of those fifteen cases, two settlements exceeded $100,000,000.[232] There also was a similarly large mega-settlement in a case filed after *Morrison*.[233]

jumped to an all-time high since the passage of the [Private Securities Litigation Reform Act]. The number of FPI accounting-related cases doubled to 16 cases in 2008, while the average settlement value of FPI cases overall decreased." Grace Lamont, *Observations from the Editor* of PRICEWATERHOUSECOOPERS, 2008 SECURITIES LITIGATION STUDY (2009), http://www.fortfield.com/casefiles/PwC.class%20actions.2008.Report.pdf [https://perma.cc/LBL8-N6C8]. Recall that Siegel's 2005 study indicated that the size of the settlements was commensurate with the insurance policies of foreign issuers. *See* Siegel, *supra* note 44, at 321. On comparative annual settlements analysis, *see* CORNERSTONE RESEARCH, SECURITIES CLASS ACTION SETTLEMENTS: 2015 REVIEW AND ANALYSIS 1, 5-6 (2016); PWC, *supra* note 29, at 20–21.

231 At this point, more research is needed to determine if the changes are explained primarily by *Morrison*.

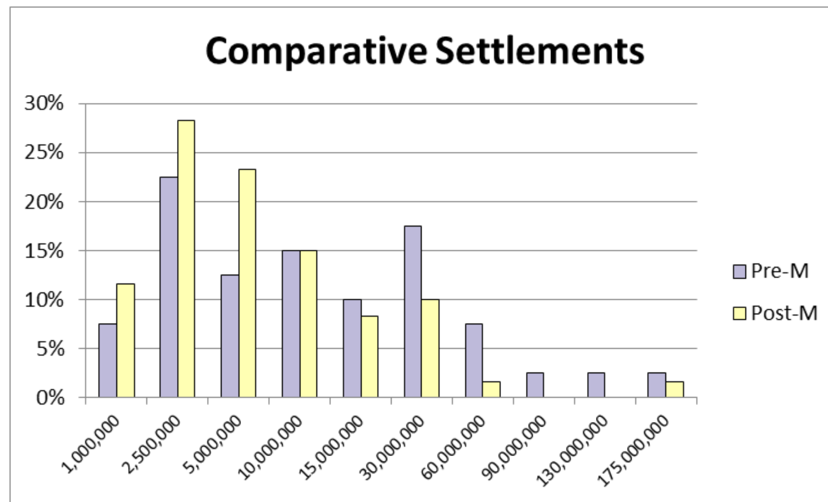
232 Stipulation and Agreement of Settlement with Defendant Satyam Computer Services Ltd., *In re* Satyam Computer Servs. Ltd. Sec. Litig., 1:09-md-02027-BSJ (S.D.N.Y. Feb. 16, 2011) (No. 252-1); Stipulation and Agreement of Settlement Regarding "Post-explosion" American Depositary Shares Class Action *In re* BP p.l.c. Securities Litigation, 4:10-md-02185 (S.D. Tex. Sept. 15, 2016) (No. 1395-1).

233 *See, e.g.*, Stipulation of Settlement, *In re* Barrick Gold Securities Litigation, 1:13-cv-03851-RMB (S.D.N.Y. May 31, 2016) (No. 164-1).

I analyzed these differences in two steps. First, I added the fifteen cases filed pre-*Morrison* and settled after *Morrison* to the cases filed post-*Morrison*. Next, I excluded the three outliers. The resultant mean settlement value for all post-*Morrison* settlements decreased to $7,423,521. The median remained almost unchanged ($3,125,000). By contrast, the summary statistics for cases settled and filed pre-*Morrison* remained significantly higher. Namely, the mean and median settlements were $12,264,000 and $8,000,000, respectively.

The below figure also illustrates that, as compared with the pre-*Morrison* settlements, there has been an increase in the number of smaller settlements ranging from under $1 million to $5 million. Overall, the lower mean and median values and the higher frequency of smaller settlements are important characteristics of the post-*Morrison* subsample.

FIGURE 1: COMPARATIVE SETTLEMENTS



e. Litigation and the Chosen Degree of Bonding

The fourth set of tables, Tables 6 and 7, present the same findings and juxtapose them with the chosen level of commitment of a foreign defendant to the U.S. legal system, i.e., the type of a cross-listing program. The Tables summarize the following data: (1) filings by different plaintiff subclasses against defendants trading either listed shares, debt and other securities, listed ADRs (Levels II and III), or shares and ADRs traded OTC; (2) instances of dismissal on or after a motion to dismiss but prior to the summary judgment stage;[234] (3) settlements before a district court ruled on a motion to dismiss; and (4) settlements after a defendant lost on a motion to dismiss.

TABLE 6: PRE-*MORRISON* RESULTS

Securities	Filed Local	Filed FC	Filed FS	Dismissed	Settled Before MD	Settled after MD
Listed Shares	42	15	17	24	6	12
OTC Shares & ADRs	7	1	3	5	1	1
Listed ADRs	42	13	18	21	6	14
Debt Securities	1	3	3	4	0	0
Total	**92**	**32**	**41**	**54**	**13**	**27**

[234] Recall that the sample includes only one summary judgment for defendant. *See supra* note 210.

TABLE 7: POST-*MORRISON* RESULTS

Securities	**Filed Local**	**Filed FC**	**Filed FS**	**Dismissed**	**Settled Before MD**	**Settled after MD**
Listed Shares	89	2	2	33	15	30
OTC Shares & ADRs	7	0	0	2	4	1
Listed ADRs	30	1	1	16	6	6
Debt Securities	1	0	0	1	0	0
Total	**127**	**3**	**3**	**52**	**25**	**37**

The presented results, again, illustrate that the majority of cases were dismissed between the motion to dismiss stage and the summary judgment stage. The number of settlements reached before the summary judgment stage, i.e., after the motion to dismiss is denied, also indicates that this first negative outcome often leads to settlements and that cases rarely proceed further. This conclusion has already been established in the context of domestic litigation.[235] Litigation against foreign corporations is analogous in this respect.

Recall also that although the ratio of settlements to dismissals before and after *Morrison* was somewhat similar, more actions filed after *Morrison* settled. One possible explanation is that against the growing number of filings by local plaintiffs *and* a decrease in average settlement

[235] Adam C. Pritchard & Hillary Sale, *What Counts as Fraud? An Empirical Study of Motions to Dismiss Under the Private Securities Litigation Reform Act*, 2 J. EMPIRICAL LEG. STUD. 125, 128 (2005) ("Both risk aversion and, of course, the possibility that fraud actually occurred ensure that securities fraud class actions rarely go to a jury. Cases that are not dismissed on a motion to dismiss or at summary judgment, and that survive class certification, invariably settle.").

amounts, risk averse defendants may prefer to settle. Another explanation, of course, is actual instances of fraud.

More research is needed in this area. For instance, either preliminary explanation may explicate why as many as twenty-five defendants, which constitutes about 20% of the post-*Morrison* filings, preferred settling over waiting for the outcome of their motions to dismiss and in some cases did not even move to dismiss the complaints.

Those twenty-five defendants and the uptick in filings partially explain that numerical difference in the ratio of settlements to dismissals. In contrast, if we count only settlements when a motion to dismiss was denied, the Supreme Court decision does not affect the numbers—about 27% of the cases in the subsamples filed before and after *Morrison* settled after motion to dismiss. Roughly, 50% of all cases are dismissed. These descriptive data call for further research on *Morrison'*s substantive impact on litigation, settlements, or strike suits against FPIs.[236]

A final accompanying remark is that in the overwhelming majority of cases the actual attorneys' fees and litigation costs should be relatively modest compared to cases proceeding to trial. This may allay some concerns regarding legal fees and settlement amounts, which generally may rise disproportionately as a case proceeds.[237] Cumulatively,

[236] It is possible that there was little effect. This would be consistent with the previous research finding that the nature of a corporate defendant, i.e., foreign or domestic, does not alter judicial outcomes in securities litigation. *See* Cheng et al., *supra* note 186, at 31–33 ("While the incidence of litigation is lower for foreign firms, the lawsuit outcomes—likelihood of dismissal and the amount of settlement, are no different for lawsuits against the foreign-listers compared to outcomes for U.S. domestic firms but the time to settlement is longer for foreign cases. Thus while private enforcement of securities law works for foreign firms as for U.S. firms once the lawsuit is filed some frictions remain as evidenced in the longer settlement period.").

[237] *See, e.g.*, STARYKH & BOETTRICH, *supra* note 27, at 18 ("NERA's statistical analysis has found robust relationships between settlement amounts and the litigation stage at which settlements occur"); James D. Cox & Randall S. Thomas, *Mapping the American Shareholder Litigation Experience: A Survey of Empirical Studies of the Enforcement of the U.S. Securities Law*, 6 EUR. COMPANY & FIN. L. REV 164, 166–67 n.6 (2009)

Tables 6 and 7 indicate that the majority of the sample cases against FPIs did not rise to that level, either before or after *Morrison*.

The second set of data in Tables 6 and 7 include the types of cross-listing programs. As outlined in Part II, these types predetermine the disclosure and reporting obligations of a foreign issuer, as well as its exposure to antifraud suits under sections 11 and 12(a)(2) of the Securities Act. Possibly, selecting a Level I OTC ADR program also minimizes the risk of fraud-on-the-market claims under section 10(b) of the Exchange Act when the OTC market is not sufficiently efficient to satisfy the reliance element of a section 10(b) action.[238]

The results presented in the Tables suggest that both before and after *Morrison*, the majority of cases were brought against defendants with directly listed shares (i.e., primary and secondary listings) and Levels II and III ADRs trading on U.S. exchanges. Accordingly, the specifics of a cross-listing program could be associated with the chosen level of bonding to the U.S. legal system *and* the related litigation risk.

The pre-*Morrison* sample includes only seven cases involving OTC ADRs and shares traded OTC. Five of the cases were dismissed. After *Morrison,* I also identified only seven complaints against issuers trading OTC securities. In four out of the seven cases, defendants settled prior to a ruling on a motion to dismiss. By contrast, the filing numbers are much higher in cases against FPIs with listed ADRs and shares.

Several explanations are plausible. On the one hand, if the securities at issue trade on a national exchange, to wit,

(discussing defense counsel's fee arrangements and billing insurance carriers "on an hourly basis"); John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 592 (2010) (citing the litigation cost arguments with reference to the enactment of the Private Securities Litigation Reform Act barring discovery prior to a ruling on the motion to dismiss).

[238] *See* Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2409–11, 2413–14 (2014).

an efficient market, it is easier for plaintiffs to show reliance. On the other hand, consider that before *Morrison,* plaintiffs, *ex hypothesi*, could claim reliance on the efficiency of a listing venue in an FPI's home market. The possible propensity to sue exchange-listed foreign companies both before and after *Morrison*, therefore, is not fully explained by pleadings and legal costs as such.

Another relevant explanation is that private plaintiffs may not watch OTC issuers as carefully and vigorously as they monitor listed issuers, which would point toward higher transaction costs in litigation when an FPI's securities are traded OTC. For instance, either the plaintiffs' bar cannot identify securities law violations by OTC issuers as easily as it can pinpoint misleading disclosure by listed reporting issuers, or many OTC issuers are not worth pursuing due to, perhaps, their smaller size, lack of assets in the United States, or precarious financial position.[239] The plaintiffs' bar and investors may also deliberately target larger and more visible companies.

To summarize, the results suggest that when selecting among specific types of cross-listing programs, a foreign firm should implicitly accept that both the expected benefits of listing and the accompanying risk of litigation are higher for exchange-listed securities. Recall that, as discussed in Section II.B.2, listed securities are associated with higher cross-listing premiums and other benefits. Those perks are not free and may carry higher embedded litigation costs vis-à-vis Level I, OTC-traded ADRs.[240]

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[239] Transaction cost explanations are suggested, for instance, in Cheng et al., *supra* note 186, at 32 (finding, *inter alia,* "that transaction costs of pursuing litigation against foreign firms also play a role. Firms in countries that are farther from the U.S., those that have weaker judicial efficiency in the home country or from countries with a weaker track record of prior U.S. acquisitions are less likely to be targeted by plaintiff investors and attorneys. This suggests that factors that increase the costs to pursue litigation against firms in foreign countries lower the rate of lawsuits against foreign companies listed in the U.S."); *see also* Cox, *supra* note 161.

[240] The listing firms should internalize higher ex-ante (compliance) and ex-post (litigation) costs of listings, counterbalanced by an assortment

3. Concluding Remarks

Finally, let us briefly juxtapose the expected value of a cross-listing program, formulaically expressed in Part III, with the case data. Recall that the value of cross-listing initiatives may be expressed as follows:

Expected Value (Cross-Listing) = CLB – C – EAC – P(M)×M – P(D | M)×D – P(E)×E.

"M" is sunk costs incurred by any foreign company when a class action is filed. It is possible that these expected costs, mainly resulting from the filing of a complaint and a motion to dismiss under the PSLRA, were almost unaffected by *Morrison*. Even though there has been a decrease in the number of f-squared and f-cubed complaints, it may be offset by a recent increase in local filings. For local *Morrison* plaintiffs, the percentage of dismissed cases has changed only slightly.

Recall that following these early stages, and after a motion to dismiss is denied, the probability and costs of an adverse outcome in the form of a settlement or a judgment for plaintiff were expressed as "D." In terms of the negative outcomes to a corporate defendant, the post-*Morrison* settlement values are lower than the pre-*Morrison* settlements.[241]

This study also confirms that both before and after *Morrison* courts often dismissed claims involving securities primarily trading on foreign exchanges, purchased by either

of bonding benefits and firm-specific advantages of a cross-listing program. This suggestion is consistent with economic research on "inadvertent" liability associated with unsponsored ADR Programs. *See* Iliev et al., *supra* note 147 (documenting lower firm value after involuntary cross-listings, which the authors attributed to higher risk of litigation associated with unsponsored ADR programs opened by financial intermediaries); *see also* Greene & Patel, *supra* note 10, at 158–59 (suggesting that "the issuer made a voluntary entry into the USA through its sponsorship of the [ADR] programme" and, thus, "fraud claims . . . should be permitted").

241 Only the *typicality* of "global" actions (i.e., f-cubed and f-squared actions) has diminished.

U.S. or foreign plaintiffs. In addition, there were more filings involving U.S. exchange-traded shares and ADRs (Levels II and III) purchased by either U.S. plaintiffs or foreign investors. In sum, "local" cases involving listed securities have dominated securities litigation. Such class action lawsuits settled more often than other groups. This conclusion suggests that firms may make a choice with respect to bonding through not only the mandatory disclosure rules or trading on prestigious exchanges, but also through the expected litigation risk, which is higher if issuers opt for exchange-traded securities. The results are similar both before and after *Morrison*.

V. CONCLUSION

The primary conclusion of this research is that the actual risk of litigation has become more ascertainable and possibly slightly lower than before *Morrison*. Therefore, the deterrence effect and irrational "fears" associated with such litigation should be equally reduced. Foreign managers, in theory, seek an optimal combination of firm-specific benefits, signaling, and bonding through, *inter alia*, law and enforcement, which help to improve firm value and reduce the cost of capital. *Morrison* enables a firm not only to rule out the irrational and inflated assessment of the risk of litigation in the United States, but also to better determine the probability distribution of possible litigation outcomes. It may equip the foreign issuer with the tools for a better appraisal of the expected value of a cross-listing program by assessing its level of exposure vis-à-vis possible bonding and exchange-trading benefits. In this sense, the Supreme Court in *Morrison* did address the "fear factor" associated with global actions and, at the same time, improve risk assessment by foreign issuers. International firms need to take these changes into consideration in making decisions on cross-listing in the United States.