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Liability for Transnational Securities Fraud, Quo Vadis?

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Abstract

This Chapter evaluates the state of affairs with regard to liability for transnational securities fraud in the post-Morrison era, to find that it is in a state of flux. Indeed, the U.S. Supreme Court's decision in Morrison has relatively little to do with this situation beyond helping to expose the severe limitations from which civil liability for securities fraud already suffers. The U.S. liability regime as it is currently designed may be ineffectual in deterring securities fraud and in supporting good corporate governance through legal bonding. In contrast, public enforcement emerges as a potent institution in this regard in various countries around the world, although its effectiveness hinges on informal institutional prerequisites.

Keywords: securities fraud, civil liability, class actions, bonding, corporate governance

JEL Classifications: G15, G18, G38

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Liability for Transnational Securities Fraud, *Quo Vadis?*

Amir N. Licht*

Chapter for Rethinking Global Finance and Its Regulation
(Douglas Arner, Emilios Avgouleas, Ross Buckley, eds., CUP, forthcoming)

Abstract

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Draft. Comments welcome.

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I. INTRODUCTION

Globalization of securities markets is not a new phenomenon. Although commentators often invoke recent advances in computer and telecommunication technology in connection with globalized securities markets, these are but facilitating factors in a trend that has been with us for well over a century. As of mid-2014, roughly six percent of some 43,600 firms listed on the world's stock exchanges were foreign.[1] The sheer number of foreign firms and their share among the total number of companies traded on a particular market vary greatly. They are especially high in global and regional financial centers such as New York, London, Hong Kong, and Luxembourg. Inflows of cross-listings signify that firms find their foreign destination market a valuable asset worth the costs, both one-off and on-going, that this transaction entails. This makes cross-listing a topic of prime importance for policy- and law-makers in both home- and host-markets of cross-listed firms.

Why firms prefer certain stock exchanges over others when they decide to internationalize their capital market presence has been a vexing question for academics for more than three decades. Even today, this question is anything but settled. Of particular interest in this regard are factors that could be amenable to policy measures, especially legal reforms, because regulators may be able to employ such measures to improve their country's relative position in the global capital market. This Chapter focuses on a particular legal institution - namely, civil liability for transnational securities fraud. This institution has attracted much scholarly attention as a pivotal component in the institutional environment that foreign firms may consider valuable. According to the "legal bonding theory", on which more

[1] Author's calculations based on data from the World Federation of Exchanges available at www.world-exchanges.org. For further details see Part II *below*.

below, becoming exposed to such liability consequent to a foreign listing may be used by corporate insiders as a credible signal for committing to improved corporate governance.[2]

Many believe that the U.S. federal regime of securities fraud liability serves precisely as a credible commitment mechanism of this sort. In support of this view commentators cite a combination of factors, including in particular the U.S. class action mechanism and, until recently, the willingness of American courts to apply this regime expansively in terms of its extraterritorial reach. In 2010, however, the United States Supreme Court significantly curtailed this extraterritorial reach in its landmark decision in *Morrison v. National Australia Bank*.[3] Surprisingly discarding forty years of elaborate jurisprudence on this subject, the Court held that only investors who traded on U.S. markets can sue for securities fraud. Regardless of their nationality, investors who traded securities of cross-listed firms in other venues were excluded from getting redress for fraud under the U.S. regime.

This Chapter evaluates the state of affairs with regard to liability for transnational securities fraud in the post-*Morrison* era, to find that it is in a state of flux. Indeed, the *Morrison* decision has relatively little to do with this situation beyond helping to expose the severe limitations from which civil liability for securities fraud already suffers. The U.S. liability regime as it is currently designed may be ineffectual in deterring securities fraud and in supporting good corporate governance through legal bonding. In contrast, public enforcement emerges as a

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[2] *See* an excellent survey by Karolyi at G. Andrew Karolyi, *Corporate Governance, Agency Problems and International Cross-Listings: A Defense of the Bonding Hypothesis*, 13 EMERGING MARKETS REV. 516 (2012).

[3] 130 S. Ct. 2869.

potent institution in this regard in various countries around the world, although its effectiveness hinges on informal institutional prerequisites.

II. THE WORLD OF CROSS-LISTINGS

A. Trends

Companies can expand their capital market presence in various ways.[4] Cross-listing refers to a transaction in which the firm, on its own initiative, makes its securities available for trading on a foreign market. This could be done with or without raising of new capital, where in the former case the listing may be accompanied by an issuance of new securities. In large financial centers such as London and New York, and increasingly in other countries as well, foreign firms may be able to choose from a menu of modes of listing. Each mode of listing may entail different regulatory requirements in terms of disclosure and other corporate governance measures, due either to legal requirements or to the stock exchange's listing rules that are deemed part of the listing agreement. Because securities are often denominated in the firm's home currency, financial intermediaries may facilitate trading in these securities in the host market by establishing a depositary receipt facility, of which the most well-known are American Depositary Receipts ("ADRs").[5]

Liberalization of foreign exchange and international capital movements during the early 1980s caused the number of cross-listed firms around the world to swell more than six-fold. According to a study by Fernandes and Giannetti, this number

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[4] For an excellent survey *see* G. Andrew Karolyi, *The World of Cross-Listings and Cross-Listings of the World: Challenging Conventional Wisdom*, 10 REV. FIN. 99 (2006); *see* also Thomas O'Connor & Kate Phylaktis, *Cross-Listing Behaviour*, in SURVEY OF INTERNATIONAL FINANCE 248 (H. Kent Baker and Leigh A. Riddick, eds. 2012).

[5] Unless otherwise stated, I will use "cross listing" and "foreign listing" interchangeably. The literature also uses "dual listing" and "multiple listing" as similar, though not identical, terms. With a similar caveat, I will also use "listing" and "trading" interchangeably.

rose from less than 400 in 1980 to some 2,500 in 1997.[6] After 1997 there were between 2,400-2,500 cross-listed firms and as noted above, in 2014 a similar number of foreign firms were cross-listed in exchanges followed by the World Federation of Exchanges. Table 1 provides details about the number of domestic and foreign firms in some thirty prominent markets around the world in April 2014.[7] One may note the particularly high share of foreign firms in numerous markets, ranging from the mammoth NYSE on the one hand to the much smaller Irish Stock Exchange on the other hand. Indeed, it is not uncommon to find a high share of cross-listed firms even in relatively small and peripheral exchanges such those in Lima, Santiago, or Oslo.

[Table 1 about here]

Recent research shows that trends in cross-listings have been anything but monotonic. In addition to substantial variation in the proportion and the number of firms listed in any foreign exchange, Fernandes and Giannetti's data show an increasing concentration of foreign listings in the top two world exchange countries: the United States and the United Kingdom. Until 1990, U.K. and U.S. exchanges jointly held less than forty percent of the total number of foreign listings. By the end of 2006, these major international exchanges had increased their market share to approximately sixty percent. Importantly, the number of foreign firms increased relative to the number of domestic companies in the United States and the United Kingdom (as opposed to the remaining stock exchanges in their sample). In 1988,

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[6] *See* Nuno Fernandes & Mariassunta Giannetti, *On the Fortunes of Stock Exchanges and Their Reversals: Evidence from Foreign Listings*, 23 J. FIN. INTERMEDIATION 157 (2014).

[7] The World Federation of Exchanges publishes data on some sixty markets, in which more than 43,000 firms are listed and cross-listed. For presentation in Table 1 I selected markets that may have special importance *inter alia* as global or regional financial centers, as emerging markets, etc. For the full dataset see World Federation of Exchanges ("WFE") Statistics, available at www.world-exchanges.org/statistics/monthly-reports (last visited June 2, 2014). Note that the WFE's membership is not universal. For example, the London Stock Exchange is not a member such that Table 1 does not cover it.

foreign listed firms represented 5.6 percent of the firms listed in the United States and the United Kingdom, whereas in 2006 these firms accounted for more than 17 percent. Equally interestingly, while in 1980 the London Stock Exchange dominated the market for foreign listings with some 26 percent share, with U.S. exchange following with about 14 percent, these markets changed places and by 2006, U.S. markets had 35 percent of cross-listings whereas London had just below 25 percent. Several European exchanges, that in 1990 had a 7-13 percent share of foreign listings, have lost ground dramatically toward 2006 - a change that the authors relate to differences in corporate governance.

Sarkissian and Schill put the above-mentioned trends in yet a more general context.[8] Using an especially broad sample of cross-listing transactions during a fifty-seven year period of 1950-2006, these authors show that listings cluster in time, forming foreign listing waves. Waves in a host market often reflect waves in a home market with which it shares a particular affiliation. For example, the United Kingdom's popularity in the 1950s as a host market reflected an increase in listings from South Africa, whose firms tended to list in the United Kingdom. Overall, Sarkissian and Schill interpret their evidence as consistent with cross-listing activity being motivated by shocks in market pricing efficiency and economic proximity, but not shocks in the stringency of market institutions. From firms' point of view, cross-listing decisions are largely motivated by economic synergies between countries rather than pricing efficiency or institutional differences between markets. Consistent with a growing number of prior studies, Sarkissian and Schill also observe that cross-

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[8] *See* Sergei Sarkissian & Michael J. Schill, *Cross-Listing Waves*, J. FIN. QUANTITATIVE ANAL. (forthcoming)

listing firms experience temporary valuation gains that fail to prove durable in the long run.[9]

B. Motivations

The academic literature has advanced a series of theoretical accounts about factors that could motivate cross-listing. These theories have evolved over time. The first theories to appear dealt with financial aspects of cross-listing. Starting in the early 1990s, studies about other business motivations for cross-listing also emerged. It was only toward the late 1990s that theories about governance ("bonding") motivations were first articulated in detail. One should note at the outset that these accounts are not mutually exclusive. In fact, it is quite likely that several motivations are simultaneously at work in any firm's cross-listing decision-making process. The following provides brief references to these theories;[10] bonding theories are further elaborated in the next Part.

Financial Gains. Cross-listings were originally thought of as a means for lowering firms' cost of capital - that is, for enabling firms to get more money from investors when they offer their stock to the public. This effect could stem from two related sources - segmentation gains and diversification gains, the former being a more prominent explanation.[11] Segmentation occurs when similar assets in different

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[9] *See* also Juan Carlos Gozzi et al., *Internationalization and the Evolution of Corporate Valuation*, 88 J. FIN. ECON. 607 (2008); Sergei Sarkissian & Michael J. Schill, *Are There Permanent Valuation Gains to Overseas Listing?*, 22 REV. FIN. STUD. 371 (2009); Sergei Sarkissian & Michael J. Schill, *The Nature of the Foreign Listing Premium: A Cross-Country Examination*, 36 J. BANKING & FIN. 2494 (2012).

[10] For detailed descriptions of these theories *see* Amir N. Licht, *Genie in a Bottle? Assessing Managerial Opportunism in International Securities Transactions*, 2000 COLUM. BUS. L. REV. 51 (2000); *see* also Olga Dodd, *Why Do Firms Cross-List Their Shares on Foreign Exchanges? A Review of Cross-Listing Theories and Empirical Evidence*, 5 REV. BEHAVIORAL FIN. 77 (2013); G. Andrew Karolyi, *Why Do Companies List Abroad?: A Survey of the Evidence and Its Managerial Implications,* 7 NYU SALOMON BROS. CENTER 1 (1998).

[11] *See*, for example, René M. Stulz, *Globalization of Corporate Finance and the Cost of Capital*, 8 J. APPLIED CORP. FIN. 30 (1999); Gordon J. Alexander et al., *Asset Pricing and Dual Listing on Foreign*

markets have different prices, barring transaction costs. In this view, the popularity of investing in emerging market stocks largely lies in potential segmentation gains. Such markets may exhibit barriers to foreign investment due to regulatory limits on foreign holdings in domestic corporations, informational barriers, and so forth. In the past, foreign exchange restrictions may have also engendered capital market segmentation but these barriers have been largely dismantled by end of the millennium. Additionally, cross-listing brings foreign stocks closer to investors, and offers several other straightforward advantages that stem from lower transaction costs.

Liquidity. Cross-listing may contribute to share value by increasing stock liquidity, e.g., thanks to increased trading hours and trading venues. Expected returns positively correlate with liquidity, measured in terms of the bid-ask spread. Narrower spreads following cross-listing generate improved liquidity, which increases share value.[12] Enhanced inter-market competition might lower the spread and therefore improve liquidity, but multi-market trading might also decrease liquidity by fragmenting order flows among the markets. Management surveys indicate the importance of the liquidity motivation,[13] but the net result depends on the circumstances of each security.[14]

Shareholder Base. By cross-listing its stocks, a firm could expand its potential investor base more easily than if it traded on a single market. As cross-listing brings

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Capital Markets: A Note, 42 J. FIN. 151 (1987); Robert C. Stapleton & Marti G. Subrahmaniam, *Market Imperfections, Capital Market Equilibrium and Corporation Finance*, 32 J. FIN. 307 (1977).

[12] *See* Yakov Amihud & Haim Mendelson, *Asset Pricing and the Bid-Ask Spread*, 17 J. Fin. Econ. 223 (1986); Yakov Amihud & Haim Mendelson, *Liquidity and Asset Prices: Financial Management Implications*, 17 Fin. Mgmt. 5 (1988).

[13] *See* Franck Bancel & Usha R. Mittoo, *European Managerial Perceptions of the Net Benefits of Foreign Stock Listings*, 7 EUR. FIN. MGMT. 213 (2001); Franck Bancel & Usha R. Mittoo, *Why do European firms go public?*, 15 EUR. FIN. MGMT. 844 (2009).

[14] *See* K.C. Chan et al, *Information, Trading and Stock Returns: Lessons from Dually-Listed Securities*, 20 J. Bank. & Fin. 1161 (1996).

foreign securities closer to potential investors, it increases investor awareness of the securities. This familiarity could lower expected returns.[15] In business management terminology this aspect is referred to as "firm visibility" - a broad notion encompassing frequent mentioning of the firm in the financial press and closer monitoring of its securities by securities analysts.

Visibility. The putative benefits of increased visibility in the host country go well beyond the expected increase in shareholder base. In addition to greater demand for its stock, listing abroad provides a firm with greater access to foreign money markets and makes it easier to sell debt there. A firm becomes more credible by providing information to the local capital market, and, in turn, this continuous flow of information allows the capital market to make faster, more accurate decisions.[16] The latter aspect substantially overlaps with the "reputational bonding" theory advanced by Siegel and discussed further below.[17]

Marketing Motivations. Using cross-listings for marketing reasons relates to the visibility rationale. According to this reasoning, foreign listing can boost corporate marketing efforts by broadening product identification among investors and consumers in the host country. The listing, it is claimed, creates greater market demand for the firm's products as well as its securities.[18]

Technical Issues. Effecting a securities transaction abroad is still more complicated and expensive than effecting it domestically. Cross-listing can improve a

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[15] *See* Robert C. Merton, *A Simple Model of Capital Market Equilibrium with Incomplete Information*, 42 J. FIN. 483 (1987).

[16] See, for example, Edward B. Rock, *Greenhorns, Yankees, and Cosmopolitans: Venture Capital, IPOs, Foreign Firms, and U.S. Markets*, 2 Theor Inq L 711 (2001).

[17] *See* Jordan Siegel, *Can Foreign Firms Bond Themselves Effectively by Renting U.S. Securities Laws?*, 75 J. FIN. ECON. 319 (2005).

[18] *See* H. Kent Baker, *Why U.S. Companies List on the London, Frankfurt, and Tokyo Stock Exchanges*, 6 J. INT'L SEC. MARKETS 219 (1992).

firm's ability to effect structural transactions abroad such as foreign mergers and acquisitions, stock swaps, and tender offers.[19] Relatedly, cross-listing also facilitates and enhances the attractiveness of employee stock ownership plans ("ESOPs") for employees of large multinational corporations. Local listing in the foreign market provides foreign employees with an accessible exit mechanism for their stocks.

Corporate Governance (Bonding). Cross-listing on a foreign market signifies an entry into the host-country's capital market. The latter market operates in a different institutional environment than that of the firm's home county. Institutional differences may include different financial institutions, different informational intermediaries (such as analysts and rating agencies), different market norms, and, importantly, a different legal environment. A cross-listing brings the firm under the jurisdiction of that market's home country and of its capital market regulators. Any or all of such institutional differences may induce an improvement in the firm's corporate governance. In a proactive version of this account, firms may cross-list in higher-corporate-governance market with a view to self-improve on this front and thus lower their cost of capital.[20]

III. BONDING, LEGAL BONDING

Within the multitude of theories about likely motivations for cross-listing, the bonding theory has become the dominant account and engendered substantial literature, especially in its version that focuses on legal improvements. The notion that issuers may want to improve their corporate governance by subjecting themselves

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[19] *See* G. Andrew Karolyi, *DaimlerChrysler AG, the First Truly Global Share*, 9 J. CORP. FIN. 409 (2003).

[20] *See* Rene M. Stulz, *Globalization of Corporate Finance and the Cost of Capital*, 8 J. APPLIED CORP. FIN. 30 (1999); John E. Coffee, Jr., *The Future as History: The Prospect for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641 (1999).

to a better corporate governance regime through cross-listing - say, on an American market - is appealingly elegant. However, it should be handled with care. This Part first contextualizes the legal bonding theory in a broader analytical framework. Next, it elaborates the legal complexity entailed by cross-listing, focusing on disclosure issues. Finally, this Part briefly discusses some recent evidence.

A. Institutions, Frontiers, and Bonding

A research tradition inspired by North and others has established the importance of institutions for economic development.[21] Assuring that one's property is secured from opportunistic abuse provides incentives for investment and for complex trade. Establishing credible commitment mechanisms thus is a central challenge for economic agents, be they political potentates or corporate insiders.[22] A legal system that is well-designed in terms of the rules it promulgates to protect investors and is well-functioning in terms of actually enforcing investor protection rights may provide actors with means for making such commitment.[23] In the absence of such an institutional environment, good-type agents with good projects may find it difficult to distinguish themselves from the opportunistic crowd. Unless, however, they can find an institutional substitute. Legal bonding may provide such a substitute.

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[21] *See*, for example, DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990).

[22] *See*, respectively, Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989); OLIVER WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985); OLIVER WILLIAMSON, THE MECHANISMS OF GOVERNANCE (1996). On commitment mechanisms in general, *see* Kenneth A. Shepsle, *Discretion, Institutions, and the Problem of Government Commitment*, in SOCIAL THEORY FOR A CHANGING SOCIETY 245 (Pierre Bourdieu & James S. Coleman eds., 1991). On institutional commitment mechanisms in international investment, *see* Witold J. Henisz, *The Institutional Environment for Multinational Investment*, 16 J.L. ECON. & ORG. 334 (2000); Witold J. Henisz & Oliver E. Williamson, *Comparative Economic Organization - Within and Between Countries*, 1 BUS. & POL. 261 (1999).

[23] *See* Simon Johnson et al., *Tunnelling*, 90 AM. ECON. REV. 22 (2000); for a summary *see* Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

The issue may be theorized within the conceptual framework advanced by Djankov, Glaeser, La Porta, Lopez-de-Silanes, and Shleifer.[24] According to these authors, institutions function to control the twin dangers of dictatorship and disorder that every society faces when it strives to secure property rights, broadly defined to include a wide range of entitlements. In this setting, countries are located on different points on an institutional possibility frontier. Each point on the frontier represents a combination of institutional strategies for dealing with social power (dictatorship) and disorder, including private orderings, private litigation, and regulation.

[Figure 1 about here]

Figure 1 graphically depicts the notion of institutional possibilities. On the x-axis, the social losses from dictatorship, as opposed to the gross amounts of such activities as taxation and government expropriation, are measured relative to a world with perfect property rights. On the y-axis, the social losses from disorder are measured relative to a perfect property rights benchmark.[25] The authors provide a pertinent illustration for the present discussion:

> To illustrate these categories, take the example of social control of securities issues. Suppose that society wants to have broad and liquid securities markets and, to this end, deems it desirable that firms issuing equity disclose accurate information about their circumstances. This society has four basic institutional strategies for the enforcement of good conduct. First, the market discipline solution relies on the incentives of issuers themselves, or of their underwriters, to disclose the truth about the securities because they need to establish a reputation for credibility to raise funds in the future. Second, the society can rely on private suits by buyers of securities who feel that they have been cheated by the issuers, under the general doctrines of contract or tort. For this, the society needs a court and a judge. The question for the court is whether the issuer disclosed inaccurate information or failed to disclose material information. Third, the society can designate a public regulatory agency, which mandates what should be disclosed by security issuers, inspects their books and disclosures, and penalizes issuers and underwriters who break its rules. Between

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[24] *See* Simeon Djankov et al., *The New Comparative Economics*, 31 J. COMP. ECON. 595 (2003); *see* also Bruno Dallago, *Comparative Economic Systems and the New Comparative Economics*, 1 EUR. J. COMP. ECON. 59 (2004); Peter J. Boettke et al., *The New Comparative Political Economy*, 18 REV. AUSTR. ECON. 281 (2005).

[25] *Djankov* et al., *supra* note 24, at 599.

> private litigation and full-scale regulation, the regulator can establish the rules for security issuance, but leave the enforcement of these rules to private litigation by the wronged investors. Fourth, the society can nationalize security issuance. A company wishing to raise capital must relinquish the inspection, disclosure, and sale of securities to the state.[26]

Since any institutional possibility frontier entails an inevitable trade-off between institutional approaches, societies may wish to overcome this trade-off by shifting their frontiers toward the origin point. Djankov et al., for instance, argue that common law countries tend to be located on a frontier that is closer to the origin in comparison to civil law countries - a feature that represents general superiority of the former over the latter.[27] However, exogenous factors such as historical heritage, physical endowments, and culture may hinder a country from pushing its frontier or even from moving too far along the frontier, because any point on it may constitute an equilibrium.

Against this backdrop, individual actors may wish to escape their home-country's institutional possibility frontier and exploit another country's better frontier. Subjecting oneself to the other country's laws is one way to achieve this. What is not feasible for an entire society may be for individuals and firms who can migrate to another country's institutional environment. Specifically, by cross-listing on a better-regulated market firms can legally bond themselves and their insiders to better corporate governance as they become subject to a better legal regime, as Stulz and

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[26] *Djankov* et al., *supra* note 24, at 601.

[27] *Djankov* et al., *supra* note 24, at 605. Although, as noted, the framework advanced by Djankov et al. relates to these authors' work on legal origins, the issues are conceptually distinct such that (fortunately), we can abstract here from the scholarly controversy over the institutional role and impact of legal origins. *See* Edward Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q. J. ECON. 1193 (2002); *compare*, for example, Nuno Garoupa & Carlos Gómez Ligüerre, *The Syndrome of the Efficiency of the Common Law*, 29 B.U. INT'L L.J. 287 (2011); Daniel M. Klerman et al., *Legal Origin or Colonial History?*, 3 J. LEGAL ANALYSIS 379 (2011).

Coffee have argued.[28] Civil liability based on class action litigation plays a key role in this account in ensuring that the foreign entrants in fact comply with the legal rules of the host market.[29] Coffee thus claimed:

> All that is necessary for the [legal] bonding hypothesis to have validity is that the defendant's perceived risk of liability rises at least marginally with its entry into the U.S. markets… If, as a result, the controlling persons of the foreign issuer provide superior disclosure or consume less private benefits of control… then the value of the public shares in such companies should logically rise (and it does).[30]

While theoretically sound, the legal bonding hypothesis coincides with additional, equally plausible theories on the factors that may motivate firms' cross-listing decisions. Siegel has advanced a theory and supporting empirical findings on "reputational bonding", showing that cross-listed firms may invest in reputational assets in lieu of weakly enforced laws.[31] In this theory, reputational intermediaries such as analysts, investment bankers, and institutional shareholders screen the foreign issuer's compliance with legal rules and additional market norms, especially with regard to full and timely disclosure. This bonding theory expands on the general theory of reputation as a credible commitment device.[32]

I have criticized the legal analysis underlying several elements of the early version of the bonding hypothesis, which leave liability for securities fraud as the only

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[28] *See* Stulz, *supra* note 20; Coffee, *supra* note 20. The image of Ulysses tying himself to the ship's mast so as not to heed the Sirens' call immediately comes to mind. Jensen and Meckling formalized this notion in their agency theory, in which agents may want to incur bonding costs in order to facilitate contracting at the shadow of opportunism. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

[29] *See* Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *What Works in Securities Laws?*, 61 J. FIN. 1 (2006).

[30] John C. Coffee, Jr., *Racing Towards The Top?: The Impact of Cross-Listing and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1796 (2002).

[31] *See* Siegel, *supra* note 17.

[32] *See* Douglas W. Diamond, *Monitoring and Reputation: The Choice between Bank Loans and Directly Placed Debt*, 99 J. POL. ECON. 689 (1989); Douglas W. Diamond, *Reputation Acquisition in Debt Markets*, 97 J. POL. ECON. 828 (1989); Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981); for a survey *see* Jonathan M. Karpoff, *Does Reputation Work to Discipline Corporate Misconduct?* In THE OXFORD UNIVERSITY HANDBOOK OF CORPORATE REPUTATION 361 (Michael L. Barnett & Timothy G. Pollock eds. 2012).

plausible basis for legal bonding.[33] Liability due to public enforcement by the Securities and Exchange Commission ("SEC"), however, has not been a primary source of threat in light of an ostensibly lenient, "hands off" approach towards foreign issuers.[34] This renders public enforcement a non-credible basis for legal bonding and would thus narrow the basis of liability-based legal bonding to civil liability. More importantly, I have also emphasized that any form of regulation that would support legal bonding arguably to attract foreign issuers to U.S. markets is also likely to exert an opposite, deterrent effect. This is because corporate insiders who stand to benefit from non-compliance would rather avoid more stringent regulation - hence, the "avoiding hypothesis". The upshot of the above is that in addition to the several different motivations for cross-listing even bonding-motivated cross-listing is susceptible to the effect of several, sometimes conflicting, factors. Stulz thus acknowledges that "some firms will choose stronger securities laws than those of the country in which they are located and some firms will do the opposite."[35]

B. Complex Legal Regimes

Before moving to the empirical assessment the legal bonding theory, this section takes another look at the complexity of the legal regime that firms become subject to consequent to a foreign listing. The key insight is that cross-listing firms may be able to exceed their home-country institutional possibility frontier but they cannot leave it entirely behind. The level of impact exerted by each legal system

[33] *See* Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, 4 CHI. J. INT'L L. 141 (2003).

[34] *See* Licht, *supra* note 33; Natalya Shnitser, *A Free Pass for Foreign Firms? An Assessment of SEC and Private Enforcement Against Foreign Issuers*, 119 YALE L.J. 1638 (2010); *compare* Coffee, *supra* note 30, at 1794-95; Roger Nelson Silvers, *The Valuation Impact of SEC Enforcement Actions on Non-Target Foreign Firms*, Working Paper (2012); *see* also Jordan I. Siegel & Yanbo Wang, *Cross-Border Reverse Mergers: Causes and Consequences*, Harvard Business School Strategy Unit Working Paper No. 12-089 (2013).

[35] Rene M. Stulz, *Securities Laws, Disclosure, and National Capital Markets in the Age of Financial Globalization*, 47 J. ACCT. RES. 347, 349 (2009).

varies across different issue areas.[36] Certain topics may effectively be influenced by one legal system, while others may be influenced by both systems, to a different degree by each. This relative level of influence varies with the extent to which an issue area is company-oriented or rather transaction-oriented (trading-oriented).

Consider a security that is cross-listed on two markets in two jurisdictions. In such a scenario, two potential sources of law affect the security and all the stakeholders related to it: the legal regime of the domestic (home) market and the regime of the foreign (host) market. As a general matter, the domestic market will be the country where the company is incorporated and headquartered. In most cases it is also where the lion's share of trading takes place.

Traditionally, the location of an issue area along the second dimension would depend on the extent to which the issue is classified as relating to either "company law" or "securities regulation". The more a certain subject could be classified as a "company law" issue, the more it would be governed by a single legal regime, usually the home market. On the other hand, the more an issue could be classified as a "securities regulation" one, the more likely it is that both systems would have a claim to regulate it. The distinction between "company law" and "securities regulation" has never been clear-cut.[37] However, during the last decade this distinction had become even fuzzier as host markets began to intervene in corporate governance issues that used to be the realm of the home country - for instance, with regard to board composition in terms of the share of independent directors.

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[36] The following draws on Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets*, 38 VA. J. INT'L L. 563 (1998).

[37] For a discussion of this distinction *see* Amir N. Licht, *International Diversity in Securities Regulation: Roadblocks on the Way to Convergence*, 20 CARDOZO L. REV. 227 (1998).

A graphic presentation may be useful for illustrating the abstract argument. Consider a two-dimensional space where one dimension stands for the issue area. An issue may be entirely company-related - for example, the definition of the bundle of rights attached to the security or the structure and operation of company institutions such as the board of directors, committees, etc. Alternatively, an issue area may be entirely transaction-related such as rules concerning insider trading. Finally, it could be a combination of both aspects. The second dimension represents the level of influence by each of the two potentially applicable legal systems. Legal impact may stem solely from one system, or from the other, or be a combination of both.

Figure 2 depicts this model. The x-axis representa the sources of law. An issue area governed solely by domestic law would lie on the left-hand side of the space; vice versa for issues regulated entirely by the host country. If both the domestic and foreign legal systems claim an interest in regulating the issue it would lie in some mid-point along this axis. The y-axis represents the nature of the issue. A purely issuer-oriented subject would lie at the top area of the space; purely transaction-oriented issues would lie along the bottom. Mixed issues would lie in the mid-range.

[Figure 2 about here]

To get a feeling about the working of this presentation model, consider the core of company law. As noted above, by convention this issue is generally governed by the issuer's home country (domestic) law. Therefore, it is located in the upper left corner of the square as depicted by box no. 1. Next, consider disclosure duties owed by the company and its insiders with regard to a non-U.S. firm that is cross-listed in the United States. The scope of U.S.-mandated disclosure varies according to the type of cross-listing (so called "levels"), such that box no. 2, which represents this issue, may be located on nearly any point along the x-axis. Finally, consider insider trading. This is a purely transaction related issue, so it lies along the bottom of the square. Since insider trading can take place in any of the markets where the stock trades, each country is expected to prescribe some laws with regard to it. To be sure, the particular manner of regulation may vary from strict prohibition coupled with severe sanctions to open tolerance of the conduct, but some policy is likely to exist in both countries. Box no. 4 is thus depicted in the middle of the bottom side of the space.[38]

C. The Evidence

Substantial evidence suggests that a U.S. cross-listing could be beneficial, especially for firms from emerging economies.[39] Evidence directly in support of legal bonding is limited, however. The empirical challenge of identifying causality is considerable. One has to show that it is the legal system which "makes the bonding stick" - both by setting better rules *and* by inducing compliance with these rules. The former element may be difficult to show but is at least observable: one could compare the laws of two countries and try to rank them. This is no small feat in its own right and scholarly debates rage over such rankings.[40] The latter element, of the compliance mechanism, is even more elusive. Legal bonding implies that compliance

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[38] For brevity, other points depicted in Figure 2 are not elaborated on. *See* Licht, *supra* note 36.

[39] *See* Karolyi, *supra* note 2 for a detailed survey of this evidence. *See*, in particular, Ugur Lel & Darius P. Miller, *International Cross-listing, Firm Performance and Top Management Turnover: A Test of the Bonding Hypothesis*, 63 J. FIN. 1897 (2008) (top management turnover); Michael R. King & Dan Segal, *The Long-Term Effects of Cross-Listing, Investor Recognition, and Ownership Structure on Valuation*, 22 REV. FIN. STUD. 2293 (2009) (investor recognition); Luzi Hail & Christian Leuz, *Cost of Capital Effects and Changes in Growth Expectations around U.S. Cross-Listings*, 93 J. FIN. ECON. 428 (2009) (cost of capital); Laurent Frésard & Carolina Salva, *The Value of Excess Cash and Corporate Governance: Evidence from U.S. Cross-Listings*, 98 J. FIN. ECON. 359 (2010) (value of excess cash); Ryan T. Ball, Luzi Hai, & Florin P. Vasvari, *Equity Cross-Listings in the U.S. and the Price of Debt*, Working Paper (2013) (price of debt).

[40] For a brief discussion in the cross-listing context *see* Licht, *supra* note 33. *See*, generally, Holger Spamann, The "Antidirector Rights Index" Revisited, 23 REV. FIN. STUD. 467 (2010); *see* also Priya P. Lele & Mathias M. Siems, *Shareholder Protection: A Leximetric Approach*, 7 J. CORP. L. STUD. 17 (2007); Mathias M. Siems, *Shareholder Protection Around the World (Leximetric II)*, 33 Del. J. CORP. L. 111 (2008); John Armour et al., *How Do Legal Rules Evolve? Evidence From a Cross-Country Comparison of Shareholder, Creditor, and Worker Protection*, 57 AM. J. COMP. L. 579 (2009).

obtains because of the legal system - due to deterrence - as opposed to voluntary compliance. A good deal of the literature assumes, but does not show, that beneficial effects associated with a U.S. cross-listing can be attributed to legal bonding. In tandem, there is substantial evidence for the reputational bonding and the avoiding hypotheses. This section briefly points to the evidence.

Firstly, the multiplicity of possible financial or strategic motivations for cross-listing described above may lead to identification problems due to endogeneity beyond any corporate governance factors.[41] Evidence for the avoiding hypothesis has been accumulating recently.[42] The main challenge, however, concerns the need to disentangle legal bonding from reputational bonding. Some studies ignore this distinction and refer simply to "bonding".[43] Several other studies cite both legal and reputational bonding and assume that both play a causal role in engendering the observed beneficial effect.[44] Yet other studies find direct evidence consistent with reputational bonding irrespective of legal bonding.[45]

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[41] *See* Karolyi, *supra* note 2; Hail & Leutz, *supra* note 39.

[42] *See* Craig Doidge et al., *Private Benefits of Control, Ownership, and the Cross-listing Decision*, 64 J. FIN. 425 (2009); Craig Doidge, Andrew Karolyi & Rene M.Stulz, *Why Do Foreign Firms Leave U.S. Equity Markets?*, 65 J. FIN. 1507 (2010); Ole-Kristian Hope, Tony Kang & Yoonseok Zang, *Bonding to the Improved Disclosure Environment in the US: Firms' Listing Choices and their Capital Market Consequences*, 3 J. CONTEMP. ACCT. ECON. 1 (2007).

[43] *See*, for example, Boubakri et al., *supra* note 42; Franck Bancel, Madhu Kalimipalli & Usha R. Mittoo, *Cross Listing and Long Term Performance of ADRs: Revisiting European Evidence*, 19 J. INT'L FIN. MKTS INSTITUTIONS & MONEY 895 (2009); Michael Melvin & Magali Valero, *The Dark Side of International Cross-Listing: Effects on Rival Firms at Home*, 15 EUR. FIN. MGMT. 66 (2009).

[44] *See* Arturo Bris et al., *A Breakdown of the Valuation Effects of International Cross-Listing*, 13 EUR. FIN. MGMT. 498 (2007); Craig Doidge et al., *Why Are Foreign Firms Listed in the U.S. Worth More?*, 71 J. FIN. ECON. 205 (2004); Ball et al., *supra* note 39; Hail & Leutz, *supra* note 39; Lel & Miller, *supra* note 39.

[45] *See* Frésard & Salva, *supra* note 39; Steven Crawford, *The Role of Market Forces and Legal Institutions in Bonding Cross-Listed Firms*, Working Paper, Rice University (2009); John Ammer et al., Why Do U.S. Cross-Listings Matter?, Board of Governors of the Federal Reserve System, International Finance Discussion Paper 930 (2008); *see* also Natasha Burns et al., *Cross-Listing and Legal Bonding: Evidence from Mergers and Acquisitions*, 31 J. BANKING FIN. 1003 (2007); King & Segal, *supra* note 39; Kate Litvak, *The Relationship among US Securities Laws, Cross-listing Premia and Trading Volumes*, Working Paper (2009).

A handful of studies tackle the empirical challenge systematically. Doidge, Karolyi, Lins, Miller, and Stulz argue that "direct U.S. securities laws and enforcement are more important constraints in the extraction of private benefits than is the scrutiny of financial analysts."[46] These authors find that analyst coverage increases invariably for all types (so-called "levels") of foreign listings, regardless of the firm's involvement in the U.S. capital market, suggesting that such coverage does not explain cross-listing benefits. Two parallel studies exploit a legal reform that made it easier for cross-listed firms to delist and deregister from the American market.[47] Their findings suggest that the market reacted more negatively to this reform with regard to firms from countries with weak disclosure and governance regimes. While the listing mechanism is legally-based and may be instrumental for long-term bonding, it still leaves open the question which mechanism may induce compliance - whether it is legal deterrence or reputational motivations. In an illuminating review of the legal bonding theory circa 2012, Karolyi thus tentatively observes: "A proper verdict about the bonding hypothesis, especially of its purer 'legal' form, has not yet been fully rendered. I think a more complete understanding of the enforcement mechanisms around the world, their financial needs as inputs and the full scope of legal outcomes is still needed."[48]

To foreshadow the next section, the U.S. Supreme Court's decision in *Morrison* provided an opportunity to address the legal bonding theory. In a joint study with Siegel, Poliquin, and Li, we examined the reactions of market participants to this case, which denied the right to sue for securities fraud in a U.S. class action

[46] Doidge et al., *supra* note 42, at 428.

[47] *See* Nuno Fernandes, Ugur Lel & Darius P. Miller, *Escape from New York: The Market Impact of Loosening Disclosure Requirements*, 95 J. FIN. ECON. 129 (2010); Doidge et al, *supra* note 42.

[48] G. Andrew Karolyi, *Corporate Governance, Agency Problems and International Cross-Listings: A Defense of the Bonding Hypothesis*, 13 EMERGING MARKETS REV. 516, 524 (2012).

from investors who traded outside the United States, thus practically shielding cross-listed firms from civil liability toward such investors.[49] Surprisingly, we fail to find negative reactions to this exclusionary effect. In fact, our findings even suggest the possibility of a positive reaction, which is inconsistent with the legal bonding theory.[50] Investor behavior after the case further suggests that having this cause of action is not a significant concern in choosing a trading venue. In a study that appeared after a preliminary version of this study came out, Gagnon and Karolyi also examine the economic consequences of *Morrison*. These authors, too, fail to find in their sample a significant change in firms' market value on the oral argument focal event. This is in contrast to what the legal bonding hypothesis implies and is therefore not inconsistent with our results in this respect. Finally, in line with our broad-based findings on trading patterns, Bartlett in a uniquely detailed dataset on institutional investors' trading fails to find any significant change in their choice of trading venue, suggesting that they may not sufficiently value a private right of action for securities fraud.[51]

IV. CIVIL LIABILITY AS AN ENFORCEMENT MECHANISM

In light of the foregoing discussion, this part addresses the role enforcement plays in the efficacy of the complex legal regime that applies to cross-listed firms. Indeed, enforcement may not only be significant but is outright crucial for the legal

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[49] *See* Amir N. Licht et al., *What Makes the Bonding Stick? A Natural Experiment Involving the U.S. Supreme Court and Cross-Listed Firms*, Harvard Business School Strategy Unit Working Paper No. 11-072 (2014).

[50] The staff of the U.S. Securities and Exchange Commission has repeated some of our analyses using their data and obtained consistent results. SECURITIES AND EXCHANGE COMMISSION (SEC), STUDY ON THE CROSS-BORDER SCOPE OF THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934 (2012).

[51] *See* Robert P. Bartlett, Do Institutional Investors Value the 10b-5 Private Right of Action? Evidence from Investor Trading Behavior Following *Morrison v. National Australia Bank Ltd*. UC Berkeley Public Law Research Paper No. 2171006 (2012).

regulation of such firms. In terms of formal regulation - namely, the content of legal rules - there has been a sweeping trend of convergence in recent years in relation to securities regulation. For example, the adoption of the International Financial Reporting Standards ("IFRS") by nearly all of the important market economies except the United States has eliminated much of the cross-country variability in financial reporting. Directives of the European Union ("E.U."), especially on disclosure and on market abuse, have worked further to eliminate such variability, at least in terms of the "law on the books" in E.U. Member States. Against this backdrop, compliance with formal regulation - and in particular, the mechanisms that may induce such compliance - becomes a key issue for policy makers. The first section of this part explains the importance of enforcement for effective regulation. The next section focuses on civil liability as a private enforcement mechanism against securities fraud. The final section points to problems in and challenges to civil liability in the current legal environments.

A. Enforcement: The Importance of Being Earnest

Disclosure helps in mitigating agency problems and is therefore generally believed to be desirable. More accurate and timely disclosure also helps market participants to better price financial assets.[52] Firms in certain circumstances may have some incentive to make voluntary disclosure,[53] but on the whole, securities regulation regimes impose mandatory disclosure requirements and rely on deterrence to curb

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[52] For surveys *see* Anne Beyer et al., *The Financial Reporting Environment: Review of the Recent Literature*, 50 J. ACCT. & ECON. 296 (2010); Luca Enriques & Sergio Gilotta, *Disclosure and Financial Market Regulation*, in THE OXFORD HANDBOOK ON FINANCIAL REGULATION (Eilís Ferran, Niamh Moloney, & Jennifer Payne, eds. forthcoming).

[53] *See* Stephan Hollander, Maarten Pronk, & Erik Roelofsen, *Does Silence Speak? An Empirical Analysis of Disclosure Choices during Conference Calls*, 48 J. ACCT. RES. 531 (2010); Abby Kim, *The Value of Firms' Voluntary Commitment to Improve Transparency: The Case of Special Segments on Euronext*, 25 J. CORP. FIN. 342 (2014); *see* specifically with regard to cross-listed firms Ole-Christian Hope, Tony Kang, & Joung W. Kim, *Voluntary Disclosure Practices by Foreign Firms Cross-Listed in the United States*, 9 J. CONTEMP. ACCT. ECON. 50 (2013).

fraud. Consistent with these general insights, committing to better disclosure is a central theme in several theories on motivations for cross-listing. The underlying notion is that more extensive disclosure is beneficial to investors as a means for mitigating agency costs and, therefore, to the firm and to its insiders.[54] Evidence further shows that cross-listings are associated with improving firms' informational environment.[55]

Enforcement and reputation stand out as particularly important among the mechanisms that can make firms' commitment to better disclosure credible. From Bentham to Becker and beyond,[56] conventional analysis implies that vigorous expected enforcement should increase compliance. The efficacy of enforcement depends on a well-functioning legal system, including public authorities that investigate breaches and impose punishments and a civil liability system that provides injured parties with effective remedies against wrongdoers.[57] Enforcement thus may be conceptualized as a third dimension for assessing the legal regime that applies to cross-listed firms, in addition to the two dimension depicted in Figure 2.

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[54] *See* Khaled Amira & Mark L. Muzere, *Competition among Stock Exchanges for Equity*, 35 J. BANKING FIN. 2355 (2011); Thomas J. Chemmanur & Paolo Fulghieri, *Competition and Cooperation Among Exchanges: A Theory of Cross-Listing and Endogenous Listing Standards*, 82 J. FIN. ECON. 455, 457 (2006); Steven Huddart, John Hughes & Markus Brunnermeier, *Disclosure Requirements and Stock Exchange Listing Choice in an International Context*, 26 J. ACCT. & ECON. 237 (1999); Oren Fuerst, *A Theoretical Analysis of the Investor Protection Regulations Argument for Global Listing of Stocks*, Int'l Center for Fin. at Yale, Working Paper (1998); for a policy analysis *see* Amir N. Licht, *Stock Exchange Mobility, Unilateral Regulation, and the Privatization of Securities Regulation*, 41 VA. J. INT'L L. 583 (2001).

[55] *See*, for example, Nuno Fernandes & Miguel A. Ferreira, *Does International Cross-Listing Improve the Information Environment?*, 88 J. FIN. ECON. 216 (2008); Shingo Goto, Masahiro Watanabe, & Yan Xu, *Strategic Disclosure and Stock Returns: Theory and Evidence from US Cross-Listing*, 22 REV. FIN. STUD. 1585 (2009).

[56] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1970) (1789); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

[57] *See*, generally, Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 49 UCLA L. REV. 781 (2001).

As the theory of institutional possibility frontiers implies and evidence confirms, countries vary in the legal duties they promulgate and in the apparatus they deploy to enforce them, especially with regard to investor protection.[58] In contrast, reputation relies on self-discipline that leads actors credibly to commit to lawful (or cooperative, or otherwise non-opportunistic) behavior by creating reputational assets.[59] Evidence indeed shows that firms' non-compliance entails both legal and reputational costs.[60] To make things more complex yet, enforcement and reputation as compliance-inducing mechanisms interact with one another.[61] Specifically, enforcement measures - both public enforcement steps implemented by regulators and private enforcement through litigation - may be needed for triggering the imposition of reputational penalties by market participants.[62]

Putting reputational mechanisms aside and focusing on legal enforcement, several studies analyze the role of public versus private enforcement in disclosure regimes. Both types of enforcement engender deterrence, which is needed to overcome insiders' inclination to hide or delay bad news because they may fear getting sued.[63] Between these two types, a growing body of evidence now shows that

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[58] *See* La Porta et al., *supra* note 29; Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207 (2009).

[59] *See* Diamond, *supra* note 32; Klein & Leffler, *supra* note 32.

[60] *See* Karpoff, *supra* note 32.

[61] *See* Edward M. Iacobucci, *On the Interaction between Legal and Reputational Sanctions*, 43 J. LEGAL STUD. 189 (2014); Scott Baker & Albert Choi, *Managing Reputation with Litigation: Why Legal Sanctions Can Work Better than Market Sanctions*, Working Paper (2013).

[62] *See* John Arrmour, Colin Mayer, & Andrea Polo, *Regulatory Sanctions and Reputational Damage in Financial Markets*, Working Paper, Saïd Business School (2011); with regard to private enforcement through securities class actions *see* Brian Carson McTier & John K. Wald, *The Causes and Consequences of Securities Class Action Litigation*, 17 J. CORP. FIN. 649 (2011); Mark L. Humphery-Jenner, *Internal and External Discipline Following Securities Class Actions*, 21 J. FIN. INTERMEDIATION 151 (2012); *See,* generally, Karpoff, *supra* note 32.

[63] *See* Douglas J. Skinner, *Why Firms Voluntarily Disclose Bad News*, 32 J. ACCT. RES. 38 (1994); S.P. Kothari, Susan Shu & Peter Wysocki, *Do Managers Withhold Bad News?* , 47 J. ACCT. RES. 241 (2009).

a solid infrastructure of public enforcement, that in turn relies on informal social institutions of law-abidingness, are needed for making a country's disclosure regime efficacious.

Jackson and Roe thus show that the scope of regulatory staff and budget positively affects financial market outcomes.[64] In an especially important study, Christensen, Hail, and Leuz investigate the implementation of market abuse and transparency directives in E.U. Member States, finding positive effects, which are larger in countries that implement and enforce the directives more strictly. These effects are also stronger in countries with traditionally stricter securities regulation and with a better prior track record of implementing regulation and government policies.[65] These authors obtain consistent results with regard to the adoption of IFRS accounting standards - namely, that beneficial (market liquidity) effects are limited to five E.U. countries that concurrently made substantive changes in reporting enforcement.[66] There is little evidence of liquidity benefits in IFRS countries without substantive enforcement changes even when they have strong legal and regulatory systems. At the firm level of analysis, Daske, Hail, Leuz, and Verdi argue that capital market benefits to more transparent firms accrue only to firms from countries where the rule of law prevails.[67] Bhattacharya and Daouk similarly show that the cost of equity actually rises when some countries enact an insider trading law, but do not enforce it, indicating that sometimes "no law is better than a good law (that remains a

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[64] Jackson & Roe, *supra* note 58.

[65] *See* Hans B. Christensen, Luzi Hail & Christian Leuz, *Capital-Market Effects of Securities Regulation: Prior Conditions, Implementation, and Enforcement*, ECGI Finance Working Paper No. 407/2014 (2013).

[66] *See* Hans B. Christensen, Luzi Hail & Christian Leuz, *Mandatory IFRS Reporting and Changes in Enforcement*, 56 J. ACCT. ECON. 147 (2013).

[67] *See* Holger Daske et al., *Mandatory IFRS Reporting Around the World: Early Evidence on the Economic Consequences*, 46 J. ACCT. RES. 1085 (2008).

dead letter)".[68] Finally, Bushman and Piotroski find that firms in countries with strong public enforcement are more conservative, but private enforcement (disclosure and litigation) has no impact on conservative financial reporting.[69]

This is all nice and well, but of relatively little relevance for cross-listed firms. That is, it is now undisputed that vibrant public enforcement is pivotal for the efficacy of a securities regulation regime. In a cross-listing setting, such enforcement in theory could come from the issuer's home-country regulator as well as it host-country regulator, wherein the more stringent enforcement regime would dominate.[70] As noted above, however, public enforcement against foreign issuers in the United States is minimal at best, even if some sporadic enforcement might take place occasionally.[71] While there could have been an idiosyncratic enforcement action vis-à-vis foreign issuers in other jurisdictions, I am not aware of any systemic enforcement efforts of this type. The upshot is that host-country public enforcement cannot be relied on as a legal bonding mechanism, leaving private enforcement as the remaining candidate for this task.

B. Private Enforcement and its Predicaments

In their study entitled *What Works in Securities Laws*, La Porta, Lopez-de-Silanes, and Shleifer argued that it is mandating disclosure and facilitating private

[68] *See* Utpal Bhattacharya & Hazem Daouk, *When No Law is Better than a Good Law*, 13 REV. FIN. 577 (2009); *see* also Bhattacharya & Hazem Daouk, *The World Price of Insider Trading*, 57 J. FIN. 75 (2002); Mark DeFond, Mingyi Hung & Robert Trezevant, *Investor Protection and the Information Content of Annual Earnings Announcements: International Evidence*, 43 J. ACCT. & ECON. 37 (2007); Mark Humphery-Jenner, *Strong Financial Laws Without Strong Enforcement: Is Good Law Always Better than No Law?*, 10 J. EMPIRICAL LEGAL STUD. 288 (2013).

[69] *See* Robert M. Bushman & Joseph D. Piotroski, *Financial Reporting Incentives for Conservative Accounting: The Influence of Legal and Political Institutions*, 42 J. ACCT. & ECON. 107 (2006); see also Ole-Kristian Hope, *Disclosure Practices, Enforcement of Accounting Standards, and Analysts' Forecast Accuracy: An International Study*, 41 J. ACCT. RES. 235 (2003).

[70] *See supra* Figure 2 and accompanying text.

[71] *See supra* note 34 and accompanying text.

enforcement through civil liability rules that benefit stock markets (while discounting the role of public enforcement).[72] In connection with cross-listing and legal bonding Coffee argued that the market appreciates civil liability as "a powerful engine of private enforcement (e.g., the contingent fee-motivated plaintiffs bar) [that] stands ready to enforce U.S. legal rules."[73] Coffee further underscored the qualities of the U.S. class action in this regard:

> Very few other jurisdictions recognize the class action, and virtually none has any experience with it in the securities law context. Equally important, U.S. law accepts the contingent fee and the practice of awarding relatively high fee awards to the successful attorney in a class action. Finally, the "American Rule" on fee shifting, under which each side generally bears its own expenses, means that an unsuccessful plaintiff does not face liability for the defendant's typically greater expenses. All these elements combine to create an entrepreneurial system of private enforcement in the United States that is not paralleled elsewhere.[74]

Securities fraud class actions are a mixed blessing, however. To begin on a positive note, McTier and Wald present evidence consistent with the notion that securities class actions draw attention to agency problems in the firms, which are then at least partly resolved.[75] Humphery-Jenner similarly argues that class actions may be conducive to mitigating agency problems by promoting disciplinary takeovers, CEO turnover and pay-cuts, and may harm CEOs' future job-prospects.[76] Several studies associate litigation risk (namely, exposure to securities class actions) with more timely disclosure of bad news.[77] This evidence predominantly refers to U.S. firms.

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[72] *See* La Porta et al., *supra* note 29.

[73] *See* Coffee, *supra* note 30, at 1788.

[74] Coffee, *supra* note 30, at 1780.

[75] *See* McTier & Wald, *supra* note 62.

[76] *See* Humphery-Jenner, *supra* note 62.

[77] *See* Laura Field et al., *Does Disclosure Deter or Trigger Litigation?*, 39 J. ACCT. & ECON. 487 (2005); Dain C. Donelson et al., *The Timeliness of Bad Earnings News and Litigation Risk*, 87 ACCT. REV. 1967 (2012); *See* also Douglas J. Skinner, *Earnings Disclosures and Stockholder Lawsuits*, 23 J. ACCT. & ECON. 249 (1997).

On the other hand, securities class actions have engendered a vast literature criticizing their merit and general desirability as a means for imposing civil liability in the secondary market.[78] In the United States, a 1995 legal reform to the civil liability regime has reduced the problem of meritless "strike-suits", that are filed solely to extract settlements for their nuisance value to the firm. Yet the reform yielded mixed results, such that the general desirability of class-action based antifraud liability remains debatable.[79]

The most fundamental difficulty in securities class actions regarding secondary market transactions stems from the "circularity problem".[80] Briefly, for any transaction in the secondary market affected by fraud by the issuers or its insiders, one investor's loss is the counterparty's gain (hence "circularity"). Current public shareholders end up paying past shareholder - where the two groups at least partially overlap - for insiders' misdeeds, either by way of compensation or through insurance policies, which in either case are funded from the company's coffers (hence again

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[78] *See*, for example, Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487 (1996); John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534 (2006); Paul G. Mahoney, *Precaution Costs and the Law of Fraud in Impersonal Market*, 78 VA. L. REV. 623 (1992); Paul G. Mahoney, *The Development of Securities Law in the United States*, 47 J. ACCT. RES. 325 (2009); Joel Seligman, *Rethinking Private Securities Litigation*, 73 U. CIN. L. REV. 95 (2004); *see*, generally, Steven A. Ramirez, *The Virtues of Private Securities Litigation: An Historic and Macroeconomic Perspective*, 45 LOY. U. CHI. L.J. 669 (2014). Note that Coffee thus seems to be of two minds with regard to the desirability of securities class actions against cross-listed firms. For a discussion *see* John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229 (2007) (hereinafter Coffee 2007).

[79] For a review *see* 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 (2009).

[80] *See*, for example, James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497 (1997); Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 ARIZ. L. REV. 639 (1996); Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691; Paul G. Mahoney, *Precaution Costs and the Law of Fraud in Impersonal Markets*, 78 VA. L. REV. 623 (1992); for a summary *see* Merritt B. Fox, *Civil Liability and Mandatory Disclosure*, 109 COLUM. L. REV. 237 (2009)*; Compare* James J. Park, *Shareholder Compensation as Dividend*, 108 MICH. L. REV. 323 (2009); Jill E. Fisch, *Confronting the Circularity Problem in Private Securities Litigation*, 2009 WIS. L. REV. 333; *see* also Lawrence E. Mitchell, *The "Innocent Shareholder": An Essay on Compensation and Deterrence in Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 243.

"circularity"). In any event, it is virtually undisputed that insiders who committed fraud rarely have to pay anything directly. This, while attorneys pocket just about half of the direct costs paid by the firm.[81] That insurers provide additional products to the firms might be the reason that multiple generations of managers at the same companies repeatedly violate the securities laws.[82]

In the domestic U.S. context scholars thus call for radical reforms in the securities fraud civil liability regime. For example, Fox goes as far as to argue that an issuer not publicly offering securities at the time of a disclosure violation (namely, fraud) should have no liability.[83] Rose calls for consolidating the enforcement authority now shared between federal regulators, state regulators, and class action lawyers in a federal agency, such as the SEC, and to grant that agency exclusive authority to prosecute national securities frauds.[84] Without delving into the details of these ideas, it is clear that they reflect deep misgivings about the current U.S. regime.[85]

C. Civil Liability in Cross-Listed Firms

All of the above holds *a fortiori* with regard to firms cross-listed in the United States, in addition to legal issues that are unique to imposing transnational civil liability for securities fraud on such firms. The latter factor will be discussed in the

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[81] *See* Judson Caskey, *The Pricing Effects of Securities Class Action Lawsuits and Litigation Insurance*, J. L. ECON. & ORG. (forthcoming).

[82] *See*, generally, TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION (2010); for consistent evidence in cross-listed firms *see* Siegel, note 17.

[83] *See* Fox, *supra* note 80.

[84] *See* Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173 (2010); *compare* James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CALIF. L. REV. 115 (2012).

[85] A heated debate has been raging in the United States with regard to the fraud on the market doctrine. Though the issue is related to the present discussion it exceeds the present scope. Just recently, the U.S. Supreme Court decided to keep this doctrine intact, with a minor procedural modification. *See Halliburton Co. v. Erica P. John Fund, Inc.,* 573 U.S. ____ (2014).

following section. Legal scholar who addressed the appropriateness of the current class-action-based civil liability for cross-listed firms have unsurprisingly coalesced around a consensus that it is undesirable. Citing the weaknesses of the current U.S. regime - in particular, the circularity problem - Langevoort has opined that "a case can be made for some pull back in terms of antifraud liability exposure in private actions" against cross-listed firms.[86] In a comprehensive and insightful analysis of this subject, Fox argues that the U.S. regime should not as a general matter be imposed upon any genuinely foreign issuer, even where the claimant is a U.S. investor purchasing shares in a U.S. market or where the issuer engages in significant conduct in the United States relating to the misstatement.[87] The only exception, he argues, would be a foreign issuer that has agreed, as a form of bonding, to be subject to the U.S. regime. Determining a foreign issuer's "national identity" is key in this applying this theory. Recognizing this challenge, Guseva in a similar spirit calls for adopting a regulatory approach that takes into account the foreign issuer's home-country institutions.[88]

These views are backed by evidence on the securities fraud liability that cross-listed firm may face in the United States. Siegel's field work on cross-listed firms examined in detail the actual operation of the civil liability regime among firms and securities lawyers, confirming that in these firms, too, virtually all cases end in

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[86] *See* Donald C. Langevoort, *U.S. Securities Regulation and Global Competition*, 3 VA. L. & BUS. REV. 191, 199 (2008); *see* also Coffee 2007, *supra* note 78.

[87] *See* Merritt Fox, *Securities Class Actions against Foreign Issuers*, 64 STAN. L. REV. 1173 (2012); *see* also Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom*, 95 MICH. L. REV. 2498 (1997); Merritt B. Fox, *The Political Economy of Statutory Reach: U.S. Disclosure Rules in a Globalizing Market for Securities*, 97 MICH. L. REV. 696 (1998).

[88] *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); *compare* Steven M. Davidoff, *Rhetoric and Reality: A Historical Perspective on the Regulation of Foreign Private Issuers*, 79 U. CIN. L. REV. 619 (2010).

settlement that is paid by insurers.[89] In a recent study of markets' reaction to the filing of class actions against foreign firms, Gande and Miller find in their extended sample a negative market response estimated at some $73 billion for 1996-2008.[90] As noted above, in a joint study with Siegel and others, we find that when the *Morrison* Court signaled its intention to deny non-U.S. trades a federal cause of action for securities fraud, market participants responded with indifference or even positively and did not seem to change their trading patterns to secure such a cause of action by trading in U.S. markets.[91] This evidence suggests that market participants do not consider the U.S. class-action-based private enforcement regime of civil liability a valuable mechanism for ensuring full disclosure and good corporate governance more generally.

Implementing civil liability through a U.S.-style class action mechanism is controversial among policy-makers in other countries as well. Several other countries during the last decade have adopted some type of class actions, and a small number among them have adopted a full-fledged "American-style" class action mechanism. These reforms deal with mass torts in general and are not limited to securities fraud liability.[92] However, in the securities area, governments that responded to the study that the Dodd-Frank Act instructed the SEC to conduct after the *Morrison* decision cited different approaches to implementing civil liability for securities fraud. The British Government in particular voiced fundamental disagreement "as to the

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[89] *See* Siegel, note 17.

[90] *See* Amar Gande & Darius P. Miller, *Why Do U.S. Securities Laws Matter to Non-U.S. Firms? Evidence from Private Class-Action Lawsuits*, Working Paper (2012); *see* also Elaine Buckberg & Max Gulker, *Cross-Border Shareholder Class Actions Before and After* Morrison, NERA Economic Consulting, Working Paper (2011).

[91] *See* Licht et al., *supra* note 49.

[92] *See* Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306 (2011).

desirability and appropriateness of even having a private right of action against an issuer for securities fraud", citing the circularity problem and high costs.[93] Against this backdrop, and having replicated the gist of our findings by its staff, the SEC responded to Congress's mandate by providing a detailed review of several options that Congress might take but eschewed any explicit recommendation in favor of extending U.S. securities fraud liability beyond the scope that the *Morrison* Court has delineated.[94]

*D. Private Enforcement Post-*Morrison

The *Morrison* decision has been nothing short of a watershed event for the regulation of global capital markets. In *Morrison*, the U.S. Supreme Court discarded, in harsh terms, forty years of jurisprudence on the international application of the federal civil liability regime for securities fraud. The Court's novel territorial test indeed responded to well-reasoned calls for scaling back the scope of this liability, yet it did so in a manner that reflected deeper currents in U.S. law with regard to the United States' regulatory role on the global scene and, not less importantly, about the role of courts and on statutory interpretation.[95] Lower U.S. courts took cue from *Morrison* and applied it forcefully to ensure that only U.S.-located full transactions would be covered by the U.S. civil liability regime.[96] With respect, this judicial approach at times exhibits a certain zeal that even exceeds the textualist interpretation that the Supreme Court insisted on in *Morrison*.[97]

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[93] *See* SEC, *supra* note 50, at 24.

[94] *See* SEC, *supra* note 50.

[95] *Compare Kiobel v. Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (2013).

[96] *See*, as of this writing, *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, No. 12-4355 (2d Cir. 2014) and cases cited therein.

[97] In *City of Pontiac* the United States Court of Appeals for the Second Circuit rejected the so-called "listing theory", holding that *Morrison* bars Exchange Act Section 10(b) claims with respect to the

In assessing the road ahead with regard to transnational civil liability for securities fraud, scholars have looked introspectively at remaining avenues within American law. Buxbaum's thorough analysis of the law post-*Morrison* identifies two such avenues: litigation brought in U.S. federal courts under foreign securities laws, and participation in FAIR (Federal Account for Investor Restitution) fund distributions ordered by the SEC.[98] Both of these ways are fraught with difficulties and neither of them provides an equal substitute for pre-*Morrison* law. One may note in particular that the distribution to injured investors of amounts recovered as penalties through the FAIR Fund mechanism depends on an SEC public enforcement action and on the SEC's discretion.[99] In light of the inherent deficiencies of the U.S. class action regime as it is currently designed, one is hard pressed to argue for expanding it further. One might further conjecture that the "foreigners need not apply" atmosphere, which characterizes post-*Morrison* decisions in lower federal courts, could also affect future litigation based on foreign securities laws in American courts.

In tandem, commentators have also looked extrospectively, with regard to non-U.S. jurisdictions, to see if non-U.S. traders might find a substitute there for the

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purchase or sale of securities on foreign exchanges when those same securities are cross-listed on a U.S. exchange. This decision, while showing fidelity to *Morrison*'s territorial approach, is inconsistent with the very language of Section 10(b), which runs afoul of the judicial deference to Congressional statutory language called for by *Morrison*. Separately, the Second Circuit ruled that *Morrison* also applies to criminal cases. *See United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013); *see* also Zachary D. Clopton, Bowman *Lives: The Extraterritorial Application of U.S. Criminal Law After* Morrison v. National Australia Bank, 67 N.Y.U. ANN. SURV. AM. L. 137 (2011).

[98] *See* Hannah L. Buxbaum, *Remedies for Foreign Investors Under U.S. Federal Securities Law*, 75 L. & CONTEMP. PROBS. 161 (2012); *see* also Linda J. Silberman, Morrison v. National Australia Bank: *Implications for Global Securities Class Actions*, in EXTRATERRITORIALITY AND COLLECTIVE REDRESS 363 (Duncan Fairgrieve & Eva Lein eds., 2012); Marco Ventoruzzo, *Like Moths to a Flame? International Securities Litigation after* Morrison: *Correcting the Supreme Court's "Transactional Test",* 52 VA. J. INT'L L. 405 (2012).

[99] *See*, generally, Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 BUS. LAW. 317 (2008); Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 FLA. L. REV 1103 (2008).

loss of U.S. federal civil remedies after *Morrison*. Realistically, the chances for that are not great. A more likely outcome, at least in the foreseeable future, is a fragmentation of civil liability litigation among several jurisdictions under their different regimes of mass claim litigation.[100] As Walker, a Canadian, puts it in light of an international survey she conducted: "[E]veryone, at least outside the United States, seems also to agree that they do not want to adopt U.S.-style class actions in their legal systems."[101]

Canadian courts indeed loomed as a potential forum for global securities fraud litigation after the twin decisions in *Imax*, which certified a global class of shareholders that alleged statutory and common law misrepresentation claims.[102] While recovery under the statutory claims is significantly capped, recovery under common law ones need not be, but the latter depends crucially on avoiding the need to show individual reliance. In early 2014, however, in a decision that also related to the *Imax* litigation, the Court of Appeal for Ontario determined that common law negligent misrepresentation claims could not be certified as class actions on the basis of "fraud on the market" or "efficient market" theories.[103] Hopes for reaching mega-settlements in Ontario instead of the Southern District of New York thus diminished accordingly.

The European Union has been another arena for interesting developments about securities fraud liability in connection with broader reform programs on mass

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[100] *See*, with regard to Australia, Peta Spender & Michael Tarlowski, *Adventures on the Barbary Coast:* Morrison *and Enforcement in a Globalised Securities Market*, 35 MELB. U. L. REV. 280 (2011).

[101] *See* Janet Walker, *Who's Afraid of U.S.-style Class Actions?*, 18 SW. J. INT'L 509, 509 (2012); *see* also Hensler, *supra* note 92.

[102] *Silver v. IMAX Corporation* [2009] O.J. Nos. 5573; 5585 (S.C.J.). *See* Tanya Monestier, *Is Canada the New Shangri-La of Global Securities Class Actions?*, 12 NW. J. INT'L L. & BUS. 305 (2012); see also Poonam Puri, *Securities Litigation and Enforcement: The Canadian Perspective*, 37 BROOKLYN J. INT'L L. 967 (2012).

[103] *See Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90.

litigation. Commentators pointed out the Dutch procedure of collective arbitration in this regard.[104] Yet there is consensus that that procedure, while allowing for the grouping of claimants from several jurisdiction, cannot substitute the U.S. class-action based regime for securities fraud. Importantly, resistance to this mode of liability in European and in other civil law jurisdiction is principled, as this mode is at odds with basic conceptions of individual autonomy in private law in these jurisdictions.[105]

V. CONCLUSION

This Chapter has sought to evaluate the state of affairs with regard to liability for transnational securities fraud, in particular, subsequent to the U.S. Supreme Court's seminal decision *Morrison*. In a word, this liability is in a state of flux. The notion that investors who were harmed as a result of a breach of the duty of full disclosure deserve compensation looks compelling, if not self-evident. That the law should implement procedural and substantive rules for helping injured claimants whose claim is too small to pursue individually also sounds hard to quarrel with, and indeed countries around the world are in the process of developing such rules. These policy goals are worth pursuing regardless of whether such civil liability may also serve as a mechanism for legal bonding to improve corporate governance in firms, though the issues are closely related, of course.

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[104] *See*, for example, Silberman, *supra* note 98; *see* also Wulf A. Kaal & Richard W. Painter, *Forum Competition and Choice of Law Competition in Securities Law After* Morrison v. National Australia Bank, 97 MINN. L. REV. 132 (2012); Michael Palmisciano, N*ote: Going Dutch: The Effects of Domestic Restriction and Foreign Acceptance of Class Litigation on American Securities Fraud Plaintiffs*, 53 B.C. L. REV. 1847 (2012); *see*, generally, S.I. STRONG, CLASS, MASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW (2013).

[105] *See* Manning Gilbert Warren III, *The U.S. Securities Fraud Class Action: An Unlikely Export to the European Union*, 37 *Brook. J. Int'l L.* 1075 (2012); *see* also Antonio Gidi, *The Recognition of U.S. Class Action Judgments Abroad: The Case of Latin America*, 37 BROOK. J. INT'L L. 893 (2012); Dana M. Muir, Junhai Liu & Haiyan Xu, *The Future of Securities Class Actions against Foreign Companies: China and Comity Concerns*, 46 U. MICH. J.L. REFORM 1315 (2013).

Civil liability for securities fraud - in a domestic setting and *a fortiori* in a transnational setting - nonetheless entails an especially vicious combination of difficulties that for now defies satisfactory solutions. Without derogating from the need to continue efforts towards reform in the civil liability context, this chapter underscores the importance of public enforcement for protecting the integrity of securities markets. More progress in this direction may be achieved by each country improving its own public enforcement institutions. In addition, although regulatory cooperation is not challenge-free either, investing in regulatory cooperation likely will enhance the effectiveness of domestic enforcement institutions.[106]

[106] *See*, generally, Chris Brummer, *Post-American Securities Regulation*, 98 CAL. L. REV. 327 (2010); Pierre-Hugues Verdier, *Mutual Recognition in International Finance*, 52 HARV. INT'L L.J. 56 (2011); Pierre-Hugues Verdier, *The Political Economy of International Financial Regulation*, 88 IND. L.J. 1405, 1405 (2013); David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 683, 685 (2012); Sean J. Griffith, *Substituted Compliance and Systemic Risk: How to Make a Global Market in Derivatives Regulation*, 98 MINN. L. REV. 1291 (2014); *see* also Amir N. Licht, *Games Commissions Play: 2x2 Games of International Securities Regulation*, 24 YALE J. INT'L L. 61 (1999).

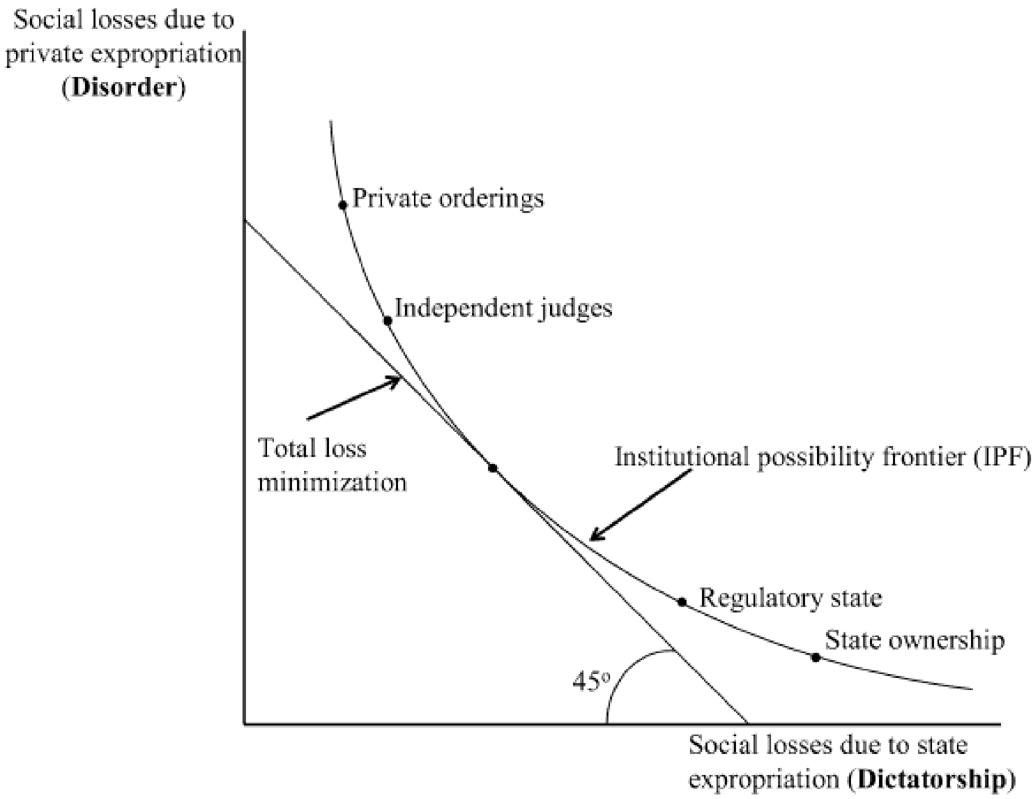
Tables and Figures

Table 1. Number of Listed Companies - April 2014

Exchange	Total	Domestic co's	Foreign co's	Share Foreign/ Total
Americas				
BM&FBOVESPA [Brazil]	370	359	11	3%
Lima SE	267	213	54	20%
NASDAQ OMX	2675	2367	308	12%
NYSE Euronext (US)	2393	1870	523	22%
Santiago SE	305	226	79	26%
TMX Group [Canada]	3844	3765	79	2%
Total region	**9,854**	**8,800**	**1,054**	**11%**
Asia - Pacific				
Australian SE	2043	1940	103	5%
Hong Kong Exchanges	1667	1575	92	6%
Japan Exchange Group - Tokyo	3427	3415	12	0%
Korea Exchange	1808	1793	15	1%
National Stock Exchange India	1690	1689	1	0%
New Zealand Exchange	165	142	23	14%
Singapore Exchange	766	477	289	38%
Taiwan SE Corp.	871	807	64	7%
Total region	**12,437**	**11,838**	**599**	**3%**
Europe - Africa - Middle East				
BME Spanish Exchanges	3289	3256	33	1%
Deutsche Börse	706	627	79	11%
Euronext	1066	938	128	12%
Irish SE	52	43	9	17%
Johannesburg SE	379	318	61	16%
Luxembourg SE	229	23	206	90%
Moscow Exchange	257	256	1	0%
NASDAQ OMX Nordic Exchange	757	731	26	3%
Oslo Børs	213	168	45	21%
SIX Swiss Exchange	274	237	37	14%
Tel Aviv SE	485	469	16	3%
Wiener Börse	99	80	19	19%
Total region	**7,806**	**7,146**	**660**	**7%**
Total	**30,097**	**27,784**	**2,313**	**5%**

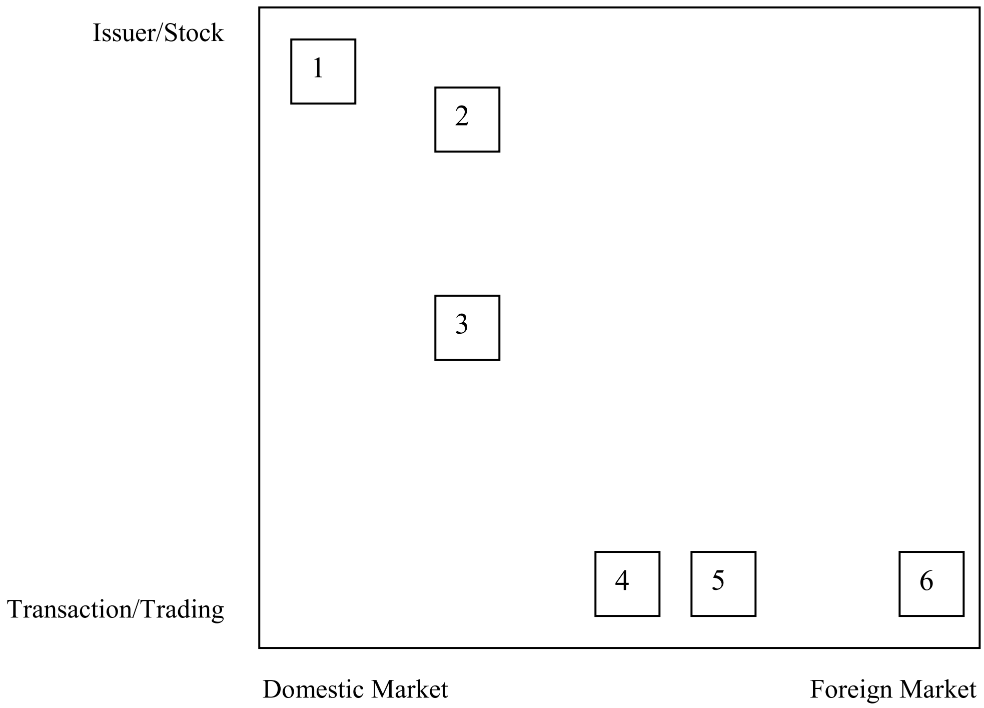
Source: World Federation of Exchanges (www.world-exchanges.org/statistics/monthly-reports)

Figure 1. Institutional Possibilities



Source: Simeon Djankow, Edward Glaeser, Rafael La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, *The New Comparative Economics*, 31 J. COMP. ECON. 595, 599 (2003).

Figure 2. Sources of Law Affecting Cross-Listed Firms



Legend
1 - Company law (corporate governance)
2 - Disclosure
3 - Takeover regulation
4 - Insider trading
5 - Trading transparency - dual-listed security
6 - Trading transparency - foreign-listed security

Based on Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets*, 38 VA. J. INT'L L. 563, 620 (1998)

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