Liu Meng-Lin v. Siemens AG: The Last of the Foreign Whistleblowers

I. OVERVIEW

Liu Meng-Lin was a Taiwanese compliance officer for the healthcare division of Siemens China, Ltd. (Siemens), the Chinese subsidiary of the German corporation Siemens AG.[1] Liu discovered that employees within his division were routinely engaging in the sale of medical equipment that indirectly resulted in improper payments to officials in North Korea and China.[2] Concerned that the payments violated both company policy and U.S. anticorruption laws, Liu reported the conduct to his superiors at Siemens.[3] Instead of collaborating with Liu to address the possible violations, Siemens gradually decreased Liu's responsibilities, restricted his authority, demoted him, and ultimately fired him.[4]

Following his termination, Liu sought redress. He notified the Securities and Exchange Commission (SEC) of Siemens' potentially corrupt conduct.[5] He then filed a lawsuit in the United States District Court for the Southern District of New York, alleging that Siemens violated the antiretaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) by firing him.[6] In his complaint, Liu failed to plead that the corrupt conduct, the discovery of the abuses, the efforts to address the violations, or Siemen's mistreatment of Liu occurred within the territorial jurisdiction of the

1. Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 177 (2d Cir. 2014).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

United States.[7] Siemens moved for failure to state a claim on two grounds.[8] First, Siemens contended that the antiretaliation provision of the Dodd-Frank Act does not apply extraterritorially.[9] Second, Siemens asserted that Liu's complaint failed to establish that Liu made a disclosure to the SEC that was "required or protected" by any of the specific statutes enumerated in the Dodd-Frank Act.[10] The district court granted Siemen's motion to dismiss with prejudice, and Liu appealed the district court's decision.[11] The United States Court of Appeals for the Second Circuit *held* that Liu failed to prove that the facts constitute a domestic application of the statute and that the antiretaliation provision of the Dodd-Frank Act does not apply extraterritorially. *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 183 (2d Cir. 2014).

II. BACKGROUND

A. The Dodd-Frank Act

In response to the financial crisis brought on by the "too big to fail" American banks,[12] in 2010 the United States Congress passed the Dodd-Frank Act, the most comprehensive financial regulatory reform since the Great Depression.[13] The Dodd-Frank Act amended the Securities Exchange Act of 1934 (SEA)[14] and was enacted to "provide for financial regulatory reform, to protect consumers and investors, to enhance federal understanding of insurance issues, to regulate the over-the-counter derivatives markets, and for other purposes."[15] The Dodd-Frank Act established a concrete strategy to "improv[e] the accountability and transparency of the financial system."[16] One of the mechanisms for

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 177-78.
11. *Id.*
12. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, intro., 124 Stat. 1376, 1376 (2010) (codified in scattered sections of 7, 12, 15, 18, 22, 31, and 42 U.S.C.).
13. David He, *Beyond Securities Fraud: The Territorial Reach of U.S. Laws After* Morrison v. N.A.B., 2013 COLUM. BUS. L. REV. 148, 166.
14. *Annual Report to Congress on the Dodd-Frank Whistleblower Program*, U.S. SEC. & EXCHANGE COMMISSION (2013), http://www.sec.gov/about/offices/owb/annual-report-2013.pdf [hereinafter *Annual Report*].
15. H.R. REP. NO. 111-365, at 1 (2009).
16. Dodd-Frank Act intro., 124 Stat. at 1376; Nicole H. Sprinzen, Asadi v. G.E. Energy (USA) L.L.C.*: A Case Study of the Limits of the Dodd-Frank Anti-Retaliation Protections and the Impact on Corporation Compliance Objectives*, 51 AM. CRIM. L. REV. 151, 160-61 (2014).

achieving the statute's objectives was the creation of new incentives and protections for whistleblowers.[17]

The Dodd-Frank Act's extensive reform of the U.S. financial regulatory system contains a whistleblower protection program to assist the SEC in uncovering violations of securities laws.[18] The whistleblower protection program shields whistleblowers from harm through the antiretaliation provision[19] and offers whistleblowers rewards through the bounty provision.[20] The antiretaliation provision, section 922(h)(1)(a), prohibits employers from retaliating against individuals who provide the SEC with information about possible securities violations.[21] This provision also provides a private cause of action for whistleblowers who have been subject to retaliatory discharge or other forms of discrimination.[22] The bounty provision authorizes the SEC to provide financial rewards to whistleblowers who voluntarily provide information to the SEC that leads to a successful enforcement action.[23] From the program's inception to the end of 2013, the United States Securities and Exchange Commission Office of the Whistleblower has received 6,573 tips and complaints from individuals in over 65 countries.[24] In 2013, 11.77% of whistleblowers participating in the program submitted tips or complaints from abroad.[25]

B. The Presumption Against Extraterritoriality

The presumption against extraterritoriality is a principle of statutory construction indicating that all legislation of Congress is presumed to apply domestically unless Congress clearly manifests its intent for extraterritorial application.[26] The presumption against extraterritoriality is founded upon two central beliefs: that interpreting legislation to apply only domestically functions as a protection measure against unintended clashes of law between U.S. laws and laws of other nations that could

17. Dodd-Frank Act § 922, 124 Stat. at 1841-49; Sprinzen, *supra* note 16, at 198.
18. Dodd-Frank Act § 922, 124 Stat. at 1841-49; 15 U.S.C. § 78u-6 (2012).
19. *Annual Report*, *supra* note 14, at 2; 15 U.S.C. § 78u-6.
20. *Annual Report*, *supra* note 14, at 2.
21. Dodd-Frank Act § 922, 124 Stat. at 1845-46.
22. *Id.* § 922, 124 Stat. at 1841-43.
23. 15 U.S.C. § 78u-6.
24. *Annual Report*, *supra* note 14, at 10.
25. *Id.* at 22.
26. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877-78 (2010).

result in international discord[27] and that "Congress ordinarily legislates with respect to domestic, not foreign matters."[28]

The presumption against extraterritoriality was clearly articulated in the United States for the first time in the 1932 United States Supreme Court case *Blackmer v. United States*.[29] In *Blackmer*, the Supreme Court defined the territorial jurisdiction of legislation and statutes. The Court held that the United States retains authority over a U.S. citizen residing in a foreign country and that the U.S. citizen is "bound by [the] laws made applicable to him."[30]

Almost two decades later, the Supreme Court explicitly applied the presumption against extraterritoriality in *Foley Bros., Inc. v. Filardo*.[31] *Foley* concerned the extraterritorial application of the Eight Hour Law Act.[32] In determining that the legislation did not apply to a contract for construction of public works in a foreign country, the Court considered several factors, including whether the statutory structure, the legislative history, or administrative interpretations of the Eight Hour Law Act entertained an intention for extraterritorial application.[33] This case firmly established the presumption against extraterritoriality as a "canon of construction" of U.S. law.[34]

Although the Supreme Court disregarded, and even refused to apply, the presumption against extraterritoriality in antitrust and trademark cases,[35] the Court consistently applied the presumption against extraterritoriality to legislation regarding employment and labor.[36] In 1991, in *EEOC v. Arabian American Oil Co.* (*Aramco*), Ali Boureslan, a naturalized citizen of the United States working in Saudi Arabia, sued a Delaware corporation, Arabian American Oil Company (Aramco).[37] Boureslan claimed that Aramco violated Title VII of the Civil Rights Act of 1964 (Title VII) by illegally discriminating against him because of his

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27. EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991); *see also* Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1, 11, 13 (2014).

28. *Morrison*, 130 S. Ct. at 2877; *see also* Clopton, *supra* note 27, at 13.

29. 284 U.S. 421, 437 (1932).

30. *Id.*

31. 336 U.S. 281, 286 (1949).

32. *Id.* at 281. The Eight Hour Law Act prevented any laborer or mechanic from working more than eight hours in one calendar day during the course of any contractual obligation to which the United States was a party. *Id.*

33. *Id.* at 285-87.

34. *Id.* at 285; *see also Aramco*, 499 U.S. 244, 248 (1991).

35. William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 85-86 (1998).

36. *Id.* at 85-86; *see Aramco*, 499 U.S. at 247-48.

37. *Aramco*, 499 U.S. at 247.

race, religion, and national origin.[38] The Supreme Court rejected Boureslan's contention that Title VII had extraterritorial application for three key reasons.[39] First, the definitions of the jurisdictional terms "employer" and "commerce" were ambiguous and did not constitute "specific language" to include U.S. employers employing U.S. citizens abroad.[40] Second, the statute's "alien exemption" clause did not manifest a congressional intent to protect U.S. citizens from employment discrimination abroad because it would mean that Title VII would be applicable to U.S. employers and foreign employers of U.S. citizens.[41] Lastly, the Court decided that Congress's failure to address potential conflicts between Title VII and foreign laws and procedures suggested that Congress did not intend Title VII to have an extraterritorial application.[42]

The decision in *Aramco* was not unanimous, and Justice Marshall, Justice Stevens, and Justice Blackmun dissented.[43] The dissent disagreed with the majority's holding that Title VII did not apply extraterritorially and asserted that the majority misconstrued *Foley* to treat the presumption against extraterritoriality as a "clear statement" rule.[44] The dissent argued that under *Foley* the court is not "free to invoke the presumption against extraterritoriality until it has exhausted all available indicia of Congress's intent on this subject."[45]

Despite the Supreme Court's steadfast application of the presumption against extraterritoriality, especially in employment law, the United States Court of Appeals for the Second Circuit disregarded the presumption against extraterritoriality throughout the twentieth century in contexts that related the application to securities law.[46] The Second Circuit supported the judiciary's flexibility in determining the exterritorial application of statutes,[47] and instead of strictly adhering to the presumption against extraterritoriality, the Second Circuit applied "conduct" and "effects" tests.[48] The conduct test, propounded in *Leasco*

38. *Id.*
39. *Id.* at 246-59.
40. *Id.* at 248-49.
41. *Id.* at 253-54.
42. *Id.* at 256.
43. *Id.* at 260 (Marshall, Blackmun & Stevens, JJ., dissenting).
44. *Id.* at 262.
45. *Id.* at 266.
46. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010).
47. The Second Circuit's interpretation that congressional silence regarding the extraterritorial application of a statute allows courts to "discern" whether Congress would have wanted the statute to apply extraterritorially is a deviation from previous jurisprudence. *Id.* at 2878-79.
48. *Id.* at 2879. The Supreme Court in *Morrison* called into question the conduct test and effects test. *See infra* Part II.

Data Processing Equipment Corp. v. Maxwell,[49] asked "whether the wrongful conduct occurred in the United States."[50] The conduct test permitted the United States to assert jurisdiction over a corporation who had fraudulently induced investors to buy securities abroad even though the company's securities were not listed on any domestic exchange. This test granted the judiciary broad latitude to apply U.S. securities laws to situations that could be barred by the presumption against extraterritoriality.[51] The "effects test," espoused in *Schoenbaum v. Firstbrook*,[52] considered whether the wrongful conduct had a "substantial effect in the United States or upon United States citizens."[53] For example, under the effects test, section 10(b) of the SEA applied to "transactions [that took place in another country because] they affected the value of the common shares publicly traded in the United States."[54]

The Second Circuit's abandonment of the presumption against extraterritoriality and adoption of the conduct test and effects test were closely examined by the Supreme Court in *Morrison v. National Australia Bank Ltd.*[55] The Court heavily criticized the tests for their unpredictability, inconsistency, and imposition of "judicial-speculation-made-law" that allowed the courts to divine "what Congress would have wanted."[56] *Morrison* expressly overturned the Second Circuit's previous holdings that the presumption against extraterritoriality did not apply to section 10(b) of the SEA when the stock transactions underlying the violation occurred abroad.[57] The Supreme Court explicitly rejected the Second Circuit's conduct test and effects test and remarked that the tests failed to accord appropriate weight to the need for the presumption as a protective measure against unintended clashes of law between U.S. laws and laws of other nations that could result in international discord.[58] This decision reaffirmed the Supreme Court's decision in *Aramco* and its approach of applying the presumption against extraterritoriality as a

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49. In *Leasco Data Processing Equipment Corp. v. Maxwell*, the Second Circuit considered whether Congress "would not have wished to protect an American investor if a foreigner comes to the United States and fraudulently induces him to purchase securities abroad." 468 F.2d 1326, 1334, 1337 (2d Cir. 1972).

50. *Morrison*, 130 S. Ct. at 2879.

51. *Id.* at 2879-80; *Leasco*, 468 F.2d at 1336-37.

52. In *Schoenbaum v. Firstbrook*, the Second Circuit concluded that some effect on American securities markets or investors was sufficient to permit congressional legislation to apply extraterritorially. 405 F.2d 215, 219-20 (2d Cir. 1968).

53. *Morrison*, 130 S. Ct. at 2879.

54. *Id.* at 2878-89.

55. *Id.* at 2879-81.

56. *Id.* at 2880-81.

57. *Id.* at 2885.

58. *Id.* at 2884-85.

clear-statement rule.[59] The concurrence in *Morrison* argued that the majority decision departed from precedent and transformed the presumption "from a flexible rule of thumb into . . . a clear statement rule."[60]

Shortly after the Supreme Court issued their decision in *Morrison*, Congress enacted the Dodd-Frank Act.[61] There has been a debate over whether the Dodd-Frank Act overruled *Morrison* and whether the Dodd-Frank Act rebuts the presumption against extraterritoriality regarding the SEA.[62] Legal scholars and courts have considered that section 929P(b) may have been intended to answer the question of extraterritorial application addressed by the Supreme Court in *Morrison* and counter the presumption against extraterritoriality by adding explicit extraterritorial language to the SEA.[63] The district courts have varied in their conclusions regarding this issue.[64] The Southern District of New York has consistently applied the presumption against extraterritoriality and has failed to revive the application of the conduct test and effects test to securities law.[65]

Nonetheless, the Supreme Court reaffirmed the use of the presumption against extraterritoriality in *Morrison* in *Kiobel v. Royal Dutch Petroleum Co.* in 2013.[66] In *Kiobel*, Nigerian nationals living in the United States sued Dutch, British, and Nigerian corporations in federal court under the Alien Tort Statute. The Court concluded that neither the text nor the legislative history were sufficient to overcome the

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59. *Id.* at 2891-92; *see also Aramco*, 499 U.S. 244, 247-48 (1991).

60. *Morrison*, 130 S. Ct. at 2891 (Stevens & Ginsburg, JJ., concurring).

61. Dodd-Frank Act, Pub. L. No. 111-203, intro., 124 Stat. 1376, 1376 (2010) (codified in scattered sections of 7, 12, 15, 18, 22, 31, and 42 U.S.C.); *Morrison*, 130 S. Ct. at 2869.

62. *See* Richard Painter, Douglas Dunham & Ellen Quackenbos, *When Courts and Congress Don't Say What They Mean: Initial Reactions to* Morrison v. National Australia Bank *and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INT'L L. 1, 14-17 (2011) (discussing the relationship between the jurisdiction granted in provisions of the Dodd-Frank Act and the decision in *Morrison*).

63. He, *supra* note 13, at 166; *see* SEC v. Chi. Convention Ctr., LLC, 961 F. Supp. 2d 905, 910 (N.D. Ill. 2013) ("Section 929P(b) 'creates a single national standard for protecting investors affected by transnational frauds by codifying the authority to bring proceedings under both the conduct and effects test regardless of the jurisdiction of the proceedings." (quoting 156 CONG. REC. H5233, 5235-39 (statement of Rep. Kanjorski))).

64. *See* Painter, Dunham & Quackenbos, *supra* note 62, at 4 (finding that some lower court judges interpret the Dodd-Frank Act to empower the SEC and DOJ to pursue transnational securities fraud whereas other judges view the intent of Congress as the language of the statute and nothing more).

65. SEC v. Tourre, No. 10 Civ. 3229(KBF), 2013 WL 2407172, at *1 (S.D.N.Y. 2013); *In re* Optimal U.S. Litig., 865 F. Supp. 2d 451, 455-56 (S.D.N.Y. 2012); Cornwell v. Credit Suisse, 729 F. Supp. 2d 620, 627 (S.D.N.Y. 2010).

66. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

presumption against extraterritoriality. Wholly embraced as a clear-statement rule, the presumption against extraterritoriality worked as an almost insurmountable barrier to the regulation of foreign conduct.[67]

The question of whether the Dodd-Frank Act has an extraterritorial application arose for the first time in 2012 in *Asadi v. G.E. Energy L.L.C.*[68] In *Asadi*, the plaintiff, Khaled Asadi, a dual citizen of Iraq and the United States, was working for U.S.-based GE Energy in Amman, Jordan when he learned that GE Energy had hired a woman closely associated with the Senior Deputy Minister of Electricity of Iraq to gain preferential treatment from the Minister while negotiating a joint venture.[69] Asadi reported the potential violation to his supervisor, and after his interview, he received a surprisingly negative performance report, he was pressured to step down from his position, and ultimately he was fired.[70] Asadi brought suit in the United States District Court for the Southern District of Texas, alleging that GE Energy violated the antiretaliation provision of the Dodd-Frank Act by terminating his employment after Asadi informed his supervisors that GE had potentially violated the Foreign Corrupt Practices Act (FCPA).[71]

The Southern District of Texas analogized the antiretaliation provision of the Dodd-Frank Act to section 10(b) of the SEA and held that the antiretaliation provision of the Dodd-Frank Act did not demonstrate an affirmative indication of congressional intent for the extraterritorial application of the statute.[72] Relying heavily on *Morrison*'s emphasis that when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit the provision to its terms, the court utilized the language of Dodd-Frank's section 929P(b) to strengthen the conclusion that the antiretaliation provision does not apply extraterritorially.[73] This reasoning has not been adopted or rejected at the appellate level; rather, the appeal was decided on other grounds.[74]

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67. *Id.* at 1665.

68. Asadi v. G.E. Energy (USA), L.L.C., No. 4:12-345, 2012 WL 2522599, at *1 (S.D. Tex. June 28, 2012).

69. *Id.*

70. *Id.* at *1-2.

71. *Id.* at *1.

72. *Id.* at *3.

73. *Id.*

74. The decision of the United States District Court for the Southern District of Texas was appealed. On appeal, the Fifth Circuit did not consider whether Asadi's claim constituted an extraterritorial application; the court only considered whether Asadi qualified as a whistleblower. Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 621, 630 (5th Cir. 2013).

III. THE COURT'S DECISION

In the noted case, the Second Circuit relied heavily on *Morrison* to determine that the antiretaliation provision of the Dodd-Frank Act was inapplicable to the facts of the case domestically and extraterritorially.[75] The court affirmed the district court's grant of Siemens's motion to dismiss in a two-part analysis.[76] First, the court determined that Liu failed to demonstrate that the case involved a domestic application of the antiretaliation provision.[77] Second, the court held that the antiretaliation provision is not intended to apply extraterritorially.[78] The court did not address whether the district court correctly ruled that section 806 of the Sarbanes-Oxley Act[79] does not "require or protect disclosures of FCPA violations" or whether Liu qualified as a "whistleblower" through his "internal reporting of [the] alleged misconduct, with or without his subsequent disclosures to the SEC" under the Dodd-Frank Act.[80]

First, the court analyzed whether the facts established a sufficient connection to the United States to permit a domestic application of the antiretaliation provision of the Dodd-Frank Act.[81] Liu asserted that Siemens is subject to and required to comply with U.S. securities laws because Siemens voluntarily elected to have a class of securities publicly listed on the New York Stock Exchange.[82] The court rejected Liu's contention that U.S. securities laws apply extraterritorially to the actions occurring abroad of any company that has issued U.S.-listed securities.[83] The court interpreted *Morrison* to prohibit a "fleeting connection," such as the mere listing of securities on a U.S. exchange, as sufficient to overcome the presumption against extraterritoriality without a "meaningful relationship between the harm and those domestically listed securities."[84] The court did not specify what types of conduct or

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75. Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 178-83 (2d Cir. 2014).
76. *Id.* at 179-83.
77. *Id.* at 179-80.
78. *Id.* at 183.
79. Congress passed the Sarbanes-Oxley Act in 2002 to provide protection for whistleblowers. The Dodd-Frank Act amended the Sarbanes-Oxley Act by increasing the protections available to whistleblowers. Sarbanes Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 and 18 U.S.C.); Dodd-Frank Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1842-49 (2010) (codified in scattered sections of 7, 12, 15, 18, 22, 31, and 42 U.S.C.).
80. *Liu Meng-Lin*, 763 F.3d at 183 (citations omitted) (quoting Meng-Lin Liu v. Siemens A.G., 978 F. Supp. 2d 325, 330 (S.D.N.Y. 2013)).
81. *Id.* at 179-80.
82. *Id.* at 179.
83. *Id.* at 179-83.
84. *Id.*

combination of facts would render a domestic application of the statute. The court did note that because the whistleblower, the employer, the allegedly corrupt activity, the whistleblowing, and the retaliation all occurred abroad, the facts "reveal[ed] essentially no contact with the United States regarding either the wrongdoing or protected activity."[85]

Second, the court examined whether the antiretaliation provision could apply extraterritorially.[86] Liu presented statutory evidence and cited specific language in support of the statute's extraterritorial reach.[87] He argued that language such as "all employees" and "no employer" proved that Congress intended the antiretaliation provision to apply extraterritorially.[88] Adhering strictly to *Kiobel*, the Second Circuit concluded that the broad language that includes all employees is the type of "generic" language that does not suggest congressional intent to apply the statute extraterritorially and is inadequate to overcome the presumption against extraterritoriality.[89]

Next, Liu contended that the legislative history and context supported an extraterritorial application of the antiretaliation provision.[90] Liu reasoned that because other sections have some extraterritorial application, the antiretaliation provisions should be read to have extraterritorial reach in effect by association.[91] Liu used section 929P(b) of the Dodd-Frank Act and 15 U.S.C. § 78u-6(b) to support this argument.[92] Section 929P(b) of the Dodd-Frank Act grants district courts jurisdiction over two types of lawsuits: (1) suits involving "conduct within the United States, even if the securities transaction occurs outside the United States and involves only foreign investors," and (2) suits involving "conduct occurring outside the United States that has a foreseeable substantial effect within the United States."[93]

The court rejected the proposition that section 929P(b) demonstrated congressional intent to have the antiretaliation provision apply extraterritorially because "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and

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85. *Id.* at 179.
86. *Id.* at 180-83.
87. *Id.* at 180.
88. *Id.*; Dodd-Frank Act, Pub. L. No. 111-203, § 929P, 124 Stat. 1376, 1843, 1845 (2010) (codified in scattered sections of 7, 12, 15, 18, 22, 31, and 42 U.S.C.).
89. *Liu Meng-Lin*, 763 F.3d at 178-81.
90. *Id.* at 180-83.
91. *Id.*
92. *Id.* at 180-81; Dodd-Frank Act § 929P, 124 Stat. at 1864-65; 15 U.S.C. § 78u-6(b) (2012).
93. *Liu Meng-Lin*, 763 F.3d at 180-83; Dodd-Frank Act § 929P, 124 Stat. at 1865.

purposely in the disparate inclusion or exclusion.'"[94] The court emphasized that Congress is aware that without a clear statement or explicit grant of extraterritorial reach, a statute has none.[95] The court also rejected this argument because Liu failed to explain how the extraterritorial application of a jurisdictional grant in section 929P(b) creates extraterritorial reach for the whistleblower antiretaliation provision.[96]

Liu also argued that 15 U.S.C. § 78u-6(b), the Dodd-Frank whistleblower bounty provision, supported his claim.[97] This provision allows the SEC to provide financial awards to whistleblowers who voluntarily provide original information to the SEC that leads to a successful enforcement action.[98] Liu reasoned that because the whistleblower bounty provision includes an extraterritorial reach, Congress intended the antiretaliation provision to apply extraterritorially as well.[99] The court rejected this argument for three reasons.[100] First, Liu's argument was based on the assumption that SEC regulations deserved weight in determining congressional intent with respect to the extraterritorial application of the statute.[101] Courts normally only defer to an agency's statutory interpretation when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.[102] Second, the court concluded that the antiretaliation and bounty provisions should be considered separately because the bounty provision does not mention the antiretaliation provision, because the SEC regulations suggest that the requirements of the antiretaliation and bounty provisions are to be read separately, and because an indication of extraterritorial application must be restricted to "its terms."[103] The court thoroughly dismissed the proposition that regulation addressing the extraterritorial reach of the bounty provision can be interpreted to support the idea that the antiretaliation provision applies extraterritorially.[104]

Lastly, the court rejected the argument that the whistleblower bounty provision demonstrated congressional intent for the antiretaliation provision to have extraterritorial reach because the two provisions have

94. *Liu Meng-Lin*, 763 F.3d at 180-81.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 181-82.
100. *Id.* at 182-83.
101. *Id.* at 182.
102. *Id.* at 180-82.
103. *Id.* at 182-83.
104. *Id.*

significantly different "international ramifications."[105] The court expounded upon the international consequences, emphasizing the contrast between "[p]roviding rewards to persons, foreign or domestic, who supply information" about legal violations and "seeking to regulate the employment practices of foreign companies with respect to the foreign nationals they employ in foreign countries."[106] The court specified that applying the antiretaliation provision in circumstances such as Liu's would be an intrusion on other countries' sovereignty.[107]

IV. ANALYSIS

The decision by the Court of Appeals for the Second Circuit in *Liu Meng-Lin* is consistent with recent jurisprudence surrounding the presumption against extraterritoriality.[108] Despite the Supreme Court statements that *Morrison* and *Kiobel* do not adopt the presumption against extraterritoriality as a "clear statement rule," their approach is in fact an implementation of the presumption against extraterritoriality as a "clear statement rule."[109] In relying on the decisions in *Morrison* and *Kiobel*, the Second Circuit followed this pattern of reasoning and continued the judicial trend of deviation from the factor-by-factor analysis set forth in *Foley*.[110] Under *Foley*, the presumption against extraterritoriality is an "approach [to ascertain] unexpressed congressional intent."[111] It provides a nonexclusive list of factors that should be considered. It does not, however, relieve courts of the responsibility to consider "all available indicia"[112] to determine legislative intent.[113]

In *Liu Meng-Lin*, the court relied exclusively on the explicit statutory language and brushed over the tangential factors.[114] A closer examination of factors from *Foley* suggests that Congress intended the Dodd-Frank Act to have an extraterritorial application. First, the statutory constructions suggest an extraterritorial application because Congress intended for the Dodd-Frank Act to assist the SEC in

105. *Id.*
106. *Id.* at 183.
107. *Id.*
108. *Id.* at 178-83; Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2883 (2010); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).
109. *Morrison*, 130 S. Ct. at 2883; *Kiobel*, 133 S. Ct. at 1669.
110. *Liu Meng-Lin*, 763 F.3d at 178-83; *Morrison*, 130 S. Ct. at 2883; *Kiobel*, 133 S. Ct. at 1665-66, 1669; *Aramco*, 499 U.S. 244, 247 (1991).
111. Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).
112. *Aramco*, 499 U.S. at 261, 266 (Marshall, Blackmun & Stevens, JJ., dissenting).
113. *Id.*
114. *Liu Meng-Lin*, 763 F.3d at 178-83.

uncovering violations of the FCPA, as evidenced by the significant number of whistleblower reports investigated and pursued that allege violations of the antibribery provisions and accounting provisions abroad.[115] Second, the legislative history supports extraterritorial reach because it indicates that Congress had very little time to react to the Supreme Court's decision in *Morrison* and that Congress was not careful about the extraterritorial construction of the Dodd-Frank Act.[116] Next, the legislative context demonstrates congressional intent for the statute to apply extraterritorially because the antiretaliation and bounty provisions are part of a single statutory scheme.[117] Lastly, the administrative interpretations establish that the provisions should be read together. In the SEC's amicus curiae brief, the SEC referred to the bounty program and antiretaliation protections collectively as "the whistleblower program."[118]

The Second Circuit did not state or suggest, as lower courts have, that the Dodd-Frank Act overruled and effectively reversed the decision in *Morrison*.[119] This interpretation would allow the courts to depart from the presumption against extraterritoriality and return to the Second Circuit's conduct test and effects test.[120] Applying the Second Circuit's former tests could have changed the result of the case. Under the conduct test, because the conduct wholly occurred abroad, the statute would not have an extraterritorial application.[121] However, because the corrupt behavior by Siemens executives could impact the value of the common shares publicly traded in the United States, the effects test could permit the statute's extraterritorial application.[122]

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115. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to 78dd-3 (2012). In 1977, the Foreign Corrupt Practices Act was enacted to make it unlawful for certain persons and entities to make payments to foreign government officials to assist in obtaining and retaining business. *Foreign Corrupt Practices Act*, U.S. DEP'T JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/ (last visited Mar. 18, 2015).

116. Painter, Durham & Quackenbos, *supra* note 62, at 14-15, 25.

117. Dodd-Frank Act, Pub. L. No. 111-203, § 1, 124 Stat. 1376, 1381 (2010) (codified in scattered sections of 7, 12, 15, 18, 22, 31, and 42 U.S.C.).

118. Brief of the Securities and Exchange Commission, Amicus Curiae Supporting the Appellant, *Liu Meng-Lin*, 763 F.3d 175 (No. 13-4385).

119. *Liu Meng-Lin*, 763 F.3d at 178-83.

120. *See* SEC v. Chi. Convention Ctr., LLC, 961 F. Supp. 2d 905, 908-16 (N.D. Ill. 2013) (discussing the SEC's contention that the Dodd-Frank Act repealed *Morrison* and reinstated the conduct test and effects test).

121. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878-79, 2882-83 (2010).

122. *See id.* at 2878 (noting that under the Second Circuit's effects test, transactions occurring abroad and having a substantial effect in the United States or upon United States citizens are subject to the exercise of the United States' jurisdiction).

The conduct and effects tests closely align with the factor-by-factor analysis used in *Foley*. Both methods of interpretation provide the court with guidelines to assess explicit and implicit congressional intent. Applying the conduct and effects tests would better achieve the Dodd-Frank Act's objectives because the court would be guided by principles and practice of foreign relations law and not limited to explicit statutory language.[123] In *Liu Meng-Lin*, the court's narrow focus, analyzing only the explicit statutory evidence, fails to fully analyze congressional intent.[124]

There are additional drawbacks to applying the presumption against extraterritoriality as a clear statement rule. This approach fails to account for the fact that "[e]conomic globalization has transformed the means by which sovereignty is exercised, and therefore the exercise of regulatory authority."[125] Furthermore, the adoption of a clear statement rule inhibits the development of law because courts are not required to delineate what set of circumstances permit a domestic application of a statute. *Liu Meng-Lin* offers only that the connection to the United States must be more than the listing of shares on the New York Stock Exchange.[126] In contrast, applying the conduct and effects tests would have provided some guidance as to what fact pattern would constitute a domestic application of the law.[127]

This holding will have widespread effects on corrupt corporate behavior and whistleblower protections. The decision greatly impacts the likelihood that foreign nationals will report illegal conduct by multinational companies.[128] The absence of protection from the potential risks of retaliation, including termination and blacklisting, will lead many potential whistleblowers to refrain from reporting possible violations internally to company supervisors and externally to the SEC.[129] In an SEC report, the Commission found that 11.77% of the tipsters participating in the SEC's whistleblower program were located abroad, suggesting that a reduction in reported violations will severely limit the SEC's ability to prosecute violations of U.S. securities laws involving foreign conduct or foreign nationals and will substantially effect U.S. investors.[130]

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123. H.R. REP. NO. 111-365, at 1 (2009); *Morrison*, 130 S. Ct. at 2893-94 (Stevens & Ginsburg, JJ., concurring); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (Breyer & Ginsburg, JJ., concurring).

124. Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 183 (2d Cir. 2014).

125. Stephen Kim Park, *Guarding the Guardians: The Case for Regulating State Owned Financial Entities in Global Finance*, 16 U. PA. J. BUS. L. 739, 754 (2014).

126. *Liu Meng-Lin*, 763 F.3d at 179-81.

127. *Morrison*, 130 S. Ct. at 2878-89.

128. *Id.*

129. *Annual Report*, *supra* note 14.

130. *Id.* at 22.

V. CONCLUSION

The presumption against extraterritoriality protects against unintended clashes between U.S. laws and laws of other nations and protects the institution of separation of powers.[131] The presumption against extraterritoriality does not, however, protect workers or investors from corrupt conduct and compliance violations by corporations or their senior officials and management.[132] Applying the presumption against extraterritoriality as a clear statement rule not only protects corrupt foreign corporate executives but also endorses foreign corrupt behavior that severely harms U.S. workers and investors. Employing the conduct and effects tests instead of the presumption against extraterritoriality would better serve U.S. workers and investors in our global economic marketplace.[133]

The conduct and effects tests would not function as an intrusion on sovereignty of foreign nations, but as an additional mechanism to achieve the objectives of the Dodd-Frank Act. The ability of foreign courts to penalize corporate executives for fiscal injuries inflicted upon investors and workers is an enormous threat that would substantially deter fraudulent behavior. The Second Circuit's decision in *Liu Meng-Lin* inadvertently supports the denigration of the U.S. and global marketplace by creating a loophole by which multinational corporations can engage in corrupt conduct without the threat of U.S. judicial repercussions.[134]

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131. *Aramco*, 499 U.S. 244, 248 (1991).
132. Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 177 (2d Cir. 2014).
133. *Id.* at 183; *Morrison*, 130 S. Ct. at 2895 (Stevens & Ginsburg, JJ., concurring).
134. *Id.*

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