

**THE U.S. SECURITIES AND EXCHANGE COMMISSION, FINANCIAL  
INSTITUTIONS OUTSIDE THE U.S. AND EXTRATERRITORIAL  
APPLICATION OF THE U.S. SECURITIES LAWS**

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**1. Introduction**

The growing internationalization of the securities markets is a well-documented trend<sup>1</sup> which is likely to continue. Although some in the United States have expressed concern over the possibility of non-U.S. control of domestic businesses and industries, the basic policy of the U.S. remains one of encouraging the free flow of capital. These transnational transactions are viewed as being beneficial to the capital markets and the U.S. balance of trade. Nevertheless, they present the U.S. Securities and Exchange Commission ("Commission" or "SEC") with significant enforcement and regulatory problems.

Transnational dealings are of legitimate concern to the Commission if they involve securities of U.S. corporations or U.S. citizens, or if they have an impact on U.S. securities markets. The Commission's role is to protect investors (principally, but not exclusively, U.S. investors) and the U.S. securities markets, and in the performance of that role the Commission seeks to protect U.S. residents from fraud and also to prevent fraudulent activities from occurring in the U.S. The Commission also has a legitimate concern, in this time of rapid and sophisticated international communications, to prevent any one from using foreign instrumentalities to evade the U.S. securities laws.

Increasingly, in attempting to enforce the U.S. securities laws in cases having international aspects, the Commission has found it necessary to proceed against

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foreign financial institutions which were directly involved in violative conduct or which were being used, unwittingly, by others to evade the U.S. securities laws. Such cases involve difficult questions of the proper jurisdictional reach of U.S. law and present delicate problems of diplomacy. Nevertheless, when the Commission has believed it necessary for the protection of investors and the securities markets and for fulfillment of the purposes of the U.S. securities laws, it has not hesitated, either in actions initiated by it or in private actions, to urge U.S. courts to assert broad bases of subject matter and personal jurisdiction. The Commission has had substantial success in conducting investigations and in obtaining appropriate relief in U.S. courts, frequently with the assistance of foreign regulatory bodies, but a number of cases have raised questions concerning the Commission's ability to obtain relief against and information from foreign institutions. From another point of view, these latter cases also raise questions as to the impact an aggressive assertion of jurisdiction in this area might, to the extent sustained by the courts, have on international business and on international relations. This article will discuss some of the different types of cases which have arisen<sup>2</sup> and will indicate the doctrinal bases on which the Commission predicates jurisdiction in such cases.

The extent of extraterritorial<sup>3</sup> application of U.S. laws, and of U.S. securities laws in particular, has been discussed many times, and this article will not attempt an exhaustive treatment of that subject. Nevertheless, some analysis of the leading cases will be necessary as background and to set forth general guiding principles, particularly because three recent cases, *Bersch v. Drexel Firestone, Inc.*,<sup>4</sup> *IIT v. Yencap, Ltd.*,<sup>5</sup> and *S.E.C. v. Kasser*,<sup>6</sup> have not yet received extensive analysis or interpretation. Consequently, the first part of this article will treat some of the major principles concerning the application of U.S. securities laws to transactions having international aspects and will summarize the statutory bases for Commission jurisdiction. The second part of the article will look at the types of cases in which the Commission has asserted jurisdiction to proceed against non-U.S. financial institutions and will attempt to formulate some conclusions as to the proper role of the Commission in those cases.

## 2. Pertinent provisions of the securities laws

Before getting into the substance of the discussion, it seems appropriate to summarize those provisions of the U.S. securities laws which prescribe the Commission's authority to bring suit and which define the jurisdictional elements of a violation.<sup>7</sup> Unfortunately, the U.S. securities laws are not explicit about whether and to what extent they are to be applied extraterritorially.<sup>8</sup> Nevertheless, the concern of Congress with the problem of transnational securities dealings is expressed in the very title of the Securities Exchange Act of 1934 ("Exchange Act"):

An act to provide for the regulation of securities exchanges and of over-the-counter markets

operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes.<sup>9</sup>

In addition, Section 2 of the Exchange Act,<sup>10</sup> which sets forth the necessity for regulation, refers several times to the need for protecting "interstate commerce", which, in turn, is defined by Section 3(a) (17)<sup>11</sup> to include "trade, commerce, transportation, or communication . . . between any foreign country and any state, or between any state and any place or ship outside thereof".

The definition of interstate commerce is important because many operative provisions of the Exchange Act, including Section 10(b) (the basic antifraud provision of the Act), make the use of "any means or instrumentality of interstate commerce" a jurisdictional predicate for their application.<sup>12</sup> These operational provisions are also invoked, generally speaking, by the use of the mails or the facilities of a national securities exchange. Other provisions apply in case of the involvement of a registered security or apply to persons in the securities business.<sup>13</sup>

Section 21(d) of the Exchange Act<sup>14</sup> authorizes the Commission to file an injunctive action in the proper United States district court whenever "it shall appear to the Commission that any person is engaged or is about to engage in any acts or practices constituting a violation of any provision of this title, [or] the rules or regulations thereunder . . .". Section 27 of the Exchange Act provides the United States district courts with exclusive jurisdiction of suits involving violations of the Act and the rules and regulations thereunder. Section 27 also provides for service of process "in any other district of which the defendant is an inhabitant or wherever the defendant may be found".<sup>15</sup>

The Commission is also authorized to bring administrative proceedings against broker-dealers or persons associated with them (Sections 15(b) (4) and (6) of the Exchange Act).<sup>16</sup> Since non-U.S. banks or other financial institutions might come within the definition of a broker or dealer,<sup>17</sup> it is possible for such entities to be the subjects of Commission administrative proceedings in appropriate cases. See, for example, the discussion of *In the Matter of Stephen Smith* in the text accompanying footnote 146, *infra*. The Commission also has broad investigatory powers under Section 21(a) of the Exchange Act.<sup>18</sup>

A final jurisdictional provision of the Exchange Act which has been involved in some of the cases involving extraterritorial application is Section 30(b),<sup>19</sup> which provides:

The provisions of this title or any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this title.

The Commission has adopted no rules under this Section. The scope of this exemption is discussed later in the article.

The substantive provisions of the securities laws are many and complex; however, the preponderance of extraterritoriality cases have involved a relatively small number of key sections. A substantial majority of the cases have involved Section 10(b) of the Exchange Act<sup>20</sup> and Rule 10b-5<sup>21</sup> thereunder. As indicated earlier, Section 10(b) is the basic antifraud provision of the Exchange Act. It proscribes the use of “any manipulative or deceptive device or contrivance” in connection with the purchase or sale of any security by use of any means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange. It is a very broadly worded section, and, as will be seen, the Commission has consistently argued that it should be applied broadly in cases of international fraud.

Another fundamental provision of the U.S. securities laws which has been involved in some of these cases is Section 5 of the Securities Act of 1933.<sup>22</sup> Section 5 is the heart of the Securities Act and requires public offerings of securities to be registered with the Commission and sold pursuant to a prospectus containing proper disclosure. Like Section 10(b) of the Exchange Act, Section 5 makes it unlawful for any person to use the mails or any means of interstate commerce to accomplish various aspects of the offer and sale of securities without complying with the substantive provisions of the Section.

Two other provisions which have frequently been involved in international cases are Sections 13(d)<sup>23</sup> and 16<sup>24</sup> of the Exchange Act. These provisions are of the type alluded to earlier which apply when a registered security is involved.<sup>25</sup> Section 13(d) imposes reporting requirements on certain beneficial owners of more than five percent of a class of stock that is registered under Section 12. Section 16 imposes reporting requirements and trading restrictions on certain 10 percent beneficial owners, officers, and directors. These sections apply to “any person” or “every person” in the designated class, and Section 13(d) defines “person” to include a group of persons acting together. These provisions have frequently come into play in international cases because persons seeking to evade the law have attempted to use non-U.S. financial institutions as a shield. The Commission has aggressively sought to prevent such evasion.

### 3. Summary of extraterritorial application of the securities laws in decided cases

Since the U.S. securities laws, like most U.S. statutes, are not explicit about extraterritoriality,<sup>26</sup> the U.S. courts have sought to ascertain Congressional intent, recognizing that the only limitation on the exercise of Congressional power is the U.S. Constitution. As the court said in *Leasco Data Processing Equipment Corp. v. Maxwell* (“*Leasco*”):

[I]f Congress has expressly prescribed a rule with respect to conduct outside the United States, even one going beyond the scope recognized by foreign relations laws, a United States court

would be bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment.<sup>27</sup>

However, since the legislative history behind the securities laws does not provide any significant guidance as to extraterritoriality,<sup>28</sup> the courts have been unwilling to "... assume that the legislature always means to go to the full extent permitted".<sup>29</sup> In attempting to define appropriate limitations on the extraterritorial application of the securities laws, the courts have referred extensively to principles of international law.<sup>30</sup> Moreover, the courts seem uniformly to have considered the Restatement (Second) of Foreign Relations Law of the United States (1965) (hereinafter referred to as the Restatement) to be an authoritative statement of international law.<sup>31</sup>

However, the cases have not simply adopted the Restatement principles as rigorous guides to the extraterritorial application of the securities laws.<sup>32</sup> Indeed, the courts have engaged in extensive speculation as to the intent of Congress of the "what would Congress have wanted, if it had ever thought of this problem" type.<sup>33</sup>

Nonetheless, the courts (as well as academic commentators) have frequently used the Restatement principles as a framework for the analysis of the issue, making it convenient to do so for the purposes of this discussion as well.<sup>34</sup> In particular, the discussion of extraterritoriality has turned on two provisions of the Restatement: Section 17<sup>35</sup> and Section 18.<sup>36</sup> Section 17 describes what is generally referred to as the "subjective territorial principle", which is, in substance, that a state has jurisdiction over acts which occur within its territory even when the effects of such acts are felt only outside the state's territory. Jurisdiction based on this principle is also described as conduct-based jurisdiction. Section 18 describes the so-called "objective territorial principle", which provides that a nation may regulate conduct which occurs outside its territory and produces an effect within its territory. Jurisdiction based on this principle is sometimes called effects-based or impact-based jurisdiction. Accordingly, determinations as to whether jurisdiction should lie in particular cases have tended to be based on an analysis of whether there was sufficient conduct in the United States and/or whether transactions performed entirely outside the United States nevertheless had a direct, foreseeable, and substantial impact on U.S. investors or securities markets.<sup>37</sup>

#### 4. Subjective territorial principle

The Restatement permits a broad assertion of jurisdiction by a state over conduct within its territory, even when the consequences of such conduct are felt outside the territory.<sup>38</sup> Since many substantive provisions of the Exchange Act, such as Section 10(b), proscribe use of the means of interstate commerce in connection

with any violative conduct, the Commission has argued strenuously that *any* use of the jurisdictional means in connection with violative conduct is sufficient to trigger jurisdiction even if the transaction is primarily a foreign one.<sup>39</sup> The Commission has stressed that it is well established, at least in purely domestic U.S. cases, that a mere preparatory or tangential use of the jurisdictional means is sufficient.<sup>40</sup> The policy behind this position is discussed *infra* in the section on “The Commission Position”.

Nevertheless, the courts have not been willing to go to the limits permitted by international law in sustaining conduct-based jurisdiction, at least in private suits. The earlier cases, primarily involving U.S. private plaintiffs, required that there be “significant conduct”<sup>41</sup> or conduct constituting an “essential link”<sup>42</sup> in the transaction in the U.S. More recently, major decisions of the U.S. Court of Appeals for the Second Circuit (“Second Circuit”) in *Bersch v. Drexel Firestone, Inc.*<sup>43</sup> and *IIT v. Vencap, Ltd.*<sup>44</sup> have distinguished between preparatory acts and acts constituting perpetration of a fraud, but have also framed different standards depending on the residence and nationality of the plaintiffs and on whether or not the suit was a class action on behalf of foreigners. Both because of what the Second Circuit has said and because of what it has not said about Commission enforcement actions, the level of conduct necessary to support jurisdiction in a Commission suit is not entirely clear. No court has directly considered this question,<sup>45</sup> although the recent decision of the U.S. Court of Appeals for the Third Circuit (“Third Circuit”) in *S.E.C. v. Kasser*<sup>46</sup> may provide significant guidance. Below is a brief summary of these three recent cases followed by an attempt to analyze their impact on Commission actions.

*IIT v. Vencap*, like many of the recent extraterritoriality cases, resulted from the well-publicized IOS collapse.<sup>47</sup> The court found that jurisdiction could exist if the facts disclosed that the U.S. had been used for the perpetration of fraudulent acts themselves, as opposed to mere preparatory activities or a failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries.<sup>48</sup> The court referred the matter back to the district court for further findings.<sup>49</sup>

In arriving at its conclusion, the Second Circuit court utilized the following reasoning:

We do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners. This country would surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States. By the same token it is hard to believe Congress meant to prohibit the SEC from policing similar activities within this country; we doubt that the result in *S.E.C. v. United Financial Group, Inc.*, 474 F. 2d 354, 357 (9 Cir. 1973), would have differed if the court had not been able to find that the issuer was an American corporation and that three American investors held \$10,000 of its probably worthless stock. If there would be subject matter jurisdiction over a suit by the SEC to prevent the concoction of securities frauds in the United States for export, there would also seem to be jurisdiction over a suit for damages or rescission by a defrauded foreign individual.<sup>50</sup>

The holding in *IIT* applies directly to suits by named foreign plaintiffs only, but the reference to SEC enforcement actions appears to imply that the right of foreign plaintiffs to sue is coextensive with the right of the SEC to “prevent the concoction of securities frauds in the United States for export”. Consequently, the distinction between perpetration of fraud and mere preparatory acts may be read as limiting the SEC’s power to sue.<sup>51</sup> The Second Circuit court used similar language in *Bersch v. Drexel Firestone, Inc.*,<sup>52</sup> which also resulted from the IOS disaster, and which was decided the same day as *IIT*. Such a conclusion would substantially inhibit the Commission’s power to prevent U.S. facilities from being abused in connection with international fraudulent dealings. However, as will be seen, part of the *Bersch* holding appears to contradict the implication the language cited above has for SEC actions.

In *Bersch*, the court made sharp distinctions among U.S. residents, U.S. citizens residing abroad, and foreigners, i.e., persons who were neither U.S. citizens nor U.S. residents. The court observed that, had the case involved a suit by foreign plaintiffs against a foreign company identified with a foreign country, the activities in the U.S. would not have justified jurisdiction. The court cited its holding in *IIT v. Vencap* quoted above and noted that that holding went farther than any other case in authorizing jurisdiction in U.S. courts over suits by foreign plaintiffs.<sup>53</sup> The court stated that there could not be jurisdiction for foreign plaintiffs in cases “where the United States activities are merely preparatory or take the form of culpable nonfeasance and are relatively small in comparison to those abroad”.<sup>54</sup> The court’s formal holding was that the securities laws:

[d]o not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses.<sup>55</sup>

Next, the court discussed the question of U.S. investors, distinguishing between residents and nonresidents. The court viewed the case with respect to U.S. residents as involving application of the objective territorial principle, so that aspect of the case will be discussed later under the appropriate heading.

With respect to the question of liability for sales to U.S. citizens resident abroad, the court concluded that there would not be jurisdiction in the absence of significant activities within the U.S. The court stated:

Congress surely did not mean the securities laws to protect the many thousands of Americans residing in foreign countries against securities frauds by foreigners acting there, and we see no sufficient reason to believe it would have intended otherwise simply because an American participated so long as he had done nothing in the United States.<sup>56</sup>

Nevertheless, the court stated:

While merely preparatory activities in the United States are not enough to trigger application of the securities laws for injury to foreigners located abroad, they are sufficient when the injury is to Americans so resident.<sup>57</sup>

The formal holding of the court was that the securities laws:

[a]pply to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto.<sup>58</sup>

This holding, to the extent it suggests anything about the jurisdictional standards to be applied in cases brought by the Commission, appears to contradict the implication contained in the court's explicit reference to the SEC in its discussion of jurisdiction over suits by foreign plaintiffs in *IIT v. Vencap, Ltd.*, and in *Bersch* itself.<sup>59</sup> In those discussions, the court indicated that foreigners had the same right to sue as the SEC, thereby implying that the SEC, like foreigners, can sue only if acts in the U.S. constitute the perpetration of the fraud and are not merely preparatory to it. The *Bersch* discussion of American nonresidents, however, permits suits by such persons even when the conduct in the U.S. was "merely preparatory" so long as the conduct was "of material importance".

A result which would permit nonresident Americans to maintain suit in U.S. federal courts for violation of the securities laws but not let the SEC sue on the same facts would be anomalous. Consequently, it appears unlikely that the court would actually require more actionable conduct to satisfy jurisdiction requirements in an injunctive action brought by the SEC, the agency charged with protecting all investors, as well as the domestic securities markets and the public interest in general, than in an action brought by a private party. This conclusion is bolstered by the court's observation that the *Bersch* case raised problems regarding the dubious binding effect of a judgment for defendant on absent foreign plaintiffs in a class action that are not present when the SEC seeks to enjoin the activity or when an action is brought by named plaintiffs.

The Third Circuit recently gave further definition to the Commission's authority to sue in *S.E.C. v. Kasser*,<sup>60</sup> which involved an appeal by the Commission from an adverse district court finding on jurisdiction. The Third Circuit reversed and remanded, relying heavily on *IIT v. Vencap*. The court noted that, although it was questionable whether the alleged fraudulent activities of the defendants had any effects in the U.S., there was "significant conduct which formed part of the defendants' scheme that did occur within this country"<sup>61</sup> — conduct which "was essential to the plan to defraud"<sup>62</sup> and which went beyond activities of a preparatory nature. Referring to the opinion in *IIT*, the court stated: "[T]he conduct of the defendants here cannot be deemed to be 'mere[ly] preparatory' to fraudulent acts committed outside this country, for it was much more substantial than the United States-based activities in *IIT*".<sup>63</sup>

The court thus viewed the facts in *Kasser* as presenting a relatively strong case for jurisdiction. Its language, however, indicated that jurisdiction would exist even on a lesser showing. Relying on *IIT*, as well as its own decision in *Straub v. Vaisman and Co.*,<sup>64</sup> the court stated that "the Federal securities laws in our view do



grant jurisdiction in transnational securities cases where at least some activity designed to further a fraudulent scheme occurs within this country".<sup>65</sup> The court found three sound policy rationales for its decision: (1) "to deny such jurisdiction may embolden those who wish to defraud foreign securities purchasers or sellers to use the United States as a base of operations";<sup>66</sup> (2) "a holding of no jurisdiction might induce reciprocal responses on the part of other nations";<sup>67</sup> and (3) "reviving the complaint in this case . . . will enhance the ability of the SEC to police vigorously the conduct of securities dealings within the United States".<sup>68</sup>

Despite the Third Circuit's heavy reliance on *IIT*, the *Kasser* and *Bersch* opinions suggest that the level of conduct which may be considered "significant" would be fairly low in a Commission action. The *Kasser* opinion contains language which implicitly suggests that a finding that significant conduct occurred may be made as long as there is "at least some activity designed to further a fraudulent scheme". Despite certain contradictory language, it is submitted that the Commission could sue under the *Bersch* decision even if the only activities in the U.S. were preparatory. If so, it would appear that anyone involved in conduct constituting a violation of the securities laws would be amenable to Commission suit if he engaged in activities connected with the violation in the U.S. which went beyond a minimal or incidental level. Since the Commission has not abandoned its contention that *any* such conduct would be sufficient, it would seem advisable for violators to stay entirely away from this jurisdiction. Perhaps they will, but experience suggests that this issue will continue to come before the courts.<sup>69</sup>

## 5. Objective territorial principle

Generally speaking, it would be permissible under Restatement Section 18 to assert jurisdiction with respect to foreign violative conduct having a substantial, direct and foreseeable domestic effect.<sup>70</sup> There has been substantial controversy and uncertainty as to whether the U.S. cases support assertion of jurisdiction to the full extent permitted by international law. In particular, although the U.S. courts have analyzed cases in terms of Restatement Section 18, there has been doubt as to whether jurisdiction may be had on the basis of "effects" alone or whether there must also be conduct in the U.S.<sup>71</sup> It now appears that jurisdiction may exist under the decided cases on the basis of harmful effects alone.

As was the case with conduct-based jurisdiction, the Second Circuit has had the most to say on this subject. *Schoenbaum v. Firstbrook*<sup>72</sup> was the first case to apply the objective territorial principle.<sup>73</sup> The court held:

We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities. In our view, neither the usual presumption against extraterritorial

torial application of legislation nor the specific language of Section 30(b) show Congressional intent to preclude application of the Exchange Act to transactions regarding stocks traded in the United States which are effected outside the United States, when extraterritorial application of the Act is necessary to protect American investors.<sup>74</sup>

There remained doubt as to whether jurisdiction could attach in the absence of any domestic conduct.<sup>75</sup> However, *Bersch* appears to have resolved the problem. As indicated earlier, the *Bersch* court viewed its determination as to jurisdiction with respect to U.S. resident members of the plaintiff class as involving an application of the objective territorial principle and permitted suit against two defendants whom it found responsible for “dispatch[ing] from abroad misleading statements to United States residents”,<sup>76</sup> characterizing the case as being of the type contemplated by Restatement Section 18. The specific holding was:

... The anti-fraud provisions of the federal securities laws:

Apply to losses from sales of securities to Americans resident in the United States whether or not acts (or culpable failures to act) of material importance occurred in this country.<sup>77</sup>

The court went on to uphold jurisdiction over an accountant for IOS which had certified the financial statements used in the offering, stating that “. . . action in the United States is not necessary when subject matter jurisdiction is predicated on a direct effect here . . .”.<sup>78</sup> Accordingly, *Bersch* made it explicit that jurisdiction may be based on adverse domestic effects alone.

Other U.S. Courts of Appeal appear to agree. In *Travis v. Anthes*,<sup>79</sup> the Eighth Circuit court stated:

We are also persuaded that Section 10(b) and Rule 10b-5 are applicable to defendants’ self-dealing, even if it is assumed that all such dealings took place in Canada. “It is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends . . .”.<sup>80</sup>

The Ninth Circuit said recently in *Des Brisay v. The Goldfield Corporation*:<sup>81</sup>

... In short, in view of Congress’s intention to protect the integrity of domestic securities markets in a particular stock, the fact that an allegedly improper transaction occurred outside the United States or involved parties other than United States citizens has been held not to defeat subject matter jurisdiction where the securities involved in the transaction were registered and listed on a national exchange and the effect of the foreign transaction adversely affected buyers, sellers and holders of those securities.<sup>82</sup>

Of course, the Restatement requires that those effects be substantial, direct, and foreseeable. The cases have not fully defined these concepts, but they do suggest some important characteristics. For one thing, it is not sufficient to allege that foreign acts have had “an adverse effect on the American economy or American investors generally”.<sup>83</sup> Nor is a U.S. investor protected from a securities fraud com-

mitted entirely abroad because the harm such an investor suffered abroad was felt at home.<sup>84</sup> Moreover, it has been held that any impairment of the value of U.S. investments must result from the securities fraud itself and not from subsequent unrelated transactions,<sup>85</sup> and that real estate investments in the U.S. by a foreign issuer did not create the necessary impact.<sup>86</sup> In short, it appears clear that, in order for there to be jurisdiction over foreign acts constituting a substantive violation of the U.S. securities laws, those acts must in and of themselves result in substantial damage to an interest protected by the U.S. securities laws. In a fraud case, that would mean that the violations would have to affect investors "in whom the United States has an interest",<sup>87</sup> presumably U.S. investors who were the victims of fraud that had some U.S. nexus,<sup>88</sup> or that the fraud would have to have a direct effect on the market for a domestically traded security (i.e., a foreign-based manipulation of such a security<sup>89</sup>). In the case of provisions like Section 13(d) and Section 16 of the Exchange Act — which require disclosure of certain securities transactions by large stockholders and corporate officers — the protected interest would be defined by the Congressional purpose behind them. Accordingly, if Congress's intent that certain beneficial ownership interests be disclosed, for example, is thwarted by acts occurring abroad, it would appear that a sufficient impact would have occurred.<sup>90</sup>

On the other hand, it does not appear to be necessary that the securities be registered or exchange-listed (except in the case of provisions which only apply if registered or listed securities are involved) or that the issuer of the securities be a U.S. company.<sup>91</sup> Nor does the nationality of the defendant appear to be crucial.<sup>92</sup> Again, the salient factor appears to be impact on a U.S. interest which the courts believe Congress meant to protect.

## 6. Personal jurisdiction

Most of the cases involving extraterritorial application of the securities laws have dealt with the question of subject matter jurisdiction. Moreover, as indicated earlier, Section 27 of the Exchange Act gives district courts jurisdiction over violations of the Act and provides for service of process "wherever the defendant may be found". Nevertheless, concepts of personal jurisdiction have been significant in a number of cases.

It is a fundamental notion in the U.S. that a court's assertion of personal jurisdiction over a defendant must be consistent with U.S. concepts of due process of law. U.S. due process concepts as to jurisdiction over the person require not only adequate notice and an opportunity for hearing but certain minimum contacts with the jurisdiction "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' ".<sup>93</sup> The U.S. Supreme Court has held that when a defendant is not personally present and there is no other demonstrable basis for jurisdiction, it is "essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activi-

ties within the foreign state, thus invoking the benefits and protections of its laws".<sup>94</sup>

The courts have held that Congress meant Section 27 to extend personal jurisdiction to the fullest reach permitted by the due process clause.<sup>95</sup> In *Leasco*, the court said:

... use of the word "wherever", [in Section 27] rather than "where" or "in which", demonstrates an intention to authorize service on a defendant who can be "found" only in a foreign country, and although the section does not deal specifically with *in personam* jurisdiction, it is reasonable to infer that Congress meant to assert personal jurisdiction over foreigners not present in the United States to but, of course, not beyond the bounds permitted by the due process clause of the Fifth Amendment.<sup>96</sup>

The Second Circuit held in *Leasco* and reaffirmed in *Bersch* that the boundaries of due process, in the case of a defendant not personally present at the time of service, were set forth in Sections 35, 36 and 37 of the Restatement (Second) of Conflict of Laws, which the court said in large part merely amplified the central idea contained in *Hanson v. Denckla*.<sup>97</sup> Section 35 of the Restatement (Second) of Conflict of Laws (1969) confers jurisdiction over persons doing business in a state. Section 36 confers jurisdiction over persons doing an act in a state. Section 37 applies to persons causing effects in a state by acts done elsewhere. These principles also apply to corporations (Sections 47, 49, and 50).

As the Second Circuit stated in *Leasco*:

All this reflects the modern notions that where a defendant has acted within a state or sufficiently caused consequences there, he may fairly be subjected to its judicial jurisdiction even though he cannot be served with process in the state, and that the principal function of service of process is rather to give notice and opportunity to be heard, which can be done by appropriate methods of service outside the state.<sup>98</sup>

The courts have exercised personal jurisdiction over a foreign corporation which controlled a U.S. corporation<sup>99</sup> and a foreign corporation which did a substantial amount of business in the U.S.<sup>100</sup> The Eighth Circuit held in *Travis v. Anthes* that:

[P]ersonal jurisdiction can be acquired over the defendants who have acted within the district or sufficiently caused foreseeable consequences there, by service of process on them in Canada.<sup>101</sup>

On the other hand, in *Leasco* the court rejected the idea that an accountant conducting an improper audit of a company in London "could be subjected to personal jurisdiction in any country whose citizen had purchased stock of a company they had audited . . .".<sup>102</sup>

In *Bersch* the court found that it did not have personal jurisdiction over the Canadian broker-dealer which had managed the third IOS offering (one which was not made in the U.S.). The court found that the broker-dealer was not doing

business in the U.S. even though its business consisted of buying and selling securities traded on Canadian markets for U.S. residents and arranging with U.S. broker-dealers for its Canadian customers to buy and sell securities traded in U.S. markets and even though representatives of the broker-dealer visited U.S. investment bankers and brokerage firms to solicit this type of business. The court held that if that type of activity constituted doing business within the U.S.:

[E]very securities dealer of any significant size anywhere in the world would be "doing business" here. <sup>103</sup>

The court also refused to predicate jurisdiction on Section 37 of the Restatement (Second) of Conflict of Laws, concluding that there was nothing to show that the broker-dealer had knowledge that some of the purchasers of the second IOS offering would be U.S. persons and that, accordingly, the "effects" of the broker-dealer's actions in the U.S. were not sufficiently direct and foreseeable. Not surprisingly, the court expressed doubt about subject matter jurisdiction but found it unnecessary to reach the question.

These decisions suggest that personal jurisdiction exists if subject matter jurisdiction exists on the basis of conduct or impact, provided that the defendant was sufficiently involved in the disputed transaction so that his retention as a defendant is not inconsistent with the fair play concept. <sup>104</sup> The *Bersch* decision, however, indicates that the courts may have some difficulty delimiting the concept of doing business in a "state" within the meaning of Section 35 of the Restatement (Second) of Conflict of Laws. In view of the international scope of the securities business, the court was clearly concerned about casting too wide a net. However, the court's analysis of the doing business criteria appears strained. It is submitted that the court could have paid less attention to the question of whether the broker-dealer was doing business within the state and more attention to the proviso in Section 35 that jurisdiction only be exercised with respect to matters arising from business done in the state. <sup>105</sup>

## 7. The section 30(b) exemption

Section 30(b) of the Exchange Act provides an exemption from the Act for persons engaging in the securities business <sup>106</sup> "without the jurisdiction of the United States", but gives the Commission rulemaking power to prevent such persons from transacting their business in a way which evades the U.S. securities laws. It is clear that a person otherwise entitled to rely on this exemption who engages in transactions which come within the subject matter jurisdiction of the U.S. loses the benefits of the exemption with respect to those transactions. <sup>107</sup> In *Schoenbaum*, the court indicated that the purpose of the section was to relieve foreign persons in the securities business from reporting and regulation under the Exchange Act. <sup>108</sup>

The Commission has never adopted any rules under Section 30(b); nor has it ever officially explained the absence of such rules. There are, however, a number of probable explanations. In the first place, and most important, neither the Commission nor the courts have given the Section 30(b) exemption broad application. As stated in *Schoenbaum*, the exemption applies only to foreign brokers, dealers and banks and its primary purpose appears to be to relieve foreign securities firms from being subject to the whole panoply of broker-dealer registration and reporting under the Exchange Act, simply because they might engage in some transactions which could not be classified as "without the jurisdiction of the United States", for purposes of Section 30(b). As indicated elsewhere in this article, transactions within the jurisdiction of the U.S. are not limited to transactions within the territory of the U.S., but may include, under some circumstances, transactions executed abroad or sales of securities into the U.S. from abroad.

Given this relatively narrow scope of the exemption, the activities of foreign securities firms, at least historically, have not presented a serious problem for the Commission. In addition, while thought has been given from time to time to trying to develop rules under Section 30(b), it has proved difficult to frame rules which would not either tend, by implication or otherwise, to broaden the Section 30(b) exemption or else to involve the Commission in a difficult task of attempting to regulate broker-dealers or banks in foreign countries.<sup>109</sup> The exemption provided by Section 30(b) has not heretofore impaired the ability of the Commission to enforce the fraud provisions of the U.S. securities laws in international transactions or its ability to require compliance with the registration requirements of the Securities Act where such compliance was needed for the protection of U.S. investors.

The increasing internationalization of the securities markets may in the future require further attention to rules under Section 30(b), but this has not yet become necessary.

## 8. U.S. requirements that may violate foreign law

At times, one party in a U.S. law suit seeks documents which the other party claims may not lawfully be produced under applicable foreign law. The court in such a case must decide whether or not to order production of the documents in the face of the claim that to do so would violate foreign law and, if it orders their production, what sanctions may be imposed for noncompliance with the order.

Recently, the Tenth Circuit had occasion to consider these problems in a case under the U.S. securities laws: *Arthur Andersen & Co. v. Finesilver*.<sup>110</sup> In that case, Arthur Andersen & Co. objected to the production of certain documents on the ground that their production would violate the Swiss secrecy laws. The district court had overruled the objections, which had led to appeals and a petition for a writ of mandamus. The Court of Appeals relied heavily on the U.S. Supreme Court's decision in *Société Internationale v. Rogers*<sup>111</sup> and concluded that con-

sideration of foreign law in a discovery context is required in dealing with sanctions to be imposed for disobedience and not in deciding whether the discovery order should issue. The court criticized certain Second Circuit cases which suggest that a district court should not order production if the order would cause a party to violate foreign law. According to the Tenth Circuit court, these decisions fail to recognize the distinction between the power to compel discovery and the imposition of sanctions for noncompliance with an order for production.<sup>112</sup>

The Tenth Circuit court stated that the dilemma it confronted was that of accommodation of the principles of the law of the forum with concepts of due process and international comity. The court stated that it was not impressed by Arthur Andersen's contention that international comity prevents a U.S. court from ordering actions which violate foreign law. The court stated that foreign law may not control local law.<sup>113</sup> The court then determined that the district court's discovery order was not a final decision and was not appealable. Consequently, the appeals were dismissed. The petition for mandamus was also denied.

These cases do not make it clear exactly what the consequences would be of the failure of a defendant in a Commission enforcement action to produce documents on the ground that to do so would violate foreign law. However, in *S.E.C. v. American Institute Counsellors, Inc.*,<sup>114</sup> the district court judge, at the Commission's request, ordered the transfer of certain assets held by Swiss Credit Bank from Switzerland to the U.S., recognizing that such a transfer would violate Swiss law. The judge declined to defer to Swiss banking law and customs because of Swiss Credit Bank's participation in the alleged violations and because control of the assets in question was necessary for the proper protection of investors. An agreement which satisfied the Commission was reached without appeal.

Clearly, there remain unresolved problems in this area, which could make it difficult for the Commission to obtain relief in future cases.<sup>115</sup>

## 9. The commission position

In the foregoing discussion of the state of the law, much was said about the expansive view of jurisdiction the Commission has urged on U.S. courts. It is appropriate now to say something about why the Commission has taken such an aggressive position, especially in view of the frequent criticisms of that position for failure to give weight to such factors as sovereignty, international comity, and the welfare of international business.

It is not enough to say that the Commission is only concerned with enforcing the U.S. securities laws, although the Commission takes that responsibility very seriously indeed and to that end has consistently advocated a broad assertion of jurisdiction in cases involving international aspects as necessary to the achievement of the essential goals of the U.S. securities laws of protection of investors and the securities markets. It must also be said that the Commission has not been insensitive

to the broader considerations of international relations and business. A look at the Commission's arguments in its briefs and at the way it has handled some of its cases (many of which were not the subjects of judicial opinions) indicates that the Commission believes that vigorous enforcement of the U.S. securities laws can lead to international cooperation and can help foster a climate of certainty, trust, and confidence for international business.

These cases show the ways in which international fraud artists and persons seeking to evade the regulatory and disclosure requirements of the U.S. securities laws have sought "gaps in international regulation through which a modern-day pirate may safely sail".<sup>116</sup> In particular, these cases show the ways in which foreign financial institutions, particularly banks and offshore investment companies, have been used, with varying degrees of awareness, to shield or facilitate such violations and evasions.

## 10. Jurisdiction revisited

To reiterate a bit, the Commission has pointed out that the definition of interstate commerce in Section 3(a) (17) of the Exchange Act to include commerce between any foreign country and any State is indicative of the concern of Congress with transnational transactions.<sup>117</sup> The Commission has consistently cited the numerous cases holding that the U.S. securities acts, as remedial legislation, are to be broadly construed,<sup>118</sup> and has argued that Congress intended all provisions of the U.S. securities laws to be broadly construed, including those dealing with jurisdiction.<sup>119</sup>

Accordingly, the Commission has argued strenuously for broad application of the U.S. securities laws in cases in which the jurisdictional triggering element is present. In cases under Section 10(b), the Commission has pointed out that the jurisdictional requirements are met if the facilities of interstate commerce are used *in connection with* a fraudulent scheme, even if such use is incidental or merely preparatory.<sup>120</sup> The Commission has argued that such application would protect investors and help foster an atmosphere beneficial to honest enterprise by preserving investor confidence in the securities markets.<sup>121</sup> Moreover, as the Commission said in its *amicus curiae* brief in the *Schoenbaum* case:

This country has a direct and immediate interest in the regulation of the uses to which the mails, means and instrumentalities of interstate commerce and facilities of national securities exchanges are put. As the Court of Appeals for the Fifth Circuit has stated, "Quite obviously the broad purpose of this legislation was to keep the channels of interstate commerce, the mail, and national security exchanges pure from fraudulent schemes, tricks, devices, and all forms of manipulation". *Hooper v. Mountain States Sec. Corp.*, 282 F. 2d 195, 202 (1960), *certiorari denied*, 365 U.S. 814 (1961).<sup>122</sup>

It could be argued that such an approach to conduct-based jurisdiction is particularly appropriate when the SEC is the plaintiff. Commission enforcement actions



are primarily directed toward seeking injunctive relief against certain conduct. The activities sought to be enjoined might be part of a continuing course of conduct. In such a case, even if the activities could be confidently termed preparatory, or incidental, it would be appropriate to grant injunctive relief to prevent unpredictable future results of or developments from such conduct. Moreover, a court in a Commission injunctive action would not have to be concerned about the competing interests of foreign governments in the case as a whole or problems of enforceability. An injunction in such a case would not necessarily put a stop to the fraud, but would protect against the use of the jurisdictional means in connection with the fraud.

The Commission has also argued for application of the U.S. securities laws to acts done outside the U.S. which have an impact within the U.S.<sup>123</sup> The Commission has contended that the U.S. securities laws are generally applicable to foreign transactions when such application is necessary to protect U.S. investors and markets.<sup>124</sup> It would appear essential in these days of rapid communications and relatively free passage among nations for the U.S. to assert jurisdiction in such cases in order to prevent easy evasion of U.S. laws.

## 11. International cooperation

As indicated, the Commission has disagreed with those who express concern that a broad assertion of jurisdiction will damage international relations or international business. Indeed, international cooperation has been extensive and extremely valuable in two of the Commission's most significant international cases: *S.E.C. v. Vesco*<sup>125</sup> and *S.E.C. v. American Institute Counsellors, Inc.*<sup>126</sup> The *Vesco* case has been one of the Commission's most complicated and far-reaching enforcement actions. The Commission named 42 corporate and individual defendants and alleged violation of the antifraud, filing, and proxy provisions of the Exchange Act.<sup>127</sup> Included among the defendants were four foreign banks, a foreign bank holding company, and four foreign mutual funds.<sup>128</sup>

The prosecution of the *Vesco* case has been extremely difficult and complex and has been significantly impeded by the evasive efforts of certain of the defendants.<sup>129</sup> Nevertheless, much has been accomplished since the institution of the case to prevent the further looting of the IOS Funds, thanks largely to an extraordinary, and probably unique, international cooperative effort. The Commission conferred with interested foreign governments, and a committee of regulatory authorities from the U.S., the federal government of Canada, the Provinces of Quebec and Ontario, Luxembourg, and the Netherlands Antilles was established for the purpose of coordinating the recovery, realization and administration of the assets of the various parts of the *Vesco* empire.<sup>130</sup> Through the efforts of this committee, and with the cooperation of the courts, liquidators and trustees have been appointed abroad for many of these entities, including IOS, Ltd. itself.<sup>131</sup>

In the Commission's suit, preliminary and final relief was granted against numerous defendants.<sup>132</sup> Among those against whom final judgments were obtained (by default) were Bahamas Commonwealth Bank Limited,<sup>133</sup> Overseas Development Bank of Luxembourg, S.A., and International Bancorp. In April, 1974, the Commission agreed to a dismissal without prejudice of three Swiss defendants upon their furnishing assurances that they would not violate or knowingly aid and abet others to violate any U.S. securities laws and that they would furnish full cooperation in the form of complete and truthful testimony and the production of relevant documents.<sup>134</sup>

The *American Institute Counsellors* case was one of a number of notable Commission actions against foreign financial institutions which have named Swiss banks as defendants. Some of these cases have presented delicate problems of diplomacy because of tension between the Commission's enforcement concerns and the interest of the Swiss in protecting sovereignty and the integrity of the bank secrecy laws.<sup>135</sup> Despite the problems, however, the Commission has generally been able to obtain effective relief.

In the *American Institute Counsellors* case, the Commission has been particularly successful, thanks to the extensive cooperation of the Swiss banking authorities. In November, 1975, the Commission filed a civil injunctive action against American Institute Counsellors, a registered investment adviser, and a number of other defendants, including the Swiss Credit Bank, or Credit Suisse, alleging that the defendants had engaged in a massive distribution of unregistered gold-related securities to United States citizens.<sup>136</sup> As indicated in the earlier discussion under "Violations of Foreign Law," the district court issued a temporary restraining order which, *inter alia*, ordered the bank to transfer to its New York branch office all assets held by the bank on behalf of the other defendants. To comply with that order, Swiss Credit Bank established an irrevocable letter of credit in the amount of approximately \$122,000,000, representing the aggregate credit balances on deposit with the bank on behalf of the defendants.<sup>137</sup>

On June 30, 1976, the court entered a final order against Swiss Credit Bank pursuant to a stipulation and undertaking of Swiss Credit Bank in which it consented to a final order without admitting or denying the allegations of the Commission's complaint. The final order prohibited Swiss Credit Bank from offering or selling securities of the various entities involved in the case in violation of the registration provisions of the Securities Act of 1933 or from engaging in any business activities with certain of the entities named in the Commission's complaint when such entities are acting as unregistered broker-dealers, investment advisers, or investment companies. Swiss Credit Bank undertook to adopt and implement procedures reasonably calculated to insure that Swiss Credit Bank would not participate in activities of the type alleged in the Commission's complaint. In addition, Swiss Credit Bank undertook to continue to freeze the assets in the accounts on deposit with the bank of certain of the defendants in the case. Swiss Credit Bank also undertook to continue to maintain with its lawyers in Washington, D.C., a

letter of credit in the amount of approximately \$120,000,000 for the purpose of making payments to the U.S. beneficial owners of the securities which are the subject matter of the case. The ability of the court to use the letter of credit was subject to certain terms and conditions, including the condition that it not be used so long as the obligations and activities specified in a decree of the Swiss Banking Commission relating to the disposition of assets which were the subject matter of the Commission's case were being substantially performed.<sup>138</sup>

The decree of the Swiss Banking Commission contemplates a freeze on all assets to which investors are entitled until such time as a satisfactory plan of distribution can be implemented. The decree designated a Special Auditor to prepare and effect the plan of distribution.<sup>139</sup>

Other cases have been concluded without such successful cooperation. For example, the cases of *S.E.C. v. Cosmopolitan Investors Funding Co.*<sup>140</sup> and *S.E.C. v. Bank Vom Linthgebeit*<sup>141</sup> involved sensitive questions concerning the Commission's ability to serve process effectively on the Swiss bank defendants. In November, 1975, the Commission authorized the staff to seek orders from the courts in these two cases pursuant to Rule 4(i)(1)(E) of the U.S. Federal Rules of Civil Procedure, directing service of process to be made by registered mail on certain Swiss defendants (including the two Swiss banks). The Commission, however, in light of previously raised objections by the Swiss Government to service of process by mail into Switzerland, directed the staff to contact the State Department to determine whether service could be effected in a manner satisfactory to the Swiss Government.

By April, 1976, no solution to the problem appeared to be available, and the judge in the *Bank Vom Linthgebeit* case was threatening dismissal of the action against the Swiss defendant. In light of these developments, the Commission authorized the staff to effect service immediately by registered mail into Switzerland. The State Department was notified of the Commission's intention and expressed reservations about the procedure.

In June and July, service on the Swiss defendants was effected. This action prompted both Swiss bank defendants to consent to final judgments of permanent injunction as prayed for in the complaints. One of the individual Swiss defendants similarly was enjoined by consent and two others defaulted. The Commission is not aware that protest to the method of service utilized was made by the Swiss Government.

## 12. Achievement of the purposes of the securities laws

The *Vesco* case illustrates some of the problems and possibilities in coping with international fraud. A good look at that case shows the importance of aggressive enforcement. It also shows that a broad assertion of jurisdiction need not be inconsistent with international cooperation. It is submitted that decisive action of the

type initiated by the Commission in the *Vesco* case can only be beneficial to international business in the long run. The *American Institute Counsellors* case shows how a blatant and massive evasion of the registration provisions of the Securities Act was only brought to an end by a determined effort to enforce the law.<sup>142</sup>

As was said earlier, in addition to problems of fraud and registration violations, cases having international aspects frequently involve violations of the beneficial ownership disclosure provisions of the Exchange Act. Persons wishing, for whatever reasons, not to disclose their ownership of substantial interests in registered securities often seek to avail themselves of the protections of foreign bank secrecy laws. If the Commission were to permit such an attempt to succeed, the Congressional intent in adopting those disclosure provisions could be vitiated. A person in a position to own sufficient stock in a U.S. company to trigger the disclosure provisions is probably in a position to cause a foreign bank to act for him and protect his identity. Accordingly, the Commission has felt that its enforcement responsibilities left it no choice but to proceed against foreign persons, including banks if necessary, when such action was required to ensure fulfillment of the purposes of the U.S. securities laws.<sup>143</sup>

An example is *S.E.C. v. General Refractories Company*,<sup>144</sup> in which Swiss Bank Corp., a Swiss corporation doing business in the U.S., consented to an injunction. The Commission had alleged that the bank, in effect, had aided its customers in concealing their ownership and/or control of more than 5% of the outstanding stock of General Refractories Company. The order enjoined the bank from disposing of, acquiring, or voting General Refractories securities owned or controlled by certain European defendants, and required the bank to adopt and implement procedures designed to preclude use of the bank's facilities for further violations of Section 13(d) of the Exchange Act and the rules thereunder.<sup>145</sup>

As noted earlier, the Commission has the authority in appropriate cases to include foreign financial institutions in its administrative proceedings. A case in which it did so was *In the Matter of Stephen Smith*<sup>146</sup> in which the Commission censured Banque-de-Paris et des Pays-Bas (Suisse), S.A., a Swiss bank, for its part in a manipulation case.<sup>147</sup> As part of the disposition of the case, the bank agreed that when it receives orders to purchase more than 5% of any securities offering during the period of initial distribution, it will inquire of the customer to determine if the customer has a relationship with the issuer or underwriter which would preclude the transaction. The bank also agreed in such cases to consult with attorneys experienced in the U.S. securities laws to determine whether adequate disclosure of the purchase has been made or will be made in the offering prospectus.

The *General Refractories* and *Stephen Smith* cases demonstrate the constructive results Commission actions, whether by injunction or by administrative proceedings, can achieve in this area. The cases involved two types of problems — manipulation and failure to disclose beneficial ownership — which are most difficult to deal with when persons acting abroad can achieve anonymity.<sup>148</sup> By getting the banks involved in those cases to agree to adopt procedures designed to prevent violations

of the U.S. securities laws, the Commission, in effect, enlisted those banks in the law enforcement effort. Such procedures should not inhibit the banks from serving the legitimate needs of their customers.

### 13. Conclusion

The Commission has sought to obtain appropriate judicial relief in cases having international aspects whenever it appeared necessary to protect investors and the integrity of the securities markets. In doing so, the Commission has sought international cooperation without sacrificing legitimate law enforcement goals. The Commission believes that, in the international area, as in the domestic area, vigorous enforcement of the law is essential to the confidence of investors and to the strength and efficiency of the securities markets.

## Notes

<sup>1</sup> For example, according to the Department of the Treasury (Treasury Bulletin, January, 1977, Table CM-V-1), foreign purchases and sales of United States securities increased from a gross of \$7.8 billion in 1965 to a gross of \$30.8 billion for the period January to November, 1976.

<sup>2</sup> Since Commission investigations are private, this article will not discuss any cases involving foreign financial institutions which are currently under investigation.

<sup>3</sup> To describe the question of the extent to which the U.S. securities laws apply to transactions having transnational or international aspects in terms of "extraterritoriality" may be somewhat misleading. The use of that term implies an effort to apply the law to events and persons beyond the territorial limits of the U.S., but in most of the cases of so-called extraterritoriality, jurisdiction has been predicated at least in part on conduct within the U.S. However, since that term has frequently been used to apply to all sorts of cases having transnational aspects, it will be used in this article as a convenient shorthand reference.

<sup>4</sup> 519 F. 2d 974 (2d Cir. 1975).

<sup>5</sup> 519 F. 2d 1001 (2d Cir. 1975).

<sup>6</sup> 548 F. 2d 109 (3d Cir. 1977).

<sup>7</sup> In view of the scope of this article, principal attention will be devoted to the Securities Exchange Act of 1934. The Securities Act of 1933 is primarily concerned with the registration of securities offered publicly within the U.S. or to U.S. citizens. For a summary of the various rules and regulations relating to transnational securities offerings by or to U.S. citizens, see Comment, *The Transnational Reach of Rule 10b-5*, 121 U. Pa. L. Rev. 1363, 1364-1365 (1973). Also see Securities Exchange Act Release No. 13056, December 10, 1976, soliciting public views concerning means of improving the disclosure now required of foreign issuers by Forms 20 and 20-K.

<sup>8</sup> Section 1604 of the proposed U.S. Federal Securities Code does deal explicitly with the question of extraterritorial application of the U.S. securities laws. (American Law Institute Federal Securities Code (Reporter's Revision of Text of Tentative Drafts Nos. 1-3, October 1, 1974, as further revised by Tentative Draft No. 5, April 1, 1976)).

Section 1604(a) (1) provides that, within the limits of international law, the Code applies to: offers, purchases or sales occurring within the U.S. although initiated outside the U.S.; certain nonresidents; an attempt, solicitation, or conspiracy outside the U.S. to commit a violation inside the U.S.; and violative conduct the constituent elements of which occur to a substantial (but not necessarily predominant) extent within the U.S. or some or all of whose constituent elements occur outside the U.S. but cause a substantial effect within it as a direct and foreseeable result. Section 1604(a) (2) provides for jurisdiction based on fraudulent conduct initiated within, but occurring outside, the U.S. For an extensive and highly critical analysis of Section 1604, see Karmel, *The Extraterritorial Application of the Federal Securities Code*, 7 Conn. L. Rev. 669 (1975).

<sup>9</sup> Act of June 6, 1934, 48 Stat. 881, 15 U.S.C. 78a to 78jj, as amended.

<sup>10</sup> 15 U.S.C. 78b (1970).

<sup>11</sup> 15 U.S.C. 78c(a) (17) (1970). Similarly, see Section 2(7) of the Securities Act of 1933 [15 U.S.C. 77b(7) (1970)], Section 2(a) (18) of the Investment Company Act of 1940 [15 U.S.C. 80a-2(a) (18) (1970)], and Section 202(a) (10) of the Investment Advisers Act of 1940 [15 U.S.C. 80b-2(a) (10) (1970)].

<sup>12</sup> See Brief for S.E.C. as Amicus Curiae at 13, *Schoenbaum v. Firstbrook*, 405 F. 2d 200 (2d Cir. 1968).

<sup>13</sup> See Brief for S.E.C. as Amicus Curiae at 17–18, *Schoenbaum v. Firstbrook*, *supra* n. 12.

<sup>14</sup> 15 U.S.C. 78u(e) (1970). See also Section 20(b) of the Securities Act of 1933 [15 U.S.C. 77t(b) (1970)], Section 43(e) of the Investment Company Act of 1940 [15 U.S.C. 80a–41(e) (1970)] and Section 209 of the Investment Advisers Act of 1940 [15 U.S.C. 80b–9(e) (1970)].

<sup>15</sup> 15 U.S.C. 78aa (1970). See also Section 22(a) of the Securities Act of 1933 [15 U.S.C. 77u(a) (1970)], Section 44 of the Investment Company Act of 1940 [15 U.S.C. 80a–43 (1970)], and Section 214 of the Investment Advisers Act of 1940 [15 U.S.C. 80b–14 (1970)].

<sup>16</sup> 15 U.S.C. 78o(b) (4) and (6) (1970 Edition, Supplement V, 1975).

<sup>17</sup> See *U.S. v. Weisscredit Banca Commerciale E D'Investimenti*, 325 F. Supp. 1384 (S.D. N.Y. 1970). The *Weisscredit* case concerned a motion to dismiss a criminal indictment against a Swiss bank charging violation of Federal Reserve Board Regulation T. The indictment charged that Weisscredit was a broker and dealer engaged in the transaction of business in securities through the medium of a member of the New York Stock Exchange and had improperly extended credit to customers. Weisscredit argued that Regulation T was not applicable to it because it was a bank and not a broker or dealer. However, the court noted that the definition of a bank in the Exchange Act included only domestic institutions so that a Swiss banking institution could still be considered a broker or dealer. The court noted that Weisscredit was being charged as a broker-dealer and not as a bank.

Although the court concluded that the indictment properly charged Weisscredit with violation of Regulation T, the court noted that, even if Weisscredit was not subject to Regulation T, it could still be found to have aided and abetted violations of Regulation T by the New York Stock Exchange member involved in the case.

<sup>18</sup> 15 U.S.C. 78u(a) (1970). The Commission has recommended to Congress legislation which would authorize federal district courts to grant appropriate ancillary relief in cases of refusal by a person not located in the U.S. to comply with a Commission subpoena or provide information in a Commission investigation. The Commission has also sought specific authority to impose administrative sanctions on non-U.S. financial institutions. See Testimony of Roderick M. Hills, Chairman, Securities and Exchange Commission, before the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Committee on Government Operations, 94th Cong., 2nd Sess. (August 1976).

<sup>19</sup> 15 U.S.C. 78dd(b) (1970).

<sup>20</sup> 15 U.S.C. 78j (1970).

<sup>21</sup> 17 CFR. §240.10b–5 (1976).

<sup>22</sup> 15 U.S.C. 77e (1970).

<sup>23</sup> 15 U.S.C. 78m(d) (1970).

<sup>24</sup> 15 U.S.C. 78p (1970).

<sup>25</sup> In this case, “registered” means registered pursuant to Section 12 of the Exchange Act [15 U.S.C. 781 (1970)] as opposed to Section 5 of the Securities Act. Very briefly, Section 12 contains provisions governing the registration of securities on national securities exchanges and provides for registration with the Commission of other securities of issuers having assets of more than \$1,000,000 and 500 or more shareholders, subject to a variety of exemptions.

<sup>26</sup> See *Lauritzen v. Larsen*, 345 U.S. 571, 578–579 (1953) and cases and learning cited therein. As the Court said: “. . . we are simply dealing with a problem of statutory construction rather commonplace in a federal system by which courts often have to decide whether ‘any’ or ‘every’ reaches to the limits of the enacting authority’s usual scope or is to be applied to foreign events or transactions”. *Id.* at 578–579.

<sup>27</sup> 468 F. 2d 1326, 1334 (2d Cir. 1972). See *United States v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945).

<sup>28</sup> See *Bersch v. Drexel Firestone, Inc.*, 519 F. 2d 974, 993 (2d Cir. 1975); Note, *American Adjudication of Transnational Securities Fraud*, 89 Harv. L. Rev. 553, 553 (1976); Sandberg, *The Extraterritorial Reach of American Economic Regulation: The Case of Securities Law*, 17

Harv. Int'l L. J. 315, 318 (1976); Goldman and Magrino, *Some Foreign Aspects of Securities Regulation: Towards a Reevaluation of Section 30(b) of the Securities Exchange Act of 1934*, 55 Va. L. Rev. 1015, 1017 (1969); and Brief of S.E.C. as Amicus Curiae at 17, *Schoenbaum v. Firstbrook*, *supra* n. 12.

<sup>29</sup> *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F. 2d 1326, 1334 (2d Cir. 1972).

<sup>30</sup> See *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F. 2d 1326, 1334 (2d Cir. 1972); *Bersch v. Drexel Firestone, Inc.*, 519 F. 2d 974, 988 (2d Cir. 1975); and *IIT v. Vencap, Ltd.*, 519 F. 2d 1001, 1017 (2d Cir. 1975). See also Note, *American Adjudication of Transnational Securities Fraud*, 89 Harv. L. Rev. 553, 554 (1976).

Many commentators have criticized the approach taken by the U.S. Federal courts to extraterritorial application of the U.S. securities laws for failure to give adequate consideration to sensitive matters of international relations and economic policy. It has frequently been argued that implementation of a conflicts or choice of law approach would facilitate evaluation of all the important criteria. For example, see Goldman and Magrino, *op. cit. supra* n. 28; Note, *Jurisdiction—Extra-Territorial Application of United States Securities Laws—Section 30 (b) of Securities Exchange Act of 1934—Liability of Foreign Insiders for Short-Swing Transactions in American Listed Securities: Roth v. Fund of Funds* (2d Cir. 1968), 10 Colum. J. Transnat'l L. 150, 156 (1971); Sandberg, *op. cit. supra* n. 28; and Becker, *Extraterritorial Dimensions of the Securities Exchange Act*, 2 Int'l L. and Pol. 233 (1969). For a more general treatment, see Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 Ohio St. L. J. 586 (1961).

Nevertheless, although U.S. courts have expressed some sensitivity in this area, and many have considered a wide variety of factors, none appear to have used choice of law principles in any formal way in applying the U.S. securities laws.

The Commission has not been among the advocates of the use of choice of law principles in extraterritoriality cases. The Commission's position will be set forth in more detail later. However, it is interesting to note that application of choice of law principles might operate to defeat a Commission injunctive action in circumstances in which a private plaintiff would be able to maintain a suit for damages. If a court determines that the U.S. securities laws do not reach a transaction, it may still hear the case while applying foreign law, even if the U.S. securities laws are the basis of the court's jurisdiction. See Sandberg, *op. cit. supra* n. 28 and cases cited therein. However, the Commission is a creature of Congress and has only that authority to sue which has been given to it by statute. The Commission's authority to sue under Section 21(d) of the Exchange Act says nothing about suing for violations of foreign laws. Consequently, it is questionable whether the Commission would be able to maintain a suit if the court determined to apply foreign law.

<sup>31</sup> See *Leasco Data Processing Equipment Corp. v. Maxwell*, *Bersch v. Drexel Firestone, Inc.*, and *IIT v. Vencap Ltd.*, all cited *supra* n. 30.

<sup>32</sup> See Comment, *The Transnational Reach of Rule 10b-5*, *supra* n. 7, at 1370, for the argument that *Leasco* set limits on the reach of Section 10(b) short of the boundaries of international law. See Sandberg, *op. cit. supra* n. 28 for the argument that the courts have established a "minimum connection" theory. See Note, *American Adjudication of Transnational Securities Fraud*, *supra* n. 28, for the argument that the courts have construed the application of Rule 10b-5 more narrowly than would be permitted by the Restatement. See Karmel, *op. cit. supra* n. 8, for the argument that the *Bersch* court refused to assert jurisdiction as to "predominantly foreign" transactions although the Restatement would have permitted it. The *Bersch* court had no doubt that specified activities within the U.S. were sufficient to permit the U.S. to impose a rule pursuant to Section 17 of the Restatement, but went on to state: "When, as here, a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United



States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries." 519 F. 2d at 985.

Also see the district Court opinion in *S.E.C. v. Kasser*, 391 F. Supp. 1167 (D.C. N.J., 1975). However, in *Recaman v. Barish*, 408 F. Supp. 1189 (E.D. Pa. 1975), the court stated that Restatement Sections 17 and 18 contained the two basic tests for assessing whether or not the U.S. has a "significant connection" with a particular transaction sufficient to warrant assertion of jurisdiction.

<sup>33</sup> For example, in *Leasco* the court asked itself: "... whether, if Congress had thought about the point, it would not have wished to protect an American investor if a foreigner comes to the United States and fraudulently induces him to purchase foreign securities abroad". 468 F. 2d at 1337.

<sup>34</sup> One commentator stated: "The result is that the principles of international law function as more than mere benchmarks. The plaintiff who is able to sift through the complex facts of a transnational security sale and point to elements which satisfy one or more of these principles is in a good position to sustain his jurisdictional claim." Comment, *The Transnational Reach of Rule 10b-5*, *supra* n. 7, at 1370.

<sup>35</sup> Section 17 states: "A state has jurisdiction to prescribe a rule of law

(a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory, and

(b) relating to a thing located, or a status or other interest localized, in its territory."

Relative to subsection (b), it should be noted that, in the words (including footnote) of the *Leasco* court: "While the black letter seems to require that, in a case like this, not only there should be conduct within the territory but also the conduct relate "to a thing located, or a status or other interest localized, in its territory", Comment A and Illustrations 1 and 2, the latter of which [1] is quite pertinent here, appear to be satisfied if there has been conduct within the territory."

—  
 "[1] X and Y are in State A. X makes a misrepresentation to Y. X and Y go to State B. Solely because of the prior misrepresentations, Y delivers money to X. A has jurisdiction to prescribe a criminal penalty for obtaining money by false pretenses. Restatement (Second) of the Foreign Relations Law of the United States 45."

468 F. 2d at 1334.

<sup>36</sup> Section 18 states: "A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

(a) The conduct and its effect are generally recognized as constituent elements of crime or tort under the law of states that have reasonably developed legal systems, or

(b) (i) the conduct and its effect are constituent elements of activities to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

<sup>37</sup> It has also been suggested that: "... a mix of partially local conduct and some local effects also establishes a minimum connection with the United States, though neither the conduct nor the effects alone would justify application of the Securities Act". Sandberg, *op. cit. supra* n. 28.

<sup>38</sup> Restatement Section 17, *supra* n. 35.

<sup>39</sup> See *S.E.C. v. United Financial Group, Inc.*, 474 F. 2d 354, 357 (9th Cir. 1973) and Brief of S.E.C. as Amicus Curiae at 13, *Schoenbaum v. Firstbrook*, *supra* n. 12. It should be noted that, in the words of the *Leasco* court: "... we see no reason why, for purposes of jurisdiction to impose a rule, making telephone calls and sending mail to the United States should not be

deemed to constitute conduct within it". 468 F. 2d at 1335.

<sup>40</sup> See e.g., *Ellis v. Carter*, 291 2d F. 270 (9th Cir. 1961); also see Brief of S.E.C. as Amicus Curiae at 13, *Schoenbaum v. Firstbrook*, supra n. 12, and Memorandum of S.E.C. as Amicus Curiae in Support of Petition for Rehearing at 6, *IIT v. Vencap, Ltd.*, supra n. 30.

<sup>41</sup> *Leasco Data Processing Equipment Corp. v. Maxwell*, supra n. 30, and *Travis v. Anthes*, 473 F. 2d 515 (8th Cir. 1973). Both courts said the respective cases were of the Restatement Section 17 type.

<sup>42</sup> *Leasco Data Processing Equipment Corp. v. Maxwell*, supra n. 30.

<sup>43</sup> 519 F. 2d 974 (2d Cir. 1975).

<sup>44</sup> 519 F. 2d 1001 (2d Cir. 1975).

<sup>45</sup> In *S.E.C. v. United Financial Group, Inc.*, 475 F. 2d 354 (9th Cir. 1973), the court adverted to the Commission's argument that the use of interstate commerce facilities is sufficient to warrant exercise of jurisdiction and stated that that theory might have some merit. However, the court determined that it was unnecessary to reach that point. See *infra* n. 134.

<sup>46</sup> 548 F. 2d 109 (3d Cir. 1977). Also see *Arthur Lipper Corp. v. S.E.C.*, 547 F. 2d 171 (2d Cir. 1976).

<sup>47</sup> The liquidators of IIT, an investment trust organized in Luxembourg and owned by IOS, sued Vencap, a Bahamian "venture capital firm" and its officer-directors, who were two U.S. citizens residing in the Bahamas. Pursuant to negotiations in London and the Bahamas, it had been agreed that IIT would invest in Vencap. U.S. Counsel for IIT drafted a subscription agreement in New York, and proposed drafts were exchanged in New York between U.S. counsel for both parties. Closing took place in the Bahamas. Subsequently, Pistell, the founder, chairman, president, and treasurer of Vencap, who was a U.S. citizen resident in the Bahamas, allegedly caused Vencap to engage in transactions which resulted in "funneling substantial amounts of Vencap's funds into his own hands".

<sup>48</sup> The court noted that class actions might be treated differently because of possible limited domestic connections and because of the doubtful binding effect. 519 F. 2d at 1018, n. 31.

<sup>49</sup> The district court again found that it had jurisdiction in *IIT v. Vencap, Ltd.*, 411 F. Supp. 1094 (S.D. N.Y. 1975).

<sup>50</sup> 519 F. 2d at 1017-1018.

<sup>51</sup> The Commission supported IIT's petition for rehearing, contending that the Second Circuit's decision would be contrary to the interests of defrauded U.S. investors, and would impede intergovernmental efforts to deal with the after-effects of transnational securities frauds, contrary to the policy interests of the Commission. Memorandum of the Securities and Exchange Commission as Amicus Curiae in Support of Petition for Rehearing at 2, *IIT v. Vencap, Ltd.*, 519 F. 2d 1001 (2d Cir. 1975).

<sup>52</sup> 519 F. 2d 974, 987 (2d Cir. 1975). *Bersch* was a class action on behalf of many thousands of foreign investors and 386 U.S. citizens resident both in the U.S. and abroad, alleging antifraud violations in connection with three offerings of securities of IOS, Ltd., a Canadian corporation with its principal offices in Switzerland. One offering was sold in Europe to Europeans; the second was sold to IOS employees, clients and other persons with associations with IOS, approximately 386 of whom were U.S. citizens; and the third was a secondary offering managed by a Canadian broker-dealer, no part of which was sold to U.S. citizens. The complaint alleged that officers of IOS, co-defendant underwriters (two of whom were U.S. citizens), accountants (also U.S. citizens), and officers of a Bahamian subsidiary of IOS had met in the U.S. to structure and initiate the distributions and to draft portions of an allegedly misleading prospectus. The offerings were made outside the U.S., with the prospectuses mailed from foreign post offices to potential investors. The U.S. resident purchasers apparently received misleading prospectuses mailed into the U.S. Shortly after the offering, IOS collapsed.

The district court found and the Court of Appeals appeared to agree that the three offerings were sufficiently intertwined that it was unrealistic to differentiate among them.

<sup>53</sup> In a footnote (519 F. 2d at 987, n. 29), the court indicated that two SEC cases, *S.E.C. v. Gulf Intercontinental Finance Corp.*, 223 F. Supp. 987 (S.D. Fla. 1963), and *S.E.C. v. United Financial Group, Inc.*, 474 F. 2d 354 (9th Cir. 1973) (see n. 134, *infra.*), had substantive U.S. connections in addition to being SEC injunctive actions. The court stated that the plaintiff class in *Travis v. Anthes*, 473 F. 2d 515 (8th Cir. 1973), consisted of U.S. citizens and noted three district court decisions which the court said looked the other way (*Finch v. Marathon Securities Corp.*, 316 F. Supp. 1345 (S.D. N.Y. 1970); *Investment Properties Int'l, Ltd., v. I.O.S., Ltd.*, [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶93,001 (S.D. N.Y. 1971), *aff'd.* without opinion (2d Cir. 1971) (unreported), and *S.E.C. v. Kasser*, 391 F. Supp. 1167 (D. N.J. 1975). The *Kasser* case was subsequently reversed. See n. 60, *infra.*, and accompanying text.

<sup>54</sup> 519 F. 2d at 987.

<sup>55</sup> *Id.* at 993.

<sup>56</sup> *Id.* at 992.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 993.

<sup>59</sup> See notes 51-52, *supra.*, and accompanying text.

<sup>60</sup> 548 F. 2d 109 (3d Cir. 1977). The *Kasser* case involved alleged fraudulent misrepresentations made by a U.S. citizen and various U.S. and non-U.S. entities controlled by him to a corporation owned by the Province of Manitoba, Canada, in connection with the purchase and sale of securities. The defendants argued that the transactions alleged in the complaint were essentially non-U.S., having no significant impact on either the U.S. investing public or the U.S. securities market. The Commission asserted that a court has jurisdiction when a scheme to defraud non-U.S. entities is devised in the U.S. by U.S. residents who utilize the means of interstate commerce to achieve their objectives. After analyzing various cases applying principles of international law, the district court acknowledged that "the Restatement approach" would appear to permit the exercise of jurisdiction where conduct occurred within the borders of the U.S., but found it necessary to look to Congressional intent to see whether Congress meant jurisdiction to be extended to its permissible limits in securities law cases. 391 F. Supp. 1167 (D. N.J. 1975). The district court concluded that the principal objective of the U.S. securities laws was to protect U.S. purchasers and that "Congress did not intend to confer jurisdiction on the Federal courts over an essentially foreign transaction in American securities unless that transaction has an impact on domestic investors or securities markets". *Id.* at 1175. The district court stated that its view that the transactions were essentially "foreign" was not altered by what it described as "miscellaneous acts" in the U.S. Those miscellaneous acts included: negotiations in the U.S.; transfer of funds through the New York office of a Swiss bank; execution of a master finance agreement in New York; U.S. incorporation of most of the defendant corporations; and use of the U.S. mails, telephone and telegraph in furtherance of the scheme.

<sup>61</sup> 548 F. 2d at 111-112.

<sup>62</sup> *Id.* at 115.

<sup>63</sup> *Id.*

<sup>64</sup> 540 F. 2d 591 (3d Cir. 1976). The case involved a suit by a West German customer of a registered U.S. broker-dealer against the firm, alleging fraud in connection with securities purchases executed by the broker-dealer on the basis of instructions transmitted from West Germany. The court had no doubt that jurisdiction could be invoked because: "The fraudulent scheme was conceived in the United States by American citizens, involving stock in an American corporation traded on American over-the-counter exchange, and an American securities broker from his office in New Jersey was responsible for the wrongful omissions. Moreover, on policy grounds the interest of the United States in regulating the conduct of its broker-dealers in this country and enhancing world confidence in its securities market is ample justifi-

cation for applying the securities laws. We conclude that federal jurisdiction was properly invoked". *Id.* at 595.

<sup>65</sup> 548 F. 2d at 114 (3d Cir. 1977).

<sup>66</sup> *Id.* at 116.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> In *F.O.F. Proprietary Funds, Ltd. v. Arthur Young and Company*, 400 F. 2d 1219 (S.D. N.Y. 1975), which was decided after *Bersch* and *IIT* and which involved a non-U.S. plaintiff, the following actions which the plaintiff alleged had occurred were found to constitute mere preparation: the fraudulent scheme was devised and carried out by U.S. citizens or corporations operating from the U.S.; the allegedly misleading offering circular and "comfort letter" were drafted and reviewed by the defendants in New York; some sales activity occurred in the U.S.; and the financing and expenditures of the proceeds from the offering were authorized by persons in the U.S.

<sup>70</sup> See n. 36 *supra*.

<sup>71</sup> Three decisions in the Southern District of New York are indicative. In *Selzer v. Bank of Bermuda, Ltd.*, 385 F. Supp. 415 (S.D. N.Y. 1974), the court held that there must be both a significant connection with the U.S. and a detrimental effect on U.S. investors. The court also held, however, that a significant connection existed if U.S. investors were involved to their detriment. In *S.E.C. v. Capital Growth Co., S.A. (C.R.)*, 391 F. Supp. 593 (S.D. N.Y. 1974), the court held that there must be significant conduct in the U.S., or conduct outside the U.S. having a harmful impact on U.S. investors. In *Recaman v. Barishi*, 408 F. Supp. 1189 (E.D. Pa. 1975), the court noted the split in the cases but decided it did not have to take a position since neither test was satisfied.

See Karmel, *op. cit. supra* n. 8, at 678 *et seq.*, for the argument that a careful reading of the cases discloses that both conduct and effects have been required. However, see Sandberg, *op. cit. supra* n. 28, at 319, for the argument that either conduct, effect or an appropriate mix is sufficient.

<sup>72</sup> *Schoenbaum v. Firstbrook*, 405 F. 2d 200 (2d Cir. 1968) *rev'd on rehearing on other grounds*, 405 F. 2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969), was a derivative suit under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in which the plaintiff alleged the sale of treasury shares of a Canadian corporation to other non-U.S. persons at the market price when defendants possessed undisclosed favorable material inside information. Shares of the Canadian corporation were listed on the American Stock Exchange. The district court dismissed the action on grounds of failure to state a cause of action and lack of subject matter jurisdiction. However, the court of appeals held that subject matter jurisdiction existed where transactions taking place outside the U.S. involved stock registered and listed on a national securities exchange and were detrimental to the interests of U.S. investors. The court also concluded that the facts of the case alleged a sufficiently serious effect upon U.S. commerce to warrant assertion of jurisdiction.

<sup>73</sup> Note, *Extraterritorial Application of the Securities Exchange Act of 1934*, 69 Colum. L. Rev. 94, 102 (1969), and Comment, *The Transnational Reach of Rule 10b-5*, *supra* n. 7, at 1380.

<sup>74</sup> 405 F. 2d at 206.

<sup>75</sup> See Karmel, *op. cit. supra* n. 8, at 678-679; Note, *American Adjudication of Transnational Securities Fraud*, *supra* n. 28, at 556-557, and Sandberg, *op. cit. supra* n. 28, at 319-320.

<sup>76</sup> 519 F. 2d at 991. The court characterized as "debatable" assertion of subject matter jurisdiction over a U.S. and a Canadian underwriter which had managed the two offerings which were not made to U.S. residents. The court indicated that the question would turn on whether the activities of the underwriters, whether in the U.S. or abroad, could be considered as essential to carrying out the offering to U.S. residents.

<sup>77</sup> *Id.* at 993. The characterization of this aspect of the case appears to be somewhat inconsistent with the same court's finding in *Leasco* that: ". . . we see no reason why, for purposes of jurisdiction to impose a rule, making telephone calls and sending mail to the United States should not be deemed to constitute conduct within it". 468 F. 2d at 1335.

See also *Madonick v. Denison Mines, Ltd.*, [1973-1974 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,550 (S.D. N.Y. 1974).

<sup>78</sup> 519 F. 3d at 991.

<sup>79</sup> 473 F. 2d 515 (8th Cir. 1973).

<sup>80</sup> *Id.* at 527-528.

<sup>81</sup> 549 F. 2d at 133 (9th Cir. 1977).

<sup>82</sup> *Id.* at 135. The California Court of Appeals recently took the same position in *UFITEC, S.A. v. Carter*, CCH Fed. Sec. L. Rep. ¶95,874 (Ci. App. Cal. 1977), a contract suit in a state court. The question arose because the defendant claimed the contract was void pursuant to Section 29 of the Exchange Act [15 U.S.C. 78cc (1970)].

<sup>83</sup> *Bersch v. Drexel Firestone, Inc.*, *supra* n. 30, at 989.

<sup>84</sup> *Id.*, and *Leasco Data Processing Equipment Corp. v. Maxwell*, *supra* n. 30.

<sup>85</sup> *Investment Properties International, Ltd. v. I.O.S., Ltd.* [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶93,011 (S.D. N.Y. 1971).

<sup>86</sup> *Recaman v. Barish*, 408 F. Supp. 1189 (E.D. Pa. 1975).

<sup>87</sup> *Bersch v. Drexel Firestone, Inc.*, *supra* n. 30, at 989.

<sup>88</sup> *Id.*

<sup>89</sup> Also see *Schoenbaum v. Firstbrook*, *supra* n. 72.

<sup>90</sup> See *Roth v. Fund of Funds, Ltd.*, 405 F. 2d 421 (2d Cir. 1968).

<sup>91</sup> *Bersch v. Drexel Firestone, Inc.*, *supra* n. 30.

<sup>92</sup> It is fundamental that a nation may govern the conduct of its citizens anywhere in the world. *Bersch v. Drexel Firestone, Inc.*, *supra* n. 30, at 985. However, the courts have not discovered a Congressional intent to so apply the securities laws. As the court said in *IIT*: "Taking first the element that 'one defendant, who owns and controls other defendants is a United States citizen', we do not think that this alone would give subject matter jurisdiction. . . . It is simply unimaginable that Congress would have wished the anti-fraud provisions of the securities laws to apply if, for example, [the American defendant] while in London had done all the acts here charged and had defrauded only European investors". 519 F. 2d at 1016.

Nevertheless, some cases have gone far enough in asserting jurisdiction in cases involving U.S. defendants to suggest that nationality may have been an influencing factor. See *Karmel, op. cit. supra* n. 8, at 688, Comment, *The Transnational Reach of Rule 10b-5*, *supra* n. 7, at 1387-1389, citing *S.E.C. v. Gulf Intercontinental Finance Corp.*, 223 F. Supp. 987 (S.D. Fla. 1963), and *S.E.C. v. United Financial Group, Inc.*, 474 F. 2d 354 (9th Cir. 1973).

<sup>93</sup> *International Shoe Co. v. State of Wisconsin*, 326 U.S. 310 (1945).

<sup>94</sup> *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>95</sup> *Travis v. Anthes*, 473 F. 2d 515, 529 (8th Cir. 1973); *Leasco Data Processing Equipment Corp. v. Maxwell*, *supra* n. 30, at 1339; *Bersch v. Drexel Firestone, Inc.*, *supra* n. 30, at 998.

<sup>96</sup> 468 F. 2d at 1340. Of course, "personal jurisdiction is conferred upon the Court by valid service of process". *Wagman v. Astle*, 380 F. Supp. 497, 499 (S.D. N.Y. 1974), citing 1 Moore's Federal Practice ¶0.60 [10], n. 7 (1972).

<sup>97</sup> 357 U.S. 235, 253 (1958).

<sup>98</sup> 468 F. 2d at 1340.

<sup>99</sup> *Ferraioli v. Cantor*, 259 F. Supp. 842 (S.D. N.Y. 1966).

<sup>100</sup> *Fogel v. Chestnutt*, [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. ¶92,133 (S.D. N.Y. 1968).

<sup>101</sup> 473 F. 2d at 529.

<sup>102</sup> 468 F. 2d at 1342.

<sup>103</sup> 519 F. 2d at 998.

<sup>104</sup> One case appears out of line in this regard. In *Wagman v. Astle*, 380 F. Supp. 497 (S.D. N.Y. 1974), the court found that it would violate due process to exercise personal jurisdiction over non-U.S. beneficial owners of more than 10% of the shares of a non-U.S. corporation in a case allegedly subject to Section 16(b) of the Exchange Act. The court found no minimal connection between the individual defendants and the U.S., even though the corporation in question was registered with the SEC and the individual defendants filed certain reports required of officers, directors, and 10% beneficial owners of registered companies. In reaching its conclusions, the court appeared to give great weight to criticisms of Section 16(b) and to the fact that Ontario, Canada, had no similar provisions. The court was not persuaded by the argument that registration is implicitly conditioned on compliance by insiders with Section 16 and that the defendants recognized as much when they fulfilled the reporting requirements of Section 16(a).

<sup>106</sup> Such persons include brokers, dealers, and banks (see *Schoenbaum v. Firstbrook*, *supra* n. 72), but not mutual funds (see *Roth v. Fund of Funds, Ltd.*, *supra* n. 90).

<sup>107</sup> *Roth v. Fund of Funds, Ltd.*, *supra* n. 90; *Arthur Lipper Corp. v. S.E.C.*, *supra* n. 46.

<sup>108</sup> In its *amicus curiae* brief in *Schoenbaum*, the Commission argued that Section 30(b) had no relation to those provisions of the Exchange Act which based jurisdiction on use of the jurisdictional means or the presence of a registered security, but only related to those provisions which made the jurisdictional triggering element the identity of a person involved, particularly the brokerdealer registration provisions. The Commission contended that: "... the purpose was to authorize the Commission to promulgate rules to reach foreign transactions not involving the use of a jurisdictional means or a registered security whenever necessary to prevent evasion of the Act and, at the same time, to limit the otherwise universal application of certain provisions of the Act to persons in the securities business in the absence of those elements or such rules". Brief of S.E.C. as *Amicus Curiae* at 24, *Schoenbaum v. Firstbrook*, 405 F. 2d 200 (2d Cir. 1968).

See *Metro-Goldwyn-Mayer, Inc. v. Transamerica Corporation*, 303 F. Supp. 1354 (S.D. N.Y. 1969). That case cited Section 30(b) as authority for rejecting the notion that credit regulations adopted by the Federal Reserve Board pursuant to Section 7 of the Exchange Act applied to loans by non-U.S. banks to a U.S. corporation to finance a tender offer for stock of a U.S. corporation. See also *Bank of Bermuda Limited v. Rosenbloom*, CCH Fed. Sec. L. Rep. ¶95,820 (S.D. N.Y. 1977). By contrast, see *U.S. v. Weisscredit Banca Commerciale E D'Investimenti*, cited and discussed *supra* at n. 17. That case held, in effect, that non-U.S. banks cannot avail themselves of the Section 30(b) exemption if the transactions take place within the U.S., and that such banks may be treated as broker-dealers with respect to such transactions.

Also see *UFITEC, S.A. v. Carter*, *supra* n. 82, in which the California Court of Appeals rejected the contention of a Swiss banking corporation that the Exchange Act did not apply if U.S. credit was not involved. The court felt there was U.S. impact in the form of capital outflow when a U.S. investor received non-U.S. credit to speculate in non-U.S. securities on non-U.S. exchanges.

<sup>109</sup> In its brief in the case of *Fontaine v. S.E.C.*, 295 F. Supp. 880 (D. Puerto Rico 1966), the Commission took the position that general rules, particularly those relating to the records and conduct of registered broker-dealers, if adopted for the purpose of preventing evasion of the Act, are rules within the meaning of the last clause of Section 30(b), even if not adopted specifically pursuant to that rule. Consequently, conduct in contravention of such general rules would not be exempted by Section 30(b). See Reply Memorandum of Defendants Securities and Exchange Commission at 12-13, *Fontaine v. S.E.C.*, *supra*. The court did not reach this particular question. It did, however, conclude that: "The mere fact that a registered broker-dealer engaged in foreign activities does not create a bar to the exercise of United States jurisdiction; foreign business operations which have an effect in the United States may, under appropriate circumstances, be subject to applicable United States law". 295 F. Supp. at 890.

<sup>110</sup> 546 F. 2d 338 (10th Cir. 1976).

<sup>111</sup> In *Société Internationale v. Rogers*, 357 U.S. 197 (1958), the U.S. Supreme Court confronted this problem in a case under the Trading with the Enemy Act. The claimant in that case asserted that it was unable to produce certain relevant documents because to do so would involve disclosure of banking records in violation of Swiss laws. The district court had ordered production and had dismissed the case for noncompliance. The Court of Appeals affirmed. The Supreme Court found that the district court was justified in issuing the production order but determined that dismissal was not an appropriate sanction for failure to comply when it had been established that such failure was due to inability and not to willfulness, bad faith, or any fault of the petitioner. However, the court went on to imply strongly that the inability of the petitioner to produce the documents might prove a serious handicap in its efforts to prove its case.

<sup>112</sup> 546 F. 2d at 341. For a different approach, see *U.S. v. First National City Bank* ("Citibank"), 396 F. 2d 897 (2d Cir. 1968), one of the cases criticized by the *Finesilver* court. The Second Circuit affirmed a finding of contempt against Citibank for failure to produce documents in the possession of its branch in West Germany. The court found that production would apparently not violate West German criminal law and would at most expose Citibank to civil liability. However, the court rested its determination not so much on its conclusions as to whether or not production would violate the law as on a balancing of the U.S. and West German national interests and on an analysis of the hardships Citibank would suffer, an approach suggested by Restatement Section 40.

<sup>113</sup> 546 F. 2d at 342. The court also implied that Andersen should not have purported to speak for the U.S. on the subject of international comity but should have sought to have appropriate officers and agencies of the U.S. make such representations to the court as they might deem suitable.

<sup>114</sup> [1975-1976 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,388 (D. D.C. 1975).

<sup>115</sup> See Note, *Extraterritoriality - Enforcement of United States Court Orders Conflicting with Foreign Law or Policy - Securities and Exchange Commission v. American Institute Counsellors, Inc.*, CCH Fed. Sec. L. Rep. ¶95,388 (D. D.C. 1975), 17 Harv. Int'l. L. J. 679 (1976).

<sup>116</sup> Memorandum of Securities and Exchange Commission as Amicus Curiae in Support of Petition for Rehearing at 10, *IIT v. Vencap, Ltd.*, *supra* n. 30.

<sup>117</sup> Brief of S.E.C. as Amicus Curiae at 13, *Schoenbaum v. Firstbrook*, *supra* n. 12; Memorandum of S.E.C. as Amicus Curiae in Support of Petition for Rehearing at 3, *IIT v. Vencap, Ltd.*, *supra* n. 30.

<sup>118</sup> See, e.g., *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *S.E.C. v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963).

<sup>119</sup> Memorandum of S.E.C. as Amicus Curiae in Support of Petition for Rehearing at 3-4, *IIT v. Vencap, Ltd.*, *supra* n. 30.

<sup>120</sup> *Id.* at 4-6.

<sup>121</sup> Brief for Appellant at 33, *S.E.C. v. Kasser*, *supra* n. 60.

<sup>122</sup> Brief for SEC as Amicus Curiae at 18, *Schoenbaum v. Firstbrook*, *supra* n. 12.

<sup>123</sup> Brief for Appellee at 38-40, *S.E.C. v. United Financial Group, Inc.*, *supra* n. 92. The Commission expressed particular concern about the adverse effects on the U.S. balance of payments and capital markets flowing from abuses by offshore funds, particularly those operated by U.S. persons or those which represent or imply regulation by the SEC.

<sup>124</sup> Brief for S.E.C. as Amicus Curiae at 14, *Schoenbaum v. Firstbrook*, *supra* n. 12. The Commission has cited the *IIT* court's statement that "[t]his country would surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States". Brief of Respondent at 54, *Arthur Lipper Corp. v. S.E.C.*, *supra* n. 46, citing 519 F. 2d at 1017. The Commission has noted the difficulties that other governments interested in an international transaction might have obtaining effective jurisdiction over defen-

dants, obtaining evidence, and enforcing judgments (Brief for Appellant at 33, *S.E.C. v. Kasser*, *supra* n. 60), and has argued that extraterritorial application of securities laws may contribute to international cooperation. (Memorandum of S.E.C. as Amicus Curiae in Support of Petition for Rehearing at 10, *IIT v. Vencap, Ltd.*, *supra* n. 30).

<sup>125</sup> Civil No. 72-5001 (CES) (S.D. N.Y., filed November 27, 1972).

<sup>126</sup> [1975-1976 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,388 (D. D.C. 1975).

<sup>127</sup> The complaint alleged, in substance, that Vesco and his group, acting through International Controls Corp., a U.S. corporation, acquired control of IOS, Ltd., the investment adviser and manager of a complex of non-U.S. mutual funds. The Vesco group then looted the mutual funds of in excess of \$225 million by having the mutual funds sell the funds' marketable securities and by using the proceeds from such sales to further the Vesco group's activities.

The defendants named in this part of the case included, among many others, International Bancorp, a Bahamian corporation, which was a holding company for various banking assets spun off by IOS; Bahamas Commonwealth Bank, a Bahamian corporation which was majority-owned by International Bancorp; and Overseas Development Bank Luxembourg, a non-U.S. corporation which maintained its principal executive offices in Luxembourg and which was wholly-owned by International Bancorp. The banks, which were newly formed and thinly capitalized, served as conduits in that control and custody of the cash and portfolio securities of the IOS funds were transferred from independent and responsible custodian banks to defendant banks. Subsequently, the funds' assets were used as the Vesco group saw fit.

<sup>128</sup> The mutual funds, Fund of Funds, IIT, Venture Fund, and Transglobal Growth Fund Limited (known collectively as the IOS Dollar Funds), were the victims of the fraud perpetrated by Vesco and his associates but were included as defendants in the injunctive action in order to obtain effective relief.

<sup>129</sup> As has been widely reported, Vesco and his associates were able to remove large portions of the funds' assets and were able successfully to seek sanctuary first in the Bahamas and then in Costa Rica. For a full narrative treatment of this matter, see Hutchison, *VESCO*, Praeger Publishers, Inc. (New York, 1974).

<sup>130</sup> See 40 S.E.C. Ann. Rep. 20 (1974).

<sup>131</sup> *Id.* In particular, on December 18, 1973, the Luxembourg court declared IIT to be in liquidation and appointed liquidators. See Memorandum of the Securities and Exchange Commission as Amicus Curiae in *IIT v. Lam*, No. 75-1062 (10th Cir. 1975). On February 14, 1974 and April 4, 1974, a court in the Netherlands Antilles declared Venture Fund to be bankrupt and in liquidation and appointed two individuals to be its trustees. On August 1, 1973, the Supreme Court of Ontario appointed a liquidator for Fund of Funds and IOS Growth Fund. Judge Stewart in *S.E.C. v. Vesco* has recognized the primary role of these liquidators and trustees. See Consent Order in *S.E.C. v. Vesco*, Civ. No. 72-5001 (CES) (S.D. N.Y., dated November 30, 1973). The consent order appointed a special receiver for Fund of Funds and IOS Growth Fund, but noted the efforts of the Committee referred to in the text and recognized the primary authority and responsibility of the liquidator appointed by the Supreme Court of Ontario, where the funds were incorporated. Judge Stewart also recognized the roles of the liquidators for IIT and Venture Fund. See Order entered in *S.E.C. v. Vesco*, Civ. No. 72-5001 (CES) (S.D. N.Y., dated October 29, 1974).

<sup>132</sup> See Preliminary Injunction in *S.E.C. v. Vesco*, Civ. No. 72-5001 (CES) (S.D. N.Y., dated November 8, 1973). Also see *International Controls Corp. v. Vesco*, 490 F. 2d 1334 (2d Cir. 1974).

<sup>133</sup> The Bahamas Finance Minister cancelled this defendant's banking license in June, 1974, for acting in a manner detrimental to the public interest. See Hutchison, *VESCO*, Praeger Publishers, Inc. (New York, 1974), p. 360.

<sup>134</sup> The Commission has instituted a number of actions against non-U.S. mutual funds. One



of the few decided Commission cases in this area was *S.E.C. v. United Financial Group, Inc.*, *supra* n. 92, in which the Ninth Circuit upheld jurisdiction in a Commission injunctive action against a U.S. holding company which controlled a large number of service and investment companies incorporated outside the U.S. The court found a number of shareholders with addresses in the U.S. The court also found that United Financial Group advertised in overseas editions of U.S. publications which were read by U.S. citizens abroad; that three U.S. citizens living abroad swore they had been sold shares of United Financial Group companies; and that an offer to exchange shares had been made to a U.S. citizen in the U.S. The court also found that interstate facilities were used in distributions of prospectuses, to set up sales meetings, and to consummate investment transactions. See also *S.E.C. v. Gulf Intercontinental Finance Corp.*, *supra* n. 92.

Another decided case involving non-U.S. mutual funds was *S.E.C. v. Capital Growth Co., S.A. (C.R.)*, *supra* n. 71, an injunctive action against a Costa Rican investment company and various related entities alleging a course of conduct designed to convert the assets of the Capital Growth companies in violation of Rule 10b-5. The district court stated the applicable standard as follows: "The leading cases in this circuit make it clear that subject matter jurisdiction will attach to the transactions here in issue if it can be established either that there was significant conduct within the territorial limits of the United States or that there was extraterritorial conduct which was harmful to and which had an impact upon United States investors". 391 F. Supp. at 596-597.

The court considered allegations that U.S. shareholders had purchased defendant's securities through the U.S. mails after receiving a sales talk in New York; that the stock certificates and periodic literature about the companies had been sent through the mails to U.S. investors; and that the company had made representations stressing the company's ties with the U.S. and its securities markets. The court concluded that there was both impact on U.S. investors and conduct which was harmful to and which had an impact upon United States investors". 391 F.

In still another non-U.S. mutual fund case, *S.E.C. v. Everest Management Corporation*, Civil No. 71-4932 (S.D. N.Y., November 7, 1975), the Commission named First National City Trust Company (Bahamas) Ltd. as a defendant, charging violations of the antifraud provisions of the Federal securities laws. The defendant, a subsidiary of First National City Bank, allegedly participated in the dissemination of false and misleading information in connection with the sales of securities in a non-U.S. mutual fund and distribution of false and misleading periodic reports to the fund's shareholders. The Commission also alleged that the defendant failed to supervise the activities of the fund's investment manager. The defendant and certain of its employees consented to entry of a judgment permanently enjoining them from engaging in the alleged violative activities. Bank Hofmann, a defendant in the *Cosmopolitan* case (see n. 140, *infra*, and accompanying text), was also a defendant in this case.

<sup>135</sup> 42 S.E.C. Ann. Rep. 126-127 reported that:

"The ratification process continued on the Treaty between the United States and Switzerland on Mutual Assistance in Criminal Matters . . . .

"In general, the Treaty provides for broad cooperation between the two countries in criminal matters. Provision is made for assistance in locating witnesses, obtaining witnesses' statements and testimony, the production and authentication of business records, and the service of judicial and administrative documents. The Treaty also provides for special assistance in cases involving organized crime.

"The Treaty should be of assistance to the Commission in major cases where Swiss financial institutions are utilized to engage in securities transactions in the United States, or where funds resulting from illegal activities are secreted in such situations".

The Treaty was ratified on June 21, 1976 (122 CONG. REC. S. 9980 (daily ed. June 21, 1976)).

<sup>136</sup> The complaint alleged numerous securities laws violations including violations of the

registration, antifraud, record-keeping, and broker-dealer provisions, and of the Investment Company Act and Investment Advisers Act registration provisions. Simultaneously with the filing of the complaint, certain of the defendants other than the bank consented to the entry of a judgment of permanent injunction enjoining them from violations of the U.S. federal securities laws and also to certain ancillary relief.

<sup>137</sup> In December, 1975, a Judgment of Preliminary Injunction and Other Relief with findings of fact and conclusions of law was issued against certain defendants other than the bank. The judgment required, among other things, that anyone holding funds or other assets on behalf of the defendants identify such assets in writing to the Special Counsel appointed by the court. On January 27, 1976, pursuant to this judgment, Swiss Bank Corp. notified the district court that it held \$18.6 million in assets on behalf of the defendants. Another Swiss bank, Bank Leu, A.G., notified the Commission's staff that it also held assets on behalf of the defendants. The Swiss banks voluntarily froze all assets of the defendants in their possession pending the outcome of the litigation.

<sup>138</sup> SEC Litigation Release No. 7475, July 1, 1976.

<sup>139</sup> All information collected by the Special Auditor was to be provided to the Commission except that the names of the investors would not be given to the Commission unless the Swiss Banking Commission determined that fraud and misrepresentation had occurred in connection with the specific investments with which the investors were involved; written consent of the investors was obtained; or information was provided with respect to investors whose identities were already in the Commission's possession. SEC Litigation Release No. 5721, August 13, 1976.

<sup>140</sup> Civil Action No. 75-666 (M.D. Pa., filed June 6, 1975). The Commission filed a civil injunction action against Cosmopolitan Investors Funding Co., two Cosmopolitan officers, Bank Hofmann A.G., a Swiss Bank, and two of its officers, and others for alleged violations of the antifraud provisions of the Exchange Act. Cosmopolitan and its officers were also charged with violations of the reporting and proxy provisions of the Exchange Act. The Cosmopolitan officers allegedly established an illegal kickback scheme in which they caused Cosmopolitan to purchase shares of two non-U.S. mutual funds having little or no value, and to deposit a portion of the proceeds in secret Bank Hofmann accounts for the benefit of the Cosmopolitan officers. The bank officers were also officers of the company from which Cosmopolitan purchased the mutual fund shares, and they allegedly knew the details of the kickback transaction. The complaint further alleged that the bank officers handled the mechanics of the transaction through secret code-name accounts for the Cosmopolitan officers and that the bank officials distributed the proceeds to the participants in the scheme and shared in those proceeds. See SEC Litigation Release No. 6927, June 11, 1975.

<sup>141</sup> Civil No. 75-903 (S.D. Fla., filed May 27, 1975). In May, 1975, the Commission brought an injunctive action against Bank Vom Linthgebeit, a Swiss bank, and others, alleging, among other things, that during 1971 the defendants engaged in a scheme to manipulate the market price of securities of Investment Property Building, Inc. The Commission alleged that the scheme was furthered by an agreement to acquire a large block of Investment Property shares through the use of a secret bank account at Bank Vom Linthgebeit. See SEC Litigation Release No. 9602, May 27, 1975.

<sup>142</sup> A rare case involving a foreign bank as an actual issuer of securities was *S.E.C. v. Normandie Co.*, Civil No. 72-1531-JLK (S.D. Fla. June 8, 1973). In September, 1972, the Commission successfully sued to enjoin Normandie Trust Company from the sale of virtually worthless Letters of Credit issued by Normandie. Although Normandie, a Panamanian corporation, purported to be a bank and to perform numerous banking functions, its sole activity to the date of the complaint was to sell these Letters of Credit through the use of false and misleading information. The total face value of the Letters of Credit offered by Normandie was over \$27 million.

The Commission has also placed foreign banks on its Foreign Restricted List, which is designed to alert the public to possible unlawful distributions of foreign securities in the U.S. See Response of the Securities and Exchange Commission to the Request of the Senate Subcommittee on Securities Dated December 19, 1975, February 9, 1976, at 30.

<sup>143</sup> The Commission has also moved on the administrative front to attempt to prevent abuses in this area. On January 27, 1976, the Commission, in Securities Exchange Act Release No. 12055, proposed an amendment to Exchange Act Rule 17a-3(a) (9) which, in effect, would permit brokers to handle transactions for a non-U.S. financial institution acting for other beneficial owners only if the institution agreed to reveal the identity of the beneficial owners at the Commission's request. Any information so obtained would be confidential unless the Commission used it in an enforcement action. The institution would have to obtain whatever consents or waivers local law might require. The Commission issued a further release on the subject on January 10, 1977 (Securities Exchange Act Release No. 13149), but has not yet adopted the amendment.

<sup>144</sup> Civil No. 75-0809 (D. D.C. September 4, 1975). See also *S.E.C. v. Banque-de-Paris et des Pays-Bas (Suisse)*, Civil No. 77-0798 (D. D.C. May 10, 1977) and *S.E.C. v. Bethmann Bank, et al.*, Civil No. 77-0872 (D. D.C., filed May 23, 1977).

case who were enjoined in *S.E.C. v. General Refractories Co.*, 400 F. Supp. 1248 (D. D.C. 1975), have appealed (Nos. 75-1973 and 76-1061 (consolidated) (D.C. Cir. 1975)), alleging, in part, lack of subject matter and personal jurisdiction. These defendants had been served with process in Switzerland by registered mail pursuant to Rule 4(i) (1) (E), and objected on the ground that such service did not conform to Swiss procedure. The Commission has contended, however, that such service is valid even though failure to comply with Swiss desires might render unavailable Swiss assistance in enforcing a final judgment. The Commission cited the note of the advisory committee which drafted Rule 4(i), as well as numerous cases. See Brief of SEC at 72-74, *S.E.C. v. General Refractories Co.*, Nos. 75-1973 and 76-1061 (consolidated) (D.C. Cir. 1975).

<sup>146</sup> SEC Securities Exchange Act Release No. 11597 (August 15, 1975).

<sup>147</sup> SEC Securities Exchange Act Release No. 12192 (March 11, 1976). The bank was alleged to have withheld a large portion of a public offering of Pelorex Corporation stock from the public market, and to have acted in concert with another defendant in artificially limiting the availability of Pelorex stock from the beginning of the offering. The bank was also charged with reselling at a substantial profit a portion of the stock so withheld at a later date.

<sup>148</sup> For a case involving both problems, see *S.E.C. v. Edward M. Gilbert, et al.*, Civil No. 76-366 (S.D. N.Y., filed January 21, 1976). On January 21, 1976, the Commission filed an injunctive action against numerous persons, including two Swiss banks, charging violations of the antifraud and beneficial ownership reporting provisions of the U.S. federal securities laws in connection with the purchase and sale of common stock of Conrac Corporation. The defendants, including the two Swiss banks, allegedly manipulated the price of Conrac shares through prearranged trades, by placing increasingly higher bids for Conrac shares, and by dominating and controlling the trading market for Conrac shares. The complaint also alleged that certain of the defendants, including the two Swiss banks, acting as a group, failed to comply with the appropriate reporting provisions of the Exchange Act after acquiring in excess of 5% of the outstanding common stock of Conrac. SEC Litigation Release No. 7254, January 28, 1976.

Philip A. Loomis, Jr. (b. 1915) received his A.B. degree from Princeton University in 1938 (highest honors) and his LL.B. degree from Yale Law School in 1941 (cum laude), where he was a member of the editorial board of the Yale Law Journal. He joined the staff of the Securities and Exchange Commission in 1954. He was appointed Director of the SEC's Division of Trading and Exchanges in 1955 and became General Counsel of the SEC in 1963. He became an

SEC Commissioner in 1971. He was awarded the Career Service Award of the National Civil Service League in 1964; the SEC Distinguished Service Award in 1966; and the Justice Tom C. Clark Award of the Federal Bar Association in 1971.

Richard W. Grant (b. 1945) received his A.B. degree from Brown University in 1968 and his J.D. degree from Boston University Law School in 1971. He joined the SEC's Division of Investment Company Regulation (now Division of Investment Management) in 1972. He became legal assistant to former SEC Chairman Ray Garrett, Jr. in 1975 and subsequently assumed his present duties as legal assistant to Commissioner Loomis.