Washington and Lee Law Review

Volume 47 | Issue 3 Article 7

Summer 6-1-1990

Transnational Securities Fraud Jurisdiction Under Section 10(B): The Case For A Flexible And Expansive Approach

TRANSNATIONAL SECURITIES FRAUD JURISDICTION UNDER SECTION 10(b): THE CASE FOR A FLEXIBLE AND EXPANSIVE APPROACH

The increasingly internationalized capital market has resulted in a growing number of securities transactions that possess a transnational character and, consequently, in increased opportunities for commission of transnational securities frauds.[1] A transnational securities fraud is a fraudulent securities transaction that, because it possesses both foreign and domestic elements, potentially implicates both United States jurisdiction and the jurisdiction of one or more foreign nations.[2] Because transnational securities frauds arise in a wide variety of factual circumstances, the frauds possess varying degrees of connection to the United States.[3] Transnational securities frauds' varying degree of connection to the United States presents United States courts with the issue of determining the amount of United States connection necessary for a United States court properly to exercise jurisdiction over a transnational securities fraud case.

As indicated, transnational securities frauds encompass a wide range of factual situations and these fact situations vary considerably in their degree of connection to the United States. For example, a transnational securities fraud is most tenuously connected to the United States if the fraud involves parties foreign in both citizenship and residence, and the sole factor that provides the fraud with a United States connection is some conduct done in the United States to further the fraudulent scheme.[4] Transnational frauds

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1. *See generally Internationalization Report Sent to Congress by SEC Staff*, 19 Sec. Reg. & L. Rep. (BNA) No. 32, at 1187 (Aug. 7, 1987) (discussing increasing internationalization of securities markets); Becker, *Exporting United States Law: Transnational Securities Fraud and Section 10(b) of the Securities Exchange Act of 1934*, 3 CONN. J. INT'L L. 373 (1988) (same); Note, *Barriers to the International Flow of Capital: The Facilitation of Multinational Securities Offerings*, 20 VAND. J. TRANSNAT'L L. 81 (1987) (same); Note, *SEC Proposals to Facilitate Multinational Securities Offerings: Disclosure Requirements in the United States and the United Kingdom*, 19 N.Y.U. J. INT'L L. & POL. 457 (1987) (same); Fedders, *Policing Trans-Border Fraud in the United States Securities Markets: The "Waiver by Conduct" Concept—A Possible Alternative or a Starting Point for Discussions?* XI BROOKLYN J. INT'L L. 475 (1985) (discussing potential for fraudulent conduct in increasingly internationalized securities market).

2. *See* Grunenthal GmbH v. Hotz, 712 F.2d 421, 425 (9th Cir. 1983) (analyzing as "transnational" dispute involving allegedly fraudulent securities transaction that potentially implicates both United States and foreign jurisdiction); Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 415 (8th Cir. 1979) (same); SEC v. Kasser, 548 F.2d 109, 110 (3d Cir. 1977), *cert. denied*, 431 U.S. 938 (1977) (same); IIT v. Vencap, Ltd., 519 F.2d 1001, 1004-11 (2d Cir. 1975) (same).

3. *See infra* notes 4-8 and accompanying text (describing widely varying connections between transnational securities frauds and United States).

4. *See generally* Grunenthal GmbH v. Hotz, 712 F.2d 421 (9th Cir. 1983) (concerning fraudulent transaction in foreign securities between foreigners in which only connection between

in which there is United States conduct and one party is a United States citizen or resident have greater connection to the United States than frauds for which United States conduct provides the only United States connection.[5] The transnational securities frauds with the strongest connection to the United States are those in which both parties are United States citizens or residents, and the only foreign element is some contributory fraudulent conduct perpetrated outside the United States.[6]

Although these categories generally describe the different fact situations that present issues of the transnational scope of the United States securities fraud laws, each general category is capable of much variation. For example, frauds in which one or both of the parties possess United States citizenship or residency may involve much different degrees of United States conduct.[7]

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transaction and United States was use of United States instrumentalities of interstate commerce to perpetrate fraud along with some allegedly fraudulent conduct done in United States); Fidenas, A.G. v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5 (2d Cir. 1979) (concerning fraudulent securities transaction in which all parties were foreign and essential core of fraud, including all fraudulent conduct except for secondary and ancillary aspects, occurred outside of the United States); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972) (concerning securities frauds involving foreign parties but in which some conduct contributing to the fraud occurred in United States).

5. *See, e.g.*, Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 28-29 (D.C. Cir. 1987) (concerning transnational securities fraud that involved foreign plaintiffs and United States defendant in which United States conduct contributing to fraud did not include all necessary elements of fraud); Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 411-13 (8th Cir. 1979) (concerning transnational securities fraud involving foreign plaintiff, United States defendants, and in which significant amounts of fraudulent and contributory conduct occurred in United States); SEC v. Kasser, 548 F.2d 109, 110-11 (3d Cir. 1977), *cert. denied*, 431 U.S. 938 (1977) (concerning transnational securities fraud in which plaintiff was foreign, defendants included at least one United States corporation, and in which contributory United States conduct was significant); Straub v. Vaisman & Co., 540 F.2d 591, 594 (3d Cir. 1976), *cert. denied* (concerning transnational securities fraud involving foreign plaintiff and United States defendants and in which conduct was done in United States in furtherance of scheme to defraud plaintiff in connection with plaintiff's purchase of stock of United States corporation traded on United States stock exchange); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 977-81 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975) (concerning transnational securities fraud that included both United States citizens or residents and foreigners as both plaintiffs and defendants and in which United States conduct contributed to fraud); § 10(b) of Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1988) (requiring plaintiff to allege use of United States mail or other instrumentalities of interstate commerce to make § 10(b) securities fraud claim). Because § 10(b) claims must involve use of United States mail or other instrumentalities of interstate commerce, a § 10(b) claim presupposes that the alleged fraud possesses at least the United States connections inherent in the perpetrator's use of United States mail or other instrumentalities of interstate commerce to carry out the fraud. *Id.*

6. *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975). The Second Circuit in *Bersch* said that the United States has jurisdiction over a transnational securities fraud in which the plaintiffs are United States citizens resident in the United States, whether or not acts of material importance to the fraud occurred in the United States. *Id.* The court did not provide in this context any definition of "act of material importance". *See also infra* notes 48-51 and accompanying text (discussing *Bersch* three-part test for United States jurisdiction over transnational securities frauds).

7. *Compare Bersch*, 519 F.2d at 985 n.24 (describing, in transnational securities fraud

A fraud that involves one or more United States parties and substantial United States conduct has more ties to the United States than a fraud that involves one or more United States parties and very little United States conduct.[8] Transnational securities frauds' varying United States connections, therefore, present United States courts with the problem of determining whether a dispute has United States connections sufficient for United States adjudication, or whether the United States courts should relegate the dispute to foreign adjudication.[9]

United States jurisdiction and adjudication is important to prospective litigants for several reasons. First, differences in both substance and procedure between United States and foreign securities fraud laws may affect the outcome.[10] Second, the existence of United States jurisdiction may be

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case involving both United States and foreign plaintiffs and defendants, contributory United States conduct) *with* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 28-29 (D.C. Cir. 1987) (describing United States conduct allegedly contributing to transnational securities fraud involving United States defendant and foreign plaintiff). In *Bersch*, the defendants engaged in various sorts of relevant United States conduct. This conduct included holding numerous meetings to initiate, organize, and structure the fraudulent securities offering, retaining a United States law firm and a United States accounting firm to help prepare the offering, drafting parts of the prospectus and reading parts of the prospectus to a foreign defendant over the telephone, showing a draft prospectus to the underwriters, and opening United States bank accounts for receipt of the underwriting proceeds. *Bersch*, 519 F.2d at 985 n.24. In *Zoelsch* the relevant United States conduct was limited to preparation of an audit report in turn quoted in a second audit report distributed abroad to foreigners by the foreign party actually perpetrating the fraud. *Zoelsch*, 824 F.2d at 28-29.

8. *Compare* United States v. Cook, 573 F.2d 281, 282-83 (5th Cir. 1978), *cert. denied*, 439 U.S. 836 (1978) (concerning criminal securities fraud case in which defendant was from United States, defrauded parties were foreign, and contributory fraudulent conduct that occurred in United States was so substantial that court said analysis of scope of United States jurisdiction over transnational securities frauds was unnecessary because case was without question within jurisdiction of United States courts) *with Bersch*, 519 F.2d at 974 (holding that United States conduct contributing to fraud, because conduct merely was preparatory, and thus, was insufficient to support United States jurisdiction over claims by foreign plaintiffs against United States and foreign defendants).

9. *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1339 (2d Cir. 1972) (stating that in circumstances in which transnational dispute involves allegations of conduct in forum nation, forum nation has jurisdiction to displace foreign law and apply forum nation's law to resolve dispute). Accordingly, the *Leasco* court stated that international law principles allow plaintiffs to seek to have United States law control in a transnational securities fraud case brought in a United States court if the plaintiffs allege that United States conduct contributed to the fraud. *Id.*; *see also id.* at 1344 (discussing possibility of dismissing transnational securities fraud case under forum non conveniens to allow foreign court to adjudicate case). The Second Circuit in *Leasco* emphasized that the decision as to whether to use forum non conveniens must be based on relative trial convenience of having a case in foreign, as opposed to United States, courts. *Id.* The court further noted that when a United States plaintiff is involved, a United States court should only dismiss under forum non conveniens in unusually extreme circumstances. *Id.* (quoting Burt v. Isthmus Dev. Co., 218 F.2d 353, 357 (5th Cir. 1955), *cert. denied*, 349 U.S. 922 (1955)).

10. *See* 3C H. Bloomenthal, SECURITIES AND FEDERAL CORPORATE LAWS § 15.08 (1989) (describing foreign securities regulations).

important if a United States court has, and the alternative foreign courts lack, personal jurisdiction over a prospective defendant.[11]

Determining the proper scope of United States jurisdiction over transnational securities frauds requires a two-step analysis. The first step of the analysis is determining whether the United States has authority to exercise jurisdiction under international law principles. Under principles of international law, a nation's courts may enact jurisdictional laws only over disputes in which the forum nation has the requisite interest, as shown by satisfaction of the conduct or effects test. To meet the conduct or effects test a dispute must involve either an element of some conduct done within the territory of the forum nation or an element of some effect felt within the forum nation.[12] Accordingly, for international law purposes the United States has authority to enact jurisdictional laws regarding securities frauds involving foreign parties if some of the fraudulent conduct was done in the United States.[13] Similarly, the United States may enact jurisdictional laws covering securities frauds that, although perpetrated on foreigners not resident within the United States, nonetheless have some effect within United States territory.[14] Further, if a party perpetrates a fraud on investors resident in the United States, then the effect on United States residents constitutes an effect within United States territory sufficient to satisfy the effects prong of the international law conduct or effects test, whether or not the defrauded investors were United States citizens.[15] Therefore, disputes in which the defrauded investors are United States residents always satisfy international

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11. *See, e.g.*, Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 29 (D.C. Cir. 1987) (involving plaintiff bringing suit in United States court largely because defendant possessing considerable assets was subject to United States personal jurisdiction).

12. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) (listing elements of international law conduct or effects test). The Restatement states the international law conduct or effects test as follows: "[A] State has jurisdiction to prescribe law with respect to (1) (a) conduct a substantial part of which takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct outside its territory which has or is intended to have substantial effect within its territory." *Id.*

13. *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975) (stating that United States may exercise jurisdiction over transnational securities frauds that involve foreign parties if relevant acts or culpable failures to act occurred within United States).

14. *See supra* note 12 (stating international law principle allowing nation to exercise jurisdiction over dispute within nation's territory) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987)); *infra* notes 40-41, 45, 51, 55, 57-58, 65, 75-77, 80 & 84 and accompanying text (discussing judicial interpretations of principle that conduct from within United States allows United States jurisdiction over transnational securities fraud).

15. *See supra* note 12 (stating international law principle allowing nation to exercise jurisdiction over disputes involving effects within territory) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF UNITED STATES § 402 (1987)); *infra* notes 41, 43, 45-47, 61, 76-79 and accompanying text (describing judicial interpretations of principle that United States effects allow United States jurisdiction over transnational securities fraud).

law principles, and according to international law, the United States may exercise jurisdiction over such disputes.

If the circumstances of a transnational securities fraud dispute satisfy the international law conduct or effects test, and, thus, belong within the category of disputes over which the United States has authority to exercise jurisdiction, then a court can proceed to the second step of the analysis. Under the second step of the analysis, a court must determine whether the United States actually has enacted a statute with jurisdictional scope sufficient to reach the dispute in question. To pass this second stage of the jurisdictional test a dispute must satisfy the United States subject matter jurisdiction requirements.[16] A United States federal court has subject matter jurisdiction over a dispute that involves an amount in controversy in excess of fifty thousand dollars and in which the parties have diverse citizenship.[17] A federal court also has subject matter jurisdiction over a dispute that involves an allegation of a violation of a federal statute.[18]

Transnational securities fraud disputes typically arise upon allegations that the defendants violated section 10(b) of the Securities and Exchange Act of 1934[19] (the 1934 Act) and Securities and Exchange Commission Rule 10b-5[20] (Rule 10b-5).[21] Because claims of section 10(b) and Rule 10b-5

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16. *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972) (stating that Congress does not necessarily intend for United States jurisdiction over transnational cases actually to extend to broadest limits Restatement allows). The Second Circuit emphasized in *Leasco* that the actual transnational extent of United States jurisdiction in a particular case can be determined only by interpretation of the relevant jurisdictional statute. *Id.* The *Leasco* court stated that satisfaction of the international law conduct or effects test means only that international law principles do not preclude United States jurisdiction. *Id.* at 1335. However, satisfaction of the international law test does not by itself affirmatively decide the question of whether the United States actually should have jurisdiction over the dispute. *Id.*

17. 28 U.S.C.A. § 1332 (West Supp. 1990).

18. 28 U.S.C.A. § 1331 (West 1966 and Supp. 1990).

19. 15 U.S.C. § 78j(b) (1988).

> It shall be 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 the national securities exchange—
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> (b) To 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.

Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1988).

20. SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1989).

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

violations arise under a federal statute, United States federal courts have subject matter jurisdiction to adjudicate any claim that validly alleges the elements of a section 10(b) or Rule 10b-5 violation.[22] To determine whether a transnational securities fraud plaintiff validly has alleged the elements of a section 10(b) violation sufficient to support federal question jurisdiction, courts must determine the extent to which Congress intended the jurisdictional scope of the securities laws to extend over securities frauds that possess varying degrees of foreign elements. However, statutory analysis of section 10(b) provides only ambiguous guidance as to the extent that Congress intended section 10(b) to govern federal securities law violations that involve foreign elements.[23] The 1934 Act, in general, does not explicitly discuss transnational securities frauds, in the jurisdictional context or otherwise.[24] Instead, section 10(b) extends United States jurisdiction over any

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(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1989).

21. *See, e.g.*, Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 29 (D.C. Cir. 1987) (citing Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1988)); Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5, 5-6 (2d Cir. 1979) (same); Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 413 (8th Cir. 1979) (same); *Zoelsch*, 824 F.2d at 29 (citing SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1989); *Fidenas*, 606 F.2d at 5-6 (same); *Continental Grain*, 592 F.2d at 413 (same); *cf.* Leasco Data Processing Equip. v. Maxwell, 468 F.2d 1326, 1333 (2d Cir. 1972) (stating that in transnational securities fraud context Rule 10b-5 does not affect determination of subject matter jurisdiction).

22. *See supra* note 18 and accompanying text (discussing concept of United States jurisdiction over disputes that involve federal questions); 15 U.S.C. § 78aa (1988) (granting federal courts exclusive jurisdiction over claims brought under 1934 Act, so that state courts never can adjudicate such claims).

23. *See infra* notes 30-31 and accompanying text (discussing § 10(b)'s lack of clear guidance regarding transnational scope of United States securities fraud laws).

24. *See* Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1988) (containing no language regarding scope of United States jurisdiction over transnational securities frauds); Section 30(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78dd(b) (1988) (discussing exemption from jurisdiction under 1934 Act of persons conducting businesses in securities outside of United States).

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

Id.

Section 30(b) is not relevant to the discussion of the scope of United States jurisdiction over transnational securities frauds except inasmuch as its existence buttresses the arguments for a broad exercise of United States jurisdiction over transnational securities fraud cases. *See* Schoenbaum v. Firstbrook, 405 F.2d 200, 208 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969) (discussing relevance of § 30(b) to issues of United States jurisdiction over transnational securities frauds). In *Schoenbaum* the Second Circuit stated that the only relevance of § 30(b) of the 1934 Act to the issue of United States jurisdiction over transnational securities is that the inclusion of the § 30(b) language indicates a general congressional intent that the United

securities fraud that involves use of the United States mails or other instrumentalities of interstate commerce.[25] In addition, section 10(b) governs frauds that involve stocks not traded on the national securities exchanges of the United States.[26] Therefore, section 10(b) by itself provides no grounds for a court to deny United States jurisdiction over a transnational securities fraud merely because the stock involved in the fraud was not traded on a United States exchange or, by extension, because the stock involved was not a United States stock.[27] Thus, because section 10(b) does not explicitly restrict the scope of jurisdiction, section 10(b) impliedly provides United States courts with a broad grant of jurisdiction over transnational securities frauds.

Although the express language of section 10(b) suggests that Congress intended section 10(b) broadly to cover securities disputes regardless of whether the disputes have foreign connections, the legislative history of the 1934 Act fails to indicate whether Congress intended United States courts to have jurisdiction over transnational securities frauds.[28] Conversely, the legislative history also fails to indicate that Congress specifically intended that United States jurisdiction be unavailable in such circumstances.[29] When

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States have jurisdiction over transnational securities frauds. *Id.* The Second Circuit further stated that congressional effort to exempt from United States jurisdiction a limited category of transnational transactions related to foreign businesses in securities supports a presumption that Congress meant the 1934 Act to apply to all foreign transactions not specifically exempted. *Id.*

25. *See* Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1988) (making it illegal to use United States mail or other instrumentalities of interstate commerce to perpetrate securities fraud). The United States courts have jurisdiction over all cases brought under the 1934 Act, and thus over all cases brought under section 10(b). 15 U.S.C. § 78aa (1988). The 1934 Act contains no language that limits United States jurisdiction over securities frauds beyond the requirement of a use of the United States mail or other instrumentalities of interstate commerce. 15 U.S.C. § 78j(b) (1988); 15 U.S.C. § 78aa (1988).

26. *See* § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1988) (stating that antifraud provisions also apply to securities not registered on national securities exchange). Congress did not indicate whether Congress intended § 10(b)'s mention of securities not registered on a national securities exchange to refer to American over the counter stocks or to foreign stocks or to both. *Id.*

27. *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1336 (2d Cir. 1972) (stating that no reason exists for denying United States jurisdiction over transnational securities frauds merely on grounds that stock involved was not of United States issue); *supra* note 19 (indicating that on its face § 10(b) allows United States jurisdiction over transnational securities fraud whether or not securities involved were traded on United States securities exchange or issued by United States party) (quoting § 10(b) of Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1988)). *But cf. Leasco*, 468 F.2d at 1334 (arguing that it would be erroneous to assume Congress intended United States jurisdiction to reach full extent that facial language of United States securities fraud laws allows).

28. *See* H.R. REP. No. 1383, 73d Cong., 2d Sess. 1-16 (1934) and S. REP. No. 792, 73d Cong., 2d Sess. 1-13 (1934) (containing no indication that Congress intended 1934 Act to allow United States jurisdiction over transnational securities frauds).

29. *See supra* note 28 (stating that legislative history of 1934 Act does not indicate that Congress intended 1934 Act not to allow United States jurisdiction over transnational securities frauds).

considering the 1934 Act Congress simply did not reach the issue of United States jurisdiction over transnational securities frauds.[30]

Because Congress did not specifically address the issue, United States courts must exercise independent judgment to determine, based on the vague language of section 10(b), the proper extraterritorial scope of the United States securities fraud provisions.[31] Some courts criticize this exercise of judicial discretion on the grounds that, in making jurisdictional decisions on the basis of judicial policy objectives, courts inappropriately engage in judicial legislation.[32] However, because a court must decide whether the United States has jurisdiction over a transnational securities fraud, without the benefit of congressional directives, a court cannot avoid articulating a policy that governs the scope of United States jurisdiction over transnational securities frauds.[33] In fact, in response to the lack of congressional policy

30. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 31 (D.C. Cir. 1987) (identifying lack, in legislative history of 1934 Act, of congressional discussion of jurisdictional issues raised by transnational securities frauds); Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 416 (8th Cir. 1979) (same); Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 604 F.2d 5, 9 (2d Cir. 1979) (same); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972) (same); *Zoelsch*, 824 F.2d at 30 (stating that because in 1934 international securities transactions were infrequent occurrences, Congress did not at time of passage of 1934 Act consider issue of proper scope of United States jurisdiction over transnational securities frauds).

31. *See* Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 416 (8th Cir. 1979) (citing SEC v. Kasser, 548 F.2d 109, 114 n.21 (3d Cir. 1977), *cert. denied*, 431 U.S. 938 (1977) (noting lack of legislative guidance regarding proper transnational scope of United States jurisdiction under § 10(b)); *Zoelsch*, 824 F.2d at 29-30 (noting lack of legislative guidance regarding transnational scope of United States jurisdiction under § 10(b) and consequent need for judicial determination); Straub v. Vaisman & Co., 540 F.2d 591, 595 (3d Cir. 1976) (indicating possibility that courts must make jurisdictional decision in transnational securities fraud cases on policy grounds alone); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975) (indicating need for exercise of judicial discretion to limit scope of jurisdiction beyond language of § 10(b)); IIT v. Vencap, Ltd., 519 F.2d 1001, 1016 (2d Cir. 1975) (same); *Leasco*, 468 F.2d at 1334 (same).

32. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32 (D.C. Cir. 1987) (arguing that courts should not speculate about congressional intent regarding the scope of United States jurisdiction over transnational securities frauds). The District of Columbia Circuit stated in *Zoelsch* that other courts' imputation of congressional intent with regard to an issue Congress never actually considered are attempts to camouflage judicial legislation. *Id.* Further, the *Zoelsch* court stated that courts should leave to Congress any policy decisions regarding the scope of United States jurisdiction over transnational securities frauds. *Id.*

33. *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1016 (2d Cir. 1975) (indicating that in many transnational securities fraud cases, courts must devise test for scope of proper application of United States securities fraud laws). The Second Circuit in *Vencap* noted that in the absence of specific congressional guidance, judicial construction is needed to limit the otherwise very broad scope of United States jurisdiction over transnational disputes. *Id.* The Second Circuit in *Vencap* emphasized that some method of separating transnational securities fraud disputes appropriate for United States adjudication from those inappropriate for United States adjudication is necessary if United States courts are to be spared the task of adjudicating disputes in which the connection between the dispute and the United States is negligible. *Id.*; *see also* Straub v. Vaisman & Co., 540 F.2d 591, 595 (3d Cir. 1976) (indicating that courts must somewhere draw line as to extent of United States jurisdiction over transnational securities frauds).

regarding section 10b's scope of jurisdiction over transnational securities frauds, several federal circuit courts that have addressed the issue primarily based their decisions on judicial policy concerns.[34]

Judicial policy concerns regarding transnational securities frauds are closely related to fact pattern differences, with the factual variations in transnational securities fraud cases preventing courts from developing a general rule or standard. The actual facts underlying disputes in which courts have considered the scope of United States jurisdiction over a transnational securities fraud vary greatly in terms of the nationality of the parties and the amount of United States conduct that contributed to the fraud.[35] Because the cases arise in a wide variety of factual contexts, courts cannot reach a consensus on a general rule with regard to the federal securities laws' jurisdictional scope over transnational securities frauds.[36] Rather than follow a general standard, courts have decided the jurisdictional reach of the securities laws on a case specific basis.[37] Because the factual

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34. *See* Grunenthal GmbH V. Hotz, 712 F.2d 421, 424-25 (9th Cir. 1983) (emphasizing judicial policy rationale for determination of scope of United States jurisdiction over transnational securities fraud); Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 416 (8th Cir. 1979) (stating that in absence of legislative guidance as to extent of United States jurisdiction over transnational securities frauds, policy considerations have influenced judicial decisions); SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977), *cert. denied*, 431 U.S. 938 (1977) (stating that courts' decisions as to proper scope of United States jurisdiction over transnational securities frauds largely must be dependent on policy considerations).

35. *See* Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 416 (8th Cir. 1979) (stating that judicial decisions as to whether United States has jurisdiction over transnational securities frauds largely will depend on court's analysis of case-specific facts). *Compare, e.g.*, Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989), *cert. dismissed*, ___ U.S. ___, 110 S. Ct. 29 (1989) (concerning transnational securities fraud case in which plaintiff was foreign corporation with small percentage of United States shareholders, defendants were foreign corporations, and all fraudulent conduct occurred outside of United States) *and* Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5 (2d Cir. 1979) (concerning transnational securities fraud case in which plaintiffs and defendants all were foreign, and United States conduct was involved in secondary and tertiary aspects of fraud) *and* Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409 (8th Cir. 1979) (concerning transnational securities fraud case in which plaintiff was foreign corporation wholly owned by United States corporation, defendants were from United States, substantial conduct contributing to fraud took place in United States, but effect of fraud was felt abroad) *with* Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975) (concerning transnational securities fraud case in which defendants included both foreigners and United States citizens or residents, plaintiff class included both United States residents and foreigners, and United States conduct contributing to fraud merely was preparatory and much less significant than foreign conduct contributing to fraud).

36. *See infra* notes 39-84 and accompanying text (discussing lack of agreement between federal circuit courts of appeals as to general rule describing scope of United States jurisdiction over transnational securities frauds).

37. *See* IIT v. Cornfeld, 619 F.2d 909, 918 (2d Cir. 1980) (noting case-specific nature of decisions regarding United States jurisdiction over transnational securities frauds); Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 414 (8th Cir. 1979) (stating that finding as to jurisdiction depends on analysis of case's specific facts).

diversity of transnational fraud cases dictates case specific analysis without the benefit of a general rule the courts must make individual jurisdictional decisions according to certain broadly articulated policy aims.[38] The five federal circuit court of appeals that have considered cases dealing generally with these issues have adopted policies that either broadly or narrowly extend United States jurisdiction over transnational securities fraud disputes.[39]

The Second Circuit, which frequently considers the proper transnational scope of the United States securities fraud laws, has developed a policy of narrowly extending United States jurisdiction over transnational securities frauds.[40] The Second Circuit derived from the Restatement of the Foreign Relations Law of the United States conduct or effects test a basic approach to analyzing jurisdiction in transnational securities fraud cases.[41] Following the Restatement, the court looks to the alleged degree of United States conduct or effects in a given dispute to determine if the United States has subject matter jurisdiction over the dispute.[42] The Second Circuit developed its conduct or effects-based approach in response to a perceived absence of explicit statutory guidance as to section 10(b)'s jurisdictional scope over transnational securities frauds.[43] Accordingly, the Second Circuit developed

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38. *See infra* notes 53-54, 62-71, 78, & 81-82 and accompanying text (discussing policy aims that federal circuit courts of appeals consider in deciding scope of United States jurisdiction over transnational securities frauds).

39. *See infra* notes 64-84 and accompanying text (discussing cases that recognize broad scope of United States jurisdiction over transnational securities frauds); *infra* notes 40-63 and accompanying text (discussing cases that recognize narrow scope of United States jurisdiction over transnational securities frauds).

40. *See* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261-63 (2d Cir. 1989), *cert. dismissed*, 110 S. Ct. 29 (1989) (adopting narrow policy of extending United States jurisdiction over transnational securities frauds); IIT v. Cornfeld, 619 F.2d 909, 916-21 (2d Cir. 1980) (same); Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5, 8-10 (2d Cir. 1979) (same); IIT v. Vencap, Ltd., 519 F.2d 1001, 1015-18 (2d Cir. 1975) (same); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 984-93, 996 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975) (same); Leasco Data Processing Equip. v. Maxwell, 468 F.2d 1326, 1335-37 (2d Cir. 1972) (same); Schoenbaum v. Firstbrook, 405 F.2d 200, 207-10 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969) (same).

41. *See* Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5, 9-10 (2d Cir. 1979) (identifying effects within United States and conduct within United States as exclusive grounds for justifying extension of United States subject matter jurisdiction over foreign securities activities); IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975) (same); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) (describing conduct or effects test).

42. *See infra* notes 45-52 and accompanying text (discussing Second Circuit's analysis of United States conduct and effects as determinants of United States jurisdiction over transnational securities fraud).

43. *See* Leasco Data Processing Equip. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972) (describing language of section 10(b) as "inconclusive" with regard to extraterritorial applicability); Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5, 9 (2d Cir. 1979) (identifying lack of statutory guidance with regard to extraterritorial applicability).

its own judicial interpretation of the extraterritorial applicability of the statute.[44]

Under the Second Circuit's approach, a party can premise United States jurisdiction on either United States effects[45] or United States conduct.[46] In

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44. *See supra* note 40 and accompanying text (indicating that because of perceived lack of statutory guidance as to proper scope of United States jurisdiction over transnational securities frauds Second Circuit repeatedly has independently outlined general contours of United States jurisdiction over transnational securities frauds).

45. *See* Bersch v. Drexel Firestone Inc., 519 F.2d 974, 991 (2d Cir. 1975) (holding United States conduct unnecessary for United States jurisdiction over transnational securities fraud if fraud had direct effect in United States); Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 262 (2d Cir. 1989), *cert. dismissed*, 110 S. Ct. 29 (1989) (discussing level of United States effects necessary to allow United States jurisdiction over transnational securities fraud); IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975) (same); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 977-80, 991-93, 1001 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975) (same). In *Consolidated Gold Fields* the Second Circuit held that there were United States effects sufficient for United States jurisdiction where United States residents held 2.5% of the shares of the allegedly defrauded plaintiff corporation, the shares had a market value of approximately $120 million, and the United States effect clearly was a direct and foreseeable result of the conduct outside the territory of the United States. *Consolidated Gold Fields*, 871 F.2d at 262. In *Vencap*, however, the Second Circuit held that the fact that 300 United States citizens or residents owned some of the securities involved in the fraud, amounting to a total of approximately .5% of the whole, was insufficient to support United States jurisdiction over the case. *Vencap*, 519 F.2d at 1017. In *Bersch*, the Second Circuit held that the fact that 22 persons with United States citizenship or residency held 41,936 shares of the involved securities was a sufficient United States effect to allow United States subject matter jurisdiction over the claims of the 22 United States class plaintiffs. *Bersch*, 519 F.2d at 990-93. However, the *Bersch* court further stated that this United States effect was not sufficient to allow United States subject matter jurisdiction over the claims, sought to be joined in a class action with those of the United States class plaintiffs, of 50,000 to 100,000 foreign class plaintiffs holding the bulk of the 11,000,000 outstanding shares. *Id.* at 996. In addition, the *Bersch* court held that generalized effects on the United States securities markets that resulted from the fraud—such as a loss of investor confidence in American underwriters and in the offshore investment industry—were an insufficient basis for United States subject matter jurisdiction. *Id.* at 987-88.

46. *See* IIT v. Cornfeld, 619 F.2d 909, 918 (2d Cir. 1980) (allowing subject matter jurisdiction on basis of United States conduct with regard to securities transactions wholly consummated in the United States); Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5, 10 (2d Cir. 1979) (discussing effect of United States conduct on jurisdiction decision); *Vencap*, 519 F.2d at 1001 (2d Cir. 1975) (same); *Bersch*, 519 F.2d at 974 (same); Leasco Data Processing Equip. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972) (same). In *Fidenas* the Second Circuit found that the plaintiff's allegation that a defendant's United States main office was acquainted with a cover-up phase of the fraud was merely secondary and ancillary to the essential foreign core of conduct constituting the fraud. *Fidenas*, 606 F.2d at 5. Accordingly, in *Fidenas* the Second Circuit held that the plaintiff had failed to allege sufficient United States conduct to support United States subject matter jurisdiction, particularly because the alleged United States conduct took only the form of culpable nonfeasance. *Id.* In *Bersch* the Second Circuit found that various preliminary and ancillary meetings in the United States between underwriters, accountants, and attorneys involved in the preparation of a fraudulent securities offering carried out abroad involved insufficient United States conduct to support United States jurisdiction. *Bersch*, 519 F.2d at 985-87. In *Vencap* the exact nature of the United States conduct was not clear, thus the

disputes with no United States effects the Second Circuit requires for satisfaction of the jurisdictional requirements that United States conduct be substantial, as opposed to merely preparatory.[47] Similarly, in cases with no United States conduct the Second Circuit requires that to support subject matter jurisdiction the United States effects must be substantial.[48]

To determine whether the United States has section 10(b) subject matter jurisdiction over a transnational dispute, the Second Circuit employs a three-part test that relates to the international law conduct or effects analysis.[49] Under the first prong of the Second Circuit's three-part test, the United States always has subject matter jurisdiction if the plaintiff alleges that United States citizens resident in the United States were victims of the fraud, regardless of whether any fraudulent conduct allegedly occurred in the United States.[50] Under the second prong, the United States has jurisdiction if the allegedly defrauded parties are United States citizens resident abroad, but only if significantly contributory United States conduct was materially important to the fraud.[51] Under the final prong of the Second

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Second Circuit remanded the case for a determination of the role that United States conduct had played in the fraudulent scheme. *Vencap*, 519 F.2d at 1018-21. However, the Second Circuit emphasized in *Vencap* that subject matter jurisdiction over a transnational securities fraud only should be allowed on the basis of substantial United States conduct, in contrast to situations in which the United States conduct was merely preparatory or was only a small part of the fraudulent activity. *Id.* at 1018. The *Vencap* court also emphasized that the Second Circuit would not allow United States jurisdiction over transnational securities disputes in every instance in which some United States conduct was connected to the fraud. *Id.* In *Leasco* the Second Circuit found that the defendant's "abundant" misrepresentations in the United States and the defendant's making of telephone calls and sending of mail to the United States were sufficient United States conduct to support United States subject matter jurisdiction. *Leasco*, 468 F.2d at 1335.

47. *See, e.g., Fidenas*, 606 F.2d at 8 (stating that merely ancillary and secondary fraudulent conduct in United States is insufficient ground for United States jurisdiction); *Vencap*, 519 F.2d at 1018 (declining to extend United States transnational securities fraud jurisdiction so broadly as to allow jurisdiction on basis of mere preparatory activities in United States); Schoenbaum v. Firstbrook, 405 F.2d 200, 210 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969) (emphasizing necessity of use of United States mail or other instrumentalities of interstate commerce for United States court to have jurisdiction over transnational securities fraud under § 10(b)). *But see* IIT v. Cornfeld, 619 F.2d 909, 918 (2d Cir. 1980) (stating that while consummation of transnational securities fraud in United States strongly supports United States jurisdiction, consummation of transnational securities fraud in United States is not necessarily dispositive of issue whether United States should have jurisdiction over fraud); *Bersch*, 519 F.2d at 993 (stating that United States has jurisdiction over transnational securities frauds in which United States citizens resident in United States were defrauded whether or not fraudulent acts of material importance occurred in United States).

48. *See* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 255 (2d Cir. 1989), *cert. dismissed*, 110 S. Ct. 29 (1989) (requiring that fraud have sufficient effects within United States to warrant United States jurisdiction).

49. *See Bersch*, 519 F.2d at 993 (presenting three-part test for determination of whether United States subject matter jurisdiction exists over all or part of transnational securities fraud dispute).

50. *Id.*

51. *Id.*

Circuit's three-part test, the United States has no basis for subject matter jurisdiction if the alleged victims are foreign citizens resident abroad, unless conduct from within the United States directly caused those plaintiffs' losses.[52] The Second Circuit has stated that, although Congress undoubtedly never intended that the United States be used as a base for fraudulent foreign securities schemes conducted abroad,[53] it is nonetheless inappropriate for the United States to expend scarce judicial resources adjudicating cases that involve exclusively foreign plaintiffs, defendants, and transactions.[54] Thus, the Second Circuit has adopted a policy of narrowly extending United States jurisdiction over transnational securities frauds.

Like the Second Circuit, the District of Columbia Circuit narrowly has construed section 10(b)'s jurisdictional scope over transnational securities frauds.[55] The primary emphasis of the District of Columbia Circuit's analysis has been on the jurisdictional consequences of United States conduct.[56] With regard to jurisdiction based on United States conduct, the court characterized the Second Circuit as employing an entirely different test than the test the Third, Eighth, and Ninth Circuits employ.[57] The District of Columbia Circuit understood the Second Circuit to hold that conduct done within the United States is an adequate basis for United States jurisdiction

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52. *Id.*

53. *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975) (suggesting that Congress probably did not intend that United States be used as base for export of fraudulent securities devices, even if only to foreigners).

54. Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5, 10 (2d Cir. 1979); *see also* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 1001 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975) (separating claims of United States citizens or residents from those of foreigners for purposes of determining jurisdiction over class action). In *Bersch* the Second Circuit indicated that the United States had jurisdiction only over claims made by the relatively small number of United States citizens or residents who were class plaintiffs in the case, and no United States jurisdiction over claims made by foreigners in connection with the same fraudulent stock offering. *Bersch* , 519 F.2d at 993, 1001. *But see* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 262 (2d Cir. 1989), *cert. dismissed*, 110 S. Ct. 29 (1989) (allowing jurisdiction over entire securities fraud case on basis of limited number of United States residents among defrauded parties). In *Consolidated Gold Fields* United States residents owned 2.5% of the shares of a foreign corporation allegedly defrauded in a transnational securities scheme; the Second Circuit stated that the United States had jurisdiction over the entire case because of the United States ownership of 2.5% of the plaintiff corporation. *Id.*

55. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 36 (D.C. Cir. 1987) (considering issue of United States jurisdiction over transnational securities fraud and declining to find United States jurisdiction over dispute, largely on policy grounds).

56. *See generally Zoelsch*, 824 F.2d at 28-36 (discussing District of Columbia Circuit's views on transnational scope of United States securities laws in dispute containing no allegations of United States effects and in which court, consequently, did not address consequences of United States effects on jurisdiction decision).

57. *Id.* at 30-31; *see also infra* notes 65, 73-78, 80, 83 & 84 and accompanying text (discussing tests used by Third Circuit, Eighth Circuit, and Ninth Circuit for determining scope of United States jurisdiction over transnational securities frauds).

only when the conduct is substantial to the fraud.[58] The District of Columbia Circuit stated that, under the Second Circuit's conduct test, to consider United States conduct sufficiently substantial to support United States jurisdiction the plaintiff must allege that the defendant performed in the United States every one of the elements of a section 10(b) or rule 10b-5 violation.[59] After thus describing the District of Columbia Circuit's understanding of the Second Circuit's test, the District of Columbia Circuit adopted a narrow jurisdictional policy and a test based on the Second Circuit's test.[60]

In adopting the Second Circuit's narrow jurisdictional policy, the District of Columbia Circuit reasoned that because of the need to conserve United States judicial resources the Second Circuit's restrictive approach is appropriate.[61] Additionally, the District of Columbia Circuit noted that Congress never intended the federal securities fraud laws to protect persons other than United States investors.[62] Thus, the District of Columbia Circuit concluded that, to preserve United States judicial resources for the adjudication of domestic disputes, United States jurisdiction should extend as narrowly as possible over transnational securities frauds in the absence of explicit congressional intent to have United States courts broadly exercise jurisdiction over transnational securities frauds.[63]

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58. *Zoelsch*, 824 F.2d at 30. The District of Columbia Circuit in *Zoelsch* distinguished substantial conduct from merely preparatory conduct that did not directly cause the loss elsewhere. *Id.* (citing Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 992-93 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975) for distinction between substantial and preparatory conduct).

59. *Id.* at 30-31 (citing *IIT v. Cornfeld*, 619 F.2d 909, 920-21 (2d Cir. 1980) for idea that substantial conduct within United States means that conduct including all elements of § 10(b) or rule 10b-5 violation took place in United States, although reliance and damages can occur abroad).

60. *Id* at 31.

61. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32 (D.C. Cir. 1987) (arguing that when United States conduct is small part of transnational securities fraud, dispute benefits of United States adjudication are not great enough to justify expenditure of United States resources to adjudicate dispute). The *Zoelsch* court expressed concern that a court, in order to advance judicial policy goals, deciding to support the broad exercise of United States jurisdiction under § 10(b) inappropriately would be engaged in legislative action. *Id.*

62. *See id.* at 31-32 (noting that sole concern of Congress during debate of 1934 Act was protection of United States investors and markets) (citing H.R. REP. No. 1383, 73d Cong., 2d Sess. 1-16 (1934) and S. REP. No. 792, 73d Cong., 2d Sess. 1-13 (1934)). The District of Columbia Circuit in *Zoelsch* stated that during the discussions regarding the 1934 Act Congress was concerned only with transnational frauds to the extent that the frauds affected United States investors or markets. *Id.* at 32. The District of Columbia Circuit emphasized that in the District of Columbia Circuit's view, when deciding on the 1934 Act Congress never really considered the possible ramifications of United States jurisdiction over transnational securities frauds. *Id.* at 33. In the absence of congressional consideration of the issue of the proper scope of United States jurisdiction over transnational securities frauds, the District of Columbia Circuit argued that the judicial branch cannot appropriately make a policy decision as to how broadly United States jurisdiction should exist over transnational securities frauds. *Id.*

63. *See id.* at 32 (emphasizing District of Columbia Circuit's view that United States should not expend judicial resources to adjudicate disputes in which United States conduct is of little relative significance).

In contrast to the Second and District of Columbia Circuits, the Third Circuit has adopted a policy of broadly extending United States jurisdiction over transnational securities frauds. The Third Circuit basically has followed the Second Circuit's lead in considering United States conduct and effects as the factors that determine whether the United States has section 10(b) subject matter jurisdiction over the transnational dispute.[64] However, the Third Circuit emphasized that policy considerations different from those the Second Circuit has emphasized largely have influenced the Third Circuit's decisions recognizing a broad scope of section 10(b) jurisdiction.[65] For example, in the first of the two instances in which the Third Circuit addressed the issue, the Third Circuit noted that the defendant was an American securities dealer.[66] The Third Circuit stated that the United States has a strong regulatory interest in securities transactions activities of American securities dealers.[67] Specifically, the Third Circuit believed that, because the United States is responsible for preventing American securities dealers from engaging in fraudulent securities transactions, United States courts should act to prevent such fraudulent transactions, thereby advancing United States interests in the world capital market.[68]

Furthermore, in a separate instance, the Third Circuit expressed concern that a narrow policy of denying section 10(b) jurisdiction in transnational securities frauds might encourage persons planning to carry out fraudulent transnational securities schemes to use the United States as a haven for their fraudulent operations.[69] The Third Circuit also was concerned that denying United States jurisdiction might induce, on the part of other nations, a reciprocal refusal to exercise jurisdiction over transnational securities

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64. *See* SEC v. Kasser, 548 F.2d 109, 111-12 (3d Cir. 1977), *cert. denied*, 431 U.S. 938 (1977) (couching in terms of United States conduct and United States effects analysis of propriety of exercise of United States jurisdiction over transnational securities fraud cases); Straub v. Vaisman and Co., 540 F.2d 591, 595 (3d. Cir. 1976) (arguing that conduct within United States by itself can suffice to support jurisdiction over transnational securities fraud). *But see id.* (distinguishing Second Circuit decisions from *Straub* on basis of significant factual differences).

65. *See* Straub v. Vaisman and Co., 540 F.2d 591, 595 (3d Cir. 1976) (maintaining that United States' interest in regulating conduct of American securities dealers and in enhancing world confidence in United States securities markets provides policy basis for broadly extending United States jurisdiction over transnational securities frauds); SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977) (stating that decision about United States jurisdiction over transnational securities fraud largely must be made on policy grounds).

66. Straub v. Vaisman and Co., 540 F.2d 591, 595 (3d Cir. 1976).

67. *Id.*

68. *See id.* (indicating that United States regulation of United States securities dealers will enhance world confidence in United States securities market).

69. *See* SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977), *cert. denied*, 431 U.S. 938 (1977) (expressing concern that denial of broad United States jurisdiction over transnational securities frauds might cause United States to become haven for defrauders and manipulators). The *Kasser* court suggested that Congress had not intended that the United States become a "Barbary Coast" harboring international securities pirates. *Id.*

frauds which involve claims that a party defrauded United States investors.[70] Finally, the court stated that as a general rule Congress intended the securities laws to insure the highest standards of conduct in securities transaction, and that broad allowance of United States jurisdiction promotes that end.[71] Thus, based on these policy concerns, the Third Circuit has adopted a policy of broadly allowing United States jurisdiction over transnational securities frauds.

Like the Third Circuit, the Eighth Circuit adopted a broad section 10(b) jurisdictional policy. The Eighth Circuit emphasized that in deciding if United States courts have jurisdiction over a transnational securities fraud, a court's decision largely must hinge on the court's analysis of the specific facts of the case,[72] as influenced by the court's policy beliefs.[73] In taking this approach, the Eighth Circuit concentrated on United States conduct and effects.[74] Fundamentally, the Eighth Circuit allows jurisdiction on the basis of conduct if the United States conduct directly caused the loss[75] or was otherwise fairly substantial.[76] Furthermore, the Eighth Circuit allows jurisdiction on the basis of United States effects that are sufficiently substantial.[77] Thus, largely because of the federal securities laws' remedial purpose,[78] the Eighth Circuit's approach has been to recognize a broad

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70. *See Kasser*, 548 F.2d at 116 (expressing concern that narrow exercise of United States jurisdiction might result in reciprocally narrow exercise of jurisdiction by foreign nations in disputes in which United States interests are at stake). The *Kasser* court stated that a broad, as opposed to narrow, exercise of United States jurisdiction might encourage foreign nations to act against parties seeking to perpetrate frauds in the United States. *Id.*

71. *See id.* at 116 (stating that Congress intended antifraud provisions of 1934 Act to insure high standards of conduct in securities transactions).

72. *See* Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 414 (8th Cir. 1979) (stating that whether court decides United States has jurisdiction over transnational securities fraud case depends on particular facts of case).

73. *See id.* at 421 (admitting that Eighth Circuit largely made on policy grounds decision in favor of United States jurisdiction over transnational securities fraud case).

74. *See id.* at 413-21 (emphasizing extent of United States conduct and effects in making jurisdictional analysis); Travis v. Anthes Imperial Ltd., 473 F.2d 515, 520-27 (8th Cir. 1973) (emphasizing extent of United States conduct in making jurisdictional anaiysis in dispute lacking significant allegations of United States effects).

75. *See* Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 420 (8th Cir. 1979) (citing Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975); IIT v. Vencap, 519 F.2d 1001, 1018 (2d Cir. 1975)) (stating that United States conduct must be more than merely preparatory and must directly cause losses in order to support exercise of United States jurisdiction).

76. *See* Travis v. Anthes Imperial Ltd., 473 F.2d 515, 525-26 (8th Cir. 1973) (deciding that United States conduct including two letters, two telephone calls, and sale closing was substantial enough to support United States jurisdiction over transnational securities fraud).

77. *See Continental Grain*, 592 F.2d at 417 (stating that United States may establish jurisdiction over transnational securities fraud by satisfaction of either prong of conduct or effects test).

78. *See id.* at 416 n.10 (quoting SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963) (stating that federal securities statutes have fundamental purpose of creating new, ethically motivated philosophy of full disclosure in securities transactions).

range of significant conduct sufficient to establish subject matter jurisdiction over transnational securities frauds.[79]

Like the Third and Eighth Circuits, the Ninth Circuit has adopted a policy of broadly extending section 10(b) jurisdiction over transnational securities frauds. The Ninth Circuit follows the other circuits in considering United States conduct and effects as determinants of United States jurisdiction over the transnational disputes.[80] In adopting a fairly broad approach to the allowance of jurisdiction, the Ninth Circuit emphasized its policy concerns regarding transnational securities fraud perpetrators' use of the United States as a haven from prosecution.[81] Also, the court stated that a policy of supporting a broad exercise of jurisdiction over transnational securities fraud cases is consistent with Congress' intention that the antifraud provisions of the federal securities laws encourage the highest general standards of conduct in securities transactions.[82] For the Ninth Circuit, the simple fact that fraudulent conduct occurred in the United States provides an adequate basis for establishing United States subject matter jurisdiction, and the fact that the conduct occurred in the United States only by happenstance is irrelevant to the jurisdiction decision.[83] Accordingly, the Ninth Circuit emphasizes that in the context of transnational securities

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79. *See id.* at 421 (stating that fairly inclusive range of significant conduct should allow United States jurisdiction over transnational securities frauds).

80. *See* Grunenthal GmbH v. Hotz, 712 F.2d 421, 423-25 (9th Cir. 1983) (presenting rule that presence in transnational securities fraud of either United States conduct or United States effects allows United States jurisdiction over fraud); SEC v. United Fin. Group, 474 F.2d 354, 356-57 (9th Cir. 1973) (same).

81. *See* Grunenthal GmbH v. Hotz, 712 F.2d 421, 424-25 (9th Cir. 1983) (citing SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977) and *Continental Grain*, 592 F.2d at 421-22) (arguing that sound policy allows broad United States subject matter jurisdiction over transnational securities fraud cases, thus discouraging use of United States as base of operation for defrauders and manipulators).

82. *See Grunenthal*, 712 F.2d at 425 (citing SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963); *Continental Grain*, 592 F.2d at 421; IIT v. Cornfeld, 619 F.2d 909, 919 (2d Cir. 1980); SEC v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977), *cert. denied*, 431 U.S. 938 (1977)) (arguing that Congress intended federal securities statutes to bring about high ethical standards of conduct in securities industry); Des Brisay v. Goldfield Corp., 549 F.2d 133, 135 (9th Cir. 1977) (citing Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968), *cert. denied* 395 U.S. 906 (1969)) (stating that if courts fail to give United States securities fraud laws broad transnational effect the courts will thwart Congress' intent that securities legislation insure maintenance of fair and honest markets) ; *Grunenthal*, 712 F.2d at 425 (suggesting that broad exercise of United States jurisdiction over transnational securities frauds indirectly may tend to discourage strictly American securities frauds). The Ninth Circuit reasoned in *Grunenthal* that, by encouraging American securities professionals to behave responsibly when working on transnational securities transactions, a broad exercise of United States jurisdiction over transnational securities frauds prevents American securities professionals from developing relaxed standards in their transnational work that might spread to the securities professionals' strictly American work. *Id.*

83. *See Grunenthal*, 712 F.2d at 425 (disregarding fact that United States conduct was merely matter of convenience). For the *Grunenthal* court, the important consideration was the fact of United States conduct, rather than the reasons the conduct occurred in the United States instead of abroad. *Id.* at 425-26.

frauds United States territorial limits do not restrict United States jurisdiction.[84] Thus, the Ninth Circuit has adopted a broad policy of extending United States jurisdiction over transnational securities frauds.

As a result, despite the different outcomes that the courts reach, courts decide largely on policy grounds the fundamental issue of whether the United States has section 10(b) subject matter jurisdiction over a transnational securities fraud dispute.[85] Obviously, the courts have identified conflicting policy arguments in support of both a broad and a narrow exercise of jurisdiction.[86] However, after analysis of the competing interests that support each policy, United States courts properly should adopt a policy of broadly allowing United States jurisdiction over transnational securities frauds, subject to minor restrictions.[87]

The arguments that support a broad scope of United States jurisdiction, such as that adopted by the Third, Eighth, and Ninth Circuits, outweigh for several reasons the arguments to the contrary.[88] First, a broad policy regarding exercise of jurisdiction over transnational securities frauds prevents the inconvenience of separating plaintiffs. Courts have difficulty extricating the claims of foreigners, with few or no connections to the United States, from the claims of United States citizens resident in the United States.[89] Because a United States court will have subject matter jurisdiction over the

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84. *See* SEC v. United Fin. Group, 474 F.2d 354, 357-58 (9th Cir. 1973) (holding that United States jurisdiction under 1934 Act is not limited to United States territorial limits).

85. *See supra* notes 53-54, 62-71, 78, & 81-82 and accompanying text (discussing courts' reliance on policy considerations to determine jurisdictional scope of United States securities laws over transnational securities frauds).

86. *Compare supra* notes 40-63 and accompanying text (discussing courts that have adopted policy of narrow scope of United States jurisdiction over transnational securities frauds) *with supra* notes 64-84 and accompanying text (discussing courts that have adopted policy of broad scope of United States jurisdiction over transnational securities frauds).

87. *See infra* text accompanying notes 93-100; notes 94-99 and accompanying text (presenting arguments for, subject to minor restrictions, broad scope of United States jurisdiction over transnational securities frauds).

88. *See infra* notes 101-102 and accompanying text (discussing rationale in support of policy of narrow exercise of United States jurisdiction over transnational securities frauds); text accompanying notes 89-93 and 100; notes 94-99 and accompanying text (discussing rationale in support of policy of broad exercise of United States jurisdiction over transnational securities frauds).

89. *See, e.g.*, Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 411, 417 (8th Cir. 1979) (describing situation in which parties disputed whether United States corporation or only foreign corporation validly made transnational securities fraud claim). The Ninth Circuit in *Continental Grain* considered a situation in which the defrauded party was an Australian corporation. *Id.* However, the Australian plaintiff was a wholly owned subsidiary of a United States corporation. *Id.* at 411. The plaintiff argued that because of the United States parent corporation's accounting principles, the two corporations were consolidated to the degree that any financial loss by the Australian subsidiary would be reflected in the United States parent's accounts. *Id.* Thus, the plaintiff argued, the fraud victimized a United States party. *Id.* at 417. The Eighth Circuit resolved the issue by deciding that because the parent's loss was indirect the alleged loss by the United States parent was not by itself a sufficient basis for United States jurisdiction over the dispute. *Id.* at 417 n.12.

claims of United States citizens resident in the United States under even a restrictive jurisdiction test, the court cannot use the lack of sufficient connection to the United States to avoid adjudicating the claims of United States citizens resident in the United States.[90] However, courts that use a narrow jurisdictional test will have to determine which defendants are sufficiently connected to the United States and which are not. Consequently, under a broad jurisdictional policy a United States court often will be able to conserve judicial resources by adjudicating all the claims involved in the case at once, instead of expending time and effort to decide which claims to adjudicate and which to dismiss for lack of United States subject matter jurisdiction.[91] Further, because statutory and legislative sources provide little guidance on the issue, courts are responsible for deciding the proper extent of jurisdiction.[92] A United States court that adjudicates a United States investor's claims should adjudicate the arguably foreign claims as well. If a United States court follows a policy of narrowly granting jurisdiction, and accordingly dismisses the foreigners' claims in favor of foreign adjudication, inconsistent outcomes may result. Such inconsistency may undermine faith in the judicial process.[93]

Second, international comity principles support the policy of a broad scope of United States jurisdiction over certain types of transnational securities frauds.[94] In some situations, for example, personal jurisdiction considerations may make the United States the only nation able to adjudicate a particular securities fraud case, even if the fraud did not actually affect the United States.[95] In such a situation, international comity concerns

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90. *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975) (applying narrow Second Circuit test and finding jurisdiction over transnational securities fraud claims brought by United States citizens resident in United States regardless of whether United States conduct contributed to fraud); *supra* notes 40 & 44-51 and accompanying text (discussing narrow nature of Second Circuit's test for existence of United States jurisdiction over transnational securities frauds).

91. *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 990-91, 992 n.43 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975) (describing difficulty of determining number of United States purchasers of stock involved in fraud and similar difficulty of determining how United States persons purchased stock); IIT v. Cornfeld, 619 F.2d 909, 913 (2d Cir. 1980) (indicating ambiguity regarding number of United States citizens among defrauded stockholders resident in United States).

92. *See supra* notes 28-32 and accompanying text (describing lack of statutory guidance as to proper transnational scope of United States securities fraud laws).

93. *See supra* note 10 and accompanying text (indicating significant differences between United States and foreign securities fraud provisions). *But see* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996-97 and n.48 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975) (indicating that in special circumstances of class action United States adjudication also could lead to inconsistent results). The *Bersch* court noted that because a United States class action judgment for plaintiff class would lack claim preclusive effect in many foreign courts, the defendant might be exposed to multiple adverse judgments based on the same cause of action. *Id.*

94. *See* RESTATEMENT (SECOND) OF CONFLICTS § 98 (Supp. 1988) (describing basic principle of international comity).

95. *See* United States v. Cook, 573 F.2d 281, 284 (5th Cir. 1978), *cert. denied*, 439 U.S.

support United States adjudication, on the grounds that in the converse situation, in which a foreign nation had personal jurisdiction, the United States would benefit from foreign adjudication of the fraud to protect American interests.[96]

A third argument that supports a policy of a broad scope of United States jurisdiction is that cases in which plaintiffs seek United States jurisdiction for the most part will involve defendants in whom the United States has an interest. A plaintiff will not use section 10(b) to establish United States jurisdiction unless a United States court has personal jurisdiction over the defendant.[97] Accordingly, cases arising under section 10(b) almost always involve defendants that are in some sense American, whether because the defendants are United States citizens, because the defendants are United States residents, or because the defendants have some property or other connection to the United States.[98] If the United States court

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836 (1978) (concerning transnational securities fraud in which effects were felt abroad but perpetrators were located in United States) (citing IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975)). The *Cook* court emphasized the importance of preventing fraudulent international securities operators from using the United States as a haven, a situation the court considered a possible result of United States courts' failure to exercise jurisdiction over transnational securities frauds that United States residents perpetrated. *Id.*

96. *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975) (stating that United States would not approve of foreign nation declining to exercise jurisdiction to prevent parties resident in foreign nation from defrauding United States investors). The Second Circuit in *Vencap* stated that because it is in the United States' interest for foreign nations to exercise jurisdiction when such exercise is necessary to protect United States parties from transnational securities frauds, Congress must have intended the United States securities laws to be used to protect foreigners in certain circumstances. *Id.*

97. *See* J. MOORE, A. VESTAL, & P. KURLAND, MOORE'S MANUAL § 6.01 (1989) (stating that court must have personal jurisdiction over defendant in order to properly adjudicate case).

98. *See, e.g.*, Consolidated Gold Fields PLC v. Minorco, 871 F.2d 252, 255 (2d Cir. 1989), *cert. dismissed*, 110 S. Ct. 29 (1989) (involving only foreign corporations as defendants but in which foreign defendants own 29.9% of corporation with $1.2 billion in United States assets and thus have significant connection to United States); Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 28 (D.C. Cir. 1987) (involving United States corporation as defendants); IIT v. Cornfeld, 619 F.2d 909, 913 (2d Cir. 1980) (involving United States defendant); Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5, 6 (2d Cir. 1979) (involving defendants that include subsidiary of United States corporation); Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 411 (8th Cir. 1979) (involving United States corporation and United States citizen resident in United States as defendants); SEC v. Kasser, 548 F.2d 109, 111 (3d Cir. 1977), *cert. denied*, 431 U.S. 938 (1977) (involving corporation incorporated in United States or at least maintaining offices in United States as defendant); Straub v. Vaisman & Co., 540 F.2d 591, 594 (3d Cir. 1976) (involving United States brokerage firm and United States citizen resident in United States as defendants); IIT v. Vencap, Ltd., 519 F.2d 1001, 1004 (2d Cir. 1975) (involving defendants including United States citizen); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 979 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975) (involving United States banks as defendants); SEC v. United Fin. Group, 474 F.2d 354, 355 (9th Cir. 1973) (involving United States corporation as defendant); Travis v. Anthes Imperial Ltd., 473 F.2d 515, 518 (8th Cir. 1973) (involving as defendants only foreign corporations but in which foreign defendants own subsidies in United States and conduct business in United States and so have significant connection to

determines that the plaintiff has not adequately alleged personal jurisdiction over the defendant, the court can dismiss on that ground without even reaching the subject matter jurisdiction issue.[99] Accordingly, a United States court need never reach the issue of whether the United States has subject matter jurisdiction over a transnational securities fraud in any case that lacks the substantial connection between the United States and the defendant necessary for the United States to have personal jurisdiction over the defendant.[100]

Proponents of a narrow policy propose two arguments against a broad scope of United States jurisdiction over transnational securities frauds. First, proponents of a narrow policy claim that a broad exercise of United States jurisdiction over basically foreign securities frauds leads to undue strain on United States courts because United States courts will have to adjudicate many cases in which, because of the cases' tenuous connection to the United States, the United States has little interest.[101] Additionally, the narrow policy proponents argue that if United States courts broadly exercise jurisdiction over transnational securities frauds, United States courts in effect become open forums readily available to foreigners for adjudication of foreign securities fraud disputes. Thus, proponents of a narrow jurisdictional policy claim that a broad policy forces the United States to squander scarce judicial resources on fundamentally foreign disputes.[102]

United States); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1333 (2d Cir. 1972) (involving defendants having offices in United States); Schoenbaum v. Firstbrook, 405 F.2d 200, 204 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969) (involving United States corporations as defendants and in which fraud concerned stocks traded on United States securities exchanges). *But see* Grunenthal GmbH v. Hotz, 712 F.2d 421, 422 (9th Cir. 1983) (involving only foreign citizens and corporations as defendants). Although the defendants in *Grunenthal* possessed no significant connections to the United States, the Ninth Circuit held that the United States had jurisdiction over the case because significant conduct contributing to the fraud occurred in the United States. *Id.* at 425-26.

99. *See* J. MOORE, A. VESTAL. & P. KURLAND, MOORE'S MANUAL § 6.01 (1989) (stating that even if court has subject matter jurisdiction it cannot issue valid decision in absence of personal jurisdiction).

100. *See supra* text accompanying notes 103-104; notes 105-107 and accompanying text (explaining why broad scope of United States jurisdiction over transnational securities frauds will not cause United States courts to adjudicate cases totally lacking in significant United States connections).

101. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32 (D.C. Cir. 1987) (arguing that United States has limited interest in adjudicating merely on basis of small amount of United States conduct transnational securities fraud with primarily foreign character); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975) (noting difficulties United States court would face in trying to adjudicate foreign securities fraud claims as part of class action).

102. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32 (D.C. Cir. 1987) (quoting Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985) (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975) (noting courts' concern that United States judicial resources most appropriately are preserved for adjudication of disputes of significant interest to United States)); Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5, 10 (2d Cir. 1979) (holding it improper for United States to expend judicial resources adjudicating transnational securities fraud in which only United States connection was culpable nonfeasance occurring in United States).

However, the proponents of a narrow jurisdictional policy incorrectly argue that a broad approach to United States jurisdiction will result in the undue burden of requiring United States courts to adjudicate fundamentally foreign disputes. First, the requirements for a cause of action under section 10(b) prevent plaintiffs from bringing under section 10(b) cases that contain no connection whatsoever to the United States. Section 10(b) requires plaintiffs to allege that the defendants used United States mails or other United States instruments of interstate commerce as mechanisms to further the fraudulent scheme.[103] Thus, if the plaintiff's allegation is correct, the defendant's use of the United States mails or other instruments of interstate commerce to perpetrate a securities fraud necessarily gives the fraud some degree of connection to the United States.[104] Consequently, in contrast to narrow policy proponents' assertions, a broad exercise of United States jurisdiction does not lead to United States courts adjudicating cases with only a tenuous connection to the United States.

Furthermore, proponents of a narrow jurisdictional policy incorrectly postulate that a broad jurisdictional policy results in use of the United States courts as general forums for the adjudication of foreign securities fraud disputes, because a United States court can hear a case only if the United States court has personal jurisdiction over the defendant.[105] Because a defendant must possess certain connections to the United States for the United States to have personal jurisdiction over the defendant, the personal jurisdiction requirement assures connections between the United States and the dispute.[106] The United States has a legitimate interest in preventing parties within the reach of United States personal jurisdiction from conducting securities fraud schemes, even on foreigners.[107] Therefore, a United

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103. *See supra* note 19 and accompanying text (indicating that § 10(b) requires that plaintiff allege use of United States mails or other instrumentalities of interstate commerce to make securities fraud claim under § 10(b)).

104. *See supra* notes 16 & 19-20 (indicating that United States securities laws prevent United States courts from having jurisdiction over transnational securities fraud if fraud involves no United States conduct whatsoever, even if one or both of parties is United States resident or citizen).

105. *See* Leasco Data Processing Equip. Corp v. Maxwell, 468 F.2d 1327, 1339 (2d Cir. 1972) (noting requirement that court have personal jurisdiction over defendant to adjudicate case).

106. *See generally* Smith, *No Forum at All or Any Forum You Choose: Personal Jurisdiction Over Aliens Under the Antitrust and Securities Laws*, 39 BUS. LAW. 1685 (1984) (discussing personal jurisdiction requirements and consequences in transnational securities fraud context). Smith states that the exact nature of the 1934 Act's personal jurisdiction requirements are ambiguous. *Id.* at 1695-96. However, Smith also states that, for the United States to have personal jurisdiction a defendant clearly must have contacts with the United States, either in the form of contacts with the nation as a whole (national contacts) or in the form of contacts with the forum state. *Id.* at 1701-04.

107. *See* Grunenthal GmbH v. Hotz, 712 F.2d 421, 425 (9th Cir. 1983) (indicating United States interest in adjudicating fraud involving entirely foreign victims because assertion of United States jurisdiction would discourage United States securities professionals engaged in transnational work from developing relaxed standards possibly spilling over into work on United States transactions); Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.,

States court appropriately should exercise subject matter jurisdiction over a dispute in which a party subject to United States personal jurisdiction allegedly perpetrated a fraudulent scheme.

The second argument that proponents of a narrow policy raise against a broad scope of United States jurisdiction over transnational securities frauds is that if United States courts exercise jurisdiction over disputes that involve mostly foreign persons and foreign conduct, the United States is likely to violate international comity principles.[108] However, the comity argument fails to recognize the United States securities fraud laws' own jurisdictional limitations. Any dispute that falls within the scope of section 10(b) necessarily meets the international law principle of objective territorial jurisdiction, which is the conduct prong of the conduct or effects test.[109] Section 10(b) claims always meet the conduct prong of the conduct or effects test because the necessary allegation that the perpetrator of the fraud used the United States mails or other instruments of interstate commerce in the perpetration of the fraud [110] is always an allegation of conduct in the United States.[111]

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592 F.2d 409, 421-22 (8th Cir. 1979) (recognizing United States interest in adjudicating fraud that involves entirely foreign victims both because of risk of causing unfavorable reciprocal responses by foreign nations and because of benefits of encouraging effective international antifraud enforcement); SEC v. Kasser, 548 F.2d 109, 114 (3d Cir. 1977), *cert. denied*, 431 U.S. 938 (1977) (arguing that Congress intended that United States courts use United States securities fraud laws to protect foreigners); Straub v. Vaisman & Co., 540 F.2d 591, 595 (3d Cir. 1976) (indicating United States interest in preventing United States securities dealers from perpetrating fraud on anyone, foreign or otherwise); IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975) (arguing that Congress intended that United States not be used as base for export of fraudulent securities to foreigners because of foreign reciprocity considerations). *But see* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32 (D.C. Cir. 1987) (stating that Congress intended United States securities fraud laws to be used only to protect United States plaintiffs).

108. *See* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 263 (2d Cir. 1989), *cert. dismissed*, 110 S. Ct. 29 (1989) (discussing international comity issues raised by exercise of United States jurisdiction over transnational securities fraud). In *Consolidated Gold Fields* the SEC filed an amicus curiae brief supporting United States jurisdiction over the transnational securities fraud but also suggesting that the Second Circuit direct the trial court to abstain from granting a remedy on the grounds that granting a remedy necessarily would violate international comity principles. *Id.* The Second Circuit agreed that the United States had subject matter jurisdiction. *Id.* However, rather than follow the SEC's suggestion with regard to a remedy, the Second Circuit directed the trial court to conduct additional fact finding to determine if the trial court could fashion any remedy consistent with international comity principles. *Id.* Thus, the *Consolidated Gold Fields* court ordered the trial court to grant a remedy only if the trial court found it possible to devise a remedy that would not violate international comity principles. *Id.*

109. *See* Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 416 (8th Cir. 1979) (quoting Note, *The Extraterritorial Application of the Antifraud Provisions of the Securities Acts*, 11 CORNELL INT'L L. J. 137, 139 & nn.12-16 (1978)) (equating conduct prong of conduct or effects test with objective territorial principle).

110. *See supra* note 19 (quoting 15 U.S.C. § 78j(b) (1988)) (indicating that § 10(b) requires use of United States mails or other instrumentalities of interstate commerce in all claims brought under § 10(b)).

111. *See supra* text accompanying notes 103 & 104 (explaining that use of United States mails or other instrumentalities of interstate commerce necessarily entails United States conduct).

However, even though section 10(b) claims always meet the conduct or effects test, comity considerations still may prevent United States courts from fashioning an effective remedy.[112] In situations in which comity considerations prevent a United States remedy, a United States court need not deny United States jurisdiction solely on the grounds that the court cannot impose a remedy consistent with international comity.[113] Exercising jurisdiction over the dispute allows the court definitively to establish that no remedy consistent with international comity is possible.[114] If the court after comprehensive proceedings determines that the court cannot fashion a remedy consistent with international comity, then the court can decline to impose any remedy.[115] By broadly exercising jurisdiction, and then when appropriate declining to impose a remedy, courts prevent the ambiguity that otherwise exists if courts merely premise denial of jurisdiction on a plaintiff's bare allegations that a United States court will be unable to fashion a remedy consistent with international comity. Thus, United States courts can enforce a broad scope of jurisdiction over transnational securities frauds without violating principles of international comity.

The diversity of fact situations that comprise transnational securities frauds renders extremely complex the issue of the proper scope of transnational jurisdiction under the United States securities fraud laws.[116] In deciding whether the Untied States has jurisdiction over a transnational securities fraud, United States courts must determine whether the dispute's

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112. *See Consolidated Gold Fields*, 871 F.2d at 263 (discussing possibility of comity considerations preventing United States court from fashioning effective remedy in transnational securities fraud case). The Second Circuit in *Consolidated Gold Fields* stated that, as a settled principle of both United States and international law, a United States court should avoid taking any remedial action with an extraterritorial effect so disproportionate to the United States harm sought to be remedied that the remedial action would violate international comity principles. *Id.*; *see also* Schoenbaum v. Firstbrook, 405 F.2d 200, 207-08 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969) (discussing Congress' intent that United States avoid involvement in futile attempts to impose United States securities laws on person outside of reach of United States sanctions).

113. *See* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 263 (2d Cir. 1989), *cert. dismissed*, 110 S. Ct. 29 (1989) (allowing United States jurisdiction over transnational securities fraud even in absence of showing that remedy consistent with international comity is possible).

114. *See id.* (indicating need, following full trial on merits, for additional factfinding to determine if remedy consistent with international comity principles exists).

115. *See id.* (directing trial court to decline to impose remedy if remedy consistent with international comity is not possible).

116. *See* Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 414 (8th Cir. 1979) (stating that in determining whether United States has jurisdiction over transnational securities fraud, court should not consider dispositive any one factor previously considered significant in determining whether United States had jurisdiction over earlier transnational securities fraud case); Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5, 6 n.2 (quoting Venture Fund (Int'l) N.V. v. Willkie Farr & Gallagher, 418 F. Supp. 550, 555 (S.D.N.Y. 1976)) (discussing difficulties in making jurisdictional determinations at preliminary stage of proceedings because of disputed or ambiguous facts).

connection to the United States is sufficient to support United States subject matter jurisdiction over the dispute.[117] In the absence of congressional directives, courts have analyzed the degree of United States conduct and effects in a particular case to determine if the United States has jurisdiction over the dispute.[118]

Because no strict test exists to determine when the United States properly has jurisdiction over a transnational securities fraud, courts rely on policy considerations to inform their jurisdictional decisions.[119] The federal circuit courts that have considered the issue have developed two basic policies. The first policy favors a broad extension of United States jurisdiction over transnational securities frauds, on the grounds that courts should strive to prevent the United States from becoming a haven for persons that perpetrate fraudulent securities schemes.[120] The second policy favors a narrow allowance of United States jurisdiction, on the grounds of protecting United States courts from squandering scarce judicial resources adjudicating disputes in which the United States possesses only tenuous interest.[121]

Because of the range of factual variation presented, a bright line test for United States jurisdiction over transnational securities fraud disputes remains elusive. However, this very factual variation argues for the necessity of maintaining flexibility, and flexibility to deal with a wide variety of fact situations cannot exist if courts employ narrowly restrictive jurisdictional tests.

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117. *See supra* notes 39-83 and accompanying text (discussing judicial analysis of United States subject matter jurisdiction over transnational securities frauds in terms of frauds' connections to United States).

118. *See supra* notes 41-52, 56-60, 64, 72-79 & 83 and accompanying text (discussing judicial analysis of United States conduct and effects as determinants of United States subject matter jurisdiction over transnational securities frauds).

119. *See supra* notes 53-54, 62-71, 78 & 81-82 and accompanying text (identifying courts' reliance on policy considerations in determining whether United States jurisdiction exists over transnational securities frauds).

120. *See supra* notes 64-84 and accompanying text (discussing policy of broad exercise of United States jurisdiction over transnational securities frauds).

121. *See supra* notes 40-63 and accompanying text (discussing policy of narrow exercise of United States jurisdiction over transnational securities frauds).