LOHIER, Circuit Judge, dissenting:

If we accept her allegations as true, Ludmila Loginovskaya in a sense never had a chance. Enticed by the array of investment opportunities in the vaunted commodities markets of the United States, she was the victim of an old-fashioned fraud that a more perceptive investor, or a United States regulator, might have identified from a mile away. The main individual perpetrator of the fraud, defendant Oleg Batratchenko, is a United States citizen registered as a "principal" of commodity pool operators and commodity trading advisors under the Commodity Exchange Act ("CEA" or "Act") and a member of the National Futures Association. Most of the Thor corporate defendants are based in the United States and several are registered under the Act as commodity pool operators or commodity trading advisors. At least one of the corporate defendants, Thor Opti-Max Fund, Ltd., is a registered commodity pool.

Batratchenko, as CEO of the Thor Group, first approached Loginovskaya in Moscow in 2006 and, with a series of misrepresentations about the nature of the Thor investment programs, convinced her to invest in the programs by sending nearly $400,000 to an account in New York. A second meeting, and a similar series of misrepresentations, convinced her to cough up another $320,000 investment. The defendants assured Loginovskaya that she could redeem her investment at any time and that the funds in two Thor programs would be invested in commodity futures using particular trading strategies—otherwise, they "would be placed in risk-free U.S. money market accounts when not engaged in such trading"; that a Columbia University professor, described as "highly experienced in futures trading," would manage the investments and conduct regular valuations; and that "[r]eputable international audit firms" were auditing the Thor programs. None of these claims were true, and the defendants unlawfully diverted Loginovskaya's money for their own use in the United States.

My colleagues in the majority will not dispute that the defendants' allegedly fraudulent acts were sufficiently domestic to fall within the scope of CEA § 4o, the Act's main antifraud provision,[1] notwithstanding the application

---

[1] Section 4o provides, in relevant part:

> (1) It shall be unlawful for a commodity trading advisor, associated person of a commodity trading advisor, commodity pool operator, or associated person of a commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
> (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or

of the presumption against extraterritoriality reiterated in Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010). In other words, had Loginovskaya resided on Main Street, U.S.A. or Sutton Place, New York rather than in Surgut, Russia at the time she made her investments, we all agree that her suit would have been allowed to proceed: a large part of the defendants' scheme transpired in the United States, involved United States actors regulated by the CEA, and was premised on false promises to invest Loginovskaya's money in commodities markets in the United States, in violation of § 4o. I would start and end the Morrison inquiry there, and vacate the decision of the District Court.

Instead, the majority opinion affords an extra, unfounded layer of protection to the defendants by applying the presumption against extraterritoriality and the Morrison transaction test to § 22 of the CEA, which authorizes (and limits) private rights of action under the Act but does not

---

> (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

7 U.S.C. § 6o.

regulate any conduct.[2] Under the rule announced today, private victims of commodities fraud will be required to allege a separate domestic commodities

---

[2] Section 22 provides, in relevant part:

> (1) Any person (other than a registered entity or registered futures association) who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages resulting from one or more of the transactions referred to in subparagraphs (A) through (D) of this paragraph and caused by such violation to any other person—
> (A) who received trading advice from such person for a fee;
> (B) who made through such person any contract of sale of any commodity for future delivery (or option on such contract or any commodity) or any swap; or who deposited with or paid to such person money, securities, or property (or incurred debt in lieu thereof) in connection with any order to make such contract or any swap;
> (C) who purchased from or sold to such person or placed through such person an order for the purchase or sale of—
> (i) an option subject to section 6c of this title (other than an option purchased or sold on a registered entity or other board of trade);
> (ii) a contract subject to section 23 of this title; or
> (iii) an interest or participation in a commodity pool; or
> (iv) a swap; or
> (D) who purchased or sold a contract referred to in subparagraph (B) hereof or swap if the violation constitutes—
> (i) the use or employment of, or an attempt to use or employ, in connection with a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative device or contrivance in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after July 21, 2010; or
> (ii) a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap.

7 U.S.C. § 25(a)(1).

transaction even if they adequately plead a violation of § 4o, which does not require such a transaction. In fashioning this new rule, the majority misunderstands both the commodities laws of the United States and the presumption against extraterritoriality. As I explain, the presumption has nothing to do with statutory provisions, like § 22, that merely define who may assert a private right of action.

I. Section 22

"[The] canon of statutory interpretation known as the presumption against extraterritorial application . . . reflects the presumption that United States law governs domestically but does not rule the world." Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013) (quotation marks omitted). Absent clear congressional intent to the contrary, the presumption limits the application of our statutes regulating conduct to the territory of the United States. Accordingly, we "typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad." Id. (emphasis added); see also Morrison, 561 U.S. at 266–67 (focusing on the conduct regulated by § 10(b) of the Securities Exchange Act). But it was never meant to close our courts, as the majority opinion does, to legitimate claims that those laws have been violated.

In my view, Kiobel, on which the majority relies, actually endorses the distinction between "substantive provisions and those that only create a cause of action," Majority Op. at 16, and underscores that the presumption applies only to the former. Kiobel explains that the jurisdictional grant in the Alien Tort Statute ("ATS") is "best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations," Kiobel, 133 S. Ct. at 1663 (alteration in original) (quotation marks omitted), while the statute itself permits courts to "craft remedies for the violation of new norms of international law," id. at 1664 (quotation marks omitted). Relying on Kiobel's description of the ATS's dual structure as both a jurisdictional grant and a substantive provision of law, we recently clarified that "the presumption against extraterritoriality applies to the statute, or at least the part of the ATS that 'carries with it an opportunity to develop common law,' and 'allows federal courts to recognize certain causes of action.'" Balintulo v. Daimler AG, 727 F.3d 174, 191 (2d Cir. 2013) (emphasis in original) (citations omitted) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 731 n.19 (2004), and Kiobel, 133 S. Ct. at 1664). In other words, the ATS is a hybrid statute as it pertains to the presumption, in the sense that it both grants jurisdiction for tort claims brought by non-citizens and permits our courts to "engage in common-law development," id., thereby regulating conduct.

As indicated above, unlike § 4o and the ATS, § 22 does not purport to regulate conduct, impose liability for particular actions, or define a plaintiff's claims under the CEA. It merely "limit[s] the categories of persons that can seek remedies under the statute," Klein & Co. Futures, Inc. v. Bd. of Trade of the City of N.Y., 464 F.3d 255, 260 (2d Cir. 2006) (emphasis added), and prescribes who can pursue a private action for violations of substantive provisions of the CEA. To maintain a private cause of action, of course, a private plaintiff must have participated in one or more of the commodities transactions listed in § 22(a)(1). But these transactions are defined in other, substantive provisions of the CEA that prohibit certain types of conduct, and § 22 requires that a private party claim a violation of one of these substantive provisions, like § 4o.

Overlooking this distinction and the central question whether § 4o reaches the defendants' alleged conduct, the majority opinion insists that the presumption must be applied "equally to all statutory provisions," Majority Op. at 16, and focuses on whether § 22's private right of action applies. This approach both ignores the Supreme Court's caution against "improperly conflat[ing] the question whether a statute confers a private right of action with the question whether the statute's substantive prohibition reaches a particular form of conduct" and leads to "exceedingly strange results." Gomez-Perez v. Potter, 553 U.S. 474, 483 (2008).

A simple example illustrates one pitfall of the majority opinion's approach. Consider the jurisdictional statutes at 28 U.S.C. § 1331 and 18 U.S.C. § 3231. Although neither statute expressly rebuts the presumption, we have never dismissed a federal question suit involving actors or conduct abroad on the ground that § 1331 or § 3231 does not apply extraterritorially. Instead, we have consistently considered whether the substantive federal law giving rise to the action (or the prosecution) reaches the conduct in question. For the same reasons, it makes no sense to apply the presumption to § 22 when § 4o is the relevant, substantive federal provision that prohibits the defendants' alleged conduct in this case.

The majority opinion's approach also creates two sets of rules that depend solely on the identity of the party seeking to enforce § 4o: one for private parties located outside the United States and another for private parties located inside the United States and the Government. Because there was no evidence that

Congress intended it, we rejected a dual regime in United States v. Vilar, 729 F.3d 62, 74–75 (2d Cir. 2013), cert. denied, 134 S. Ct. 2684 (2014), which involved a criminal prosecution under § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b). There we warned against giving "the same statutory text different meanings in different cases" depending on the identity of the party bringing suit. Id. at 75. The same simple principle applies here. If a private party located inside the United States—and, as the majority opinion implicitly acknowledges, Majority Op. at 17, the Government—may bring an action to enforce § 4o against the Thor defendants for their alleged fraud, then a private plaintiff located outside the United States a fortiori may do the same, so long as that plaintiff actually has been injured as a result of a transaction in § 22(a)(1), even if that transaction occurred entirely abroad. If the defendants' alleged actions are regulated by § 4o, then any party with standing and statutory authority to do so may bring an action to hold them liable.

To dampen the practical if not the legal effects of the problem its holding creates, the majority opinion points to CEA § 14, 7 U.S.C. § 18, a provision that permits private complaints to be made to the Commodity Futures Trading Commission ("CFTC"), the civil government agency tasked with enforcing the

Act.[3] See Majority Op. at 18 ("[T]he inability to bring a cause of action [such as for fraud under § 4o] in federal court does not restrict the ability [of a private plaintiff] to bring a claim before the CFTC."). I share the majority's optimism that the CFTC can effectively police bad behavior. Having announced, however, that "the CEA creates a private right of action for persons anywhere in the world who transact business in the United States, and does not open our courts to people who choose to do business elsewhere," id., the majority cannot have it both ways. If the presumption against extraterritoriality applies equally to every statutory provision in the CEA, then it surely applies to § 14 as well. Under the majority's analysis, § 14, which is silent as to its extraterritorial application, would have no greater extraterritorial reach than § 4o or, for that matter, § 22, notwithstanding its broad statutory language. See Kiobel, 133 S. Ct. at 1665 ("[I]t is well established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality."). Of course, the majority's instinct is entirely correct: foreign private plaintiffs harmed by fraudulent commodities transactions in violation of § 4o should have an avenue of relief. In my view, that

[3] CEA § 14 provides, in relevant part: "Any person complaining of any violation of any provision of this chapter, or any rule, regulation, or order issued pursuant to this chapter, by any person who is registered under this chapter may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding [damages]." 7 U.S.C. § 18(a)(1).

avenue includes both § 14 and § 22, neither of which purports to regulate conduct and, therefore, neither of which is subject to the presumption.

II. Section 4o

As the District Court put it, "to hold that Morrison's presumption against extraterritoriality applies [to § 4o] is quite different from grafting [Morrison's] transaction test onto a statutory provision whose plain language appears to resist such an interpretation." Loginovskaya v. Batratchenko, 936 F. Supp. 2d 357, 369 (S.D.N.Y. 2013). Lest there be any doubt, and even though the majority agrees with me on this point, I want to explain briefly why Morrison's transaction test does not apply to § 4o and Loginovskaya's allegations suffice to state a claim under that provision.

By its terms, § 4o does not demand that a transaction occur; it prohibits "fraud simpliciter, without any requirement that it be 'in connection with' any particular transaction or event." Morrison, 561 U.S. at 271–72 (discussing a similarly worded provision of the federal wire fraud statute, 18 U.S.C. § 1343). It broadly forbids the use of any "device, scheme, or artifice to defraud" by any United States-registered commodity trading advisor, commodity pool operator, or associated person, whether or not that use culminates in a commodities transaction. So in addition to fraudulent transactions, § 4o prohibits "any . . . practice, or course of business which operates as a fraud or deceit" and includes frauds against "prospective" clients, which obviously do not involve a transaction.[4]

Loginovskaya has sufficiently alleged a violation of § 4o. In arriving at this conclusion I am guided by the Supreme Court's interpretation of similarly structured statutes. For example, faced with a challenge to the extraterritorial application of the wire fraud statute in Pasquantino v. United States, 544 U.S. 349 (2005), the Court held that the petitioners' offense "was complete the moment they executed the scheme inside the United States" and that the locus of the petitioners' conduct in the United States provided the necessary "domestic element" that the wire fraud statute prescribed. Id. at 371. The Thor defendants' alleged "scheme or artifice to defraud" in violation of § 4o likewise was complete at least as soon as they diverted Loginovskaya's funds in New York.

[4] By contrast, the language of § 4b of the Act, 7 U.S.C. § 6b, mirrors the relevant transaction-focused text of § 10(b) of the Securities Exchange Act. Compare 7 U.S.C. § 6b(a) (targeting fraudulent conduct "in connection with any order to make, or the making of, any contract of sale of any commodity"), with 15 U.S.C. § 78j(b) (targeting the use of any manipulative or deceptive device "in connection with the purchase or sale of any security registered on a national securities exchange"). In view of § 4b's limitation to frauds that are "in connection with" a commodities transaction, the District Court's decision might have made sense had Loginovskaya brought her claim under § 4b rather than § 4o.

Loginovskaya alleges that their deceptive scheme was executed in part in the United States because the defendants issued investment memoranda and correspondence regarding the Thor programs from New York, Loginovskaya wired her investment funds to New York bank accounts, account statements were generated in New York, and the unauthorized investments occurred in the United States. See Joint App'x 49–50, 56, 74–75. These allegations, taken together, satisfy the territoriality requirement under § 4o.

This result—one the majority should have reached—reflects the expansive purpose of the CEA, which expressly aims to "protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets," and to preserve the integrity of the United States commodities markets. See 7 U.S.C. § 5 (emphasis added). Particularly when a vast amount of investment in the United States commodities markets emanates from abroad, including sovereign wealth funds, "all market participants" must mean all, without restriction to participants who engage in domestic transactions. The legislative history of the Act confirms that its "fundamental purpose . . . is to insure fair practice and honest dealing on the commodity exchanges," S. Rep. No. 93-1131, at 1, 14 (1974), reprinted in 1974 U.S.C.C.A.N. 5843, 5844, 5856, and to encourage commodity pool operators, trading advisors, and other CEA-registered entities to engage in honest dealing that reflects well on the commodities markets, S. Rep. No. 95-850, at 12-13 (1978), reprinted in 1978 U.S.C.C.A.N. 2087, 2101 (discussing the trend in federal regulation toward "encouraging honest and sound dealing and strengthening public confidence in the nation's rapidly expanding futures markets"). Similarly, § 4l of the Act states that "the activities of commodity trading advisors and commodity pool operators are affected with a national public interest." 7 U.S.C. § 6l. The Act's primary focus is on the regulated commodity entities—the market's ambassadors of sorts—not on individual transactions.

For these reasons I respectfully dissent.