CIRCUIT BOARD JURISDICTION: ELECTRONIC PAYMENTS AND THE PRESUMPTION AGAINST EXTRATERRITORIALITY

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I. INTRODUCTION

In 2018, the Supreme Court severely limited the applicability of the Alien Tort Statute by holding that foreign corporations cannot be defendants under the current statute.[1] By deciding the case on these grounds, however, the Court avoided resolving a much broader question. The plaintiffs in *Jesner*, in an attempt to overcome the presumption against extraterritoriality that is embedded in U.S. statutory interpretation, argued that Arab Bank's conduct did "touch and concern" the United States with sufficient force to sustain a claim.[2] The plaintiffs specifically focused on Arab Bank's New York based dollar-clearing operation.[3]

Each year globally, the U.S. Dollar is used in transactions totaling in the trillions.[4] Many of these transactions occur electronically, and often neither the originator nor the receiver of the transaction is a U.S. person.[5] Electronic transactions must be cleared so that the originator's and receiver's accounts are correctly adjusted.[6] In the modern global financial system, accounts are cleared electronically, with essentially zero human activity in the actual clearing process.[7]

The Supreme Court is far from the first court to dodge the delicate issue of electronic payment systems. In a decision leading up to *Jesner*, the Second Circuit wrote:

> It seems to us to be unwise to decide the difficult and sensitive issue of whether the clearing of foreign dollar-denominated payments through a branch in New York could, under these circumstances, displace the presumption against the

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[1] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1405 (2018) ("Congress, not the Judiciary, must decide whether to expand the scope of liability under the [Alien Tort Statute] to include foreign corporations.").

[2] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013) (finding that the conduct sustaining an Alien Tort Statute claim must have some sufficient connection to the United States).

[3] Jesner, 138 S. Ct. at 1394 ("[P]etitioners allege as well that Arab Bank used its New York branch to clear dollar-denominated transactions" and that "some of these . . . transactions benefited terrorists.")

[4] David Scutt, *Here's How Much Currency is Traded Every Day*, BUS. INSIDER (Sept. 2, 2016), https://www.businessinsider.com/heres-how-much-currency-is-traded-every-day-2016-9.

[5] Julia Kagan, *Wire Transfer*, INVESTOPEDIA (Sept. 19, 2019), https://www.investopedia.com/terms/w/wiretransfer.asp.

[6] Dietrich Domanski, *Central Clearing: Trends and Current Issues*, BIS (Dec. 6, 2015), https://bis.org/publ/qtrpdf/r_qt1512g.htm.

[7] Tania Kishore Jaleel, *What is Electronic Clearing Service (ECS)?*, BUS. STANDARD (Jan. 20, 2013), https://www.business-standard.com/article/pf/what-is-electronic-clearing-service-ecs-111070800019_1.html.

> extraterritorial application of the [Alien Torts Statute], when it was not the focus of either the district court's decision or the briefing on appeal.[8]

Part of this apparently shared reluctance is undoubtedly because conclusively deciding whether dollar-clearing operations touch and concern the United States will have significant policy implications, regardless of the decision. The Supreme Court is wary of turning itself into a court of global judicial jurisdiction, as evidenced by its history of limiting the rights of foreign civil plaintiffs to sue in U.S. court.[9] At the same time, however, the United States has pursued an aggressive global financial regulatory scheme often with the potential for criminal liability. This global enforcement is sometimes justified by relatively insignificant contact with U.S. territory or areas of jurisdiction. The Department of Justice and the Securities and Exchange Commission have both opined that dollar-clearing operations are enough to subject the entire transaction and its participants to U.S. law.[10] There are, of course, different substantive policy considerations involved when the government is the party bringing the suit. In the case of an enforcement action, the government has already made the decision that the case is worth bringing in U.S. court—and presumably any negative foreign policy implications were already considered and overcome. In contrast, there is no sovereign filter when foreign plaintiffs attempt to bring an action.[11] While different concerns may animate a court's thinking, it is not clear that there is an easy method for treating the same action differently in the civil or criminal context. Without a change to the underlying statute, or a bifurcation of the law of extraterritoriality, a determination of whether a particular activity is a sufficient nexus to the United States to be territorial would cut across contexts. In this specific context, for example, a determination that dollar-clearing could support criminal prosecution—based on the activity's touch and concern to the United States—would presumably also support a civil action by a non-government plaintiff.

Given that a large portion of international transactions involve dollar-clearing at some point, the status in U.S. law of dollar-clearing operations is one of global financial concern.[12] The United States has traditionally

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[8] *In re* Arab Bank, PLC, 808 F.3d 144, 158 (2d Cir. 2015).

[9] Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015).

[10] 15 U.S.C.A. § 78 (dd)(2) (West 1998); CRIMINAL DIV. OF THE U.S. DEP'T OF JUSTICE AND THE ENF'T DIV. OF THE U.S. SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

[11] For a more detailed discussion of these policy considerations, *see infra* pages 609–610.

[12] Chase Manhattan Bank v. State of Iran, 484 F.Supp 832, 836 (S.D.N.Y. Feb 15, 1980) (describing the U.S. dollar as "the recognized reserve currency for international trade"); Jesner, 138 S. Ct. at 1395 ("The CHIPS system is used for dollar-denominated transactions

exercised significant influence in shaping the global economic system through both foreign and domestic policy.[13] However, continued indecisiveness on the limits of U.S. prescriptive jurisdiction has potential negative repercussions for the entire global financial system and the norms surrounding regulation of a system that at times appears to have no borders.

This Note will examine the treatment of currency-clearing operations in U.S. law from the perspective of international financial institutions. First, this Note will examine the presumption against extraterritoriality in U.S. law and the norms regarding extraterritorial prescriptive jurisdiction in international law. Next, this Note will examine the treatment of currency-clearing operations in relation to extraterritoriality in United States and selected foreign jurisdictions. Finally, this Note will argue that the United States, as a global financial leader, should definitively establish a restrained approach to basing prescriptive and adjudicative jurisdiction on currency-clearing, with an eye towards creating an international norm on the topic.

II. EXTRATERRITORIAL PRESCRIPTIVE JURISDICTION IN UNITED STATES

A. The Presumption Against Extraterritoriality in United States Law and Its Application

Historically, United States courts have limited the impact of domestic law beyond the country's borders.[14] The modern theory of extraterritoriality, especially in the realm of financial crimes, was spawned by Oliver Wendell Holmes in 1909.[15] Holmes wrote in an early antitrust case that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[16] The doctrine lost much of its bite, however, until the Supreme Court's decision in *E.E.O.C. v. Arabian American Oil Co. (ARAMCO)*, where the Court

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and for transactions where the dollar is used as an intermediate currency to fulfill a currency exchange.").

[13] Christopher Smart, *The Future of the Dollar — and Its Role in Financial Diplomacy*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Dec. 16, 2018), https://carnegieendowment.org/2018/12/16/future-of-dollar-and-its-role-in-financial-diplomacy-pub-77986 ("In a world of imperfect choices, other countries have come to rely on the U.S. record of building rules-based financial institutions, proposing agendas for policy coordination and shaping progress toward open markets."); *see also* Robert E. Litan, *The "Globalization Challenge: The U.S. Role in Shaping World Trade and Investment*, BROOKINGS (Mar. 1, 2000), https://www.brookings.edu/articles/the-globalization-challenge-the-u-s-role-in-shaping-world-trade-and-investment/

[14] *See generally* Foley Bros. v. Filardo, 336 U.S. 281 (1949).

[15] William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 85 (1998).

[16] American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (finding that the Sherman Antitrust Act did not cover conduct occurring wholly within a foreign country).

revived the presumption.[17] Chief Justice Rehnquist there noted that "[i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[18] Importantly, Rehnquist was careful to state that the presumption is only one of statutory construction; with explicit instruction, Congress is free to pass laws governing conduct anywhere.[19]

Since the Court's decision in *ARAMCO*, the Court has strengthened the presumption. In *Morrison v. National Australia Bank Ltd.* the Court clarified that for a statute to apply extraterritorially, it must state explicitly that it does so.[20] The Court there said courts ought not to interpret whether Congress would have intended the statute to apply extraterritorially, stating:

> The results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects.[21]

Morrison held that a "clear indication" of Congressional intent is necessary to get around the presumption.[22] *Morrison* involved Australian stockholders suing an Australian bank whose stock was not directly listed in the United States, alleging securities violations.[23] The Court focused on the fact that the bulk of the allegedly fraudulent actions occurred overseas, and the harm the plaintiffs suffered similarly occurred on foreign soil.[24]

The Supreme Court has strengthened the presumption even more since *Morrison*. While *Morrison* required only a clear indication, the Court in *RJR Nabisco, Inc. v. European Community* went even further, requiring that Congress "affirmatively and unmistakably" indicate a statute's extraterritorial

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[17] E.E.O.C. v. Arabian American Oil Co. 499 U.S. 244 (1991) (finding that Title VII of the Civil Rights Act did not apply to a Lebanese-born American citizen working in Arabian American Oil Co's (ARAMCO's) Saudi Arabian offices, because of the presumption against extraterritorial application).

[18] *Id.* at 248 (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).

[19] *Id.* at 259.

[20] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010).

[21] *Id.* at 261.

[22] *Id.* at 255.

[23] *Id.* at 252–53.

[24] *Id.* at 273 (noting that "all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States" and dismissing the claims for lack of jurisdiction as a result).

application.[25] In that case, the European Community and its member states sued RJR Nabisco in U.S. federal court for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), arguing that RJR had engaged in a money laundering scheme.[26] Like *Morrison*, the conduct about which the plaintiffs complained occurred almost entirely overseas, as did the harm suffered. The plaintiffs brought their action under RICO's private right of action.[27] The Court, while it did find that Congress intended RICO's prohibitions to apply overseas, applied the intent test separately to the private right of action provision.[28]

Outside the financial arena, the Court has similarly limited the ability of foreign plaintiffs to sue in U.S. courts for conduct occurring abroad. In its line of cases dealing with the Alien Torts Statute, the Court has progressively limited the scope of the action available to foreign plaintiffs.[29]

The unifying theme of all these lines of litigation is that United States courts should not hear claims that do not concern the United States. This principle, on its face, is simple and agreeable. And in the context of civil litigation brought by foreign plaintiffs, the Supreme Court has been more than willing to enforce this.[30] But when the United States is participating as a litigant, either in a prosecutorial role or as a civil plaintiff—for example, when it brings a civil enforcement action—the government is willing to advocate for a much more expansive view of U.S. authority to adjudicate disputes.[31]

In contrast to the restrained attitude towards civil complaints, U.S. prosecutors have taken a nearly global view of their authority. In a guidance document describing the scope of the Foreign Corrupt Practices Act (FCPA), the

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[25] RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016); *see also* Pamela K. Bookman, *Doubling Down on Litigation Isolationism*, 110 AJIL UNBOUND 57, 57-58 (2016) (arguing that the Congressional intent requirement in *RJR Nabisco* is in fact more burdensome to foreign plaintiffs than the *Morrison* requirement).

[26] RJR Nabisco, 136 S. Ct. at 2098.

[27] *Id.* at 2106.

[28] *Id.* ("[L]ogic requires that we separately apply the presumption against extraterritoriality to RICO's cause of action despite our conclusion that the presumption has been overcome with respect to RICO's substantive prohibitions.").

[29] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) (noting the problems with creating a private right of action for foreign plaintiffs against foreign defendants); Kiobel v. Royal Dutch Petroleum Co., 598 U.S. 108, 117 (2013) (noting the potential negative foreign policy implications of creating private rights of action for foreign plaintiffs).

[30] Bookman, *supra* note 25, at 57–58.

[31] For instance, note the contrast between the Department of Justice's position regarding the Foreign Corrupt Practices Act with that taken in civil cases. *Compare* CRIMINAL DIV. OF THE U.S. DEP'T OF JUSTICE AND THE ENF'T DIV. OF THE U.S. SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf *with* Brief for United States as Amicus Curiae Supporting Neither Party, Jesner v. Arab Bank, PLC (2017) (No. 16–499), 2017 WL 2792284 (noting the Government's position that clearing alone is not a sufficient domestic nexus).

DOJ and the SEC have stated that, in their view, the mere routing of transactions through the United States is enough to subject participants to United States criminal financial law.[32] DOJ officials have entered into deferred prosecution agreements with foreign companies for exactly the type of foreign conduct that civil plaintiffs cannot bring in United States courts.[33] In that case, the DOJ explicitly relied on the fact that several of the transactions in question were wired electronically through the United States.[34]

This apparent inconsistency in treatment is not entirely without justification. As the Supreme Court noted, there are additional foreign policy concerns involved when creating a private right of action, compared to enforcement by U.S. officials of U.S. law.[35] However, the Court's somewhat strained logic in *Jesner* is illustrative of the eventual limit of such distinctions. A decision on the extraterritoriality of dollar-clearing operations cannot distinguish between civil and criminal sanctions—the conduct is either connected to the U.S. or it is not. This civil-criminal divide in the application of the presumption against extraterritoriality is unsustainable in the long run.

B. International Law Limiting Countries' Abilities to Promulgate and Enforce Legislation with Extraterritorial Effects

Technically, there is no absolute prohibition against universal prescriptive jurisdiction in international law. However, in practice, it is reserved for extraordinary circumstances and is generally discouraged. Indeed, there is thought to be a norm regarding the universal applicability of certain particularly egregious crimes, such as genocide or crimes against humanity.[36] In fact, 163 of 193 UN Member states have enacted laws of universal jurisdiction relating to crimes against humanity.[37] The application of universal prescriptive jurisdiction beyond these well-worn and widely agreed upon areas, however, is a far more controversial prospect.[38]

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[32] *See supra* note 10.

[33] Deferred Prosecution Agreement, United States v. JGC Corp., No. 4:11-cr-00260 (S.D. Tex. Apr. 06, 2011); *see also* Lauren Ann Ross, Note, *Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act*, 62 DUKE L.J. 445, 447 (2012) ("a Japanese company haled into court in Texas for conduct . . . initiated in Europe, the effects of which were felt in Africa.").

[34] Ross, *supra* note 33, at 447.

[35] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) (noting the problems with creating a private right of action for foreign plaintiffs against foreign defendants); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 117 (2013) (noting the potential negative foreign policy implications of creating private rights of action for foreign plaintiffs).

[36] *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*, AMNESTY INT'L (2012), https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf.

[37] *Id.* at 12.

[38] *See generally Universal Jurisdiction*, INT'L JUSTICE RES. CTR., https://ijrcenter.org/ca

Unlike in the domestic sphere, international law operates in a negative space. In one of the earliest and most influential international cases, the Permanent Court of International Justice (PCIJ) (the League of Nations predecessor to the International Court of Justice) stated that states, as independent sovereigns, are generally free to do as they wish and assert their jurisdiction anywhere they see fit—assuming there is not a specific restriction imposed by international law.[39]

States do not have free license to assert their jurisdiction and exercise their power anywhere, however. The PCIJ noted in the *Lotus* Case that while states theoretically have jurisdiction globally, "the first and foremost restriction imposed by international law upon a State [sic] is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State."[40] Because of the exclusive right of sovereign states to govern their own territory, there is a general presumption against states passing and enforcing laws that would regulate conduct in the territory of other states.[41] The *Lotus* Case and the *Island of Palmas* Case both illustrate the general principle that a state's ability to exercise extraterritorial jurisdiction is a matter of international law, not just the state's domestic law.

As international law has developed and the world has globalized, the validity of a state's exercise of jurisdiction has shifted away from that of a pure territorial understanding to looking at whether the state has a "sufficient connection" to the regulated conduct under several "general principles of jurisdiction."[42]

Perhaps the most well-established principle is that states may generally regulate the conduct of their own citizens abroad. This is known as the "active nationality principle."[43] More controversial is the "passive personality

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ses-before-national-courts/domestic-exercise-of-universal-jurisdiction/ (last visited Oct. 5, 2019) (discussing the scope and application of universal jurisdiction in foreign countries).

[39] S.S. "Lotus", Judgement, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7):

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

[40] *Id.*

[41] "[The] principle of the exclusive competence of the State in regard to its own territory . . . [is] the point of departure in settling most questions that concern international relations." Island of Palmas Case (Neth. v. U.S.), 2 R. Int'l Arb. Award 829, 838 (Perm. Ct. Arb. 1928).

[42] Menno T. Kamminga, *Extraterritoriality*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW ¶10 (2012), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040?rskey=9rWvEm&result=1&prd=EPIL#.

[43] *Id.* at ¶11.

principle", which allows states to regulate foreign conduct which injures its own nationals.[44] In both cases, however, the state asserting jurisdiction can show a direct and tangible link to its own interests—namely the protection and regulation of its own citizens.

More controversial still is the so-called "protective principle" of jurisdiction, where a state regulates foreign conduct based on the perceived harm that such conduct will cause to the state's interests.[45] This principle covers conduct such as terrorism, forgery, and other crimes related to national security.[46] Increasingly, however, it is also used to regulate financial transactions and securities transactions.[47] This is the theory that the United States asserts in order to regulate financial activity abroad that could have a significant impact on the stability of United States financial markets. United States courts couch the protective principle as an "effects test".[48] This principle is not on its face controversial, but the difficulty comes in trying to find a discernable limit on what constitutes a significant enough effect to justify invoking this principle of jurisdiction.[49] Unlike the traditional national security basis, the "effect" of a financial transaction is often not targeted on the United States—and likely not even intended. The application of an effects test for financial transactions is not universally accepted as a basis for extraterritorial jurisdiction in international law.[50]

Finally, international law generally recognizes the concept of universal jurisdiction, but only in limited and exceptional circumstances. Universal jurisdiction applies "only to certain crimes under international law that have been made subject to universal jurisdiction either by a multilateral treaty or under customary international law."[51] These include crimes such as genocide or other crimes against humanity.[52] Even in the human rights context, the exercise of universal jurisdiction is far from uncontroversial. In *The Arrest Warrants Case*, applicants to the International Court of Justice (ICJ) challenged Belgium's exercise of universal jurisdiction when four Rwandans were convicted in a Belgian court for crimes against humanity relating to the 1994 Rwandan Genocide.[53] The ICJ overturned the challenged arrest warrant due

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[44] *Id.* at ¶12.

[45] *Id.* at ¶13.

[46] *Id.*

[47] *See generally* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).

[48] *Id.* at 257–58.

[49] *See* Kamminga, *supra* note 42, at ¶13 ("Although the validity of this principle is not contested it provides a rather uncertain basis for the exercise of extraterritorial jurisdiction because the conditions under which it may be relied upon are ill-defined.").

[50] *Id.*

[51] *Id.* at ¶14.

[52] *Id.*

[53] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. Rep. 3, ¶ 15 (Feb. 14).

to the fact that the target of the warrant was a government official in the Democratic Republic of the Congo, and thus immune to suit in Belgium.[54] The ICJ did not address the validity of the Belgian law creating universal jurisdiction, however.[55] Many countries, especially in Europe, have laws creating universal jurisdiction for genocide, torture, and other such crimes.

It is important to note that while there are international norms regarding when a state may exercise extraterritorial jurisdiction, international law does not actually create such jurisdiction. States, as sovereign entities, are free to pass laws which take effect anywhere. International law instead merely creates norms of behavior that proscribe states from exercising their jurisdiction outside these areas.

International law provides a normative hierarchy for enforcement when the laws of multiple countries apply. Traditionally, a state enforcing law based on its territorial jurisdiction has a right of enforcement superseding that of a state seeking to enforce a law of universal jurisdiction.[56] Reading between the lines, the extraterritorial application of laws is therefore an exception to the norm, and one that appears to be reserved for exceptional circumstances (or cases of bilateral agreement to let one country prosecute).

International law therefore presents a clear norm of not applying law extraterritorially outside certain circumstances. This norm should still stand even when the conduct in question might be "territorial" on the routing of a circuit board, but which is still predominantly taking place in a country other than the United States.

III. THE HISTORY AND CURRENT STATE OF ELECTRONIC DOLLAR-CLEARING

Each year globally, the United States Dollar is used in transactions totaling in the trillions of dollars.[57] These transactions are often the products of lengthy negotiation and contract drafting processes. As lawyers, there is a tendency to think that once a check is transferred or a wire ordered, the deal is over. This, however, only begins another process which can have unforeseen consequences for the parties to the original transaction. Unless a transaction is conducted in cash, the transaction must be "cleared" so that one party's account is debited, and the other party's is credited for the same amount.[58] In 1770,

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[54] *Id.* at ¶ 71.

[55] *Id.* at ¶ 41.

[56] Bernard H. Oxman, *Jurisdiction of States*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW ¶51 (2007) ("[I]n general, territorial jurisdiction is primary and that extraterritorial jurisdiction must be restrained in deference to the policies of the State where the act or omission occurs.").

[57] Will Kenton, *What is Fedwire?*, INVESTOPEDIA (Nov. 13, 2019), https://www.investopedia.com/terms/f/fedwire.asp.

[58] James Chen, *Clearing*, INVESTOPEDIA (Apr. 9, 2019), https://www.investopedia.com/t

clerks for several London banks began meeting nightly in a tavern to centrally clear the checks that had been deposited at the various banks. This centralized process saved massive amounts of time and money rather than having clerks shuttle between banks individually.[59] In the intervening centuries, the clearing process has been digitized to occur nearly instantaneously with almost no human interaction.[60]

In 2015, the Clearing House Interbank Payment System (CHIPS) processed over $1.5 trillion in transactions daily.[61] CHIPS is a private clearinghouse jointly owned by around fifty global financial institutions.[62] Essentially every large-scale transaction involving the U.S. Dollar goes through CHIPS.[63] Additionally, many transactions routed through CHIPS do not even directly involve the U.S. Dollar. Instead, they are transactions between two currencies which may not easily be exchanged, where the dollar is used as an intermediary currency to facilitate exchange.[64]

The status of CHIPS (or other U.S-based clearing systems, such as FedWire) as the institution of choice for dollar-clearing, however, is far from a permanent fixture of the global economy. In response to U.S. civil and criminal sanctions imposed on the basis of dollar-clearing operations, foreign banks have started exploring alternatives to U.S.-based operations. Currencies such as the Chinese Renminbi or the Euro are increasingly used as alternative transaction currencies.[65] As currency exchanges become increasingly de-centralized and formerly radical alternatives like cryptocurrency become more mainstream, other financial centers could easily emerge as the hubs of electronic commerce. For now, however, the clearing of "payments through New York is a routine and universal aspect of the international financial system."[66]

Given the potential for disruption and the longstanding reluctance of the United States to subject itself to foreign or international legal restrictions, the

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erms/c/clearing.asp.

[59] Minouche Shafik, Deputy Governor, Bank of England, Speech: A New Heart for a Changing Payments System, 2 (Jan. 27, 2016).

[60] *Id.*

[61] *CHIPS*, CLEARING HOUSE, https://www.theclearinghouse.org/payment-systems/chips (last visited Jan. 25, 2020).

[62] *Id.*

[63] Machreqbank P.S.C. v. Ahmen Hamad Al Gosaibi & Bros., 989 N.Y. S.2d 458 (N.Y. 2014) (quoting EDMUND M.A. KWAW, LAW & PRACTICE OF OFFSHORE BANKING & FINANCE 19 (1996) ("all wholesale international transactions involving the use of the dollar go through CHIPS . . .").

[64] Brief for the Institute of International Bankers as Amicus Curiae Supporting Respondents, p. 13–14, Jesner v. Arab Bank, P.L.C., 137 S. Ct. 1432, 2017 WL 4325882.

[65] Ernest T. Patrikis, *Will Enforcement of US Sanctions Reshape How US-Dollar Transactions Are Cleared?*, FINANCIER WORLDWIDE (Sept. 2014), https://www.financierworldwide.com/will-enforcement-of-us-sanctions-reshape-how-us-dollar-transactions-are-cleared/#.XaCmbedKiu1.

[66] Brief for Institute of International Bankers, *supra* note 64, at 14.

current precedent of routine currency-clearing operations serving as a basis for functionally universal jurisdiction is unsustainable.

A. Previous U.S. Treatment of Dollar-Clearing Operations in Relation to Extraterritoriality

The United States has not clearly articulated a standard for the treatment of dollar-clearing operations and whether or not they overcome the presumption against extraterritoriality. As discussed previously, the various courts deciding *Jesner* and other ATS litigation have taken pains to avoid ruling definitively on the status of dollar-clearing. In addition to the deferred prosecution agreement *United States v. JGC*, U.S. prosecutors have entered into similar agreements with other banks based on their use of dollar-clearing operations. Perhaps the single largest such action was the 2014 investigation into French bank BNP Paribas, then the fifth-largest bank in the world.[67]

Prosecutors charged the bank with skirting U.S.-imposed sanctions on Iran, Sudan, and Cuba specifically relating to BNP Paribas's energy and commodities trading business.[68] At the time of the investigation, BNP maintained offices in New York for the purposes of dollar-clearing transactions, and some of the transactions in question were routed—for the purposes of clearing—through CHIPS and FedWire.[69]

Prosecutors initially sought more than a $10 billion dollar fine, but BNP Paribas pled guilty and paid over $8 billion.[70] In addition to the fine, New York State's financial regulatory authority suspended BNP Paribas's ability to conduct dollar-clearing for a year, forcing the bank to contract with other institutions in order to maintain critical clearing operations.[71] While BNP Paribas's case did not hinge solely on the bank's dollar-clearing operation, prosecutors used the bank's reliance on U.S. clearing operations as a "hook" to force the bank to enter settlement negotiations.

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[67] Devlin Barrett et al., *Justice Dept. Seeks More Than $10 Billion Penalty from BNP Paribas*, WALL ST. J. (May 29, 2014), https://www.wsj.com/articles/justice-dept-seeks-more-than-10-billion-penalty-from-bnp-paribas-1401386918; Andrew Cunningham, *Biggest Global Banks 2014*, GLOB. FIN. (Nov. 13, 2014), https://www.gfmag.com/magazine/november-2014/biggest-global-banks-2014?page=2.

[68] *See* Barrett et al., *supra* note 67.

[69] Duncan Kerr, *Clearing: European Banks Weigh up US Dollar Clearing Options*, EUROMONEY (Jan. 5, 2015), https://www.euromoney.com/article/b12kjyygbzp9v4/clearing-european-banks-weigh-up-us-dollar-clearing-options.

[70] Karen Freifeld, *Exclusive: BNP Asks Other Banks for Help as Dollar Clearing Ban Nears*, REUTERS (Oct. 6, 2014), https://www.reuters.com/article/us-bnp-paribas-clearing/exclusive-bnp-asks-other-banks-for-help-as-dollar-clearing-ban-nears-idUSKCN0HV28C20141006.

[71] *Id.*

In perhaps the most tenuous application of U.S. law to dollar-clearing transactions, the Office of Foreign Assets Control (OFAC) fined two banks in Singapore for violating sanctions against Iran.[72] There, the banks did not even clear the transactions through the United States – Singapore, along with Hong Kong, Tokyo, and Manilla are the only official overseas clearing centers (due to the time difference).[73] Even though the actual transaction occurred in Singapore, OFAC took the position that because the Federal Reserve supplies some of the funds used to settle clearing imbalances, the Singaporean banks had caused U.S. financial instruments to be transferred to Iran in violation of U.S. sanctions.[74] In all these actions, U.S. prosecutors have rested a significant portion of their authority on the assumption that clearing a transaction is the same as conducting the transaction. However, like many such actions against large financial corporations, the banks in question entered into guilty pleas or deferred prosecution agreements, and thus did not subject prosecutors' assertions of authority to full judicial review and challenge.

Few U.S. courts have spoken directly on the territoriality of dollar-clearing operations. The New York Court of Appeals in *Mashreqbank PSC* found that dollar-clearing would not support jurisdiction in New York State Court.[75] However, that same court only two years prior had answered a certified question from the Second Circuit Court of Appeals, finding that a foreign bank's maintenance of a correspondent bank account with another bank for the purposes of dollar-clearing was a "transaction" within the jurisdiction of New York's long-arm statute.[76] Both cases, however, were civil actions brought by foreign plaintiffs. While the reliance on a long-arm statute would suggest that *Licci* was a determination of personal jurisdiction, rather than extraterritoriality, the same underlying logic would apply. The *Licci* court's determination that the transactions "happened" in New York—and thus were within the scope of New York's long arm statute—would also mean that the transaction was territorial, or not subject to the presumption against extraterritoriality.

Much like the broader question of extraterritoriality, it would seem that dollar-clearing is treated differently in the civil and the criminal contexts. In all cases, however, the same conduct is in question. A decisive ruling on whether dollar-clearing is sufficient contact with the United States to get around the presumption against extraterritoriality would theoretically apply equally to civil and criminal cases.

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[72] Clif Burns, *Touch a U.S. Dollar Anywhere, Go Directly to U.S. Jail*, OFAC (Aug. 2, 2017), https://s3.amazonaws.com/documents.lexology.com/1db46ca4-05a2-41e4-b8cb-17ee7989fb3b.pdf#page=1

[73] *Id.*; Kerr, *supra* note 69.

[74] Burns, *supra* note 72.

[75] Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co., 12 N.E.3d 456, 460 (2014).

[76] Licci v. Lebanese Can. Bank, SAL, 984 N.E.2d 897 (N.Y. 2012).

IV. LEGAL ANALYSIS OF DOLLAR-CLEARING IN RELATION TO EXTRATERRITORIALITY

A. Dollar-Clearing and the U.S. Presumption Against the Extraterritorial Application of Legislation

To date, few U.S. courts have squarely addressed whether dollar-clearing operations touch and concern the United States with sufficient force to displace the presumption against extraterritoriality. Currently, however, there is no unified doctrine for determining the whether or not a given action overcomes the presumption of extraterritoriality. Circuit Courts of Appeals are split on whether the inquiry is context-specific, or whether a given action's status is dependent on the type of action in the case.

In the realm of securities actions, *Morrison* clearly establishes the focus test as the proper inquiry.[77] *Morrison* did not displace the presumption when securities transactions were traded as part of a fraudulent scheme, because although the scheme was operated from the United States, the actual transactions occurred in Australia.[78] The Supreme Court concluded that the "focus" of the Securities Exchange Act was on actual securities transactions, rather than the related activities of the scheme.[79]

Circuit courts have not uniformly applied *Morrison's* focus test outside of the securities realm. In *Kiobel*, the Supreme Court ruled that to displace the presumption in Alien Torts Statute litigation, the actions in question must "touch and concern" the United States.[80] Several circuits have interpreted *Kiobel II* to displace *Morrison's* focus test, while others have viewed *Kiobel II* as a different wording of the same focus test from *Morrison*.[81]

The Court in *RJR Nabisco v. European Community* attempted to clarify the analytical framework, but some courts still analyze extraterritoriality in the ATS context differently than they analyze extraterritoriality for other statutes.[82] The Ninth Circuit, in *Mujica v. AirScan, Inc.*,[83] laid out a multifactor analysis, looking at more than the just the conduct at the "focus" of the statute to also incorporate factors such as the citizenship of the defendant(s) or the corporate involvement of the parties in the United States.[84] In either case,

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[77] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010) (stating that courts should look to the territorial "focus" of the statute and whether the domestic conduct in question is on its own sufficient to displace the presumption).

[78] *Id.*

[79] *Id.*

[80] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (Kiobel II)

[81] Brief for Institute of International Bankers, *supra* note 64, at 9.

[82] *Id.* at 10; RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016).

[83] 771 F.3d 580 (9th Cir. 2014).

[84] Mohamed Chehab, Note, *Finding Uniformity Amidst Chaos: A Common Approach to Kiobel's "Touch and Concern" Standard*, 93 U. DET. MERCY L. REV. 119, 151 (2014).

whether under *Morrison's* focus test or the Ninth Circuit's broader interpretation, corporate presence alone is not enough to displace the presumption.[85]

The reasoning of the various courts would also suggest that dollar-clearing alone should not displace the presumption against extraterritoriality. Certainly, dollar-clearing in the United States, whether through a correspondent bank account or a U.S. branch, is more of a U.S. connection than mere corporate presence alone. However, dollar-clearing as a basis for jurisdiction would not meet the factors set out by the courts for overcoming the presumption.

First, dollar-clearing, at least in isolation, is not an activity that is "focused" on the United States. By definition dollar-clearing is an ancillary activity, given that it is an essentially mechanical function. And it is an activity that can occur without human intervention—and perhaps even without either party to the transaction knowing that it is occurring.[86]

In the criminal context, U.S. courts have even suggested that the Fifth Amendment may limit the extraterritorial application of U.S. criminal law. The Second and Ninth Circuits, among others, have held that prosecution in the United States requires a sufficient nexus such that it is fair to the defendant.[87] Certainly, there are significant differences between the requirements for civil and criminal legislation. But as previously stated, the extraterritoriality of dollar-clearing would implicate both civil and criminal liability, as it would overcome the presumption regardless of the action being brought. Indeed, in the financial world, U.S. courts have more willingly displaced the presumption in the criminal context than in the civil.[88]

In the criminal context, dollar-clearing alone would not overcome the presumption against extraterritoriality in part because its application to foreign defendants would not be "fair" under the above-reasoned analysis. Arguably, dollar-clearing would present even less of a connection to the United States than corporate presence, which does not overcome the presumption when standing alone. Unlike corporate presence, parties to a transaction may engage in dollar-clearing actions without "knowing" that it occurs. Moreover, banks that engage in dollar-clearing operations, especially through correspondent accounts with other financial institutions, are not availing themselves of United States jurisdiction. Rather, they are availing themselves of the currency. As many have noted, dollar-clearing is a functional necessity, rather than a conscious choice. As the *Mashreqbank* court observed, "[a]ll wholesale

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[85] *Id.* at 153.

[86] Brief for Institute of International Bankers, *supra* note 64, at 13–14.

[87] Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 162–163 (2007).

[88] *See* Bookman, *supra* note 9, at 1099.

international transactions involving the use of the dollar go through CHIPS."[89] Under the Second and Ninth circuit's due process analysis for extraterritorial application, this economic necessity would seemingly not constitute the availment implied by a fairness analysis. The use of dollar-clearing operations, especially through a correspondent account, is no more of an "availment" than paying with U.S. dollars in cash.

B. Dollar-Clearing Under International Law

Like under domestic law, dollar-clearing as a territorial action is counter to traditional notions of jurisdiction. While there is not the direct case law as there is domestic law, none of the traditionally accepted basses for state jurisdiction would support the United States' exercise of jurisdiction based on dollar-clearing alone.

In a hypothetical case of "pure" dollar-clearing, or a case where dollar-clearing alone is the purported basis for jurisdiction, only the effects basis and the territorial basis would sustain jurisdiction (assuming that there are no grounds for the exercise of universal jurisdiction). The only argument for the effects principle supporting jurisdiction would be that the clearing of suspect transactions through the United States would weaken the integrity or perception of the country's financial system. Countries face severe negative consequences, both formal and informal, for allowing unfettered access to financial institutions and failing to prosecute those who use them unscrupulously.[90] Unlike most countries, however, the actions in question here are relatively minor, and the U.S. extensively regulates financial institutions that actively conduct business in the United States.[91] Additionally, the ubiquity and volume of dollar-clearing operations may actually undermine and prevent negative international perception. Given the volume of transactions, and their importance to

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[89] Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co., 12 N.E.3d 456, 460 (2014) (quoting Edmund M.A. Kwaw, LAW & PRACTICE OF OFFSHORE BANKING & FINANCE at 19 (1996)).

[90] Bradley Hope, Drew Hinshaw & Patricia Kowsmann, *How One Stubborn Banker Exposed a $200 Billion Russian Money-Laundering Scandal*, WALL ST. J. (Oct. 23, 2018), https://www.wsj.com/articles/how-one-stubborn-banker-exposed-a-200-billion-russian-money-laundering-scandal-1540307327 (noting some of the pushback that Denmark and Estonia faced for failing to prevent the money laundering in question); *The IMF and the Fight Against Money Laundering and the Financing of Terrorism*, INT'L MONETARY FUND (Mar. 8, 2018), https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/31/Fight-Against-Money-Laundering-the-Financing-of-Terrorism.

[91] For instance, U.S. banks must report any suspicious account activity to the Treasury Department, and generally must actively prevent the use of their services for illicit purposes. *See Bank Secrecy Act (BSA)*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, https://www.occ.treas.gov/topics/supervision-and-examination/bsa/index-bsa.html (last visited Oct. 6, 2019).

foreign financial institutions, the U.S. would likely not be subject to the same expectations that other countries are.

The territoriality principle also would not support the exercise of jurisdiction by the United States. There is no international equivalent to the "touch and concern" standard from *Kiobel*.[92] The same factual considerations are at play, however, even if the threshold is more amorphous. As discussed previously, dollar-clearing transactions involve conduct that is mostly *outside* the United States. The actual action in the United States may be nothing more than electronic signals on a circuit board.[93] Additionally, unlike piracy or other crimes on the high seas, there is conduct also occurring in another country. And in the case of a "pure" dollar-clearing transaction, significantly more of the activity would be occurring outside the United States than in it.

V. INTERNATIONAL IMPLICATIONS

The U.S. has traditionally been relatively active in applying its laws outside its own territory, and this has been the source of significant international friction.[94] Historically, the European Union has been especially critical of U.S. enforcement against actions European countries viewed as extraterritorial. In 1980, the United Kingdom passed the Protection of Trading Interests Act, which provided claw-back provisions and blocking measures to stop the enforcement of U.S. antitrust judgements.[95] The Trade Secretary stated the aim of the act was "to reassert and reinforce the defences of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us."[96] France also has previously enacted legislation aimed at limiting U.S. enforcement of economic laws in France.[97]

While U.S. courts often consider extraterritoriality from the perspective of preserving U.S. judicial resources, foreign countries impacted by U.S. judgments view application of U.S. law abroad as a "unilateral instrument of American hegemony."[98] This effect is amplified when the U.S. will apply criminal sanctions overseas but will not provide the same access to court for

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[92] Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7) (noting that states are free to do as they wish, unless there is a specific prohibition against action).

[93] Brief for Institute of International Bankers, *supra* note 64, at 13–14.

[94] *Developments in the Law: Extraterritoriality*, 124 Harv. L. Rev. 1226, 1246 (2011) ("[O]ther nations . . . have an uneasy relationship with America's often-expansive assertions of jurisdiction.").

[95] A. V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act*, 75 AM. J. INT'L L. 257 (1981).

[96] *Id.* (citing 973 Parl Deb, HC (5th ser.) (1979) col. 1533 (UK)).

[97] *Developments in the Law: Extraterritoriality*, *supra* note 94, at 1248.

[98] Austin L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 866–67 (2009).

foreign plaintiffs.[99] Given the tense relationship between U.S. extraterritorial jurisdiction and foreign allies, the U.S. should tread carefully when its actions could affect international norms regarding extraterritoriality.

VI. THE UNITED STATES SHOULD DECISIVELY RESOLVE THE STATUS OF DOLLAR-CLEARING AND FIND THAT IT ALONE IS NOT ENOUGH TO IMPLICATE U.S. JURISDICTION

Given the potential for international repercussions and disruptions to the global financial system, the United States should conclusively resolve the issue of dollar-clearing as it relates to territorial jurisdiction. The first and most important element of this is that courts should be wary of accepting jurisdiction based on this conduct. Allowing jurisdiction based only on dollar-clearing would create an invasive norm and take away the legislative and executive branches' ability to consider economic and foreign policy implications and selectively implement laws with extraterritorial application. Second, the U.S. should actively pursue an international agreement or norm restraining the exercise of jurisdiction based on currency clearing operations.

A. U.S. Courts Should Not Interpret Dollar-Clearing Operations as Actions with Sufficient "Touch and Concern" to Displace the Presumption Against Extraterritoriality

In the relatively short history of ATS litigation, courts have consistently been wary of creating litigation that has the potential to disrupt international relations. In *Jesner*, the Court articulated a concern that its actions would create international discord, and that the political branches were better suited to navigating the minefield of foreign policy concerns.[100] This is the main concern underpinning the entire presumption against extraterritoriality—namely that the courts are ill-equipped to consider the non-legal concerns that the political branches must consider.[101]

A decision affirming dollar-clearing as a basis for U.S. jurisdiction would create an invasive new international norm and could lead to significant international tension. Many countries, including close allies, have objected to the increasingly global application of U.S. law.[102] Moreover, a finding that

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[99] *Id.* at 867.

[100] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018) ("The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.").

[101] *Id.* at 1407.

[102] RJR Nabisco, 136 S. Ct. at 2107 n.9 (2016) (noting objections from other countries, including the United Kingdom and Canada, to the overseas application of U.S. antitrust law).

clearing operations are territorial would be a blunt instrument. Congress, in crafting legislation, has the ability to specify exactly which legislation would or would not have an extraterritorial effect. In contrast, a judicial decision would presumably apply to all causes of action, civil or criminal.

Additionally, due to the dichotomy between international law and domestic law, a U.S. ruling about the territoriality of dollar-clearing would not obviate the United States of a perceived breach of international norms regarding universal jurisdiction. Assuming that dollar-clearing is internationally perceived as non-territorial, a domestic court decision to the contrary does not validate the U.S.'s position internationally. Instead, it merely removes the political branches' ability to selectively apply U.S. law extraterritorially and in compliance with international norms.

B. The United States Should Actively Pursue a Restrained Agreement or Norm Regarding the Territoriality of Financial Transactions at the International Level

Whereas the United States should tread lightly at the domestic level, it should actively seek the creation of agreeable norms at the international level. Presently, there is little, if any, agreement on how to prevent conflicting regulations at the international level.[103] The potential for overlap is significant, and it can sometimes lead to situations where compliance with the two regimes asserting jurisdiction is impossible—compliance in one jurisdiction may virtually ensure a violation in the other.[104] In the past, there have been attempts to create a unified system for resolving these potential conflicts.[105] In order to create a robust international framework for resolving such conflicts, however, states must make an effort to curtail their own domestic requirements so as to create room in the international space.[106]

In the specific realm of currency clearing, the United States is uniquely positioned to shape international norms regarding jurisdiction. The United States Dollar is the overwhelming reserve currency of the world, and the United States has more currency clearing activity than any other nation. United States financial law has an enormous influence on other legal systems and international legal frameworks. The United States, therefore, is in a

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[103] *Jurisdiction of States*, MAX PLANK ENCYCLOPEDIAS OF INTERNATIONAL LAW § D (2007) opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-el436?prd=MPIL#law-9780199231690-e1436-divl-s.

[104] Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 (2018) (affirming district court's holding that the defendant violated U.S. price fixing laws even though the People's Republic of China government stated that such measures were required under PRC domestic law).

[105] *Jurisdiction of States*, *supra* note 103.

[106] Parrish, *supra* note 98, at 856 ("The increasing propensity of states to apply domestic laws extraterritorially should trouble international law scholars . . . more than it has.").

position to shape international norms through its own treatment of currency clearing's effect on prescriptive jurisdiction. U.S. law recognizing currency clearing as not being a "territorial" activity will go a long way in establishing an international trend, if not norm, in the same direction.

In order to effectuate this, however, the U.S. must state its reasons for change in a decidedly international way. The creation of international law requires either treaty or customary practice.[107] In the case of agreement, international cooperation is obviously required. For the creation of international norms, however, customary practice and *opinio juris* are both required.[108] As the center of global finance, U.S. actions with respect to currency clearing is the customary practice of the world. To demonstrate *opinion juris*, however, the United States must give some indication that a restrained treatment of dollar-clearing is not only a strategic choice, but one that is compelled by some legal obligation.[109]

The United States has a long history of hesitance towards engagement with international law. Due to the unique position of the U.S. in the realm of currency clearing, however, the U.S. cannot withdraw. Instead, the U.S. must engage with international law, so as to create norms of conduct beneficial to long-term U.S. interests.

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[107] Statute of the International Court of Justice, I.C.J. Art. 38 (noting that prior decisions and scholarly works are more evidence of law, but not necessarily sources themselves).

[108] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 201 (June 27) ("For a new customary rule to be formed not only must the acts concerned 'amount to a settled practice' but they must be accompanied by the *opinio juris sive necessitates*.").

[109] *Id.*; North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 77 (Feb. 20) ("The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio iuris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.").