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THE "MOTHER COURT" AND THE FOREIGN PLAINTIFF: DOES RULE 10b-5 REACH FAR ENOUGH?

JAMES J. FINNERTY III

INTRODUCTION


For comprehensive analyses of the underlying economic, technological, and regulatory forces shaping the process of market integration, see Internationalization of the Securities Markets, supra, and Terry M. Chuppe et al., The Securities Markets in the 1980s: A Global Perspective (1989).


The removal or easing of barriers to foreign investment, such as exchange controls and foreign investment restrictions, and the growth of investor-protection measures have been

S287
national borders to raise capital in foreign markets. Moreover, advances in telecommunications and data processing systems enable both American and foreign investors to purchase and sell securities virtually instantaneously in different national exchanges. This increasing integration of the world’s securities markets has expanded legitimate investment and capital-raising opportunities. Correspondingly, these global investment opportunities have presented new opportunities for novel transnational securities fraud schemes. It also poses difficult questions about the appropriate reach of the United States’ securities laws.

3. See Chuppe et al., supra note 1, at 18; Behr, supra note 1, at D1 (describing an electronic “superhighway . . . connect[ing] stock markets and banking centers around the world”).

4. See James R. Doty, The Role of the Securities and Exchange Commission in an Internationalized Marketplace, 60 Fordham L. Rev. 577, 581 (1992); see also 134 Cong. Rec. 15,369-70 (1988) (statement of Sen. Riegle) (observing that “securities fraud is no longer confined within any single nation’s borders”); James B. Stewart, Den of Thieves (1991) (describing use of international channels to evade detection of insider trading activities); Behr, supra note 1, at D1 (noting that international securities linkages “will expand the range of the highwaymen who try to manipulate securities markets or prey upon unwary or inexperienced investors”); The SEC’s New World Role, Economist, Jan. 6, 1990, at 73 (stating that investors lost at least $5 billion in fraudulent securities transactions worldwide and that American investors lost $1.6 billion to both American and foreign fraudsters in 1988).

The Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "Exchange Act") are the foundations of the United States' securities laws. Section 10(b) of the Exchange Act and Rule 10b-5, issued under section 10(b), are the centerpieces of the investor-protection provisions of the United States' securities regulations. In the last two decades, the federal courts increasingly have applied the Exchange Act to transnational securities fraud cases.

The Second Circuit has been the pioneer in establishing the parameters of the federal courts' subject matter jurisdiction over transnational securities fraud. Lacking congressional guidance concerning the Exchange Act's applicability to such transactions, the Second Circuit has developed two alternative jurisdictional tests in transnational securities fraud cases. The first, known as the "conduct" test, examines the nature of the defendant's conduct in the United States and its relation to the alleged fraudulent securities transaction.


8. 15 U.S.C. § 78j(b) (1988). Section 10(b) authorizes the SEC to issue rules making it unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id.
9. 17 C.F.R. § 240.10b-5 (1992). Rule 10b-5 prohibits anyone participating in a securities transaction from "employ[ing] any device, scheme, or artifice to defraud . . . [or] engag[ing] in any act, practice, or course of business which operates or would operate as a fraud." Id.
10. For the purposes of this Note, "transnational securities fraud" and "cross-border securities fraud" refer to material misrepresentations or omissions in the purchase or sale of securities involving United States issuers or traders, or their affiliates, and foreign investors abroad.
12. In the field of securities law in general, the Second Circuit has been deemed the "Mother Court." See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (Blackmun, J., dissenting), reh'g denied, 423 U.S. 884 (1975).
14. See infra notes 28-32 and accompanying text.
15. For cases construing the "conduct" test, see IIT v. Cornfeld, 619 F.2d 509 (2d Cir. 1980); Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5 (2d Cir. 1979); IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975); Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.), cert. denied, 423 U.S. 1018 (1975); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); see also infra notes 33-85 and accompanying text.
"effects" test, measures the specific direct effects of an alleged fraudulent transaction on American investors or the United States' securities markets. If a cross-border securities transaction satisfies either the "effects" test or the "conduct" test, a court will exercise jurisdiction over a transnational securities fraud claim.

In applying the "conduct test," the Second Circuit requires that the actual fraudulent act forming the basis of the foreign plaintiff's Rule 10b-5 claim occur in the United States and directly result in the foreign plaintiff's loss. The Second Circuit's analysis, though not the same threshold of material conduct, has been widely adopted by other circuits.

The Second Circuit's direct causation requirement, however, fails to recognize fully that the world's financial markets are increasingly integrated and that securities fraud transcends national borders. The likelihood of a misrepresentation or omission directly causing a foreign plaintiff's loss occurring in the United States easily can be reduced through the use of offshore corporate entities or other international channels. Consequently, the failure to permit a foreign plaintiff's private action under the Exchange Act where the defendant's acts in the United States are "merely preparatory" and, therefore, not the direct cause of the foreign plaintiff's loss may impugn the perceived fairness and integrity of the United States' securities markets.

The current conduct analysis for determining whether United States courts have jurisdiction over a cross-border securities transactions leave a gap through which innovative perpetrators of fraud may circumvent United States' securities regulations. Thus, the courts must modify their analysis. Rather than framing the jurisdictional analysis solely in terms of the sufficiency of the defendant's conduct in the United States, the courts should consider whether a defendant purposely has used a perceived affiliation with the United States to induce a foreign investor to participate in an allegedly fraudulent securities transaction.

This Note addresses the application of Rule 10b-5 in transnational securities fraud cases. In Part I, this Note surveys the Second Circuit's and its sister circuits' analyses of the extraterritorial scope of the Exchange Act's antifraud provisions. Part I also examines the policy concerns underlying these decisions. Part II proposes a limited extension of the Exchange Act's antifraud provisions in transnational securities fraud cases. It suggests that a federal court assert subject matter jurisdiction over a cross-border securities transaction when an actor purposely uses the perceived integrity of the American securities markets to induce a foreign
investor to enter into a fraudulent securities transaction. Part III considers whether such an extension of Rule 10b-5 to predominately foreign securities transactions is proper given the likelihood of jurisdictional conflicts between different countries. This Section briefly discusses interest-based approaches to resolving jurisdictional conflicts and concludes that such approaches are inappropriate. Instead, this Section advocates an approach based on the traditional judicial doctrine of *forum non conveniens*. Finally, this Note concludes that the prevailing conduct test for determining the transnational reach of Rule 10b-5 is inadequate. Rather, a "purposeful use" test should supplement the current conduct standard. This approach is better suited to the character of today's securities markets because it recognizes the increasing importance of the foreign investor to the stability of the United States' financial markets as well as to the overseas capital-raising activities of United States firms. This Note further concludes that the doctrine of *forum non conveniens* is a more appropriate tool for determining whether an assertion of the United States' jurisdiction is appropriate. *Forum non conveniens* establishes a judicially manageable approach to resolving potential jurisdictional conflicts.

I. THE FEDERAL COURTS AND THE REACH OF RULE 10b-5 IN TRANSNATIONAL SECURITIES FRAUD CASES

A. *International Law and Extraterritorial Jurisdiction*

Absent express congressional direction, the principles of international law operate as a limitation on the transnational application of the Exchange Act. Customary international law recognizes that a state has subject matter jurisdiction in civil matters over an object within its territory, over the conduct of any person within its borders, and over the conduct of a person outside its borders that causes substantial, direct, and foreseeable effects within its borders. Under international law, a state also has jurisdiction over the conduct of its nationals, wherever it may occur. Assuming a "genuine connection" between the national and the state, an individual has the nationality of the state that confers


20. See id. § 402(1)(b) & cmt. c.

21. See id. § 402(1)(b) & cmt. d.

22. See id. § 402(2) & cmt. e.

citizenship upon him and a private legal entity has the nationality of the state in which it is created. The United States, however, typically does not apply this nationality principle to establish jurisdiction over its citizens in civil or criminal matters. Further, the Restatement (Third) of the Foreign Relations Law of the United States suggests that a state may not extend its jurisdiction to prescribe a rule of law attaching legal consequences to the conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.

These principles have guided the federal courts' construction of the transnational reach of the Exchange Act. Neither the express language of the Exchange Act's antifraud provisions nor its legislative history reveal whether the Seventy-third Congress, which enacted the law, intended the transnational application of securities regulations issued under section 10(b). Indeed, section 10(b)'s legislative history simply indicates that its drafters envisioned it as a "catch-all" prohibition social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.

24. See Restatement (Third), supra note 19, § 211.
25. See id. § 213.
27. See Restatement (Third), supra note 19, § 402 cmt. g.
29. See Hearings on Securities Exchange Regulation Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 115 (1934) (statement of Thomas G. Seligman, The Transformation of Wall Street 1-2 (1982)(noting that during the 1920s approximately $50 billion in new securities were sold in the United States, $25 billion of which became valueless). Following the 1929 market collapse, Congress began an investigation into stock exchange financial practices and their effect on domestic securities markets. See Stock Exchange Practices, Letter from the Counsel for the Senate Comm. on Banking and Currency under S. Res. 84, 72nd Cong. to the Senate Banking and Currency Comm., Feb. 18, 1933, at 32 (identifying manipulation of market value through pool arrangements, corporate officers' use of inside information in the sale and purchase of stocks, and the dissemination of fraudulent information through friendly financial journalists as contributing to market instability, excessive speculation, and financial ruin of thousands of retail investors), reprinted in 5 Legislative History, supra.
29. See Hearings on Securities Exchange Regulation Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 115 (1934) (statement of Thomas G. Seligman, The Transformation of Wall Street 1-2 (1982)(noting that during the 1920s approximately $50 billion in new securities were sold in the United States, $25 billion of which became valueless). Following the 1929 market collapse, Congress began an investigation into stock exchange financial practices and their effect on domestic securities markets. See Stock Exchange Practices, Letter from the Counsel for the Senate Comm. on Banking and Currency under S. Res. 84, 72nd Cong. to the Senate Banking and Currency Comm., Feb. 18, 1933, at 32 (identifying manipulation of market value through pool arrangements, corporate officers' use of inside information in the sale and purchase of stocks, and the dissemination of fraudulent information through friendly financial journalists as contributing to market instability, excessive speculation, and financial ruin of thousands of retail investors), reprinted in 5 Legislative History, supra.
against manipulative and fraudulent practices. Similarly, Rule 10b-5's administrative history is unenlightening.30

Absent clear congressional direction, the courts have sought to identify a legislative intent to support the transnational application of Rule 10b-5.31 Drawing from the Exchange Act's language and its intended purpose of protecting American investors and the United States' securities markets, the courts admittedly have made policy judgments concern-


30. Rule 10b-5 was issued in 1948 to provide the SEC a regulatory basis to prevent fraud in the purchase of securities. For a description of the events surrounding Rule 10b-5's adoption, see Milton V. Freeman, Administrative Procedures, 22 Bus. Law. 891, 922-23 (1967) (explaining that Rule 10b-5 was adopted unanimously without discussion except for "Well, we are against fraud, aren't we?"). Professor Louis Loss identifies Freeman as the "father" of Rule 10b-5. See id. at 918. To date, the SEC has not attempted to define the extraterritorial reach of Rule 10b-5 under its rule-making authority.

31. See, e.g., SEC v. Kasser, 548 F.2d 109, 116 (3d Cir.) ("We are reluctant to conclude that Congress intended to allow the United States to become a 'Barbary Coast,' as it were, harboring international securities 'pirates.' "), cert. denied, 431 U.S. 938 (1977); ITT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975) (reasoning that Congress did not intend for the United States "to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners"); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972) (reasoning that Congress did not intend for the Exchange Act to apply to an American corporation conducting securities transactions outside the United States "[w]hen no fraud has been practiced in this country and the purchase or sale has not been made here"); Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir.) (concluding that Congress intended § 10(b) and Rule 10b-5 to protect "domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities markets from the effects of improper foreign transactions in American securities"), modified on other grounds, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969).

In determining congressional intent concerning the transnational application of the Exchange Act, the courts have reasoned that the Exchange Act's silence resulted from the Seventy-third Congress' failure to envision the growth of an international securities market. See Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 30 (D.C. Cir. 1987) ("The web of international connections in the securities market was then not nearly as extensive or complex as it has become."); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir.) ("The Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development of offshore funds thirty years later."), cert. denied, 423 U.S. 1018 (1975).

For a persuasive argument to the contrary, see Sachs, supra note 5. Professor Sachs argues that Congress was aware that the United States securities markets were highly international when considering the Exchange Act, but nevertheless chose to protect only those investors whose trades occurred on national securities markets. Thus, Sachs concludes that the courts should limit standing under Rule 10b-5 to domestic securities investors. Arguably, the courts statements are exaggerated. See Stock Exchange Practices, Senate Report No. 1455, 73d Cong., Report of the Senate Banking and Currency Comm. Pursuant to S. Res. 84 and S. Res. 56 and S. Res. 97, June 16, 1934, at 83-154 (examining investment bank manipulation of foreign government bond prices to facilitate their distribution and the financial hardship resulting from widespread foreign government defaults), reprinted in 5 Legislative History, supra note 28. To accept Professor Sachs' conclusion in the existing internationalized securities marketplace, however, would place most cross-border transactions beyond the reach of our legal system and thus undermine the legal regime of United States securities market regulation.
ing the provision’s reach. This Section will trace the application of Rule 10b-5 in actions arising from transnational securities fraud. It also will examine the policy concerns underlying these decisions. This analysis will focus first on the Second Circuit and then its sister circuits.

B. The “Mother Court” and Application of Rule 10b-5 to Transnational Securities Activities

The Second Circuit was the first circuit court to consider whether a federal court should assert subject matter jurisdiction over a transnational securities fraud claim. Its analytical framework has been adopted by other circuits.

The Second Circuit first considered whether Congress intended to apply the Exchange Act’s antifraud provisions to a fraudulent sale of stock involving two foreign corporations in Schoenbaum v. Firstbrook. There, an American shareholder in Banff Oil, Ltd., a Canadian corporation traded on the American Stock Exchange, brought a derivative suit alleging damages from the fraudulent sale of Banff treasury stock to two foreign defendants, Aquitaine of Canada, Ltd. and Paribas Corporation.

In exercising jurisdiction, the Second Circuit held that subject matter jurisdiction over transnational securities fraud existed if the securities were traded on an American exchange and the transaction could have adversely affected American investors. The court thus established that a general economic effect on a United States’ securities market was suffi-

32. Compare Bersch, 519 F.2d at 993:

We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond. . . . Our conclusions rest on case law and commentary concerning the application of the securities laws . . . and on our best judgment as to what Congress would have wished if these problems had occurred to it.

(footnote omitted) and Kasser, 548 F.2d at 116 ("[W]e may encourage other nations to take appropriate steps against parties who seek to perpetrate frauds in the United States.") with Zoelsch, 824 F.2d at 33:

Kasser’s policy arguments may provide very good reasons why Congress should amend the statute but are less adequate as reasons why courts should do so. As the Supreme Court has said in another context, '[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984)).


34. See id.

35. The plaintiff alleged that Banff’s directors and the defendants’ officers conspired to defraud Banff by selling treasury shares at a market price that the defendants knew did not reflect the actual value of the shares. See id. at 205-06.

36. See id. at 208. Construing the “effects” test broadly, the Schoenbaum court found that the fraudulent sale of Banff’s stock at a price below its actual value would reduce Banff’s shareholders’ equity. The court hypothesized that, in turn, this decreased Banff’s common stock share prices on the American Stock Exchange. See id. at 208-09.
cient to permit an American court to assert jurisdiction over a cross-border securities transaction. In reaching this holding, the *Schoenbaum* court concluded that Congress intended section 10(b) and Rule 10b-5 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."\(^{37}\)

The Second Circuit next considered whether a United States court could exercise jurisdiction under the Exchange Act over a transaction in foreign securities traded exclusively on a foreign securities market. In *Leasco Data Processing Equip. Corp. v. Maxwell*,\(^{38}\) the late Robert Maxwell allegedly misrepresented the financial performance of Pergamon Press, a British corporation he controlled, to induce Leasco, an American corporation, to purchase Pergamon's stock at a price exceeding its actual value. Maxwell negotiated the Pergamon stock purchase with Leasco in both the United States and Great Britain and made substantial misrepresentations in both countries regarding Pergamon's profitability, existing printing technology, and sales performance. The actual Pergamon stock purchase, however, occurred on the London Stock Exchange.\(^{39}\)

The court first examined whether the adverse economic effect on Leasco's stock price was sufficient to confer jurisdiction under the "effects" test. It declined, however, to assert jurisdiction over the American plaintiff's claims under the "effects" test, even though the plaintiff suffered a measurable adverse financial effect.\(^{40}\) The court reasoned that Congress did not intend for the Exchange Act to apply to an American corporation conducting securities transactions outside the United States "[w]hen no fraud has been practiced in this country and the purchase or sale has not been made here."\(^{41}\) Rather, the court analyzed Maxwell's conduct in the United States. Reviewing Maxwell's activities in the United States, the court concluded that his "substantial misrepresentations" in the United States were sufficient to confer jurisdiction.\(^{42}\) In reaching this conclusion, the court reasoned that Congress would have

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37. *Id.* at 206. The court, however, dismissed the Rule 10b-5 claim. It held that the American shareholder's pleadings failed to state a cause of action under Rule 10b-5 since the plaintiff's allegations against Banff's directors amounted to a breach of fiduciary duty, not fraud. *See id.* at 210-11.

38. 468 F.2d 1326 (2d Cir. 1972).

39. *See id.* at 1332. Responding to a Maxwell-instigated rumor of an imminent takeover of Pergamon, which would have increased its share price, Leasco purchased approximately $22 million worth of Pergamon stock on the London Stock Exchange before discovering Maxwell's false claims. *See id.* at 1332-33.

40. *See id.* at 1334. The court declined to extend *Schoenbaum* to include the adverse financial effect "of the fraudulently induced purchases in England of securities of an English corporation, not traded in an organized American securities market, upon an American corporation whose stock is listed on the New York Stock Exchange and its shareholders." *Id.*

41. *Id.*

42. *See id.* at 1337.
“wished to protect an American investor if a foreigner comes to the United States and fraudulently induces him to purchase foreign securities abroad.”

In *Leasco*, the Second Circuit thus first announced that a foreign defendant’s conduct in the United States was sufficient to confer jurisdiction over a cross-border securities transaction. Even though the actual stock purchase occurred abroad and involved the securities of a foreign corporation not traded on an American exchange, the court dismissed Maxwell’s contention that the “critical misrepresentations” occurred in London. According to the court, Maxwell’s meetings with Leasco executives and his telephone calls and letters to Leasco “whetted Leasco’s interest in acquiring Pergamon” and, therefore, constituted an “essential link” in inducing Leasco to purchase Pergamon stock on the London Exchange. Thus, the *Leasco* court stated the broad proposition that the Exchange Act would apply to securities transactions conducted abroad where a foreign defendant has engaged in some conduct in the United States related to the fraudulent securities transaction.

In 1975, the Second Circuit revisited this issue—deciding two cases in which foreign plaintiffs sought to sue American defendants involved in allegedly fraudulent cross-border securities transactions.

In *Bersch v. Drexel Firestone, Inc.* the Second Circuit redefined the applicability of the Exchange Act’s antifraud provisions to cross-border securities transactions. In *Bersch*, an American citizen brought a class action on behalf of individuals who had purchased common stock in Investors Overseas Services, Ltd. (“IOS”), a Canadian corporation. The plaintiffs alleged that IOS issued a misleading prospectus during its public offering of an offshore mutual fund and that the American defendants assisted IOS with the planning of the public offering and with the drafting of the prospectus within the United States.

The *Bersch* court considered the plaintiffs’ argument that the collapse of IOS caused an adverse economic effect on U.S. securities markets and on American investors sufficient to permit subject matter jurisdiction over the foreign class members’ claims. Narrowing *Schoenbaum*, the

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43. Id.
44. See id. at 1334-35.
45. Id. at 1335.
46. See id. (citing Mills v. Electric Auto-Lite Co., 396 U.S. 375, 385 (1970)). The court also demonstrated a concern about the parties’ nationalities. See id. at 1338 (“The case is quite different from another hypothetical we posed at argument, namely, where a German and a Japanese businessman met in New York for convenience, and the latter fraudulently induced the former to make purchases of Japanese securities on the Tokyo Stock Exchange.”).
47. 519 F.2d 974 (2d Cir.), cert. denied, 423 U.S. 1018 (1975).
48. See id. at 977-78. The plaintiff class included U.S citizens residing in the United States, U.S. citizens residing abroad, and foreign citizens who had purchased the IOS stock outside the United States. See id. at 993-98.
49. See id. at 981.
50. See id. at 987-90.
court held that the "effects" test conferred jurisdiction over fraudulent cross-border securities transactions "only when [the transaction] result[s] in injury to purchasers or sellers of those securities in whom the United States has an interest, not where acts simply have an adverse affect on the American economy or American investors generally." Consequently, the court declined to exercise jurisdiction over the foreign class members' claims under the "effects" test.

The court next considered whether the defendants' conduct in the United States was sufficient to confer jurisdiction. After reviewing the district court's factual findings, the court concluded that the defendants' activities in the United States were "merely preparatory" to the actual fraud, which the defendants' committed by placing the allegedly false prospectus in the purchasers' hands. The court, however, held that the mailing of misleading prospectuses from abroad to United States citizens in the United States to induce them to purchase the IOS securities would support jurisdiction for those plaintiffs' Rule 10b-5 claims. Turning to foreign citizens and to United States citizens residing abroad, the court held that "[w]hile 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.

The Bersch court distinguished the members of the class action both in terms of the conduct and the injury necessary to confer subject matter jurisdiction over the class members' Rule 10b-5 claims. Specifically,

51. See supra notes 34-37 and accompanying text.
52. Bersch, 519 F.2d at 989 (footnotes omitted). The plaintiffs' expert concluded that the IOS collapse resulted in a deterioration of both domestic and foreign investor confidence, thereby causing a "'steep decline'" in foreign purchases of United States securities. See id. at 987-88 (quoting plaintiff's expert). This decline in investor confidence also led to a redemption of mutual fund shares, causing a ripple effect that depressed the prices of American securities. See id. at 988 (quoting plaintiff's expert). Finally, the IOS collapse destroyed an offshore investing industry in which European investors "'were channeled into American securities markets.'" Id. (quoting plaintiff's expert). One commentator rightly has argued that "'[i]f ever the courts were to be concerned with promoting Congress' goal of protecting domestic markets, these facts should have triggered that concern.'" Matson, supra note 5, at 151.
53. See Bersch, 519 F.2d at 988.
54. According to the district court, the defendants held numerous meetings in New York at which the underwriters, their attorneys, and the accounting firm initiated, organized, and structured the IOS public offering. See id. at 985 n.24. The defendants also discussed the IOS offering with the SEC and retained lawyers and accountants to review IOS operations and to prepare reports. See id. Further, the defendants drafted part of the prospectus in New York and showed these completed drafts in New York to potential secondary underwriters. See id. Last, the defendants opened bank accounts in New York in which to deposit the proceeds of the offering before remittance to IOS. See id.
55. See id. at 992.
56. See id. at 991. The court did not address the question of sales within the United States to foreign citizens. See id. at 993.
57. Id. at 992.
58. See id. at 993.
Bersch requires a higher degree of domestic conduct by the defendant as the fraud victim’s relationship with the United States becomes more attenuated. Thus, under Bersch, a foreign plaintiff residing outside the United States must demonstrate that the defendant’s conduct within the United States directly caused his loss.  

In reaching this conclusion, the court expressly recognized that its distinction among class members was based on policy considerations, not the Exchange Act or its legislative history. Hence, the court reasoned that Congress would not have intended to devote the scarce judicial resources of the United States to predominately foreign transactions.

In a companion case to Bersch, IIT v. Vencap, Ltd., the Second Circuit applied the same analysis, but identified a new congressional intent. There, the court held that subject matter jurisdiction existed over a Bahamanian corporation alleged to have defrauded a Luxembourg investment trust when the acts that consummated the fraud occurred within the United States. Applying Bersch, the Vencap court focused on the “wickedness of particular transactions and . . . whether they were engineered from the United States.” Accordingly, the court found that negotiations and document drafting in the United States alone were insufficient to confer jurisdiction. The court concluded, however, that the defendant’s use of his attorney’s office as a “base” from which to solicit foreign clients and to maintain records of transactions could be regarded “substantively as the acts that consummated the fraud,” not “merely evidencing [the defendant’s] fraudulent intention.”

59. See id. The Bersch court concluded that the Exchange Act’s antifraud provisions: (1) 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; and (2) Apply 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; but (3) Do 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.

60. See id.

61. See id. at 985 (stating that a court “must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to [predominately foreign transactions] rather than leave the problem to foreign countries”).

62. 519 F.2d 1001 (2d Cir. 1975). Vencap was a companion case to Bersch and was decided on the same day. In Vencap, IIT alleged that Richard Pistell, a foreign resident of the United States and a principle in the defendant Bahaman venture capital firm, Vencap, fraudulently induced IIT to become a preferred shareholder in Vencap and then misappropriated Vencap’s assets for his personal use.

63. See id. at 1018.

64. Id.

65. See id. at 1011-13, 1018.

66. Id. at 1018.

67. Id.
ing this conclusion, the court announced a new rationale—that Congress did not intend for “the United States to be used as a base for manufactur-
ing fraudulent security devices for export, even when these are peddled only to foreigner.\textsuperscript{68}

The Second Circuit further refined the \textit{Bersch} distinction between “di-
rectly causing” and “merely preparatory” conduct in \textit{Fidenas AG v. Compagnie Internationale Pour L’Informatique CII Honeywell Bull S.A.}\textsuperscript{69} In \textit{Fidenas}, a German dealer in commercial paper and the Bah-
amian and Swiss companies he managed brought a Rule 10b-5 action against French and Swiss computer companies alleging that they had is-
 sued fraudulent promissory notes to his clients.\textsuperscript{70} To obtain American
jurisdiction, the plaintiffs alleged that the defendants’ American parent
corporation had attempted to conceal the fraud.\textsuperscript{71} The Second Circuit
held, however, that the alleged cover-up was “‘secondary and ancil-
lar’” to the “‘essential core of the alleged fraud [which] took place in
Switzerland.’” \textsuperscript{72} Therefore, the parent corporation’s acts did not di-
rectly cause the foreign plaintiffs’ losses\textsuperscript{73} and were insufficient to confer
jurisdiction.\textsuperscript{74}

While retaining the concept that a defendant’s acts in the United
States must directly cause a foreign plaintiff’s loss, the Second Circuit has
incorporated a comparative component into its subject matter jurisdic-
tion analysis. In \textit{IIT v. Cornfeld},\textsuperscript{75} an action related to \textit{Vencap}, the court
held that, absent specific effects on the American exchanges or American
investors, substantial fraudulent conduct must occur within the United

\textsuperscript{68.} \textit{Id.} at 1017.
\textsuperscript{69.} 606 F.2d 5 (2d Cir. 1979).
\textsuperscript{70.} \textit{See id.} at 7-8.
\textsuperscript{71.} \textit{See id.} at 8.
\textsuperscript{72.} \textit{Id.} at 10 (quoting district court opinion).
\textsuperscript{73.} \textit{See id.}
\textsuperscript{74.} \textit{See id.}
\textsuperscript{75.} 619 F.2d 909 (2d Cir. 1980). \textit{Cornfeld}, one of thirteen actions brought by the
liquidators of the International Investment Trust (“IIT”), presents a complex factual pat-
ttern. For a detailed treatment of the facts, see \textit{IIT v. Cornfeld}, 462 F. Supp. 209, 211-14
(S.D.N.Y. 1978), \textit{rev’d and remanded}, 619 F.2d 909 (2d Cir. 1980). In short, the plaint-
iff, IIT, was a Luxembourg trust fund holding a portfolio of securities investments in
which several thousand fundholders participated. Before IIT entered bankruptcy under
Luxembourg law, two Americans, including Cornfeld, controlled the fund through a se-
ries of offshore shell companies organized in Luxembourg, Panama, and Canada. These
companies were operated from Switzerland. The challenged transactions involved three
IIT purchases of securities of several companies owned by a third American, King, who
offered investments in natural resource tax shelters. First, IIT purchased $8 million in
subordinated convertible debentures, issued in Europe on the Eurodollar market, from a
wholly-owned Netherlands Antilles subsidiary of the American company. Although the
bulk of IIT’s purchases were made abroad, IIT purchased $50,000 in debentures through
a third company in the United States. Second, IIT purchased $16.8 million in common
stock of another King company on the United States over-the-counter market. Last, IIT
purchased a $12 million convertible note from a third King company. IIT’s liquidators
alleged that these transactions were part of a conspiracy to defraud the investment trust
fund.
States for a United States court to assert jurisdiction over a predominately foreign securities fraud claim. The court, however, construed Bersch to require a comparison of the degree of domestic and foreign conduct involved in the fraudulent transaction. Thus, although the domestic conduct in Cornfeld appeared similar to that which the Bersch court had found "merely preparatory," the court held that the district court had jurisdiction over the foreign investment fund's Rule 10b-5 claim.

Distinguishing Bersch, the Cornfeld court concluded that the United States citizenship of both the defendants and the issuer, as well as the substantial preparation of the prospectus and financial statements in the United States, gave the United States a greater interest in regulating the allegedly fraudulent cross-border securities issuance. Significantly, the Cornfeld court signaled that the principles established in Bersch "do not lead ineluctably to one result or the other." The Second Circuit also has applied its subject matter jurisdiction analysis to assert jurisdiction over a foreign plaintiff's fraud claim where literature inducing the securities transaction clearly emanated from the United States and the resulting trades were executed on an American exchange. In Psimenos v. E.F. Hutton & Co., the court held that the drafting of promotional literature in the United States and the execution of trading orders on an American securities market were sufficient to confer jurisdiction over a foreign plaintiff's securities fraud claim even though the bulk of the alleged fraudulent conduct occurred abroad.

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76. See Cornfeld, 619 F.2d at 920.
77. Thus, a court's "[d]etermination whether American activities 'directly' caused losses to foreigners depends not only on how much was done in the United States but also on how much (here how little) was done abroad." Id. at 920-21.
78. See id. at 920 ("[W]hile many of the acts in the United States in this case were similar to those in Bersch, the relativity is entirely different because of the lack here of the foreign activity so dominant in Bersch.").
79. See id. at 918: [W]e do not mean to suggest that either the American nationality of the issuer or consummation of the transaction in the United States is either a necessary or a sufficient factor . . . , but rather that the presence of both these factors points strongly toward applying the anti-fraud provisions of our securities laws. Id. at 913.
80. Id. at 925. Although Psimenos involved the Commodities Exchange Act rather than the Exchange Act, the court assumed that the statutes' antifraud standards were identical and applied the subject matter jurisdiction analysis relevant to transnational securities fraud cases.
81. 722 F.2d 1041 (2d Cir. 1983). Although Psimenos involved the Commodities Exchange Act rather than the Exchange Act, the court assumed that the statutes' antifraud standards were identical and applied the subject matter jurisdiction analysis relevant to transnational securities fraud cases.
82. See id. at 1046. In Psimenos, the plaintiff, a Greek citizen, contacted a Greek affiliate of E.F. Hutton ("Hutton-Greece") to explore opening a commodities futures trading account. See id. at 1043. Hutton-Greece's money managers promised Psimenos that highly qualified managers in Hutton's New York office would supervise continuously his account and gave Psimenos a flyer containing a tear-off postcard to send to New York to obtain additional information. See id. Relying on these statements, Psimenos opened a discretionary trading account with Hutton-Greece, directing his Hutton-Greece account manager to follow a conservative investment strategy. See id. After excessive trading in his account and unauthorized speculative investments resulted in a $200,000 loss,
reversing the district court's dismissal of the claim for lack of subject matter jurisdiction, the court observed that “[a]lthough most of the fraudulent misrepresentations alleged in the complaint occurred outside the United States, the trading contracts that consummated the transactions were often executed in New York.”

Thus, according to the court, the trades executed on the American commodities markets constituted the final act in Hutton's alleged fraud on Psimenos and “could hardly be called ‘preparatory activity’ not subject to review.” In reaching this conclusion, the Psimenos court reasoned that “Congress did not . . . want United States commodities markets to be used as a base to consummate schemes concocted abroad, particularly when the perpetrators are agents of American corporations.”

The Second Circuit's decisions concerning subject matter jurisdiction over a foreign plaintiff's Rule 10b-5 claim reflect two concerns. First, under the "effects" test, the plaintiff must demonstrate that the alleged securities fraud produced a direct, specific economic effect on the United States securities markets or American investors. Second, in applying the "conduct" test, the Second Circuit requires that a higher degree of materially fraudulent conduct occur within the United States as a plaintiff's connection to the United States becomes more attenuated. Thus, in the case of a foreign plaintiff, the defendant's conduct in the United States must exceed "merely preparatory" acts and directly cause the foreign plaintiff's alleged loss. Reflecting its reputation as the preeminent court in the field of securities law, the Second Circuit's subject matter jurisdiction analysis has influenced its sister circuits.

C. The Sister Circuits and the Application of Rule 10b-5 to Transnational Securities Activities

The Third, Eighth, Ninth, and District of Columbia Circuits also have considered whether a federal court should exercise subject matter jurisdiction over transnational securities fraud claims. Adopting the Second Circuit's analysis, these courts have examined whether the defendant's conduct within the United States was "merely preparatory" or "significant" to the alleged securities fraud. Despite their formal adherence to the Second Circuit's analysis, however, several of these courts require a relatively low degree of conduct within the United States in connection with the sale or purchase of securities before exercising subject matter jurisdiction over a foreign plaintiff's Rule 10b-5 claim.

Psimenos brought an action under the antifraud provisions of the Commodities Exchange Act. See id. at 1044.

83. Id.
84. Id. (citation omitted).
85. Id. at 1046. The court interpreted Bersch to "reveal[] that our true concern was that we entertain suits by aliens only where conduct material to the completion of the fraud occurred in the United States. Mere preparatory activities, and conduct far removed from the consummation of the fraud, will not suffice to establish jurisdiction." Id.
86. The exception is the United States Court of Appeals for the District of Columbia.
In SEC v. Kasser, the Third Circuit asserted jurisdiction over a SEC action against an American citizen and other corporate defendants for allegedly defrauding a Canadian corporation, the Manitoba Development Fund, in the purchase and sale of various securities. Applying the “effects” test, the Kasser court noted that the securities involved in the transaction were neither traded on an American exchange nor sold to any United States citizen. Hence, following Bersch, the court concluded that the defendants’ fraudulent acts had no specific effects in the United States sufficient to confer jurisdiction. Turning to the defendants’ conduct in the United States, however, the Third Circuit observed that “significant conduct . . . form[ing] part of the defendants’ scheme” occurred in the United States and was sufficient to confer jurisdiction. Accordingly, the Kasser court held that subject matter jurisdiction existed over a predominantly foreign securities fraud case “where at least some activity designed to further a fraudulent scheme occurs within this country.”

In reaching this conclusion, the Third Circuit expressly adopted the Second Circuit’s reasoning and declined to “immunize, for strictly jurisdictional reasons, defendants who unleash from this country a pervasive scheme to defraud a foreign corporation.” Unlike the Second Circuit, however, the Kasser court analyzed the significance of the defendants’ conduct to the actual fraud in terms of the quantity or extent of conduct within the United States. Specifically, the Kasser court measured the “sum total” of the defendants’ actions in the United States against the

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Compare Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 35 (D.C. Cir. 1987) (jurisdiction under the conduct test requires domestic conduct that “directly causes” the foreign plaintiff’s loss and is more than “merely preparatory”) with SEC v. Kasser, 548 F.2d 109, 114 (3d Cir.) (jurisdiction proper “where at least some activity designed to further a fraudulent scheme occurs within this country”), cert. denied, 431 U.S. 938 (1977).

88. The Canadian Manitoba Development Fund was the sole victim of the defendants’ securities fraud. See id. at 110.
89. See id. at 112.
90. See id.
91. Id. at 111-12. The court noted the following: various negotiations occurred in the United States; one investment contract was executed in the United States; the defendants used the mails and telephone to further the scheme; the defendants incorporated front companies in the United States; and, lastly, that the defendants established an account in a New York bank in which to deposit Manitoba’s payments. See id. at 111. Further, the court looked to the pleadings to find other activities the defendant conducted in the United States, including the maintenance of records, the drafting of agreements executed abroad, and the transmittal of funds to and from the United States. See id. The court, however, failed to discuss the significance of these activities to the fraudulent scheme or to indicate their relative significance to its decision.
92. Id. at 114. This has been coined the “minimal conduct” approach. See generally Taylor, supra note 5 (arguing that the Third and Eighth Circuits’ minimal conduct approach provides greater deterrence against transnational securities fraud than the Second Circuit’s approach).
extent of the defendants' conduct in *Vencap* and *Bersch*.

It then concluded that the defendants' activities, taken together, were "essential to the plan to defraud the [Manitoba] Fund." 95

The Eighth Circuit also has followed a "sum total" approach. 96 In *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.* 97 the Eighth Circuit held that a district court has jurisdiction over a cross-border securities transaction where the defendants' conduct in the United States significantly furthered a fraudulent scheme. 98

For the *Continental Grain* court, the locus of the actual fraud or economic injury was not critical to its analysis. 99 Rather, like the Third Circuit, the court focused on the extent of the defendants' conduct in the United States 100 as well as their nationality. 101 Accordingly, the court

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94. See id. at 115 ("[I]t appears that there was much more United States-based activity in the present case than in *Bersch* . . . .")
95. Id. In reaching this conclusion, the Third Circuit, like the Second Circuit, expressly recognized that its decision to apply Rule 10b-5 involved a policy decision. See id. at 116; see also supra note 32 and accompanying text (listing courts' policy rationales).
96. See Travis v. Anthes Imperial Ltd., 473 F.2d 515, 526 (8th Cir. 1973) (applying "totality of the circumstances" standard).
97. 592 F.2d 409 (8th Cir. 1979). In *Continental Grain*, the plaintiff, Continental Grain (Australia) Pty. Ltd. ("Continental Grain"), a wholly-owned subsidiary of an American corporation, Continental Grain Corp., was incorporated in Australia. See id. at 411. The defendant, Pacific Oilseeds, Inc. ("Pacific Oilseeds"), also was an Australian company. See id.

Continental Grain negotiated to purchase Pacific Oilseeds with Australia Chemical Holdings, Ltd. ("Australia Chemical"), POI, an American corporation and an American citizen. See id. At the time of the stock purchase, Pacific Oilseeds had a ten-year licensing agreement with defendant Northrup, King & Co. ("Northrup"), an American company, under which Pacific Oilseeds received hybrid seedstock. See id. This licensing agreement, and its continued availability, constituted Pacific Oilseeds' primary assets. See id. After learning of Continental Grain's intention to purchase POI, Northrup informed POI by telephone and mail that it would reclaim the seedstock when the licensing agreement terminated in six months. See id. at 412. Australian Chemical, who was acting as an agent for the sellers, agreed to withhold this information from Continental Grain. See id. at 411.

The contract for the sale of Pacific Oilseed to Continental Grain was executed in California, though the closing occurred in Australia. See id. at 412-13. At the closing, Continental Grain received the Pacific Oilseeds stock certificates and made initial payment of the purchase price in Australian dollars, which was converted to dollars and wired to the United States. See id. at 413. When the licensing agreement expired, Northrup brought suit to obtain possession of the seedstock. See id. Continental Grain then filed suit, alleging that defendants violated § 10(b) and Rule 10b-5 by conspiring to withhold from Continental Grain the information that Northrup intended to reclaim the seedstock when the licensing agreement terminated. See id.

98. See id. at 421 (jurisdiction appropriate where conduct in the United States "was in furtherance of the fraudulent scheme and was significant with respect to its accomplishment"). In defining "significant," the court noted that "[t]he range of significant conduct should . . . be fairly inclusive" and "[c]onsistent with the general purpose of the securities laws to mandate the highest standards of conduct in securities transactions." Id.
99. See id. at 417, 420 n.17.
100. See id. at 420 & n.17.
101. The court, however, stated that the defendants' nationality did not have any "independent significance for jurisdictional purposes." Id. at 417. Yet, the nationality of
concluded that the defendants devised and completed the fraudulent scheme in the United States\textsuperscript{102} and then "'exported' [it] to Australia."\textsuperscript{103} It therefore held that jurisdiction was proper—even though the sole victim of the allegedly fraudulent securities transaction was a foreign corporation, the stock purchase involved shares not listed or traded on an American exchange, the actual negotiations of the purchase agreement and closing occurred outside the United States, and the domestic conduct largely consisted of the use of the mail and telephone.

The Ninth Circuit extended Rule 10b-5's reach to its outermost limits in \textit{Grunenthal GmbH v. Hotz}.\textsuperscript{104} There, the Ninth Circuit held that a district court had jurisdiction over a sale of foreign securities between foreign corporations and a foreign citizen where the only conduct in the United States was a repetition of a false representation first made abroad. In reaching this holding, the court concluded that the defendant's confirmation of his first misrepresentation by his silence at a Los Angeles meeting was "'material' because immediately thereafter defendants signed and plaintiff was induced to execute the agreement."\textsuperscript{105} In concluding that the Los Angeles meeting was sufficient to establish jurisdiction, the \textit{Grunenthal} court stated that "to hold otherwise could make it convenient for foreign citizens and corporations to use this country . . . to further fraudulent securities schemes."\textsuperscript{106}

\textsuperscript{102} See id. at 420.
\textsuperscript{103} Id. It should be noted that the \textit{Continental Grain} court held that Continental Grain could not satisfy the requirements of the "effects" test. See id. at 417.
\textsuperscript{104} 712 F.2d 421 (9th Cir. 1983). In \textit{Grunenthal}, a Swiss citizen sold stock in a Mexican firm he controlled through a Bahamian trust to a German purchaser. See id. at 422. The seller resided in Italy but occasionally spent time in the United States. See id. at 422 n.2. The German purchaser alleged that the Swiss seller made fraudulent statements about the Mexican firm to induce him to acquire the company. See id. at 423. The parties negotiated the purchase agreement in Germany and the Bahamas. See id. The meeting at which the parties signed the contract of sale occurred in Los Angeles, but only because the Swiss seller was visiting the city on other business. See id. (quoting the district court opinion). The plaintiff alleged that, during the Los Angeles meeting, the seller repeated an allegedly fraudulent statement. See id. (quoting district court opinion).
\textsuperscript{105} Id. at 425. In reversing the district court's dismissal of the plaintiff's complaint, the court asserted that the fact that the parties' final meeting in Los Angeles was "'based on convenience'" was unimportant. Id.
\textsuperscript{106} The district court had dismissed the complaint for lack of subject matter jurisdiction. See \textit{Grunenthal GmbH v. Hotz}, 511 F. Supp. 582, 588 (C.D. Cal. 1981), rev'd, 712 F.2d 421 (9th Cir. 1983). In declining jurisdiction, the district court found that the plaintiff and the defendants were foreign citizens and that the securities involved in the transaction were foreign, privately-held, and not traded on an American Exchange. See id. Further, the district court noted that the Los Angeles meeting to execute the common stock purchase was the only meeting, of three meetings, held in the United States. See id. It also found the defendants' conduct in the meetings held abroad was "'at least equal to'" the defendants' conduct in the United States, that the factual misrepresentation was first made abroad, and that the meeting in the United States "'was only for convenience.'" Id.

While adopting the Third and Eighth Circuits' policy judgments, the Ninth Circuit also posited that "[a]ssertion of jurisdiction may encourage Americans—such as lawyers, accountants and underwriters—involved in
The United States Court of Appeals for the District of Columbia Circuit has been the most resistant to asserting jurisdiction over foreign plaintiffs' securities fraud claim. In Zoelsch v. Arthur Andersen & Co., the court declined to assert jurisdiction over German investors' Rule 10b-5 claims against Arthur Andersen. There, the plaintiffs alleged that Arthur Andersen knowingly provided a false and misleading audit report to German investors interested in an intricate real estate investment and tax shelter plan.

The Zoelsch court observed that Arthur Andersen prepared certain materials related to the audit report in the United States, but that an Arthur Andersen subsidiary prepared the final audit report in Germany and distributed the report only in Germany to German citizens. Accordingly, the court held that Arthur Andersen's alleged misrepresentations and omissions did not directly cause the German investors' loss and thus were not within the district court's jurisdiction under the Exchange Act. In reaching this conclusion, the court narrowly read Cornfeld to require that a defendant's alleged conduct in the United States include all the material elements necessary to establish a Rule 10b-5 violation.

The D.C. Circuit, however, reluctantly adopted the "more restrictive" Second Circuit approach, finding the circuit court's interpretation of congressional intent "somewhat odd." Compared to the other circuit

transnational securities sales to behave responsibly and thus may prevent the development of relaxed standards that 'could spill over into work on American securities transactions.' "Id. (quoting Note, American Adjudication of Transnational Securities Fraud, 89 Harv. L. Rev. 553, 571 (1976)).

107. See Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32 (D.C. Cir. 1987). Writing for the court, Judge Robert Bork stated that the court was "inclined to doubt that an American court should ever assert jurisdiction over domestic conduct that causes loss to foreign investors." Id.

108. See id.

109. The tax shelter was offered by a West German limited partnership and involved an American real estate investment partnership. See id. at 28. The German plaintiffs alleged that the American accounting firm fraudulently induced them to purchase the securities by assisting its German subsidiary in preparing an audit report containing false representations and material omissions concerning the sale. See id.

110. See id.

111. See id.

112. See id. at 31 (citing IT v. Cornfeld, 619 F.2d 909, 920-21 (2d Cir. 1980)). The Zoelsch court read Cornfeld to require that

jurisdiction will lie in American courts where the domestic conduct comprises all the elements of a defendant's conduct necessary to establish a violation of section 10(b) and Rule 10b-5: the fraudulent statements or misrepresentations must originate in the United States, must be made with scienter and in connection with the sale or purchase of securities, and must cause the harm to those who claim to be defrauded, even though the actual reliance and damages may occur elsewhere.

Id.

113. See id. at 32.

114. Id. ("Were it not for the Second Circuit's preeminence in the field of securities law, and our desire to avoid a multiplicity of jurisdictional tests, we might be inclined to..."
courts' judicial activism, the Second Circuit's analysis thus represented the least objectionable choice for the Zoelsch court.

II. Refining the Conduct Analysis

The Second Circuit's conduct analysis seeks to assess whether a defendant's activities in the United States were "merely preparatory" to or "directly caused" a foreign plaintiff's loss. These characterizations, however, are inherently subjective. Yet, the increasingly international character of the United States' securities markets calls for a well-delineated standard for determining the reach of Rule 10b-5.

The Second Circuit's jurisdictional test also fails to recognize the increasing importance of the foreign investor to the stability of the United States' financial markets as well as to the overseas capital-raising activities of United States firms. Indeed, the stability of the United States' financial markets, as well as the disclosure principle underlying its securities laws, contribute to foreign investor confidence in the integrity of the United States' securities markets. This foreign investor confidence creates a comparative advantage in capital-raising activities for American corporations. Conversely, securities fraud discourages foreign inves-

115. See id. at 33.
116. Several statistics illustrate this process of integration. The market in cross-border offerings of bonds, including foreign and Eurobonds, expanded from $38.3 billion in 1980 to $2231 billion in 1988. See Chuppe et al., supra note 1, at 57, 59. Similarly, the value of equity-related securities issued to investors in markets outside the issuer's home-country increased from $200 million in 1983 to $20.3 billion in 1987. See Warren, supra note 2, at 186 (1990). Foreign gross purchases and sales of United States debt and equity securities increased from $122.9 billion and $75.2 billion in 1980 to $2.83 trillion and $482 billion, respectively, in 1987. See Chuppe et al., supra note 1, at 77 (tbl. 9). Likewise, United States gross purchases and sales of foreign debt and equity securities increased from $35.2 billion and $17.9 billion in 1980 to $405.9 billion and $189.4 billion, respectively, in 1987. See id.
117. In the 1980s, United States mutual funds became increasingly popular with individual investors in foreign markets. See Internationalization of the Securities Markets, supra note 1, at II-18. Indeed, United States broker-dealers, investment advisors, and investment companies have increased significantly their activities in foreign markets to draw upon an additional source of liquidity to supplement their United States activities. See id. Moreover, investment companies registered in the United States commonly distribute their securities in foreign markets. See id. Further, since 1985, there has been a noticeable trend for price movements in the United States equity market to be highly correlated with price movements in foreign equity markets. See Chuppe et al., supra note 1, at 36-37 (tbl. 3).
118. See Charles T. Plambeck, Capital Neutrality and Coordinated Supervision: Lessons for International Securities Regulation from the Law of International Taxation and Banking, 9 Mich. Y.B. Int'l Legal Stud. 171, 197 (1988) (observing that high disclosure standards favor the import of capital and are neutral to the export of capital); see also Van Zandt, supra note 5, at 61 (arguing that increased demand for capital among industrial and financial borrowers in domestic markets has led borrowers to enter international capital markets, which permits borrowers to raise capital at lower costs than if restricted to domestic capital markets).
tors from purchasing American securities, thereby increasing the transaction costs associated with capital-raising activities.

The current refusal to entertain a foreign plaintiff's private action under the Exchange Act where the defendant's acts in the United States are "merely preparatory" to the consummated fraud has significant consequences. Not only does it impugn the perceived fairness and integrity of the United States' securities markets, but it also threatens the ability of American corporations to raise capital in foreign markets.

To remedy this deficiency, this Note proposes a "purposeful use" test to supplement the Second Circuit's conduct analysis.

A. The "Purposeful Use" Standard Defined

Under the "purposeful use" test, a federal court should assert jurisdiction over a foreign plaintiff's fraud claim where the defendant purposely has used its apparent affiliation with the United States to induce a foreign plaintiff to enter into a fraudulent securities transaction. The "pur-
poseful use” test, however, does not provide a basis for asserting subject matter jurisdiction over a predominantly foreign securities transaction absent conduct in the United States.

Rule 10b-5 prohibits any person participating in the purchase or sale of a security from employing a fraudulent scheme or engaging in conduct that would operate as a fraud. Liability for a Rule 10b-5 violation, however, also requires the direct or indirect use of the U.S. mails or an instrumentality of interstate commerce in connection with the allegedly fraudulent transaction. Accordingly, a fraudulent securities transaction conducted entirely outside the United States could not violate the Exchange Act. Hence, a foreign plaintiff's fraud claim necessarily must involve certain conduct in the United States. Thus, where a court deems the defendant's conduct in the United States “merely preparatory” to the actual fraud committed abroad, and therefore insufficient in itself to confer jurisdiction, the court then would assess whether the defendant purposely had used its apparent affiliation with the United States to induce the foreign plaintiff to execute the challenged transaction. If the defendant consummated the actual fraud in the United States, a court would assert jurisdiction under the “conduct” test alone, without resorting to the “purposeful use” analysis. The “purposeful use” concept thus would supplement the “conduct” test where a court finds a defendant’s conduct in the United States preparatory to a securities fraud committed overseas.

The “purposeful use” test requires a court to identify the defendant's intent in determining whether a cross-border securities transaction comes within the jurisdiction of the Exchange Act. A federal court may infer a defendant's intent from certain objective manifestations, such as specific acts or documents, drawn from the pleadings or from other relevant evidence presented to the court.

order to adjudicate his rights and liabilities stemming from a particular transaction or event. See Wright & Miller, supra note 13, § 1350, at 196. Although subject matter jurisdiction and personal jurisdiction are distinct concepts, the policy concerns are generally similar: fairness. In the context of personal jurisdiction, the Court has held that due process requires that a defendant “purposefully avail itself of the privilege of conducting activities within the forum State.” World-Wide Volkswagen, 444 U.S. at 297 (quoting Denckla, 357 U.S. at 253.).

124. See id.
125. See Schoenbaum v. Firstbrook, 405 F.2d 200, 207 n.2, 209-10 (2d Cir.), rev’d, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969). Dismissal, however, is not mandated even though a challenged transaction does not involve securities registered in the United States or traded on an organized United States market. See Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 986 (2d Cir.) (“It is elementary that the anti-fraud provisions of the federal securities laws apply to many transactions which are neither within the registration requirements nor on organized American markets.”), cert. denied, 423 U.S. 1018 (1975); see also Travis v. Anthes Imperial Ltd., 473 F.2d 515, 524 (8th Cir. 1973) (concluding that Exchange Act applies “even though the securities are foreign ones that had not been purchased on an American exchange”).
126. A motion to dismiss an action under Fed R. Civ. P. 12(b)(1) raises the question of
First, a court may draw inferences regarding a defendant’s intent from the defendant’s apparent affiliation with the United States. Although no federal court has asserted subject matter jurisdiction over a cross-border securities transaction solely on the basis of the defendant’s apparent affiliation with the United States or the defendant’s United States citizenship, in some cases, the defendant’s affiliation or nationality emerges as a critical factor. In *IT v. Cornfeld*, for instance, the Second Circuit stated that the “American nationality of the issuer . . . points strongly toward applying the anti-fraud provisions of our securities laws.” Similarly, in *Fidenas AG v. Compagnie Internationale Pour L’Informatique CII Honeywell Bull S.A.*, the court, although reaching a different conclusion than the *Cornfeld* court, also examined the defendant’s citizenship. Moreover, in *Bersch v. Drexel Firestone, Inc.*, the Second Circuit posited that a foreign plaintiff’s securities lawsuit against a foreign company for activities in the United States might be properly dismissed where the foreign company was clearly identified with that foreign country.

The emphasis placed on the defendant’s affiliation or citizenship with the United States under a “purposeful use” analysis finds support in international law. Although the nationality principle has not been applied as an independent basis for jurisdiction by the United States’ a federal court’s subject matter jurisdiction over an action. Under Rule 12(h)(3), a court may dismiss an action for lack of subject matter jurisdiction upon the motion of the parties or *sua sponte* at any point in the proceedings. See Fed. R. Civ. P. 12(h)(3). When considering a motion to dismiss for lack of subject matter jurisdiction, a court is not restricted to the allegations contained in the pleadings, but may review any evidence, such as affidavits and testimony, to resolve the factual dispute concerning the existence of jurisdiction. See Wright & Miller, supra note 13, § 1350, at 213.

127. See e.g., Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 417 (8th Cir. 1979) (“Nor do we view the nationality of [the defendants . . . as having any independent significance for jurisdictional purposes.”).

128. See Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1043 (2d Cir. 1983) (observing that defendant’s promotional materials clearly indicated foreign entity’s affiliation with its NY office), *IT v. Cornfeld*, 619 F.2d 909, 920 (2d Cir. 1980) (“We think Congress would have been considerably more interested in assuring against the fraudulent issuance of securities constituting obligations of American rather than purely foreign business.”).

129. 619 F.2d 909 (2d Cir. 1980).
130. *Id.* at 918 (citation omitted).
131. 606 F.2d 5 (2d Cir. 1979).
132. See *id.* at 8. There, the Second Circuit quoted with approval the district court’s conclusion that “the critical consideration is that the plaintiffs, the defendants, and the transaction are foreign” and declined jurisdiction. *Id.*
133. 519 F.2d 974 (2d Cir.), cert. denied, 423 U.S. 1018 (1975).
134. See *id.* at 986-87:

Assuming that . . . the underwriting related . . . to a large foreign industrial company clearly identified with a foreign country rather than with the United States, e.g., Rolls-Royce, Mercedes-Benz or Fiat, we do not believe the activities in the United States . . . would justify an American court in taking jurisdiction in a suit for damages by foreign plaintiffs.

135. See *supra* notes 18-27 and accompanying text.
a defendant's clear association with the United States would strengthen a federal court's assertion of jurisdiction over a foreign plaintiff's securities fraud case where the defendant undertook preparatory acts in the United States.

Second, a defendant's acts or statements designed to create the impression that a foreign transaction was covered by the United States' securities laws also would permit a court to draw inferences concerning the defendant's intent. In *Psimenos*, for example, the foreign defendant's identification with an American corporation and the foreign plaintiff's reliance on those representations in conducting business with the defendant appear to have been significant to the court's holding. Similarly, in *Wandschneider v. Industrial Incomes, Inc.*, the court implicitly employed a "purposeful use" analysis.

In *Wandschneider*, a German citizen brought a securities fraud claim against a New York corporation engaged in the sale and management of an offshore mutual fund, Industrial Incomes, Inc. of North America. She had purchased the Industrial Incomes shares in Germany from the defendant's German agent who, in soliciting her participation, falsely stated that the SEC regulated the fund. Moreover, the defendant's agent provided the plaintiff with a prospectus, which had been drafted in the United States and then distributed to the defendant's agents abroad. The prospectus implied that Industrial Incomes was registered with the SEC and was subject to its regulation and supervision. The prospectus also emphasized the fund manager's membership in the National Association of Security Dealers, which it described as "regulating the practices and activities of its members pursuant to authority con-

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136. Under the nationality principle of international law, a state may exercise jurisdiction over a citizen of that state for conduct occurring abroad. However, United States courts view the nationality principle as an exceptional basis for jurisdiction. See e.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 935 (D.C. Cir. 1984) (noting that jurisdiction based on domestic conduct or effects, not nationality, is customary and preferred basis of jurisdiction).

137. See *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1043 (2d Cir. 1985). The *Psimenos* court observed that Psimenos was also informed by flyer, printed by Hutton, of the quality and experience of Hutton's money managers. The flyer touted that Hutton's 'experienced and qualified staff continually monitors the performance of each current Hutton approved manager ...' and that 'Hutton's professionals thoroughly analyze and evaluate these managers in a manner beyond the resources of the ordinary investor.' The flyer contained a tear-off post card to send to Hutton's New York office for more information.

Relying on the statements, Psimenos opened an account with Hutton's Athens office...


139. See id.

140. See id. at 92,060.

141. See id. at 92,058.

142. See id. at 92,059.
ferred by Act of the United States Congress."\textsuperscript{143} At the end of the prospectus, however, it briefly stated that the fund's shares "have not been registered under the United States Securities Act of 1933, . . . and the [SEC] has not processed this General Prospectus."\textsuperscript{144}

Despite the predominantly foreign character of the transaction, the district court asserted its jurisdiction under the Exchange Act.\textsuperscript{145} In reaching this conclusion, the court found that the defendant's prospectus was a "cleverly deceptive document, clearly devised to impress a foreign investor\textsuperscript{146} with Industrial Incomes' connection to the United States and its affiliation with prominent American banks.

B. The "Purposeful Use" Standard Applied

The "purposeful use" test offers a valuable supplement to the traditional conduct analysis. Consider two examples—\textit{Finch} v. \textit{Marathon Securities Corp.}\textsuperscript{147} and \textit{Grunenthal GmbH} v. \textit{Hotz}.\textsuperscript{148}

In \textit{Finch}, a British investor sued an American corporation, Marathon Securities, alleging that the corporation's British representative misrepresented the value of Vectron Electro-Physics, Ltd. ("Vectron"), a British electronics company.\textsuperscript{149} Marathon had succeeded to the assets and assumed the liabilities of Electronic International Capital Ltd. ("EICL"), a Bermuda-based investment company that had negotiated the purchase agreement.\textsuperscript{150} Though based in Bermuda, both EICL and Marathon were "substantially controlled"\textsuperscript{151} by a United States firm. Further, six of EICL's eight directors were American.\textsuperscript{152} The negotiations regarding the stock purchase occurred in London, though the purchase agreement was signed in New York.\textsuperscript{153} A substantially similar agreement later was signed in London.\textsuperscript{154} This agreement stated that the offering was subject to United States securities regulations "to the extent that the subject matter of the agreement is within the purview of [the Securities Act of 1933

\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} See id. at 92,055. Arguably, under the Second Circuit's "direct causation" analysis, a court would not have asserted jurisdiction over the German investor's claim. First, the plaintiff was foreign and her participation in the transaction was solicited by another foreign citizen. Second, the drafting of the prospectus in the United States was a preparatory act to the actual fraud, which the defendant's German agent committed abroad when he first misrepresented the SEC's role in regulatory authority over the fund and then reaffirmed that misrepresentation by providing the prospectus to prospective German client.

\textsuperscript{146} Id. at 92,062.
\textsuperscript{148} 712 F.2d 421 (9th Cir. 1983).
\textsuperscript{149} See Finch, 316 F. Supp. at 1347.
\textsuperscript{150} See id. at 1346.
\textsuperscript{151} See id. at 1347.
\textsuperscript{152} See id.
\textsuperscript{153} See id.
\textsuperscript{154} See id.
and the Securities Exchange Act of 1934].”

The Finch court declined jurisdiction. Under a "purposeful use" analysis, however, a court should have asserted jurisdiction. In reviewing the purchase agreement's provisions as well as the apparent affiliation of EICL with the United States, a court reasonably could conclude that the defendant sought to create a misleading impression that American law would protect the prospective foreign purchaser's investment. By asserting jurisdiction under the "purposeful use" test, the court would have protected the legitimate expectations of the foreign investor. Moreover, the court would have maintained the equities between the parties to the transaction, estopping Marathon from escaping civil liability simply because of the nationality of the defrauded plaintiff.

The "purposeful use" analysis also works in the reverse direction. In Grunenthal, for example, the Ninth Circuit asserted jurisdiction over a foreign plaintiff's fraud claim against a foreign defendant for a transaction involving a foreign company. The only contact with the United States was one meeting in Los Angeles where the parties executed the purchase agreement. In fact, the entire transaction had been negotiated in Germany and the Bahamas, where the parties held the closing. Reversing the district court, the Ninth Circuit held that the defendant's confirmation by silence of a false statement first made abroad induced the plaintiff to execute the agreement and thus was sufficient to confer jurisdiction.

Under a "purposeful use" analysis, a court would have declined jurisdiction. The Los Angeles meeting, at the very least, was preparatory to the fraud and none of the individual defendants was a United States citizen. Further, none of the corporate defendants was affiliated with the United States. Moreover, the challenged transaction involved foreign, privately-held securities. Thus, the foreign defendants did not use the perceived legal protection of the United States securities laws to induce the plaintiff to participate in the transaction. A court, therefore, reasonably could conclude that the defendant did not attempt to use a perceived association to the United States to induce the plaintiff to participate in the transaction.

155. Id. at 1348.
156. See, e.g., IIT v. Cornfeld, 619 F.2d 909, 921 (2d Cir. 1980) ("[D]efendants with whom we are here concerned acted in the United States and cannot fairly object to having their conduct judged by its laws."); see also MCG, Inc. v. Great W. Energy Corp., 896 F.2d 170, 175 (5th Cir. 1990) ("[H]aving gone to such lengths to structure a transaction not burdened by the securities laws, plaintiffs cannot expect to wrap themselves in their protective mantle when the deal sours.").
158. See id. at 423.
159. See id. at 422-23.
162. See id. at 422.
The “purposeful use” analysis offers a consistent and predictable standard. While the traditional “conduct” analysis seeks to define whether a defendant’s conduct in the United States was “merely preparatory” or “directly caused” the plaintiff’s loss—each an inherently subjective determination, the “purposeful use” analysis seeks to identify the defendant’s intent and to protect the parties’ expectations. This supplement to the traditional conduct analysis recognizes the increasing importance of the foreign investor, but also provides a means by which to restrict a foreign plaintiff’s access to the United States’ courts.

III. Forum Non Conveniens: A Proposed Solution to Jurisdictional Conflicts

Part II proposed an extension of a court’s power to hear transnational securities fraud cases. As the world’s financial markets have become more integrated, however, legitimate bases of jurisdiction frequently overlap. These overlaps often result in the extension of one nation’s securities regulations to regulate conduct within the territory of another country. Part III considers whether a court should dismiss a foreign plaintiff’s Rule 10b-5 action even though it has subject matter jurisdiction over the claim. It briefly discusses an interest-based approach to resolving potential jurisdictional conflicts and concludes that such an approach is inadequate. Instead, this Part advocates an approach based on the traditional doctrine of forum non conveniens.

163. See Fisch, supra note 5, at 524-25 (arguing that courts have neglected to consider whether a court should apply the Exchange Act to the allegedly fraudulent transaction, even if the court possesses the power to hear the case).

164. There are distinctions among the several types of interest analysis designed to indicate which law should govern a legal claim. A comprehensive discussion of these approaches and their various offshoots, however, is beyond the scope of this Note. Generally, “all modern choice-of-law methods seek to identify the state whose law is most appropriately applied.” Harold G. Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 Am. J. Int’l L. 280, 287 n.31. (1982) [hereinafter Maier, Crossroads]. Accordingly, these approaches also involve an attempt to identify and to weigh the various interests of different sovereign governments having contact with the challenged transaction or event. See id. Consequently, for the purposes of this Note, these approaches will be discussed under the generic term of “interest-based” and the distinctions between the various offshoots will not be developed. For a sample of the various interest-based approaches, see Brainerd Currie, Selected Essays on the Conflict of Laws (1963); Lea Brilmayer, The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal, Law & Contemp. Probs., Summer 1987, at 11; Friedrich K. Juenger, Conflict of Laws: A Critique of Interest Analysis, 32 Am. J. Comp. L. 1 (1984); Larry Kramer, Rethinking Choice of Law, 90 Colum. L. Rev. 277 (1990); Robert A. Leflar, The Nature of Conflicts Law, 81 Colum. L. Rev. 1080 (1981); Andreas F. Lowenfeld, Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for their Interaction, 163 R.C.A.D.I. 311 (1979); Harold G. Maier, Interest Balancing and Extraterritorial Jurisdiction, 31 Am. J. Comp. L. 579 (1983); Winston P. Nagan, Conflicts Theory in Conflict: A Systematic Appraisal of Traditional and Contemporary Theories, 3 N.Y.L. Sch. J. Int’l & Comp. L. 343 (1982); Willis L.M. Reese, Choice of Law: Rules or Approach, 57 Cornell L. Rev. 315 (1972).
A. The Existing Interest-Based Approach

The interest-based approach advocates that courts balance the interests of the United States and a foreign forum in regulating the challenged transaction to determine whether the United States' jurisdiction over predominately foreign activity is "reasonable." In assessing whether jurisdiction is reasonable, a court should consider a variety of factors. Moreover, even if jurisdiction is reasonable, a court has an "obligation" to evaluate another state's interest in adjudicating the action and "should defer to the other state if that state's interest is clearly greater." This approach is related to the concept of international comity. Likewise, a conflict of laws approach, which is a variation of the

165. The Restatement (Third) of the Foreign Relations Law of the United States (1987) incorporates the interest-based approaches to resolving jurisdictional conflicts. See Restatement (Third), supra note 19, § 416 (entitled "Jurisdiction to Regulate Activities Related to Securities"). Section 416 establishes several criteria by which the United States may assert jurisdiction over a transnational securities transaction. See id. §§ 416(1), (2). The United States' authority to exercise jurisdiction under § 416, however, is limited by § 403(2), which requires a court to evaluate whether exercising jurisdiction is "reasonable." See id. § 416(2). Section 403(2) suggests that a court assess the following:

(a) . . . the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulations is generally accepted;
(d) the existence of justified expectations that might be protected or hurt by the regulation;
(e) the importance of the regulation to the international political, legal, or economic system;
(f) the extent to which the regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by another state.

Id. § 403(2).

For a comprehensive discussion of the Restatement (Third), see Karl M. Meessen, Conflicts of Jurisdiction under the New Restatement, Law & Contemp. Probs., Summer 1987, at 47. For an explicit application of the Restatement (Third) factors in the context of transnational securities cases, see AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F.2d 148, 153 & n.8 (2d Cir. 1984).

The case most often cited, both positively and negatively, as modern authority for judicial interest balancing is Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976), cert. denied, 472 U.S. 1032 (1985), an antitrust case. For a critical analysis of the Timberlane court's analysis, see Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 948-49 (D.C. Cir. 1984).

166. See Restatement (Third), supra note 19, § 403(2).

167. See id. § 403(3).

168. Id.

169. Comity is "the recognition which one nation allows within its territory to the
interest-based approach, asserts that a court identify and apply the law of the country where the plaintiff's cause of action arose. This approach also requires a court to exercise restraint in applying domestic law in light of the legislative, executive, and judicial acts of a foreign state. In so doing, a court promotes comity and reduces the potential for infringement on another sovereign nation's interests. Like interest-balancing, the list of factors to be considered is open-ended.

These interest-based approaches, however, are flawed. First, they fail to recognize that a court is ill-equipped to identify, evaluate, and weigh fairly the interests of both the United States and a foreign government. The judiciary has neither the competence nor resources to assess the economic, political, and social interests underlying a foreign state's policies. Consequently, in practice, these interest-based approaches tend to overstate domestic interests and to de-emphasize foreign government interests. Second, the interest-based approach represents an ad-hoc decision-making process. Because its interest-balancing factors are susceptible to subjective evaluation, the interest-based approach fails to provide certainty or predictability.

legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). It is not required by international law, but a discretionary doctrine "enjoin[ing] forbearance in the exercise of legitimate jurisdiction when another sovereign also has legitimate jurisdiction under international law." Maier, Crossroads, supra note 164, at 281 n.1.

170. See Lowenfeld, supra note 164, at 329.
171. See Meessen, supra note 165, at 56; see also Restatement (Third), supra note 19, § 202(2).
172. The federal courts routinely assert that the United States' interest in punishing fraudulent or manipulative conduct is entitled substantial weight and thus supports jurisdiction over predominantly foreign transactions. See Consolidated Gold Fields PLC v. Minocro, S.A., 871 F.2d 252, 263 (2d Cir.), modified by 890 F.2d 569 (2d Cir.), cert. dismissed, 492 U.S. 113, 115 (1989); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 986 (2d Cir.), cert. denied, 423 U.S. 1018 (1975); see also Restatement (Third), supra note 19, § 416 cmt. a. ("[A]n interest in punishing fraudulent or manipulative conduct is entitled greater weight than are routine administrative requirements.").
173. See, e.g., Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 949 (D.C. Cir. 1984) ("Those contacts which do purport to provide a basis for distinguishing between competing bases of jurisdiction, and which are thus crucial to the balancing process, generally incorporate purely political factors which the court is neither qualified to evaluate comparatively nor capable of properly balancing.").
174. See Brilmayer, supra note 164, at 18 (arguing that interest analysis is "permeated by the philosophy of unilateralism" so that a court will adhere to its own law rather than making neutral choices between domestic and foreign law); Maier, Crossroads, supra note 164, at 317 (interest analysis "will usually reflect an understandable bias in favor of the forum's policy"); see also Predictability and Comity, supra note 5, at 1323-25 (arguing that interest-balancing approach "is not faithful to the principle of comity among nations").
175. See Fisch, supra note 5, at 556-57 & n.194; Maier, Crossroads, supra note 164, at 319 ("[N]eeds of the states and their subjects in the international community will not be well served unless the value of predictability is given high priority."); see also Reese, supra note 164, at 316 (future planning requires predictability).
B. The Doctrine of Forum Non Conveniens

A more appropriate judicial response to the tensions arising from the increased application of the Exchange Act to transnational securities activities is embodied in the doctrine of forum non conveniens. The doctrine of forum non conveniens refers to "the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere." A grant of a motion to dismiss for forum non conveniens results in the dismissal of the action in the United States court without prejudice to the plaintiff to file suit in another forum. Forum non conveniens has been applied in cases where an action should have been brought in a foreign tribunal rather than a United States court.

The criteria relevant to forum non conveniens dismissals are not rigid and thus allow courts the flexibility to respond to different factual settings. Moreover, these criteria are better suited to judicial capabilities than the interest-based factors. Indeed, the doctrine offers a method of analysis that courts are competent to apply effectively and with which judges are familiar. Rather than weighing conflicting economic, social, or policy interests, forum non conveniens requires a court to assess whether an alternative forum in which the plaintiff could sue is available.

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176. Forum non conveniens has been proposed as a means to reduce the friction inherent in the extraterritorial application of United States antitrust law. See John Byron Sandage, Note, Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law, 94 Yale L.J. 1693 (1985).


177. Blair, supra note 176, at 1.

178. The basis of the objection is the impropriety of the court's exercising jurisdiction over the subject matter, not the court's lack of personal jurisdiction. See id. at 2-3.


able\(^\text{182}\) and to determine whether adjudicating the claim in the plaintiff's chosen forum would be disproportionately oppressive or vexatious to the defendant or create administrative or legal complications for the court.\(^\text{183}\)

The Supreme Court has set forth the relevant factors in a court's consideration of a motion to dismiss for *forum non conveniens* in *Piper Aircraft Co. v Reyno*.\(^\text{184}\) Observing that a foreign plaintiff's choice of forum deserves less deference than a citizen's choice of forum,\(^\text{185}\) the Court identified and then weighed several private and public interest factors to determine whether dismissal was appropriate.\(^\text{186}\) It then assessed whether an alternative forum was available.\(^\text{187}\) Significantly, the Court declined to engage in a comparative analysis of the rights, remedies, or procedures available in the alternative forum.\(^\text{188}\) Rather, the *Piper Aircraft* Court conducted a limited inquiry into whether an adequate forum for the litigation existed.\(^\text{189}\) In so doing, the Court firmly rejected the argument that possible changes in the substantive law governing the plaintiff's cause of action was sufficient to defeat the motion to dismiss for *forum non conveniens*.\(^\text{190}\) Thus, absent evidence that the alternative

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\(^{182}\) See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) (noting *forum non conveniens* "presupposes at least two forums in which the defendant is amenable to process [and] . . . furnishes criteria for choice between them").

\(^{183}\) See *Piper Aircraft*, 454 U.S. at 241.


\(^{185}\) See *Piper Aircraft*, 454 U.S. at 255; see also id. at 255-56 n.23 (stating that citizen's choice of forum is not dispositive and must be balanced against the "conveniences").

\(^{186}\) See id. at 241 n.6. The "private interest factors" include (1) access to sources of proof; (2) the availability of compulsory process to compel the attendance of witnesses; (3) the need to view the premises or site; and (4) other practical problems relating to sources of proof or witnesses. See id. (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)). The "public interest factors" include (1) the administrative burdens of holding trial; (2) local interest in having the controversy decided at home; (3) the interest in having the trial in the forum whose law must govern; (4) avoidance of unnecessary problems in conflict of laws or in the application of foreign law; and (5) the unfairness of burdening citizens in a forum unrelated to the dispute with jury duty. See id. (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).

\(^{187}\) See id. at 254 n.22.

\(^{188}\) See id. at 251 ("The doctrine of *forum non conveniens* . . . is designed in part to help courts avoid conducting complex exercises in comparative law.").

\(^{189}\) See id. at 254. The Court, however, suggested that "dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute." Id. at 254 n.22.
The Piper Aircraft guidelines provide an approach more consistent with a court's proper role in resolving jurisdictional questions in cross-border securities transactions. Further, forum non conveniens removes from a court the responsibility of balancing different securities regulation schemes and the policy judgments underlying them. While the doctrine requires a court to weigh several factors, it avoids complex comparative law analyses and furnishes an objective standard by which a court may determine the propriety of exercising jurisdiction over a cross-border securities transaction. It thus provides certainty and predictability, establishing a set of well-developed principles necessary to resolve difficult questions in a principled manner. Moreover, the doctrine of forum non conveniens confers on the court an important procedural power—the power to subject dismissal to the condition that the defendant agree to provide records relevant to the plaintiff's claim, to waive statute of limitations defenses or to consent to personal jurisdiction in the foreign forum.

In sum, the forum non conveniens approach is preferable to an interest-based approach. It provides a judicially manageable solution to resolving jurisdictional conflicts. If the balance of "conveniences" suggests that a foreign forum may more appropriately adjudicate the securities claim and a remedy is available in the jurisdiction, then a court should dismiss the action subject to appropriate conditions.

191. See id.; see also In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 634 F. Supp. 842, 851 (S.D.N.Y. 1986) (absence of class action procedure does not constitute "no remedy" or lead to conclusion that inadequate alternative forum), modified on other grounds, 809 F.2d 195 (2d Cir.), cert. denied, 484 U.S. 871 (1987).
192. See Piper Aircraft, 454 U.S. at 251.
193. See Sandage, supra note 176, at 1710.
194. See Piper Aircraft, 454 U.S. at 257 n.25. The Second Circuit, however, has held that a district court has no authority to compel the defendant to consent to the use of American discovery rules in a foreign proceeding. See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 809 F.2d 195, 205 (2d Cir.), cert. denied, 484 U.S. 871 (1987).
195. See Union Carbide, 809 F.2d at 203-04 (noting that such conditions are "not unusual and have been imposed in numerous cases where the foreign court would not provide an adequate alternative in the absence of such a condition").
196. See id.
197. The United States' securities laws differ from foreign laws in terms of the substantive rules, the availability of relief, and the types of damages available. See generally Misao Tatsuta, Japan, in 11 International Capital Markets and Securities Regulations (Harold S. Bloomenthal ed. 1990) (describing Japanese Securities Exchange Law of 1946); Astrid R. Baumgardner, SEC/COB Agreements: The French Perspective, N.Y.L.J., June 21, 1990, at 5; Lighthburn, supra note 2 (discussing French enforcement of securities laws); Miller, supra note 2 (examining United Kingdom's Financial Services Act's investor protection regulations); Rider, supra note 2 (discussing Britain's Financial Services Act of 1986 and history of British regulation of securities fraud); Creaven, supra note 2 (discussing securities industry reform in the United Kingdom); Nicole J. Ramsay,
plying the doctrine, a court satisfies the fundamental objections of the interest-based commentators and foreign governments—the United States declines jurisdiction over cases involving fundamental policy judgments of foreign governments about the proper manner of securities regulation in their domestic financial markets. Further, the court avoids wasting precious judicial resources on a predominately foreign dispute and vexatious litigation.

CONCLUSION

The application of the Exchange Act to transnational securities activities currently rests on judicial decisions rather than the express language of the Exchange Act. Since Schoenbaum, the circuit courts have sought to define the degree of conduct within the United States, and the level of economic effect on the United States’ securities markets or investors, sufficient to trigger the application of the Exchange Act to cross-border securities transactions. The Second Circuit’s direct causation jurisprudence, however, fails to recognize the increasing importance of the foreign investor to the stability of the United States’ financial markets and the overseas capital-raising activities of United States firms. The failure to permit a foreign plaintiff’s private action where the defendant’s

Note, Japanese Securities Regulation: Problems of Enforcement, 60 Fordham L. Rev. S255 (1992), (discussing limited enforcement of Japan’s securities laws); Goldman, supra note 2 (discussing French securities market reforms).

Moreover, private lawsuits play an important part in enforcing the United States’ securities laws and liberal pre-trial discovery tends to make litigation in the United States “more intrusive, more time-consuming, and more costly than litigation in other countries.” Fisch, supra note 5, at 531. Indeed, the English jurist Lord Denning has observed,

As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself, and at no risk of having to pay anything to the other side. The lawyers there will conduct the case “on spec” as we say, or on a “contingency fee” as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40% of the damages, if they win the case in court, or out of court on a settlement. If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such costs deterrent as we have. There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40% before the plaintiff gets anything. All this means that the defendant can be readily forced into a settlement. The plaintiff holds all the cards.

Smith Kline & French Laboratories Ltd. v. Bloch, [1983] 2 All E.R. 72, 74. As Lord Denning’s comments illustrate, differences in securities regulations among foreign states often reflect different policy judgments, values, or economic objectives. See generally Grossfield & Rogers, supra note 5.


199. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1974) (noting private actions under Rule 10b-5 are “a judicial oak which has grown from little more than a legislative acorn”).
acts in the United States are "merely preparatory" impugns the perceived fairness and integrity of the United States securities markets.

A "purposeful use" analysis offers a valuable supplement to the traditional conduct analysis. Under this approach, a federal court should assert jurisdiction over a foreign plaintiff's fraud claim where the defendant purposely has used its apparent affiliation with the United States to induce a foreign plaintiff to enter into a fraudulent securities transaction. Significantly, the "purposeful use" concept recognizes the increasing importance of the foreign investor, but also provides a means by which to restrict a foreign plaintiff's access to the United States' courts.

The increasing integration of the world's securities markets also portends continuing sources of conflict between the United States and foreign countries as the United States' securities laws are applied to an increasing number of transnational activities. Unlike the interest-based approaches to resolving these conflicts, the traditional judicial doctrine of forum non conveniens better accommodates this process of integration. Significantly, it offers a judicially manageable method permitting courts to dismiss predominately foreign transactions where a foreign tribunal is better positioned to adjudicate the challenged transaction.

The financial markets in the United States are closely linked to financial markets in other nations. Today, the United States has a far larger share of its financial assets owned by foreign investors than at the start of the 1980s. Indeed, the stability of the United States' financial markets and the ability of American firms to participate effectively in overseas capital-raising activities ultimately depends on the foreign investor's perception of the integrity of the United States' financial markets. A limited extension of Rule 10b-5 will maintain that confidence for another fifty years.