THE EXTRATERRITORIAL APPLICATION OF THE COMMODITY EXCHANGE ACT IN PRIME INTERNATIONAL TRADING, LTD. V. BP P.L.C.

I. INTRODUCTION

In 2017, traders in crude oil futures and derivative contracts brought a putative class action suit in the United States District Court for the Southern District of New York against multiple producers, refiners, and crude oil traders.[1] The plaintiffs claimed that the defendants violated sections 6(c)(1), 9(a)(2), and 22 of the Commodity Exchange Act (CEA) by manipulating the prices of Brent crude oil and Brent-related futures in overseas markets.[2] The District Court dismissed the case, holding that the defendants' conduct was so "attenuated" from the injury

1. In re North Sea Brent Crude Oil Futures Litig., 256 F. Supp. 3d 298, 302 (S.D.N.Y. 2017), *aff'd sub nom*. Prime Int'l Trading, Ltd. v. BP P.L.C., 937 F.3d 94, 103 (2d Cir. 2019), *cert. denied*.

2. *In re North Sea Brent Crude Oil*, 256 F. Supp. 3d at 302.

occurring in the United States that it "exceed[ed] the territorial limitations of the [Commodity Exchange Act]."[3]

The plaintiffs then appealed to the Second Circuit, claiming that another section of the CEA, section 2(i), gave their CEA claims extraterritorial effect.[4] However, the Second Circuit determined that the plaintiffs had forfeited their section 2(i) claim because they failed to assert it until after the District Court had issued its final decision.[5] Nonetheless, in denying the plaintiffs' section 2(i) claim, the Second Circuit held in *Prime International Trading, Ltd. v. BP P.L.C.* (*Prime*) that the CEA statutes did not have extraterritorial reach because they lacked a "clear statement of extraterritorial effect," and the alleged misconduct was "predominately foreign."[6]

Section II of this Note will discuss how courts have applied the Supreme Court's *Morrison v. National Australia Bank Ltd.* (*Morrison*)[7] analysis to the CEA and will provide an overview of the facts in *Prime*. Although the *Morrison* Court's decision involved a Securities Exchange Act (SEA) statute,[8] courts have employed the two-prong framework in *Morrison* when deciding the applicability of CEA statutes to conduct abroad. In applying this framework, courts examine whether Congress expressly intended the statute to apply "only within the territorial jurisdiction of the United States."[9] If the answer is positive, the statute does not extend to overseas activity.[10] However, if Congress failed to express such intent, courts then examine the "'focus' of congressional concern" to determine whether the statute applies beyond the borders of the United States.[11] Nevertheless, even when courts find that a statute meets the requirements of *Morrison*, they may still dismiss the case if the alleged misconduct is "so predominantly foreign as to be impermissibly extraterritorial."[12]

Section III of this Note will analyze the effect of the *Prime* Court's acknowledgment of the extraterritoriality of section 2(i) of the CEA, the Court's application of *Morrison*, the differences between *Prime* and the precedent case, *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings* (*Parkcentral*),[13] and the Court's use of the "conduct" and "effects" test in addition to *Morrison*'s two-step analysis. Courts have dismissed cases involving securities that were not listed on a domestic exchange when the plaintiffs failed to assert a "domestic transaction" and the alleged misconduct was "predominantly foreign."[14] Even though the Second Circuit dismissed *Prime,* its decision may have provided means for oil and

3. *Id*. at 306-10.
4. *Prime*, 937 F.3d at 103.
5. *Id*.
6. *Id*. at 103-07.
7. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255-66 (2010).
8. *Id*. at 251.
9. *Id*. at 255.
10. *Id*.
11. *Id*. at 266.
12. Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 216 (2d Cir. 2019).
13. *Id*.
14. *Id*. at 210-16; Loginovskaya v. Batratchenko, 764 F.3d 266, 273-74 (2d Cir. 2014).

gas commodity traders to assert swap-related claims regarding misconduct that occurred abroad. However, while it may be less challenging for commodity traders to assert their swap-related claims involving overseas misconduct, courts will likely continue to dismiss such claims if they cannot demonstrate a "direct and significant" link between the alleged misconduct abroad and the alleged injury occurring in the United States.

II. BACKGROUND

A. Commodities Exchange Act Applies to Oil and Gas Derivatives

Enacted in 1936, the CEA "regulates the trading of commodity futures in the United States."[15] The original purpose of the CEA was to regulate agricultural commodities in order to protect farmers and consumers from fluctuating market prices.[16] Since its enactment, the CEA's definition of commodity has vastly expanded to include "all goods . . . articles, . . . and . . . services . . . in which contracts for future delivery are presently or in the future dealt in."[17] The CEA now governs a broad range of commodities, including oil and gas derivatives.[18]

Due to the volatility of oil and gas commodities, many companies that trade hydrocarbons on international markets use derivatives to hedge their price risk.[19] In general terms, a derivative is a contract whose value comes from a separate or underlying commodity.[20] Derivatives may enable a company to maintain cash flow while protecting against market risk.[21] If the price of the physical commodity decreases, the company avoids losing money if it holds a derivative that offsets the decrease in price.[22] Futures contracts and swaps are two types of derivatives that oil and gas traders commonly use as hedging tools.[23] A futures contract is an agreement to buy or sell an oil or natural gas commodity for delivery at a set date in the future.[24] By entering into a futures contract, a party may increase financial stability.[25] For instance, a company may purchase a derivative to protect it from a decrease in the price of petroleum products, such that the party selling the commodity receives a cash payment to cover a loss from the change in value of the

---

15. U.S. COMMODITY FUTURES TRADING COMM'N, COMMODITY EXCHANGE ACT & REGULATIONS, https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm (last visited Oct. 10, 2019).

16. Gabrielle Schwartz, Comment, *"Deriving" an Understanding of the Extraterritorial Applicability of the Commodity Exchange Act*, 91 ST. JOHN'S L. REV. 769 (2017).

17. 7 U.S.C. § 1a (9) (1992).

18. F. B. Cochran III et al., *Financing with Oil and Gas Derivatives*, 41 ROCKY MT. MIN. L. INST. 16.01, 16.03 (1995).

19. U.S. ENERGY INFO. ADMIN., DERIVATIVES AND RISK MANAGEMENT IN THE PETROLEUM, NATURAL GAS, AND ELECTRICITY INDUSTRIES xiii (2002), https://www.eia.gov/analysis/requests/archive/2002/derivative/pdf/srsmg(2002)01.pdf.

20. *Id*.

21. CATHERINE JAGO ET AL., OIL AND GAS TRADING: A PRACTICAL GUIDE 179 (Denys Hickey ed., 2016).

22. *Id*.

23. *Id*. at 188-89.

24. F. B. Cochran III et al., *supra* note 18, at 16.03.

25. Catherine Jago et al., *supra* note 21, at 188.

commodity.[26] Conversely, a company may also purchase a derivative to cover an increase in the price of petroleum products, such that the party selling the commodity receives a cash payment equal to the increase in value.[27]

A swap, on the other hand, is an agreement to swap cash flows over a defined period of time.[28] As an example, one of the cash flows is tied to a floating price, which is determined by the spot market price of the physical commodity, while the other cash flow is tied to a fixed price.[29] To hedge against price risk, a producer can enter into a swap contract "where he receives the difference between the fixed price and the floating market price at pre-specified intervals."[30] The parties often rely on spot market prices published by a reporting agency, such as Platts, to determine the floating price.[31] However, unlike futures contracts, swap transactions are only settled financially and there is never a physical delivery of the commodity.[32] The CEA, which regulates both futures contracts and swaps, has defined swaps to include "any transaction that is not settled by delivery of the underlying commodity."[33] Consequently, any futures contract transaction that does not involve a physical delivery of the commodity falls under the CEA's definition of swap.

---

26. *Id*.

27. *Id*; *see also* Dan Caplinger, *What Are Crude Oil Futures and How Do They Work?*, MOTLEY FOOL (July 12, 2016), https://www.fool.com/investing/2016/07/12/what-are-crude-oil-futures-and-how-do-they-work.aspx (The value of futures contracts is directly tied to the value of energy commodities. When the price of oil or gas increases or decreases, the value of the futures contracts increases or decreases. For example, a seller enters into a futures contract involving 1,000 barrels of crude oil for the price of $70 per barrel. If the value of the contract drops from $70 to $69, the seller will profit, receiving $1,000 to offset the decrease in oil price. In contrast, if the value of the contract increases from $70 to $71, the seller will lose $1,000.).

28. Scott Mixon et al., *Exploring Commodity Trading Activity: An Integrated Analysis of Swaps and Futures* 2, COMMODITY FUTURES TRADING COMM'N (2016), https://cftc.gov/sites/default/files/idc/groups/public/@economicanalysis/documents/file/oce_wtiswapsfutures.pdf.

29. *Id*; *see* also Int'l Bus. House, *Swaps vs Futures: the Differences*, YOUTUBE (Aug. 27, 2019), https://www.youtube.com/watch?v=jiPRYSMB2Tw (The simplest way to understand a swap transaction is to view it as bet. Suppose that, according to Platts market data, the current price for 5,000 tons of oil is $600. One party speculates that the spot market price will increase, while another speculates that it will decrease. Consequently, they decide to make a "bet" in the form of a swap contract. If the spot market price rises to $601, the first party will make $1 per ton, and the second party will lose $1 per ton. If the spot market price declines, the opposite will occur).

30. Scott Mixon et al., *supra* note 28, at 2; *See* Int'l Bus. House, *supra* note 29 (For example, a producer needs to sell 5,000 tons of Crude oil in December this year. The current market price for 5,000 tons of Crude oil is $600. The producer speculates that the oil prices will decline in December. To offset this risk, he enters into a swap contract, short selling for $600 (i.e., "betting" that market will not decline). In December, the market price drops to $500. The producer sells his physical Crude oil for $500. However, because he hedged at $600, he does not lose profits, recovering the $100 difference between the swap agreement price and the December market price).

31. *Id*.

32. Catherine Jago et al., *supra* note 21, at 189.

33. Schwartz, *supra* note 16, at 771; 7 U.S.C. § 1a(47) (2012).

B. The Dodd-Frank Act (2010) Amended Certain Provisions of the Commodities Exchange Act

In the wake of the 2008 financial crisis, Congress enacted the Dodd-Frank Wall Street Transparency and Accountability Act ("Dodd-Frank") to prevent another crisis from taking place by "improving accountability and transparency in the financial system."[34] Due to a determination that an absence of swap market regulations contributed to the financial crisis, Congress created Title VII of Dodd-Frank, which amended the CEA to include new regulations concerning swap markets.[35] Dodd-Frank revised the CEA to apply to certain overseas swap activities,[36] including adding Section 2(i) to the CEA, which grants U.S. courts jurisdiction over suits alleging misconduct overseas in certain circumstances.[37] Section 2(i) of the CEA states that swap-related provisions of the CEA

> shall not apply to activities outside the United States unless those activities— (1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or (2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act that was enacted by [Dodd-Frank].[38]

In addition, Congress reconstructed multiple provisions of the CEA to incorporate swap-related activities.[39] For example, Congress modified Section 22, which provides a private right of action to sue for CEA violations including swaps.[40]

C. Morrison Impacted the Extraterritorial Application of Securities Statutes

For decades, courts applied a "conduct" and "effects" test to determine whether securities statutes had extraterritorial effect.[41] This test, criticized for being "unpredictable and difficult to administer,"[42] required courts to assess: (1) whether misconduct took place in the United States; and (2) evaluate whether the misconduct "had a substantial effect in the United States or upon United States

---

34. H.R. Res. 4173, 111th Cong. (2010) (enacted) (In 2006, the U.S. subprime mortgage market collapsed, setting into motion the worst global financial crisis since the Great Depression. In response, Congress enacted Dodd-Frank, which increased regulatory oversight of the financial sectors believed to be responsible for the financial crisis). *See also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), *and* Wall Street Transparency and Accountability Act of 2010, Pub. L. No. 111-203, 124 Stat. 1641 (2010).

35. Gabriel D. Rosenberg & Jai R. Massari, *Regulation Through Substitution as Policy Tool: Swap Futurization under Dodd-Frank*, 2013 COLUM. BUS. L. REV. 667, 688-89 (2013). *See* 7 U.S.C. §6s (2020).

36. *Prime*, 937 F.3d at 103.

37. 7 U.S.C. § 2(i) (2015).

38. *Id*.

39. Brief for *Prime Int'l Trading, Ltd.* et al. as Amici Curiae in Support of Neither Party, *Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94 (2d Cir. 2019) (No. 17-2233), at 26 [hereinafter Amici Curiae].

40. 7 U.S.C. § 25 (2015).

41. Schwartz, *supra* note 16, at 775.

42. *Parkcentral*, 763 F.3d at 210 (quoting *Morrison*, 561 U.S. at 258).

citizens."[43] However, even when this test was satisfied, courts would often find that there must be "some additional factor tipping the scale in favor of the application of American law."[44]

In June 2010, the Supreme Court in *Morrison* introduced a new two-step framework, which established a presumption against extraterritorial application of section 10(b) of the SEA.[45] Justice Scalia, in the majority opinion, wrote, "'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'"[46] The Court provided a two-prong process for analyzing whether a securities statute applies extraterritorially.[47] First, courts examine whether Congress "clearly expressed" its intention to apply the statute to conduct occurring outside the United States.[48] Second, if Congress did not indicate a foreign application, courts determine whether the alleged domestic activity is the "'focus' of congressional concern."[49] If the response to the second question is affirmative, courts must presume that the statute applies extraterritorially.[50]

Following the *Morrison* decision, courts have employed the two-step framework when deciding the applicability of securities statutes to conduct abroad.[51] Even though *Morrison* focused on the SEA, courts have applied its two-step process to the CEA.[52] For example, in *Loginovskaya v. Batratchenko* (*Loginovskaya*), the Second Circuit applied the two-step process to section 22 of the CEA, the private right of action provision.[53] Applying the first step, the court emphasized that "[t]he CEA as a whole . . . is silent as to extraterritorial reach."[54] Subsequently, the court examined whether the plaintiff's claim was the "focus of congressional concern."[55] The court reasoned that, under section 22, "[a] private right of action exists only when . . . [the] transactions listed in § 22 occurred within . . . the United States."[56] The court then found that, because the misconduct did not take place within the United States, the plaintiff did not satisfy *Morrison*.[57]

43. Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 65 (2d Cir. 2012).

44. *Morrison*, 561 U.S. at 258.

45. *Id*. at 255-56.

46. *Id*. at 255.

47. *Id*. at 255-56.

48. *Loginovskaya*, 764 F.3d at 271 (referencing *Morrison*, 561 U.S. at 255).

49. *Morrison*, 561 U.S. at 266.

50. *Id*.

51. Michael L. Spafford & Daren F. Stanaway, *The Extraterritorial Reach of the Commodity Exchange Act in the Wake of Morrison and Dodd-Frank*, 37 FUTURES AND DERIVATIVES L. REP. 1, 5 (2017).

52. *Id*. at 2.

53. *Loginovskaya*, 764 F.3d at 271; 7 U.S.C. § 25 (2015).

54. *Loginovskaya*, 764 F.3d at 271.

55. *Id*.

56. *Id*. at 272.

57. *Id*. at 273.

Over the past decade, several circuit courts have developed their own interpretation of *Morrison*.[58] Notably, in *Absolute Activist Value Fund v. Ficeto* (*Absolute Activist*), the Second Circuit analyzed the meaning of "domestic transaction" under the second prong of *Morrison*.[59] The Court held that "the purchase or sale of a security" on a foreign exchange should be considered "domestic within the meaning of *Morrison*" when the "facts suggest[] that irrevocable liability was incurred or title was transferred within the United States."[60] Every circuit court that has applied *Morrison* to private transactions[61] has given the same meaning to the term "domestic transaction" as the *Absolute Activist* court.[62]

D. Alleging a Domestic Application is Necessary, but Not Sufficient

Even if a court finds that a statute meets the requirements of *Morrison*, the case may still be dismissed if the alleged conduct is "predominately foreign."[63] In *Parkcentral,* the plaintiffs, international hedge funds, alleged that Porsche, a German car manufacturer, and its executives issued false statements related to the company's plan to acquire Volkswagen (VW) stock, which traded on European stock exchanges.[64] The hedge funds claimed that Porsche's statements caused them to execute "swap agreements pegged to the price of VW shares" in the United States, resulting in significant losses in profit.[65]

The Second Circuit in *Parkcentral* found that alleging a domestic transaction is necessary, but "not alone sufficient to state a properly domestic claim under the statute."[66] The court reasoned that even if the alleged securities transactions satisfied *Absolute Activist*,[67] the plaintiff's claims were "so predominantly foreign as to be impermissibly extraterritorial."[68] In making this determination, the court emphasized that allowing the suit to proceed would cause a potential regulatory conflict, as European market participants would be summoned into U.S. courts

---

58. *Absolute Activist*, 677 F.3d at 66-67; United States v. Georgiou, 777 F.3d 125, 135-36 (3d Cir. 2015); Quail Cruises Ship Mgmt. v. Agencia de Viagens CVC Tur Limitada, 645 F.3d 1307, 1309 (11th Cir. 2011); SEC v. Levine, 462 Fed. App'x 717, 719 (9th Cir. 2011).

59. *Absolute Activist*, 677 F.3d at 66-67.

60. *Id.* at 66-68.

61. SEC v. Scoville, 913 F.3d 1204, 1218 (10th Cir. 2019) (holding that Dodd-Frank restored the "conduct" and "effects" tests for government securities actions. However, the *Morrison*'s two-prong framework will continue to apply to private securities actions in the Tenth Circuit); *see also* Benjamin L. Weintraub, *10th Circuit Reinstates "Conduct-and-Effects" Test in SEC Enforcement Action, Superseding Morrison*, PAUL WEISS (Jan. 30, 2019), https://www.paulweiss.com/practices/litigation/securities-litigation/publications/10th-circuit-reinstates-conduct-and-effects-test-in-sec-enforcement-actions-superseding-morrison?id=28175.

62. *Georgiou*, 777 F.3d at 135-36 (noting that "territoriality under *Morrison* turns on where, physically, the purchaser . . . committed . . . to pay for or deliver a security," the Third Circuit held that "a securities transaction is domestic when the parties incur irrevocable liability . . . [in] the United States" or "pass[] title in the United States"); *also see Quail Cruises Ship*, 645 F.3d at 1309, and *Levine*, 462 Fed. App'x at 719.

63. *Parkcentral*, 763 F.3d at 216.

64. *Id*. at 207.

65. *Id*. at 201.

66. *Id*. at 215.

67. *Id*. at 216.

68. *Parkcentral,* 763 F.3d at 216.

and "subject[ed] to U.S. securities laws."[69] However, the court indicated that its decision to dismiss the suit "in no way forecloses the application of § 10(b) [of the SEA] to govern fraud in connection with transactions in securities-based swap agreements where the transactions are domestic and where the defendants are alleged to have sufficiently subjected themselves to the statute."[70]

E. An Overview of the Facts in Prime International Trading, Ltd. v. BP

In *Prime International Trading Ltd. v. BP P.L.C.*, the plaintiffs, traders in Brent-related Crude oil futures and derivative contracts (Brent Futures) on the Intercontinental Exchange Futures Europe (ICE Futures Europe) and the New York Mercantile Exchange (NYMEX), brought a putative class action suit against multiple individuals and entities, including BP, Statoil, and Shell.[71] The plaintiffs claimed that the defendants, who were engaged in the production of Brent crude oil, manipulated the prices of Brent crude oil and Brent-related futures by executing artificial trades of physical Brent crude oil in overseas markets.[72]

The defendants then reported the fabricated trade data to Platts, a London-based price reporting agency that compiles market data related to physical Brent crude transactions and uses it to calculate benchmark prices, including the most widely recognized benchmark, the Dated Brent Assessment.[73] ICE Futures in Europe, in turn, used the Dated Brent Assessment to generate the ICE Brent Index.[74] The ICE Brent Index was subsequently used to price futures contracts on the ICE Futures Europe and NYMEX.[75] Consequently, the plaintiffs claimed that the defendants' manipulative transactions caused a "ripple effect" on Brent Futures contracts around the world. [76]

III. ANALYSIS

In *Prime*, the plaintiffs claimed that sections 6(c)(1), 9(a)(2), 22, and 2(i) of the CEA applied to the defendants' misconduct abroad.[77] However, the Second Circuit found the CEA provisions at issue did not apply extraterritorially because they lacked a "'clear statement' of extraterritorial effect," and the alleged misconduct was "predominantly foreign."[78] In reaching this decision, the Court focused on whether the CEA statutes allowed a party to bring an action against a person for fraudulent transactions that occurred overseas.[79]

---

69. *Id*. at 215-16.
70. *Id*. at 217.
71. Prime Int'l Trading, Ltd. v. BP P.L.C., 937 F.3d 94, 94-98 (2d Cir. 2019).
72. *Id*. at 100.
73. *Id*. at 99-100.
74. *Id*. at 100.
75. *Id*.
76. *Prime*, 937 F.3d at 108.
77. *Id*. at 101-3.
78. *Id*. at 102, 105.
79. *Id*. at 102.

To determine whether the application of the CEA statutes extended to conduct abroad, the Court relied on the two-step framework in *Morrison*.[80] Applying the first prong of *Morrison*, the Court examined the plain language of sections 6(c)(1), 9(a)(2), and the private right of action provision, section 22, to assess whether Congress had clearly intended "to give [them] extraterritorial effect."[81] The Court, referencing its holding in *Loginovskaya*, noted that section 22 was "silent as to extraterritorial reach."[82] Likewise, the Court observed that there was "no affirmative, textual indication" that sections 6(c)(1) and 9(a)(2) applied to extraterritorial conduct.[83] The Court then shifted its attention to section (2)(i).[84] The plaintiffs argued that section 2(i) of the CEA applied to swap-related activities abroad with a "direct and significant connection" to the United States.[85] While the Court recognized that section 2(i) could have applied to the plaintiffs' claims "encompassing 'swap-related' Brent transactions," it determined that the plaintiffs forfeited this argument by failing to assert it until after the District Court had issued its decision.[86] Thus, the Court concluded that the CEA statutes at issue governed "only . . . domestic conduct, and not . . . foreign conduct."[87]

The plaintiffs argued that even if the CEA provisions did not satisfy the first prong of *Morrison*, their claims "involve[d] a domestic application of the statute" under the second prong of *Morrison*.[88] In deciding whether the plaintiff's claims alleged a domestic application, the Court considered whether the defendants' alleged misconduct was the "'focus' of congressional concern."[89] Since section 22 provides a private right of action, the Court noted that the plaintiffs' claim must meet the "threshold requirement of CEA § 22" prior to considering the merits of the two additional CEA provisions.[90] The court cited to *Loginovskaya*, where it held that the "focus of congressional concern" regarding section 22 was "'clearly transactional' given its emphasis on 'domestic conduct [and] domestic transactions.'"[91] Therefore, to allege a "proper domestic application" of section 22, the Court noted that "the suit must be based on transactions occurring in the territory of the United States."[92]

The Court reasoned that although it would normally look to the test delineated in *Absolute Activist* to determine whether the alleged fraudulent transactions constituted "domestic transactions," it was unnecessary to decide whether the

80. *Id*. at 103.

81. *Prime*, 937 F.3d at 103 (citing to *Morrison*, 561 U.S. at 265).

82. *Id*. at 102-03 (citing to *Loginovskaya*, 764 F.3d at 271).

83. *Id.* at 103.

84. *Id*.

85. *Id*.

86. *Prime*, 937 F.3d at 103-04 (noting that "[u]nlike Sections 6(c)(1) and 9(a)(2), Section 2(i) contains, on its face, a 'clear statement' of extraterritorial application").

87. *Id*. at 105 (excluding section 2(i) of the CEA).

88. *Id*. at 104 (referencing *Morrison*, 561 U.S. at 266).

89. *Id*. at 104.

90. *Id*.

91. *Prime*, 937 F.3d at 104 (citing to *Loginoskaya*, 764 F.3d at 272).

92. *Id*.

plaintiffs' claims were domestic in nature because they could be "impermissibly extraterritorial even if the transactions [were] domestic."[93] The Court then proceeded with its analysis under the assumption that the plaintiffs' trades on NYMEX and ICE Futures Europe qualified as domestic transactions.[94]

In *Parkcentral*, the Court emphasized that it operated under the assumption that equity swaps were domestic transactions.[95] However, in that case, it dismissed the plaintiffs' claims because the defendants' conduct was "predominately foreign."[96] The Court found that the *Parkcentral* holding, which concerned a claim regarding section 10(b) of the SEA, extended to claims under the CEA.[97] Comparing the facts in *Parkcentral* to those in *Prime*, the Court reasoned that the similarities between the two cases were sufficient to conclude that the plaintiffs' claims in *Prime* were "predominantly foreign."[98] The Court noted that, in both cases, the plaintiffs traded derivatives linked to the value of an asset, the "underlying assets were foreign," and the alleged misconduct occurred abroad.[99]

Additionally, the Court stressed that the defendants' conduct in *Parkcentral* was possibly even "*less* predominantly foreign" than that of the defendants in *Prime*.[100] The Court reasoned that *Prime's* alleged fraudulent oil trading occurred overseas. Conversely, while the defendants in *Parkcentral* issued misleading statements in Germany, their statements were "accessible in the United States and were repeated here by the defendants."[101] Furthermore, in *Parkcentral*, the hedge fund swap agreements traded in the United States were directly linked to the "price of Volkswagen's shares" on European stock exchanges.[102] In *Prime*, the Court described the plaintiffs' claims as an "attenuated 'ripple effects' theory," observing that "[n]early every link in Plaintiffs' chain of wrongdoing is entirely foreign – in contrast to *Parkcentral*, where the alleged wrongdoing occurred on American shores at the second causal step,[103] not the fifth."[104] Therefore, the Court concluded that the plaintiffs did not allege a proper domestic application of section 22 of the CEA.[105] Similarly, the Court also determined that plaintiffs failed to claim a "proper domestic application" of sections 6(c)(1) and 9(a)(2) of the CEA.[106]

---

93. *Id*. at 105.

94. *Id*.

95. *Id.*

96. *Prime*, 937 F.3d at 105 (citing to *Parkcentral*, 763 F.3d at 216).

97. *Id*.

98. *Id*. at 106.

99. *Id*.

100. *Id*.

101. *Prime*, 937 F.3d at 106 (citing to *Parkcentral*, 763 F.3d at 201).

102. *Id*.

103. *Id*. at 106-07; *see Parkcentral*, 763 F.3d at 201 (in the first causal step, the defendants in *Parkcentral* issued misleading statements in Germany regarding the company's plan to purchase Volkswagen stock. In the second, Porsche's executives repeated these statements and made them "accessible" in the United States).

104. *Id*.

105. *Id*. at 107.

106. *Prime*, 937 F.3d at 107.

A. If the Prime Court Had Not Determined that the Plaintiffs Forfeited Their 2(i) Claim, Would the Plaintiffs Have Had a Stronger Argument that Their Claims Satisfied Morrison?

In *Prime*, the Second Circuit acknowledged that had the plaintiffs asserted their section 2(i) claim in a timely manner and had the alleged misconduct occurred after the statute became effective, section 2(i) could have applied to the plaintiffs' claims regarding "'swap-related' Brent transactions."[107] Therefore, if the Court had not dismissed the plaintiffs' section 2(i) claim, the plaintiffs likely would have had a stronger argument that their claims satisfied *Morrison*.[108]

Analyzing section 2(i) under the first step in *Morrison*, it appears that Congress clearly expressed its intention "to give [the CEA] extraterritorial effect" concerning swap-related activities.[109] Section 2(i) states that the swap-related provisions of the CEA may apply extraterritorially if they "have a direct and significant connection with activities in, or effect on, commerce of the United States."[110] Furthermore, because Congress amended section 22, section 9(a)(1), and section 6(c)(1) to include swap transactions, there is some indication that Congress intended to link the extraterritorial application of section 2(i) to those provisions of the CEA.[111]

Congress's decision to expressly grant swap-related CEA provisions extraterritorial effect in certain circumstances suggests the swap-related CEA provisions have greater extraterritorial reach than other CEA provisions.[112] Accordingly, one commentary views the *Prime* court's comparison of CEA provisions in *Loginovskaya*, in which "no swaps or transactions related to swaps [were] at issue"[113] to the CEA provisions in *Prime* to be an "imperfect analogy."[114]

B. The Prime Court Arguably Misapplied Morrison

Disregarding the possible connection between section 2(i) and the CEA provisions at issue, the Court concluded that there was "no affirmative, textual indication" that the provisions had extraterritorial effect.[115] The Court then proceeded

---

107. *Id.* at 103-04; *See* Ian S. Speir & Nima H. Mohebbi, *Preservation Rules in the Federal Courts of Appeals*, 16 J. APP. PRAC. & PROCESS 281, 284 (2015) (while the court used the word "waiver" to describe the plaintiffs' failure to present their argument in a timely manner, the correct term is "forfeiture." A forfeiture occurs in federal court when a plaintiff neglects to raise an argument to the district court. An appellate court may use a forfeited argument as a basis for reversing a district court's decision, but only if it finds that the district court was in plain error. However, the *Prime* court affirmed the district court's decision, noting that even if the plaintiffs had asserted their Section 2(i) argument timely, its "conclusion would not change" as the "alleged manipulation . . . occurred in September 2012, before Section 2(i) became effective").

108. Amici Curiae, *supra* note 39, at 26-27.

109. *Morrison*, 561 U.S. at 255.

110. 7 U.S.C. § 2(i).

111. *Id.* § 25; *Id.* § 9(1); *Id.* § 13(a)(2).

112. Spafford & Stanaway, *supra* note 51, at 9.

113. *Loginovskaya*, 764 F.3d at 271.

114. Spafford & Stanaway, *supra* note 51, at 9.

115. *Prime*, 937 F.3d at 103.

to apply the second prong of *Morrison*.[116] It noted that the "focus of congressional concern" regarding section 22 was "domestic conduct [and] domestic transactions."[117] Adding an additional step to the *Morrison* analysis, the Court emphasized that the "plaintiffs must allege not only a domestic transaction, but also domestic – not extraterritorial – *conduct* by Defendants that is violative of a substantive provision of the CEA."[118] The Court then compared the facts in *Parkcentral* to those in *Prime* to determine whether the defendants' conduct was so "predominately foreign" as to be "impermissibly extraterritorial."[119]

However, by focusing on the extent to which the misconduct took place abroad, the *Prime* Court arguably misapplied *Morrison*.[120] In *Morrison*, the Supreme Court noted that the focus of the SEA was "not on the place where the deception originated, but on the purchases and sales of securities in the United States."[121] While the *Prime* decision involves CEA claims rather than a claim under section 10(b) of the SEA, both the CEA statutes at issue and section 10(b) of the SEA aim to protect the integrity of domestic exchanges.[122] For example, section 6(c)(1) of the CEA prohibits manipulation "in connection with any swap, or a contract of sale of any commodity," including false reporting regarding "market information or conditions that affect or tend to affect the price of any commodity in interstate commerce."[123]

Furthermore, *Morrison*'s emphasis on the "primacy of the domestic exchange" suggests that courts should consider the location of the exchange when deciding whether the alleged domestic activity is impermissibly extraterritorial.[124] In *Prime,* however, the Court neglected to discuss the location of the commodity exchanges prior to determining that the plaintiffs had failed to plead a "proper domestic application" of the CEA statutes.[125]

C. There are Important Distinctions Between Prime and Parkcentral

The *Prime* Court concluded that the plaintiffs' claims were extraterritorial in nature based on what it identified as several key similarities between *Parkcentral* and *Prime*: in both cases, the plaintiffs traded derivatives linked to the value of an asset, the "underlying assets were foreign," and the alleged misconduct occurred abroad.[126] However, a close examination of the facts reveals important differences between the two cases. Consequently, the Amici Curiae, in favor of applying the

116. *Id*. at 104.

117. *Id*. at 104-05.

118. *Id*. at 106.

119. *Id*.

120. Amici Curiae, *supra* note 39, at 12.

121. *Morrison*, 561 U.S. at 266.

122. Amici Curiae, *supra* note 39, at 1; *Morrison*, 561 U.S. at 267 (noting that section 10(b) applies to "only transactions in securities listed on domestic exchanges, and domestic transactions"); 7 U.S.C. § 5.

123. 7 U.S.C. § 9(1).

124. Amici Curiae, *supra* note 39, at 17-18; *Morrison*, 561 U.S. at 267.

125. *Prime*, 937 F.3d at 104-07.

126. *Id*. at 106.

CEA to the defendants' price manipulations on a United States exchange, have questioned whether the two cases are truly analogous.[127]

First, in *Parkcentral*, the derivatives at issue were linked to VW stock which traded on the European stock exchange.[128] The *Parkcentral* Court found that when securities are "not listed on domestic exchanges," a domestic transaction is "not alone sufficient to state a proper domestic claim under the statute."[129] Referencing the *Parkcentral* decision, the *Prime* Court also concluded that alleging a domestic transaction was necessary, but not sufficient to state a claim under the CEA statutes in question.[130] However, unlike *Parkcentral*, *Prime* concerned the Brent-related derivatives that were traded on a domestic exchange, the NYMEX, rather than on a foreign exchange.[131]

Second, *Parkcentral* concerned derivatives linked to VW stock traded on European stock exchanges.[132] There are foreign regulatory bodies which govern European stock exchanges, the stock issuer, and the market participants.[133] Accordingly, the *Parkcentral* Court emphasized that allowing the suit to proceed would cause a potential regulatory conflict, as European market participants would be summoned into U.S. courts and "subject[ed] to U.S. securities laws."[134] On the contrary, the *Prime* case dealt with crude oil, a fungible commodity, which moves throughout the world without a relevant situs, such as a stock exchange.[135] Consequently, it is much harder to track and regulate commodity trades.[136] Furthermore, *Prime* involved an exchange in the United States.[137] Since the laws of the United States govern the NYMEX, the potential for "unintended clashes between our laws and those of other nations" is significantly less.[138]

D. The Court in Prime Appeared to Apply the "Conduct" and "Effects" Test in Addition to Morrison's Two-Step Framework

On June 24, 2010, the Supreme Court's decision in *Morrison* replaced the long-standing "conduct" and "effects" test with a two-prong framework.[139] One month later, President Obama signed Dodd-Frank, revising the CEA to include new regulations concerning swap markets.[140] Congress added section 2(i) to the

127. Amici Curiae, *supra* note 39, at 2-15; *also see* Spafford & Stanaway, *supra* note 51, at 9.

128. *Parkcentral*, 763 F.3d at 215.

129. *Id*. at 215-16.

130. *Prime*, 937 F.3d at 106.

131. *Id*. at 105.

132. *Parkcentral*, 763 F.3d at 201.

133. Amici Curiae, *supra* note 39, at 17.

134. *Parkcentral*, 763 F.3d at 215.

135. Amici Curiae, *supra* note 39, at 17.

136. *Id*.

137. *Prime*, 937 F.3d at 105; Amici Curiae, *supra* note 39, at 18.

138. *Prime*, 937 F.3d at 106; Amici Curiae, *supra* note 39, at 18.

139. *Morrison*, 561 U.S. at 261.

140. Jonathan E. Richman, *Proskauer* R*ose Discusses the SEC's Extraterritorial Reach*, THE CLS BLUE SKY BLOG (Apr. 11, 2017), http://clsbluesky.law.columbia.edu/2017/04/11/proskauer-rose-discusses-the-secs-extraterritorial-reach/.

CEA, which states that swap-related provisions of the CEA "shall not apply to activities outside the United States unless those activities . . . have a direct and significant connection with activities in, or effect on, commerce of the United States."[141] Some authorities argue that Congress, expressing its disapproval of the *Morrison* decision,[142] included this language to establish a "new, distinct standard governing . . . the extraterritorial reach" of CEA swap provisions.[143]

Despite Dodd-Frank's attempt to reinstate a new standard, courts continue to apply *Morrison*'s two-prong framework.[144] At the same time, however, these courts have not completely abandoned the "conduct" and "effects" test.[145] When employing the "conduct" and "effects" test, courts first determine whether the misconduct took place in the United States.[146] In *Prime*, the Court applied the first step of the conduct and effects test, finding that none of the alleged "manipulative oil trading occurred in United States."[147] Second, courts utilize a proximate cause analysis to decide whether foreign misconduct has a "substantial effect in the United States or upon a United States citizen."[148] In *Prime*, the Second Circuit performed a proximate cause analysis to determine whether there was sufficient connection between the defendants' misconduct overseas and its effect on the United States.[149] Consequently, the Court found that the defendants' manipulative reporting of Brent Crude transactions overseas was "too attenuated" from the alleged injury that occurred in the United States.[150]

In addition to proving that the plaintiffs' claims did not satisfy the "conduct" and "effects" test, the Court might have performed the "effects" step of the test to establish that the defendants' conduct did not have a "direct and significant connection with activities in, or *effect* on, commerce of the United States" under section 2(i) of the CEA.[151] Thus, the *Prime* Court could have chosen to apply both the "conduct" and "effects" test and *Morrison*'s two-step framework to demonstrate that the plaintiffs' suit would have failed regardless of whether they had successfully asserted their section 2(i) claim.

IV. CONCLUSION

While the *Prime* Court's recognition that section 2(i) "contains . . . a 'clear statement' of extraterritorial application" may open the door for future courts to

141. 7 U.S.C. § 2(i).
142. Schwartz, *supra* note 16, at 786.
143. Spafford & Stanaway, *supra* note 51, at 8-9.
144. *Id*. at 5.
145. Amici Curiae, *supra* note 39, at 19.
146. *Absolute Activist*, 677 F.3d at 65.
147. *Prime*, 937 F.3d at 106.
148. *Absolute Activist*, 677 F.3d at 65.
149. *Prime*, 937 F.3d at 106-07.
150. *Id*. at 106.
151. 7 U.S.C. § 2(i) (emphasis added).

apply the CEA's swap-related provisions to activities abroad,[152] oil and gas commodity traders asserting swap-related claims involving overseas conduct will likely continue to face obstacles if the conduct they allege is too attenuated to "have a direct and significant" impact on commerce in the United States.[153] Furthermore, unless the Supreme Court clarifies whether courts should restore the "conduct" and "effects" test, continue to use *Morrison*'s two-step framework, or apply a new standard with regard to CEA claims concerning overseas swap transactions, the Second Circuit will likely continue to rely on its previous holdings and apply *Morrison* to CEA swap-related transactions occurring outside the United States.

Finally, if the Second Circuit continues to compare cases, such as *Parkcentral*, which do not involve swap-related transactions, to cases which do, it will likely continue to find that swap-related claims concerning overseas misconduct, even those involving a domestic exchange, are "impermissibly extraterritorial" when the misconduct abroad is too "attenuated" from the alleged injury to the United States.[154]

Rebecca Cloeter[*]

152. *Id*. at 103.

153. Spafford & Stanaway, *supra* note 51, at 9.

154. *Prime*, 937 F.3d at 106.

* Rebecca Cloeter is a third-year law student at the University of Tulsa College of Law. Cloeter intends to practice international and energy law upon graduation. The author would like to thank Professor Robert Butkin and the Energy Law Journal student editors for their assistance in the writing process. Cloeter also wishes to thank her husband, Pablo Barajas, for his support.