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Mark B. Schwartz

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COMMENT

***ITOBA LTD. V. LEP GROUP PLC:** AN APPLE THAT FELL FROM THE WRONG BRANCH**

I. INTRODUCTION

"As the business world becomes increasingly global, capital markets have become [increasingly] international in scope."¹ This "internationalization," combined with Congress' unwillingness to occupy the field,² has required U.S. courts to develop workable tests to determine the existence of subject matter jurisdiction over foreign securities transactions.³ To this end, U.S. courts applied two separate and distinct tests⁴ for approximately twenty-five years before May 15, 1995.⁵

* 54 F.3d 118 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 703 (1996).

1. Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 NW. U. L. REV. 523, 523 (1993).

2. William R. Covey, Comment, *Consolidated Gold Fields PLC v. Minorco, S.A.: The Extraterritorial Application of U.S. Securities Laws in International Equities Markets*, 14 FORDHAM INT'L L.J. 240, 244 (1991) (noting the lack of congressional guidance on the extraterritorial application of U.S. securities laws).

3. See *id.* As referred to in this Comment, the term "foreign securities transactions" encompasses securities transactions that are predominantly conducted outside of the United States.

4. The two tests are: (1) the effects test, which focuses on the effects felt within the United States of a defendant's conduct which occurred abroad; and (2) the conduct test, which focuses on a defendant's domestic conduct. See *infra* Part II. See generally Covey, *supra* note 2. Covey notes: "U.S. courts apply both of these tests and the satisfaction of the requirements of either test is sufficient for the exercise of subject matter jurisdiction." *Id.* at 244-45; see also Gregory K. Matson, Note, *Restricting the Jurisdiction of American Courts over Transnational Securities Fraud*, 79 GEO. L.J. 141, 148-49 (1990) (the effects test and the conduct test "have developed side by side, [with] each address[ing] fundamentally different situations"); Donald C. Langevoort, *Fraud and Insider Trading in American Securities Regulation: Its Scope and Philosophy in a Global Marketplace*, 16 HASTINGS INT'L & COMP. L. REV. 175, 184 (1993) (noting that the conduct test is the "alternative" to the effects test).

5. The decision in *Itoba* was announced on this date. *Itoba Ltd. v. Lep*

Congressional acquiescence throughout this period to the two-test framework implies Congress' satisfaction with the balance of competing interests the two-test framework achieved.

On May 15, 1995, however, a panel of the Second Circuit Court of Appeals dismantled the two-test framework, and toppled the delicate balance of competing interests it maintained, by collapsing the framework into a single admixture of the two tests.⁶ In *Itoba Ltd. v. Lep Group PLC*,⁷ the Second Circuit rejected the District Court of Connecticut's decision to dismiss a claim concerning a British conglomerate's purchase of British securities on the London Exchange due to a lack of subject matter jurisdiction.⁸ The *Itoba* court remanded the case to the district court—despite the absence of a finding of jurisdiction pursuant to either the conduct test or the effects test applied separately—because the transaction satisfied an admixture of the two tests.⁹ This Comment argues that dismantling the two-test framework, and thereby broadening the subject matter jurisdiction of U.S. courts and increasing the extraterritorial application of U.S. securities laws, if desirable, should result from the congressional fact-finding mechanism. Moreover, judicial alteration of the application of the tests for determining subject matter jurisdiction over foreign securities transactions is inappropriate given the polycentric nature of the issues at stake and the superior fact-finding ability of the legislative branch of the U.S. government. Thus, *Itoba* is the “apple,” i.e., a legislative pronouncement, that fell from the wrong “branch,” i.e., the judicial branch.

Part II of this Comment describes the development of the

Group PLC, 54 F.3d 118 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 703 (1996).

6. *Id.* at 122. The framing and the application of the courts' inquiry into the existence of subject matter jurisdiction are particularly significant because a finding of subject matter jurisdiction confers upon the court “the power to deal with the general abstract question.” 50 C.J.S. *Jurisdiction* (1947). A narrowly framed and applied inquiry yields courts less power over a given range of disputes, while the opposite is true for a broadly framed and applied inquiry. Therefore, the decisions of how to frame and how to apply the inquiry to determine the existence of subject matter jurisdiction are particularly significant because they necessarily embody complex policy considerations regarding the jurisdictional reach of U.S. courts and the extraterritorial application of U.S. laws. See *infra* Part VI.

7. *Itoba*, 54 F.3d at 118.

8. *Id.* at 124.

9. *Id.*

law governing U.S. courts' subject matter jurisdiction over foreign securities transactions during the twenty-five year period prior to *Itoba*. Part III details the transaction underlying *Itoba*. Part III also describes and analyzes the recommendation of the federal magistrate judge and the opinions of the District Court of Connecticut and the Second Circuit Court of Appeals. Part IV describes how *Itoba* expands the subject matter jurisdiction of U.S. courts and increases the extraterritorial application of U.S. securities laws. Part V examines the likely positive and negative effects of *Itoba*'s expansive approach. Finally, Part VI concludes that since the possible negative effects of expanding subject matter jurisdiction over foreign securities transactions are at least as compelling as the possible positive effects, such a decision to expand the jurisdictional reach of U.S. courts farther into the international forum represents lawmaking more appropriately reserved for Congress.

II. THE LAW OF SUBJECT MATTER JURISDICTION OVER FOREIGN SECURITIES TRANSACTIONS BEFORE *ITOBA*

By 1972, the Second Circuit had developed two tests to determine the existence of subject matter jurisdiction over foreign securities transactions: the effects test and the conduct test.¹⁰ These tests remedied the "dearth of conclusive statutory provisions and legislative history on the extraterritorial jurisdiction of [U.S. securities laws]."¹¹

The effects test examines the effect within the United States of a defendant's conduct which occurred abroad.¹² As first enunciated,¹³ the effects test permitted district courts to exercise subject matter jurisdiction over foreign securities transactions in cases involving securities traded on a U.S. exchange.¹⁴ This formulation of the effects test, however,

10. *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208-09 (2d Cir.) (establishing the effects test), *rev'd on other grounds en banc*, 405 F.2d 215, 217 (2d Cir. 1968), *cert. denied sub nom. Manley v. Schoenbaum*, 395 U.S. 906 (1969); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1333-39 (2d Cir. 1972) (establishing the conduct test).

11. Covey, *supra* note 2, at 244.

12. *Schoenbaum*, 405 F.2d at 208; *see also* Matson, *supra* note 4, at 149-54 (discussing *Schoenbaum* and the effects test).

13. *Schoenbaum*, 405 F.2d at 200.

14. *Id.* at 208.

proved too broad. The Second Circuit Court of Appeals later refined the effects test by requiring plaintiff-investors to demonstrate tangible, individualized injury caused by the defendant's conduct.¹⁵ The refined effects test therefore required that district courts examine the effect of the defendant's conduct on a U.S. investor.¹⁶

Two premises underlie the development of the effects test. First, U.S. courts should "protect domestic investors who [purchase] foreign securities on American exchanges."¹⁷ Second, U.S. courts should "protect the domestic securities market from the effects of improper foreign transactions in American securities."¹⁸

In contrast, the conduct test focuses on a defendant's domestic conduct.¹⁹ Pursuant to the modern formulation of the conduct test, subject matter jurisdiction is limited to cases involving the perpetration of "substantially completed fraudulent acts,"²⁰ as opposed to mere preparatory acts, by the defendant.²¹

Like the effects test, two premises underlie the development of the conduct test. First, U.S. securities laws should apply extraterritorially if fraudulent conduct in connection with a securities transaction occurred within the United States.²² Second, Congress should not "allow the

15. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 988 (2d Cir.) (finding a lack of subject matter jurisdiction for U.S. courts in suit brought by foreign nationals under U.S. securities laws, where collapsed Canadian corporation adversely affected a U.S. exchange by offering stock to foreign nationals through a prospectus containing false and misleading statements), *cert. denied sub nom. Bersch v. Arthur Andersen & Co.*, 423 U.S. 1018 (1975).

16. *Id.* at 991.

17. *Schoenbaum*, 405 F.2d at 206.

18. *Id.*

19. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972).

20. The "substantially completed fraudulent acts" requirement can reasonably be derived from the Second Circuit's refusal to extend subject matter jurisdiction to "mere preparatory activities" in *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018 (2d Cir. 1975).

21. The requirement that fraudulent acts be substantially completed removed from jurisdictional reach cases involving "mere preparatory activities . . . [or] failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries." *Id.*

22. *Leasco*, 468 F.2d at 1339 ("[T]he nation where the conduct has occurred has jurisdiction to displace foreign law and to direct its courts to apply its own [law].").

United States to be used as a base for manufacturing fraudulent security devices for export, even when [such devices] are peddled only to foreigners.”²³

In sum, for approximately twenty-five years before *Itoba* and pursuant to the then well-defined conduct and effects tests, the U.S. securities laws applied:

to losses from sales of securities to Americans resident in the United States whether or not acts . . . of material importance occurred in this country; and . . . to losses from sales of securities to Americans resident abroad if, but only if, acts . . . of material importance in the United States have significantly contributed thereto; but . . . [did] not apply to losses from sales of securities to foreigners outside the United States unless acts . . . within the United States directly caused such losses.²⁴

Thus, the two-test framework precluded foreign nationals from suing foreign issuers in U.S. courts under U.S. securities laws when the allegedly fraudulent conduct occurred abroad. This was true regardless of the effect felt within the United States of an issuer’s conduct.

III. *ITOBA LTD. v. LEP GROUP PLC*

In *Itoba*,²⁵ a panel of the Court of Appeals for the Second Circuit permitted a foreign national to sue a foreign issuer in a U.S. district court for allegedly fraudulent conduct occurring abroad based on a novel application of the effects test and the conduct test.²⁶ This Part first details the facts underlying the transaction before the *Itoba* court. Second, this Part describes and analyzes the magistrate’s recommendation, which the District Court of Connecticut accepted without comment, and

23. *Vencap*, 519 F.2d at 1017. The conduct test prevents the United States from becoming “a base for manufacturing fraudulent securities devices for export” despite the requirement that fraudulent acts be substantially completed, because the test focuses on the fraudulent conduct occurring domestically. As such, the conduct test permits the exercise of jurisdiction over fraudulent activity occurring within the United States but affecting only foreign nations. *Id.*

24. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.), *cert. denied sub nom. Bersch v. Arthur Anderson & Co.*, 423 U.S. 1018 (1975).

25. *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 703 (1996).

26. *Id.* at 122.

the Second Circuit's opinion in *Itoba*.

A. *Factual Background*

Between June and November 1990, plaintiff Itoba Limited (Itoba) bought more than thirty-seven million ordinary shares²⁷ of defendant Lep Group PLC (Lep) for approximately \$114 million.²⁸ Itoba, a Channel Islands²⁹ corporation, is wholly owned by A.D.T. Limited (ADT), a transnational holding company based in Bermuda.³⁰ ADT's holdings also include A.D.T. Securities Systems, Inc. (ADT Securities), a Delaware-based firm providing security and protection services.³¹ ADT's shares trade on the New York Stock Exchange and approximately half of its shareholders live in the United States.³² Lep is a British conglomerate whose ordinary shares trade on the London Exchange.³³

In the late 1980s, ADT considered expanding ADT Securities by acquiring the latter's major competitor, National Guardian, which is a Lep subsidiary.³⁴ ADT discovered that an unrelated third party, Canadian Pacific, also desired to acquire Lep.³⁵ Negotiations between ADT and Canadian Pacific culminated in an agreement to explore the joint purchase of Lep.³⁶ Under this agreement, ADT directed Nicholas Wells (Wells), ADT's in-house financial analyst, to value Lep. Meanwhile, Canadian Pacific hired S.G. Warburg (Warburg), a British investment bank, to evaluate Lep's business operations.³⁷

27. Ordinary shares are the British equivalent of common stock in the United States. *Id.* at 120; GLENN G. MUNN ET AL., *THE ST. JAMES ENCYCLOPEDIA OF BANKING & FINANCE* 783 (9th ed. 1991).

28. *Itoba*, 54 F.3d at 121.

29. The Channel Islands are "a group of islands in the English Channel, off the Northwest coast of France. They are a possession of the British Crown, but they are not part of the United Kingdom." 6 *ENCYCLOPEDIA AMERICANA* 278 (Int'l ed. 1984). For the purposes of this Comment, Itoba is referred to as a British Company.

30. *Itoba*, 54 F.3d at 120.

31. *Id.*

32. *Id.*

33. *Id.* "London Exchange" is shorthand for the International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd. *Id.*

34. *Id.* ADT contemplated acquiring National Guardian by buying Lep. *Id.*

35. *Id.* at 120-21. Canadian Pacific planned to buy Lep in order to enter the freight forwarding business. *Id.* at 120.

36. *Id.* at 121.

37. *Id.*

Warburg evaluated Lep's business operations based on its (i) 1988 Securities and Exchange Commission (SEC) Form 20-F,³⁸ (ii) United Kingdom annual reports, (iii) shareholder register, and (iv) analyst reports.³⁹ Soon after Warburg completed its evaluation, Canadian Pacific lost interest in the joint purchase.⁴⁰ ADT, however, remained interested in acquiring Lep, so Wells continued his valuation.⁴¹ He supplemented his research with the Warburg report and with a copy of Lep's 1988 SEC Form 20-F, which he received from Canadian Pacific.⁴²

Based on Wells' analyses and the Warburg report, ADT's chairman, Michael Ashcroft, concluded that ADT should acquire Lep.⁴³ ADT then formulated a plan whereby Itoba would buy Lep shares anonymously and in installments.⁴⁴ By November 1990, Itoba invested approximately \$114 million in Lep.⁴⁵

Soon thereafter, Lep's share price plummeted ninety-seven percent, causing the value of Itoba's investment to decline \$111 million to \$3 million.⁴⁶ Itoba attributes this decline to a series of business reversals resulting in a \$522 million write-off from

38. SEC Form 20-F is a mandatory filing pursuant to the registration requirements of 12(b) or 12(g) of the Securities Exchange Act of 1934. PETER E. YAEGER, SECURITIES FILINGS: REVIEW & UPDATE 97 (PLI Corp. L. & Practice Course Handbook Series No. 351, 1980). Private foreign issuers use SEC Form 20-F to register classes of securities on U.S. exchanges. *Id.* at 96-97. SEC Form 20-F requires extensive disclosure by foreign securities issuers in order to provide U.S. investors with a level of information as equal as possible and practicable to that provided to investors in domestic securities. *Id.* at 96. A completed Form 20-F must include a description of the foreign issuer's business and a discussion and analysis, prepared by management, of the issuer's statements of income. *Id.* at 100-01. Pursuant to the Securities Exchange Act's registration requirements, Lep filed Form 20-F for the year ended December 31, 1988, *Itoba*, 54 F.3d at 121, as it deposited nearly 13 million of its approximately 136 million outstanding shares in an American depository in 1988, *id.* at 120. Lep deposited these shares to create a U.S. market for its ordinary shares. *Id.* For a discussion of American Depository Receipts, see *infra* Part V.B.

39. *Itoba*, 54 F.3d at 121.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* Itoba likely bought the shares anonymously and in installments to minimize the effect on the stock price of the planned acquisition.

45. *Id.*

46. *Id.*

Lep's books in the year ended 1991.⁴⁷ Itoba claims Lep violated Rule 10b-5⁴⁸ and sections 10(b) and 20 of the Securities Exchange Act of 1934⁴⁹ by investing in speculative business

47. *Id.*

48. Rule 10b-5, promulgated under the Securities Exchange Act of 1934, provides that:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1995).

49. Section 10(b) of the Securities Exchange Act of 1934 provides that:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1994). Section 20 of the Securities Exchange Act of 1934 provides that:

(a) . . . Every person who, directly or indirectly, controls any person liable under any provision of [the Securities Exchange Act of 1934] or any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

(b) . . . It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of [the Securities Exchange Act of 1934] or any rule or regulation thereunder through or by means of any other person.

(c) . . . It shall be unlawful for any director or officer of, or any owner of any securities issued by, any issuer required to file any document, report, or information under [the Securities Exchange Act of 1934] or any rule or regulation thereunder without just cause to hinder, delay, or obstruct the making or filing of any such document, report, or information.

(d) . . . Wherever communicating, or purchasing or selling a security while in possession of, material nonpublic information would violate, or result in liability to any purchaser or seller of the security under any provision of [the Securities Exchange Act of 1934] or any rule or regulation thereunder, such conduct in connection with a purchase or sale of a put, call, straddle, option, or privilege with respect to such security or

ventures without informing the public.⁵⁰

B. The Magistrate Judge's Recommendation and Its Acceptance by the U.S. District Court of Connecticut

Magistrate Judge Jean Margolis applied the conduct test and the effects test separately to the transaction underlying Itoba's claim and concluded that the district court should dismiss the claim due to a lack of subject matter jurisdiction.⁵¹ The magistrate found that effects jurisdiction did not exist because the alleged fraud committed abroad did not affect stock traded on a U.S. securities exchange and bought by a U.S. investor.⁵² The magistrate reasoned that the fraud allegedly committed abroad⁵³ did not detrimentally affect a U.S. investor since the plaintiff (Itoba) is a British company.⁵⁴ The magistrate further reasoned that if ADT, rather than Itoba, were the plaintiff, the U.S. district court would have jurisdiction pursuant to the effects test, since ADT's stock trades on a U.S. securities exchange and about half of its shareholders live in the United States.⁵⁵

Additionally, the magistrate rejected the presence of subject matter jurisdiction by the district court on the basis of the conduct test.⁵⁶ Two reasons underlie this rejection. First,

with respect to a group or index of securities including such security, shall also violate and result in comparable liability to any purchaser or seller of that security under such provision, rule, or regulation.

Securities Exchange Act of 1934 § 20, 15 U.S.C. § 78t(a)-(d) (1994).

50. *Itoba*, 54 F.3d at 121. The essence of Itoba's claim is that Lep's failure to disclose risky investments artificially inflated Lep's share price before Itoba bought the Lep shares. *See id.* Since the market impounds publicly available information into share price, Itoba contends that Lep's failure to disclose such information artificially inflated Lep's share price because the share price failed to fairly reflect the risk associated with these investments. *See THE MIT DICTIONARY OF MODERN ECONOMICS* 123 (David W. Pearce ed., 3d ed. 1986) [hereinafter *MIT DICTIONARY*] (defining the Efficient Market Hypothesis).

51. *Itoba*, 54 F.3d at 121-23. Procedurally, magistrate judges may be appointed to issue recommendations and other reports to federal district judges. For an overview of the powers vested in magistrate judges, see 28 U.S.C. § 636 (1994).

52. *Id.* at 124. The Lep ordinary shares purchased by Itoba were traded on the London Exchange. *Id.* at 121, 123.

53. In order to determine whether the district court possessed subject matter jurisdiction, it appears that the magistrate assumed without deciding that Lep's failure to disclose the speculative business ventures amounted to fraud.

54. *See Itoba*, 54 F.3d at 124.

55. *Id.*

56. *Id.* at 122.

Itoba and ADT did not read and rely on Lep's SEC Form 20-F; rather, it was an investment bank (Warburg) hired by ADT that reviewed that filing.⁵⁷ Second, Lep filed SEC Form 20-F⁵⁸ to register its American Depositary Receipts (ADRs)⁵⁹ and not in connection with the ordinary Lep shares Itoba bought.⁶⁰ Therefore, Lep's conduct within the United States (filing allegedly fraudulent information with the SEC) did not relate to Itoba's purchase, and, because of this, Itoba failed to prove that Lep's U.S. conduct directly caused Itoba's losses.

Thus, since the transaction in *Itoba* failed to satisfy either the conduct or the effects tests, the magistrate judge recommended that the district court dismiss Itoba's claim for lack of subject matter jurisdiction.⁶¹ The U.S. District Court for the District of Connecticut adopted the magistrate's recommendation⁶² and dismissed Itoba's claim in a short-form order.⁶³

C. *The Decision of the Second Circuit Court of Appeals*

A panel of the Second Circuit Court of Appeals, in an opinion written by Judge Ellsworth A. Van Graafeiland, reversed the district court's decision to dismiss Itoba's claims due to a lack of subject matter jurisdiction and remanded the case for trial by the district court.⁶⁴ The *Itoba* court reached this conclusion by dismantling the two-test framework and replacing it with a single "admixture," or combination of the two tests.⁶⁵ In rejecting the traditional compartmentalized use of the two-test framework, the court propounded that "[t]here is no requirement that these two tests be applied separately and distinctly from each other."⁶⁶ Furthermore, the court remarked that the "admixture . . . often gives a better picture of whether there is sufficient United States involvement to justify the

57. *Id.*

58. *See supra* note 38 and accompanying text.

59. *See supra* note 38 and accompanying text. For a discussion of the mechanics of the ADR market, see *infra* Part V.B.1.

60. *Itoba*, 54 F.3d at 122.

61. *Id.* at 121.

62. *See supra* note 53.

63. The district court dismissed the action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. *Itoba*, 54 F.3d at 121.

64. *Id.* at 118, 125.

65. *Id.* at 122.

66. *Id.*

exercise of jurisdiction by an American court."⁶⁷

The Second Circuit outlined and then refuted the magistrate's reasoning and her conclusions.⁶⁸ It rejected the magistrate's effects test analysis because ADT, a U.S. corporation, owned 100% of Itoba.⁶⁹ On this point, the Second Circuit reasoned that ADT ultimately financed Itoba's purchase of the Lep stock and, consequently, ADT's shareholders (about half of whom live in the United States) ultimately bore the loss.⁷⁰ Therefore, the court concluded that Lep's foreign conduct affected shares (ADT's shares) traded on a U.S. exchange and U.S. investors (ADT's shareholders).⁷¹ However, while the court rejected the magistrate's analysis of the effects test, it avoided declaring the existence of subject matter jurisdiction in the district court pursuant to the effects test alone.⁷²

The *Itoba* court also rejected the two reasons which led the magistrate to conclude that Itoba's claim failed to satisfy the conduct test.⁷³ The Second Circuit rejected the magistrate's first reason—"that ADT and Itoba did not read and rely on [Lep's] SEC filing in making their purchase decision"—on two grounds.⁷⁴ First, the Second Circuit noted that Itoba—or, as the Second Circuit construed it, ADT—based its investment decision on the Warburg report and Wells' evaluation of Lep's SEC Form 20-F.⁷⁵ Second, the court did not require that Itoba's directors personally read the SEC filings so long as they based their decision to acquire Lep on Wells' analysis.⁷⁶

67. *Id.*

68. *Id.* at 122-24.

69. *Id.* at 124.

70. *Id.*

71. *Id.*

72. *See id.*

73. *Id.* at 123.

74. *Id.* at 122.

75. *Id.*

76. "The fact that Itoba's board members did not read the SEC filing is not of controlling significance. A party need not personally have read a misleading financial report to establish reliance; derivative reliance is a well-established basis for liability in a Rule 10b-5 action." *Id.* (citing *Austin v. Loftsgaarden*, 675 F.2d 168, 177-78 & n.19 (8th Cir. 1982), *appeal after remand*, 768 F.2d 949 (8th Cir. 1985), *rev'd on other grounds sub nom.* *Randall v. Loftsgaarden*, 478 U.S. 647 (1986); *Garfinkel v. Memory Metals, Inc.*, 695 F. Supp. 1397, 1404 (D. Conn. 1988); *Kronfeld v. Trans World Airlines, Inc.*, 104 F.R.D. 50, 53-54 (S.D.N.Y. 1984); *Walsh v. Butcher & Sherrerd*, 452 F. Supp. 80, 84 (E.D. Pa. 1978); *In re Ramada Inns Sec. Litig.*, 550 F. Supp. 1127, 1131 (D. Del. 1982)).

The court also rejected the magistrate's second reason for denying jurisdiction under the conduct test: that Lep filed SEC Form 20-F to register ADRs and not in connection with its ordinary shares.⁷⁷ The court based this rejection on several grounds. First, it relied upon the direct correlation between the price of the ADRs and the price of the ordinary shares, since five ordinary shares comprise each ADR.⁷⁸ Second, the court relied on *In re Ames Department Stores Inc. Stock Litigation*⁷⁹ to bypass the fact that Itoba bought Lep's ordinary shares and not its ADRs (the security to which the SEC Form 20-F relates).⁸⁰ Finally, the *Itoba* court rejected the magistrate's second reason by denying the significance of the fact that Itoba bought ordinary shares of a British entity, which were issued in England and traded on the London Exchange.⁸¹ The *Itoba* court reasoned that which security was purchased was immaterial since the conduct test is concerned only with fraudulent conduct within the United States.⁸² Just as it did with the effects test, the *Itoba* court refuted the magistrate's reasoning for denying jurisdiction under the conduct test, but declined to conclude that the transaction satisfied the conduct test.⁸³

In the end, the *Itoba* court never declared the existence of subject matter jurisdiction under either the conduct test or the effects test. Rather, the court held that "a sufficient combination of ingredients of the conduct and effects test is present in the instant case to justify the exercise of jurisdiction by the district court."⁸⁴

77. *Itoba*, 54 F.3d at 123.

78. *Id.* ("If the ordinary share price fell on the London Exchange, the market price of an ADR would decrease in similar manner, and vice versa.")

79. 991 F.2d 953, 961-62 (2d Cir. 1993) (holding that a false and misleading statement in an SEC filing pertaining to a security other than the purchased security does not preclude a Rule 10b-5 action).

80. *See Itoba*, 54 F.3d at 123.

81. *Id.* at 122-23.

82. *Id.* at 123 (citing *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1337 (2d Cir. 1972)).

83. *See id.* at 124.

84. *Id.* The Second Circuit buttressed its conclusion that subject matter jurisdiction was present under the admixture with another "ingredient" previously relevant only under a conduct test analysis, namely, that the making of the allegedly false and misleading filings with the SEC was not "merely preparatory to the fraud." *Id.* at 123. It did so by noting that "[i]n view of the deleterious effect this continued nondisclosure had on thousands of ADT shareholders in the United

IV. HOW *ITOBA* EXPANDS THE SUBJECT MATTER JURISDICTION OF U.S. COURTS AND INCREASES THE EXTRATERRITORIAL APPLICATION OF U.S. SECURITIES LAWS

Itoba expands the subject matter jurisdiction of U.S. courts over foreign securities transactions and increases the extraterritorial application of U.S. securities laws by abandoning the compartmentalized two-test framework.⁸⁵ Removing the requirement⁸⁶ that a claim satisfy either the conduct test or the effects test in full and in isolation leaves a single examination of all facts applicable to both tests.⁸⁷ The inherent nature of this single examination allows a claim to fail the conduct test and the effects test when applied separately, but still pass jurisdictional muster, since facts applicable to one test can now be aggregated with facts applicable to the other test to support a finding of subject matter jurisdiction. Claims that would have failed both the conduct test and the effects test, and would therefore have been excluded from judicial review, now have a third chance for U.S. review under *Itoba's* admixture. Moreover, this new class of cases resulting from *Itoba's* expansive approach to subject matter jurisdiction broadens the extraterritorial application of U.S. securities laws by applying such laws to a wider range of disputes.

The two-test framework, by its nature, compartmentalized a district court's inquiry into the presence of subject matter jurisdiction. Since district courts applied each test in isolation and required the complete satisfaction of at least one test to yield a finding of subject matter jurisdiction, courts ignored facts relevant to an analysis of one test while applying the other test. This compartmentalization feature of the two-test framework limited the scope of transactions falling within the purview of U.S. courts because transactions that nearly passed muster under each test, but nevertheless fell short under both

States, it cannot be described correctly as incidental or preparatory." *Id.* at 124.

85. See *supra* Part II.

86. While *Itoba* denies the existence of a requirement that the two tests be applied in isolation, *Itoba*, 54 F.3d at 121-22, courts consistently applied them this way. For an example of the separate application of the two tests by the courts, see the recommendation of the magistrate judge described in *Itoba*, *supra* Part III.B. Academic literature also echoes the presence of two separate and distinct tests. See *supra* note 4 and accompanying text.

87. This single examination of all facts applicable to both tests is what the *Itoba* court referred to as the admixture. *Itoba*, 54 F.3d at 122.

tests, were excluded.

In contrast with the two-test framework, *Itoba's* admixture requires a single examination of all facts applicable to both tests. This "melting pot" approach allows for instances where the separate application of the two tests would not have yielded subject matter jurisdiction, but a single examination of an aggregation of facts pertinent to both tests will yield such a finding since courts never ignore facts through compartmentalization.⁸⁸ Moreover, by broadening the subject matter jurisdiction of U.S. courts, *Itoba* broadens the extraterritorial application of U.S. securities laws.

V. LIKELY POSITIVE AND NEGATIVE EFFECTS OF *ITOBA'S* ADMIXTURE

Itoba's expansion of subject matter jurisdiction of U.S. courts and the extraterritorial application of U.S. securities laws necessarily affects many interests in many ways. This Part examines a likely benefit, increased worldwide investor protection, and two likely detriments, constriction of the ADR⁸⁹ market and damage to international comity, of *Itoba's* expansive approach to extraterritorial jurisdiction over foreign securities transactions.

A. *Likely Positive Effect of Itoba's Admixture*

The most likely positive effect of *Itoba's* expansive approach to U.S. courts' subject matter jurisdiction over foreign securities transactions will be increased investor protection worldwide. *Itoba's* admixture opens U.S. courts to more extraterritorial complaints than did the two-test framework.⁹⁰ Combining increased access to U.S. courts with the most comprehensive securities regulation in the world,⁹¹ i.e., the U.S.

88. While it may be true that the admixture "often gives a better picture" of a transaction, *Itoba*, 54 F.3d at 122, the fact remains that the admixture expands the subject matter jurisdiction of U.S. courts.

89. See *infra* note 102 and accompanying text; see also *supra* note 38 (relationship between SEC Form 20-F and ADRs).

90. See *infra* Part VI.

91. Lauren D. Rosenthal, Note, *Rule 10b-5 and Transnational Bankruptcies: Whose Law Should Apply?*, 61 FORDHAM L. REV. S321, S339 (1993) ("United States securities laws are . . . more inclusive and comprehensive in scope than comparable laws of other countries"); see also Andrew N. Grass, Jr., *Internationalization of the Securities Trading Markets*, 9 HOUS. J. INT'L L. 17, 49 (1986) (noting that the

securities laws, has the potential to greatly increase investor protection worldwide.⁹²

This increased worldwide investor protection will likely result primarily from two sources. First, comprehensive U.S. securities laws afford injured investors unique protections and greater chances of recovery than do the securities laws of other nations. More specifically, the emphasis on accountability integral to the U.S. securities regulatory framework⁹³ permits injured investors greater opportunities for redress by allowing them to hold key players responsible in situations where redress would be unavailable under foreign regulatory schemes.

Second, the possibility of liability under rigid U.S. securities regulation will likely affect the behavior of foreign securities issuers. A foreign issuer, aware that his actions may result in the need to defend against charges of violating U.S. securities laws in a U.S. tribunal, will likely conduct his business with increased caution. Therefore, *Itoba's* expansive approach, through the increased application of comprehensive securities laws and its affect on foreign securities issuers, will likely lead to greater investor protection globally.

Expanding U.S. courts' jurisdiction to provide increased investor protection globally is consistent with other circuits' view that judicially expanding jurisdiction over foreign securities transactions represents a positive transition in securities law.⁹⁴ This view rests on three tenets, all of which are pre-

scope of insider trading regulation is far more developed in the United States than in other nations); Elyse Diamond, Note, *Outside Investors: A New Breed of Inside Traders*, in *Annual Survey of Financial Institutions and Regulation, Transnational Financial Services in the 1990s*, 60 *FORDHAM L. REV.* S319, S338-47 (1992) (comparing key aspects of U.S. securities regulations with their foreign counterparts and concluding that the "United States securities law is by far the most comprehensive.").

92. See Rosenthal, *supra* note 91, at S339.

93. Langevoort, *supra* note 4, at 178-79. Langevoort explains that U.S. securities regulation reflects Congress view that investment information which fairly reflects market realities can prevent market crashes like that of 1929. *Id.* Therefore, Congress drafted the U.S. securities laws to ensure that investment information fairly reflects underlying market realities. *Id.* A key method used to ensure the dissemination of such information is to hold information disseminators accountable for investment information that fails to reflect fairly that which it purports to reflect. *Id.*

94. See *Continental Grain (Austl.) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979) ("[O]ur decision in favor of finding subject matter jurisdiction is largely based upon policy considerations"). But see *Zoelsch v. Arthur Andersen*

mised on increased investor protection. First, failure to apply U.S. securities laws to substantially all situations involving domestic conduct permits the United States to "become a 'haven' for defrauders who could then export their schemes abroad."⁹⁵ Second, the United States should "encourage effective anti-fraud enforcement internationally."⁹⁶ Third, broad extraterritorial enforcement of the Securities Exchange Act's anti-fraud provisions is consistent with Congress' intent "to elevate the standard of conduct in [all] securities transactions."⁹⁷

Itoba is consistent with discouraging securities fraud domestically, since it permits U.S. courts to exercise jurisdiction in cases narrowly failing to satisfy either the conduct test or the effects test. *Itoba*'s admixture allows U.S. courts to supplement otherwise insufficient evidence of fraudulent conduct which occurred in the United States with evidence of fraudulent conduct which occurred abroad and which yielded a negative domestic effect.⁹⁸ *Itoba*'s admixture also allows U.S. courts to supplement otherwise insufficient evidence of a negative domestic effect resulting from fraudulent conduct abroad with evidence of fraudulent activities which occurred in the United States.⁹⁹ The admixture therefore suits the first tenet of jurisdictional expansion by decreasing the likelihood that fraudulent conduct which occurred in the United States will escape the jurisdictional reach of U.S. courts.

Itoba also suits the second tenet listed above—encouraging effective international anti-fraud enforcement—by demonstrating the United States' strong commitment to the effective international enforcement of securities regulation. *Itoba* declares to the world that at least some U.S. courts will now complement the comprehensive U.S. securities laws with expanded

& Co., 824 F.2d 27, 30-31 (D.C. Cir. 1987) (Bork, J.) (rejecting expansive approach to jurisdiction adopted by *Continental Grain* in favor of more restrictive two-test framework).

95. Matson, *supra* note 4, at 164 (citing *Continental Grain*, 592 F.2d at 421).

96. *Continental Grain*, 592 F.2d at 421 (citing with approval SEC v. Kasser, 548 F.2d 109, 116 (3d Cir.), *cert. denied sub nom. Churchill Forest Indus. (Manitoba), Ltd. v. SEC*, 431 U.S. 938 (1977)).

97. *Id.* For an effective rebuttal of the argument for expanding jurisdiction over foreign securities transactions in the absence of clear congressional guidance, see Matson, *supra* note 6, at 163-66; see also Zoelsch, 824 F.2d at 29-33.

98. See *infra* Part IV.

99. See *infra* Part IV.

judicial enforcement. If foreign securities regulators equate these two factors—rigid regulation and extensive judicial enforcement—with the general confidence and integrity of the U.S. securities markets (as compared with many foreign markets) foreign regulators will likely pursue more effective anti-fraud legislation and escalate their own enforcement efforts. If one takes the position that fraud is an evil in itself and that it is in the interest of the international community to eradicate all fraud,¹⁰⁰ then *Itoba's* expansive approach to international securities regulation represents a positive development in encouraging international anti-fraud enforcement.

Itoba also furthers the congressional goal of elevating the standard of conduct in securities transactions, which is the third tenet of jurisdictional expansion. *Itoba* applies the comprehensive U.S. securities laws to cases that previously would likely have escaped U.S. regulation.¹⁰¹ Therefore, *Itoba* elevates the standard of conduct in securities transactions by increasing the likelihood that U.S. courts will apply U.S. securities laws to foreign securities transactions.

Itoba's expansive approach will likely lead to more effective investor protection globally. This represents a potential positive effect of the decision, especially given the explicit view of other circuits that the United States should judicially expand its jurisdictional reach to protect investors in foreign securities transactions despite the absence of congressional guidance.

100. Langevoort, *supra* note 4, at 175-76 (explicating the view that "because fraud is 'bad,' no nation should seriously object to the application of the American anti-fraud provisions abroad where the result is simply to remedy such fraud"); see also Andreas F. Lowenfeld, *Jurisdiction to Prescribe: Some Contributions From an International Lawyer*, 4 B.U. INT'L L.J. 91, 95 (1986) (noting that no nation has ever accused the United States of invading territorial sovereignty by extraterritorializing securities fraud jurisdiction).

101. In addition to increasing investor protection, it should be noted that *Itoba* addresses a fundamental nationalistic ideal, namely, the United States sovereign interest in protecting its citizens and its capital markets. Since the United States permits foreign issuers to access capital from its citizens, foreign issuers should not be surprised when the United States regulates the capital formation process. If this were not the case, the borders of the United States would permit capital formation, but would prohibit the regulation of that capital formation. John M. Fedders, *Policing Trans-Border Fraud in the United States Securities Markets: The "Waiver By Conduct" Concept—A Possible Alternative or a Starting Point For Discussions?*, 11 BROOK. J. INT'L L. 477, 488 (1985) ("Borders stop judges, law enforcement officials, and private plaintiffs, but not criminals.").

B. Likely Negative Effects of Itoba's Admixture

Expanding the subject matter jurisdiction of U.S. courts over foreign securities transactions, thereby broadening the application of U.S. securities laws extraterritorially, will also likely produce negative effects. *Itoba's* two most likely negative effects are its chilling effect on the ADR¹⁰² market and its erosive effect on international comity.

1. Likely Negative Effect on the ADR Market

Perhaps *Itoba's* most detrimental aspect is its potential chilling effect on the ADR market. The ADR market mechanism allows international securities transactions to settle more efficiently than they would without it.¹⁰³ This efficiency translates into a lower cost of capital for foreign corporations and ultimately higher returns for domestic investors. The mechanics of creating an ADR, and some of the virtues of ADRs, are summarized in the following passage:

The distribution of ADRs for a foreign stock in the United States begins with the deposit of the stock in a bank, typically in the jurisdiction of the issuer. The bank then issues receipts. Thus, while the shares remain in a bank in Europe or Japan, the receipts can be distributed into the United States. A secondary market in the United States can then develop.

This simple process "domesticates" the foreign security, permitting investors in the United States to trade the ADR in

102. ADRs are "[f]orms for listing . . . shares of foreign companies on American stock exchanges in an acceptable American bank or trust company, representing the deposit of an equivalent amount of underlying foreign shares." MUNN, *supra* note 27, at 33. Stated another way, an ADR is "a receipt for shares held in a deposit in a foreign branch of an American bank, when those shares are in a foreign corporation. ADR's are negotiable and are used by foreign corporations to sell shares in the United States." MICHAEL C. THOMSETT, INVESTMENT & SECURITIES DICTIONARY 10 (Webster's New World 1988) (1986). ADRs are a "low tech," mechanical method of creating a more global securities market. Richard P. Bernard, *International Linkages Between Securities Markets: "A Ring of Dinosaurs Joining Hands and Dancing Together"?*, 1987 COLUM. BUS. L. REV. 321, 327. ADRs have existed for more than fifty years and are currently traded on the New York Stock Exchange (NYSE), American Stock Exchange (AMEX), and the National Association of Securities Dealers and Quotes (NASDAQ). *Id.* at 327-28.

103. This is primarily because the ADR market mechanism allows U.S. investors to avoid trading directly on foreign markets. *See infra* note 108 and accompanying text.

their own currency. Their trades are settled through the clearing and settlement system of the United States, thus avoiding, for example, the fortnightly settlement in the United Kingdom and the physical delivery system in Japan. The investor may even be able to avoid in part stock transfer taxes in the domicile of the issuer since, from the standpoint of the register of the issuer, the stock remains registered in the name of the depository bank. Therefore, it is not surprising that approximately 1.5 billion shares are today traded in ADR form.¹⁰⁴

Itoba's expansion of U.S. courts' subject matter jurisdiction over foreign securities transactions will likely cause foreign securities issuers to reconsider offering ADRs because of the increased possibility of having to defend against charges of violating rigid U.S. securities laws in a U.S. court.¹⁰⁵ The virtues, described above, of the ADR market require careful scrutiny of domestic lawmaking that potentially hinders the workings of that market.

Itoba presents a quandary for foreign securities issuers. It forces them to weigh their interest in obtaining U.S. capital with the increased likelihood that U.S. courts will force them to defend, in the United States, against charges of violating rigid U.S. securities laws.¹⁰⁶ Given the relatively small percentage of foreign stock a foreign issuer generally reserves for ADRs, the tremendous potential downside of defending against charges of violating U.S. securities laws in a U.S. tribunal will likely chill capital formation through the ADR market. Foreign securities issuers will likely shun this previously effective capital accumulation mechanism,¹⁰⁷ forcing U.S. investors to seek these potentially lucrative foreign issues through a less

104. Bernard, *supra* note 102, at 328.

105. See Mary K. Kane, *Dispute Resolution in the United States: Concerns and Opportunities in an Era of Globalization of Securities Markets*, 14 HASTINGS INT'L & COMP. L. REV. 405, 411 (1990) ("[I]t is clear that the extraterritorial application of U.S. antifraud provisions in a global securities market will cause serious concern"); Langevoort, *supra* note 4, at 185-86 (noting that "to the extent that similar jurisdictional claims could be made by other nations, there is strong potential for multiple, overlapping standards of conduct being applied to the same transactions, substantially burdening the processes of planning and dispute resolution with duplication and uncertainty").

106. For an overview of the comprehensive nature of U.S. securities law, see sources cited *supra* note 91.

107. See *supra* note 102 and accompanying text.

efficient and effective channel.¹⁰⁸

Itoba's facts illustrate why foreign securities issuers may balk at the ADR market with the *Itoba* approach in place. *Itoba's* transaction is "at its core, a transaction between foreigners, involving foreign securities purchased on a foreign securities market."¹⁰⁹ The ordinary shares *Itoba* bought represent ownership of a British entity.¹¹⁰ *Itoba* is itself a British entity.¹¹¹ And *Itoba* bought British ordinary shares and did so on the London Exchange.¹¹² These critical facts suggest the genuine "foreignness" of the transaction underlying *Itoba*. This "foreignness" counsels against the existence of subject matter jurisdiction in a U.S. court, and yet, the *Itoba* court found such jurisdiction.¹¹³

Thus, *Itoba* raises the possibility that a court sensing securities fraud could use the admixture to manufacture subject matter jurisdiction in cases where the presence of such jurisdiction is marginal at best. Through this possibility, *Itoba* creates a potential for abuse, especially in cases where a small foreign investor can garner sympathy for his claim against a large foreign conglomerate. The admixture—by allowing a simple marshaling of the facts to create the appearance of well-founded, yet arguably non-existent, subject matter jurisdiction—permits courts to overstep their bounds and apply U.S. securities laws to "very" foreign securities transactions.

An analysis of the *Itoba* decision illustrates this potential for abuse. The *Itoba* court disregarded *Itoba's* purchase of ordinary shares, as opposed to ADRs, by highlighting the correlation between the value of the ordinary shares and the value of the ADRs.¹¹⁴ The *Itoba* court also circumvented *Itoba's* identi-

108. The less efficient and effective channel requires the U.S. investor to purchase the foreign shares directly on the foreign market on which they trade. By doing so, however, U.S. investors lose the benefits of the ADR market. See *supra* note 102 and accompanying text.

109. Brief for Defendants-Appellees at 9, *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118 (2d Cir. 1995) (No. 94-7562), *cert. denied*, 116 S. Ct. 703 (1996).

110. See *Itoba*, 54 F.3d at 120.

111. *Id.*

112. *Id.* at 121.

113. Given the British interest in this dispute and the international comity issues discussed *infra* Part V.B.2, a finding by the *Itoba* court that subject matter jurisdiction was not present likely would have forced a more appropriate result. That is, the Second Circuit should have forced *Itoba* to seek redress in a British tribunal pursuant to British securities laws by dismissing the complaint.

114. *Itoba*, 54 F.3d at 123. The *Itoba* court relied on the direct relationship

ty as a British company by emphasizing that a U.S. company owns Itoba.¹¹⁵ In essence, the *Itoba* court constructed arguments to dismiss the “foreignness” of the transaction and forced Lep to defend against charges in the United States based on a mandatory SEC filing. The SEC filing, however, was made only to register ADRs representing less than ten percent of Lep’s shares, and, *Itoba* did not even buy the securities this filing covered. Given the actual “foreignness” of the transaction in *Itoba*, the relative insignificance of Lep’s foreign shares allocated to ADRs, and the tremendously expanded base of liability Lep faces under *Itoba*, *Itoba* will likely cause foreign issuers to develop an uneasiness about issuing ADRs and the corresponding requirement to file SEC Form 20-F.

A simple hypothetical example further illustrates *Itoba*’s probable effect on foreign securities issuers and, in turn, the ADR market. Before *Itoba*, a mature Japanese corporation in need of capital might readily seek the benefits of the ADR market’s uncomplicated capital formation mechanism,¹¹⁶ because of its efficiency, effectiveness, and proven track record.¹¹⁷ Moreover, the availability of new ADRs to U.S. investors benefits U.S. investors by creating additional user-friendly investment opportunities.¹¹⁸

However, *Itoba*’s overreaching approach to U.S. courts’ subject matter jurisdiction over foreign securities transactions creates serious issues for the Japanese corporation to consider in making its capital-raising decision. As a mature corporation, let us assume that the corporation and its directors and officers have generally operated within the existing Japanese regulatory framework.¹¹⁹ Additionally, let us assume that the Japanese corporation’s share price reflects its current accountability under that regulatory framework.¹²⁰ That regulatory

between the share price of the Lep ordinary shares and the share price of the Lep ADRs resulting from the composition of the Lep ADRs; i.e., the Lep ADRs consisted solely of Lep ordinary shares.

115. *Id.* at 124.

116. See *supra* note 102 and accompanying text.

117. See *supra* note 102 and accompanying text.

118. See *supra* note 102 and accompanying text.

119. It is reasonable to assume that a mature corporation has generally fashioned its conduct and operations within the regulatory framework which governs its operations because the corporation has made it to that stage in its corporate life. That is to say, it is plausible to assume that regulators would not have permitted a consistently regulatory-deficient corporation to continue to operate.

120. If we accept the semi-strong form of efficiency of the Efficient Market

framework, however, permits greater leeway for the corporation's directors and officers to trade on inside information than does the U.S. regulatory scheme.¹²¹ Under *Itoba*, if the Japanese corporation issues ADRs, the corporation subjects itself, through indemnification of its directors and officers, to a tremendously greater base of insider trading liability by raising the possibility that non-U.S. investors¹²² will convince a U.S. court to force the corporation to defend against insider

Hypothesis for the purposes of this illustration, see MIT DICTIONARY, *supra* note 50, at 123, the Japanese corporation's current accountability under the Japanese regulatory framework would be publicly available information that would be imputed into its share price. The Efficient Market Hypothesis denotes:

The view that the prices of shares on [a] stock market are the best available estimates of their real value because of the highly efficient pricing mechanism inherent in [a] stock market. There are three levels of efficiency. First, the market is held to be "weak-form efficient" if share price changes are independent of past price changes. Second, semi-strong form efficiency is present if share prices fully reflect all publicly available information. Third, strong form efficiency will imply share prices will have taken full account of all information whether publicly available or not. . . . [W]eak form efficiency is generally accepted, and semi-strong is becoming more so.

Id.

121. Japanese securities law emanates from the 1948 Securities and Exchange Law. Osamu Karihara, *Recent Developments in the Securities and Exchange Law in Japan*, in JAPANESE BANKING, SECURITIES AND ANTI-MONOPOLY LAW 77, 77 (Hiroshi Oda & R. Geoffrey Grice eds., 1988). Under this law, however, insider trading provisions cannot be easily enforced, nor have they been. *Id.* at 79. Indeed:

[A]lmost no legal action has been brought against insider trading since the [Japanese] Securities and Exchange Law was enacted. This does not mean that insider trading did not take place in the Japanese market. Rather, it appears that current regulations are not sufficient to sustain legal action against it.

. . . [While] extensive and detailed case law has developed in the United States under [§ 10(b) of the Securities Exchange Act of 1934], there has been no similar development in Japan. This is mainly due to the fact that under the traditional Japanese legal practice, it is not easy to impose criminal sanctions in insider trading cases under [Japanese securities regulations] because [their] expression is fairly general and not specific to insider trading. For this reason, the [Japanese] Ministry of Finance has been reluctant to use [Japanese securities regulations] for prosecuting.

Id.

122. *Itoba* raises the possibility that foreign nationals can use U.S. courts to seek redress since the plaintiff in *Itoba* was a British company. This increases the Japanese directors' and officers' chances of being forced to defend against charges of violating U.S. insider trading laws in the United States, since the admixture permits non-U.S. plaintiffs—who were previously disqualified under the effects test when the fraud occurred abroad—to sue the corporation under such laws.

trading charges pursuant to U.S. law in a U.S. forum.

Itoba permits non-U.S. shareholders to sue the Japanese corporation in a U.S. court for conduct—in this case insider trading activities—occurring in Japan and minimally affecting U.S. investors solely based on SEC filings made to register a relatively insignificant number of ADRs.¹²³ While the corporation's share price before issuing the ADRs does not reflect the expanded base of liability exposed by *Itoba*, pursuant to the efficient market hypothesis, the share price after the ADR issuance will reflect such exposure and will likely decrease as a result of this exposure.¹²⁴ Therefore, given the directors' fiduciary duty to maximize shareholders' wealth,¹²⁵ the directors will likely forego capital formation opportunities presented by the ADR market. The Japanese corporation will suffer since it will face a higher cost of capital due to the reduced supply of plausible capital. U.S. investors will also suffer because they lose the opportunity to buy foreign securities via an avenue proven more efficient than purchasing the securities directly on the foreign market.¹²⁶

Given the virtues of the ADR market,¹²⁷ it is important not to dismiss lightly *Itoba's* potential negative effect on this

123. Jeffrey E. Glen of Berwin Leighton, counsel for defendant-appellee Lep Group PLC, argues persuasively that this is perhaps the single greatest detrimental effect of broadening the subject matter jurisdiction of U.S. courts. Telephone Interview with Jeffrey E. Glen, counsel for defendant-appellee Lep Group PLC (Aug. 19, 1995).

124. Under the two-test framework, the corporation's share price would not include the expanded base of liability because neither the conduct test nor the effects test would have been met. Therefore, before *Itoba*, the possibility that the Japanese corporation would be forced into securities litigation brought by non-U.S. plaintiffs in the United States simply did not exist, and would not have been reflected in the corporation's share price.

125. Under the property concept of the corporation, the directors of the corporation owe a fiduciary duty to the corporation's owners (the shareholders) to maximize shareholders' wealth. Brent Nicholson, *Recent Delaware Case Law Regarding Director's Duties to Bondholders*, 19 DEL. J. CORP. L. 573, 587 n.103 (1994) (citing William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264-65 (1992)). In comparison to the U.S. securities laws' focus on accountability to shareholders, see *supra* note 93, Japanese securities laws focus more narrowly on shareholders' wealth. This is evidenced by lax regulation and enforcement of inducement payments or bribes in Japan, as compared with relatively rigid regulation and enforcement of such payments in the United States. See generally Langevoort, *supra* note 4.

126. See *supra* note 108 and accompanying text.

127. See *supra* note 102 and accompanying text.

market. It is especially important not to dismiss lightly this negative effect without the benefit of the legislative fact-finding process to assess the ADR market's merits while considering the interference the *Itoba* approach may cause.

2. Likely Negative Effect on International Comity

Aside from *Itoba's* potentially crippling effect on the ADR market, *Itoba's* expansive approach to U.S. courts' subject matter jurisdiction over foreign securities transactions raises international comity concerns. International comity is "a sense of mutual regard founded on identity of position and similarity of institutions" between sovereign nations.¹²⁸ This definition embraces the notion that the United States, in fashioning its stance on how and when to deal with foreign securities transactions, should respect, as a measure of good will and courtesy, securities regulation established in other nations.¹²⁹ This definition also implicitly adheres to the ideal that Congress did not intend to police the world's securities markets.¹³⁰

However, *Itoba's* expansive approach to U.S. courts' subject matter jurisdiction over foreign securities transactions does not respect the securities laws of other nations. It prescribes U.S. judicial review of a British company's purchase of British ordinary shares on the London Exchange. If U.S. courts truly desire, as they should, to promote international comity,

128. 15 C.J.S. *Commerce* § 26 (1967). As one commentator put it:

[D]eterminations of jurisdiction should reflect the legitimate concerns of other nations. Respect for other sovereigns requires that the United States not interfere with the ability of foreign nations to prescribe rules of conduct for its citizens. This principle of comity creates the foundation of the international legal system. Attempts by the United States to unilaterally police ever greater portions of the international financial arena destroy the good will and respect essential to the growth of an international legal and financial community.

Matson, *supra* note 4, at 166.

129. See 15 C.J.S. *Commerce* § 26 (1967).

130. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (explaining the rule that there is a strong presumption against the extraterritorial application of U.S. law which may be overcome only in rare instances); see also *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (noting that federal statutes are presumed to be territorial unless there is clear congressional intent to extend the statute extraterritorially); Matson, *supra* note 4, at 162 ("The legislative intent behind the Exchange Act and the 'historical approach' to statutory interpretation together weigh against the application of section 10(b) to predominantly foreign transactions.").

then a transaction like the one presented for review in *Itoba* represents a golden opportunity to demonstrate such a commitment.

Promoting international comity is not an empty ideal; it benefits the United States in the long run. Insisting on international comity in U.S. courts promotes reciprocity in foreign tribunals. As the Supreme Court noted:

The expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets . . . exclusively on our terms, governed by our laws, and resolved in our courts.¹³¹

U.S. judicial overreaching will likely lead to similar actions by other nations and ultimately a hardship on U.S. citizens.¹³²

Therefore, *Itoba's* increased investor protection does not come without paying two significant prices. First, *Itoba* likely stunts capital formation through the ADR market. Second, it sacrifices international comity since a "philosophy unique to American culture [is imposed on] foreign settings."¹³³ The preeminent question is whether U.S. citizens want to pay these prices for the increased investor protection—a polycentric question most appropriately reserved for the legislature.

VI. CONCLUSION

Itoba's expansion of subject matter jurisdiction necessarily imparts far-reaching implications.¹³⁴ While increased investor protection may result, substantial damage to the ADR market and international comity may also result.¹³⁵ It is difficult to argue that the possible detrimental effects of the *Itoba* ap-

131. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

132. See, e.g., *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 122-23 (1812) ("It is beautiful in theory to exclaim '*fiat Justitia—ruat coelum*' [let right be done, though the heaven should fall], but justice is to be administered with due regard to the law of nations, and to the rights of other sovereigns.").

133. See *Langevoort*, *supra* note 4, at 185. *Langevoort* notes that U.S. securities laws focus on accountability while other nations' securities laws focus on ideals like profit maximization, and argues that the United States should not insist on the focus it has chosen. See *id.* at 186.

134. See *supra* Part V.

135. See *supra* Part V.

proach are not at least as compelling as the possible positive effects.

Given the sensitive nature of the issues of whether the availability of ADRs should be reduced, whether it is appropriate to intrude on the sovereignty of other nations, and whether it is necessary for U.S. citizens to suffer the potential retaliatory effects or consequences of such an intrusion,¹³⁶ Congress should decide such issues. "Congress should have the final say on what competing policy interests should prevail [when it comes to the extraterritorial application of U.S. laws] because it is the most politically accountable branch of our government."¹³⁷ "It would be a terrible mistake for the judiciary to decide when to apply U.S. . . . laws extraterritorially because it lacks accountability to [the] American [public], as well as the resources needed to evaluate which competing interests should prevail in this area."¹³⁸ Since Congress is better able to evaluate the foreign policy ramifications of applying U.S. laws extraterritorially,¹³⁹ it is not desirable to "remove this area of law from the most politically accountable branch of our government (the legislature) to the least (the judiciary)."¹⁴⁰ This is clearly "an area where [the] American [public], not American jurists, most need[s] to be heard."¹⁴¹

Without clear Congressional intent to expand the subject matter jurisdiction of U.S. courts over foreign securities transactions, *Itoba* represents a potentially undesirable step considering its possible detrimental effects. The legislative branch of our three-branch system should be the branch balancing the competing interests at stake. Given the presumption against

136. In *American Banana*, the Court noted that:

For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.

American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

137. James Mathieu, Note, *The Supreme Court's Not So Clear Statement In: Equal Employment Opportunity Comm'n v. Arabian American Oil Co.*, 21 BROOK. J. INT'L L. 939, 963 (1996).

138. *Id.* at 963.

139. *Id.* at 943.

140. *Id.* at 964.

141. *Id.*

the extraterritorial application of U.S. laws¹⁴² and the implications on domestic and international financial markets and international relations, the judiciary inappropriately shifted U.S. policy in *Itoba*.

Mark B. Schwartz

142. See *supra* note 130 and accompanying text.

