THE JUDICIAL ROLE IN EXTRATERRITORIAL APPLICATION OF THE SECURITIES EXCHANGE ACT OF 1934: *VESCO*

The extraterritorial application of a law raises jurisdictional questions that go beyond statutory interpretation.[1] This discussion endeavors to analyze the jurisdictional problems raised by the judicial appliction of the Securities Exchange Act of 1934 (the Securities Exchange Act)[2] in multinational situations. In an attempt to develop a frame of reference for the resolution of these problems, an examination of the developing case law in the area with particular focus on the fact situation in *Securities and Exchange Commission v. Vesco* (the *Vesco* case)[3] is presented.

It is the allegation of the Securities and Exchange Commission (S.E.C.) in this case that Robert Vesco abused his position as the majority shareholder in International Controls Corporation (International Controls)[4] by causing International Controls to purchase another corporation, I.O.S. Ltd. (I.O.S.),[5] and then to fraudulently transfer its investment in I.O.S. to shell companies owned and operated by Vesco.[6] Prior to its purchase by International Controls, I.O.S. had controlled four mutual funds which invested primarily in United States securities markets. Following the transfer by International Controls of its I.O.S. holdings, eliminating this corporate contact with the United States,[7]

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[1]The approach common in most countries is for courts to consider possible conflict of laws situations in light of foreign concerns in coming to the determination of a just jurisdictional decision. *See* Cheatham, *Problems and Methods in Conflict of Laws*, 99 RECUEIL DES COURS, 237, 238 (1960, I).

[2]Securities Exchange Act of 1934, 15 U.S.C.A. § 78(a) (1934).

[3]SEC v. Vesco, 72 Civ. 5001 (C.E.S.) (S.D.N.Y. filed Nov. 27, 1972).

[4]Robert L. Vesco owns or controls 26% of International Control's outstanding common stock; no other shareholder owns or controls more than 10% of the outstanding common stock. "During most of the time relevant to the complaint, defendant Vesco served as chairman of the board of directors and chief executive officer of International Controls." Brief for Plaintiff at 4-5, SEC v. Vesco, 72 Civ. 5001 (C.E.S.) (S.D.N.Y. filed Nov. 27, 1972).

"International Controls is a Florida corporation, with its principle office in Fairfield, New Jersey. It is engaged in the manufacture and sale of a variety of machinery, technical instruments and other products. The company's common stock is listed on the American Stock Exchange." *Id.*

[5]I.O.S. is a Canadian holding corporation which maintains offices in Switzerland, England, and France and does business in numerous countries. Until the Vesco take-over, I.O.S. was engaged through subsidiary corporations in the management of investment and commercial banking.
Id. at 2, n.2.

[6]Vesco allegedly intentionally deceived the other shareholders of International Controls in that he claimed to have no interest in this transfer; he concealed his ownership of the purchasing companies. The shell companies were organized with minimal capitalization and with the sole purpose of managing the assets of I.O.S.
Id. at 9-10.

[7]The following three schematics are drawn to indicate how direct ties to the United States were, in form, eliminated prior to the liquidation of the mutual fund portfolios. Figure 1 shows the interests the Florida corporation, International Controls, had in I.O.S. operations. Figure 2 depicts the transfer of these interests to shell corporations and also the change in the operational lines for the mutual funds' investments. Finally the completed "divestment" of U.S. contacts is shown in figure 3. (For sake of clarity not all foreign corporations are depicted).

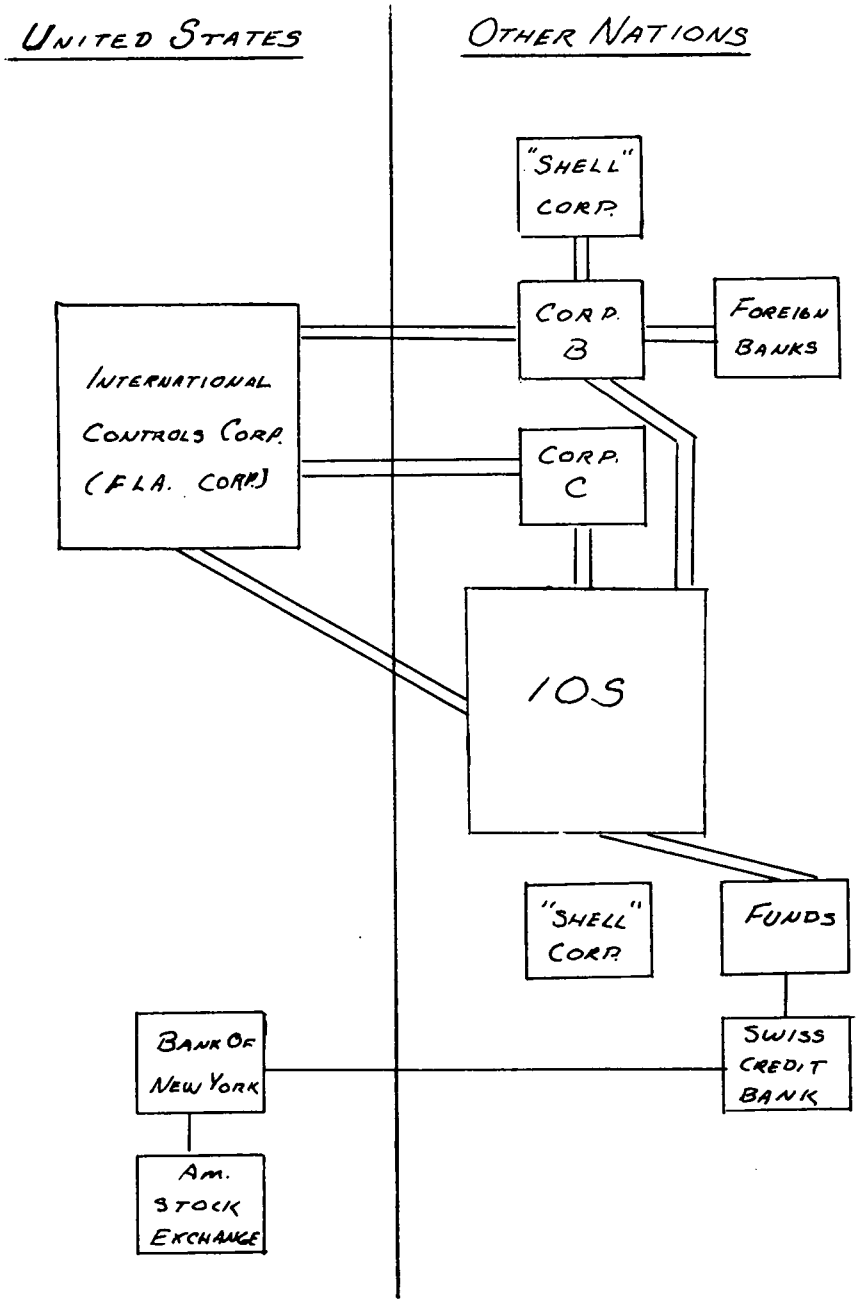
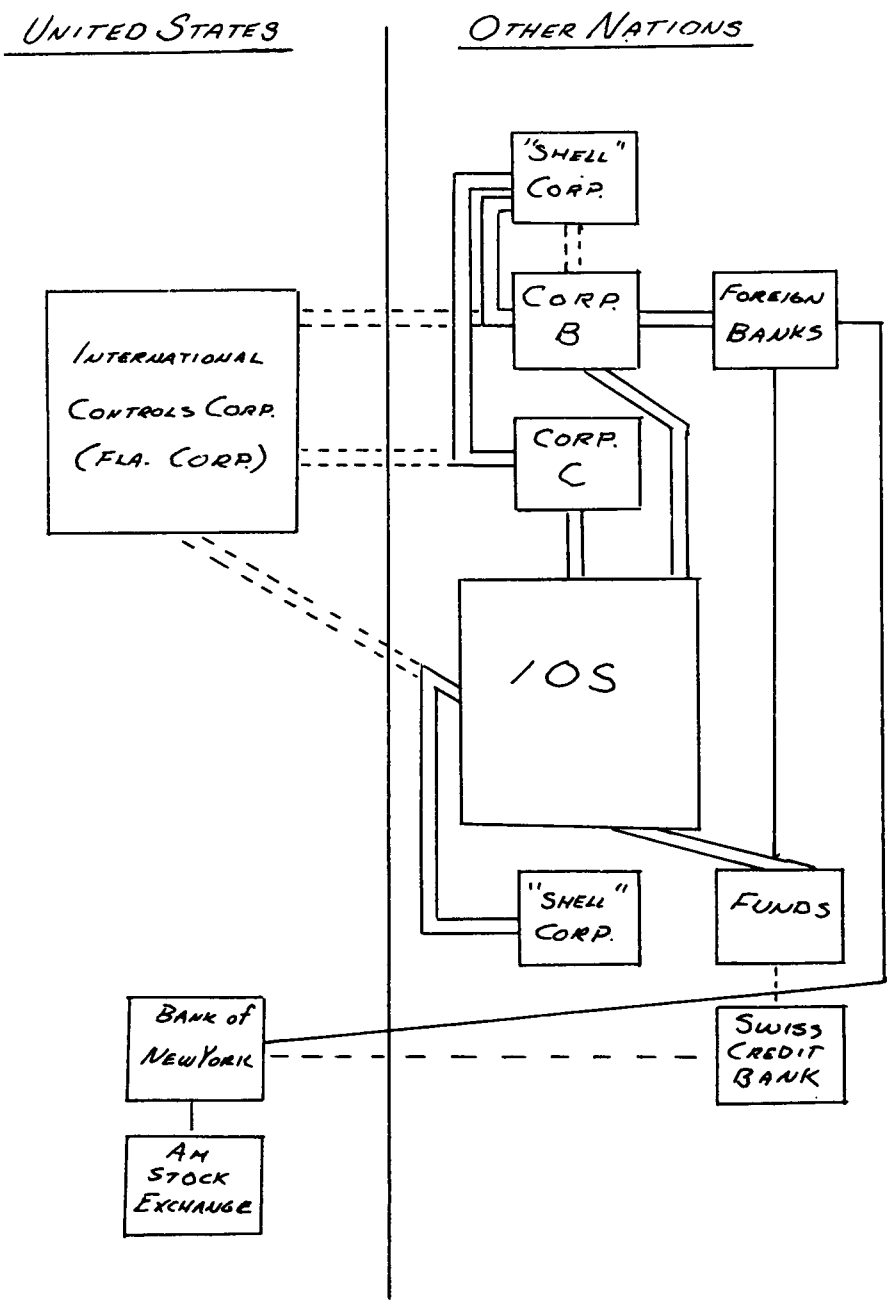

UNITED STATES
OTHER NATIONS
"SHELL" CORP.
CORP. B
FOREIGN BANKS
INTERNATIONAL CONTROLS CORP. (FLA. CORP.)
CORP. C
IOS
"SHELL" CORP.
FUNDS
BANK OF NEW YORK
SWISS CREDIT BANK
AM. STOCK EXCHANGE

FIGURE 1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FUNDS
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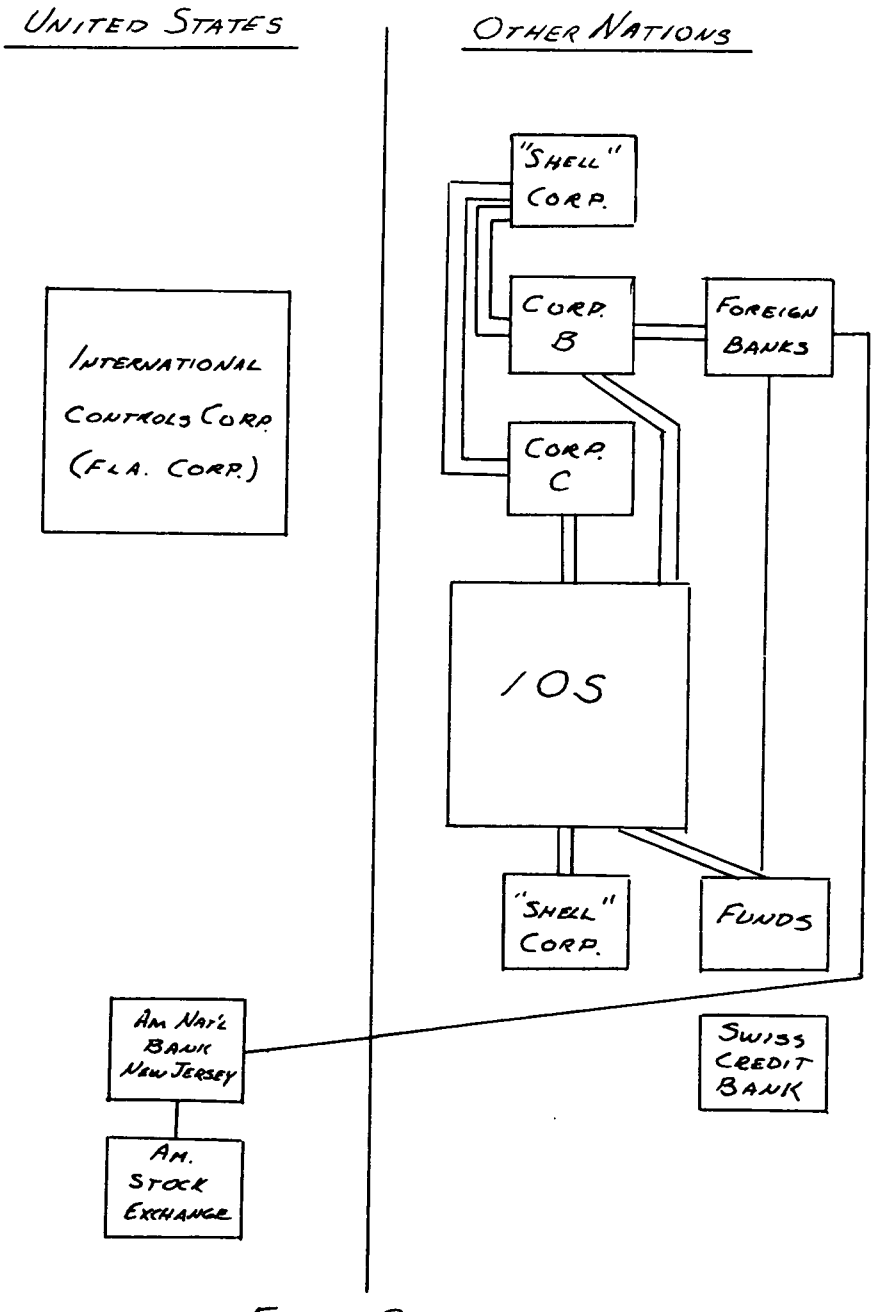
SWISS CREDIT BANK
AM STOCK EXCHANGE

FIGURE 2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IOS
"SHELL" CORP.
FUNDS
AM NAT'L BANK NEW JERSEY
SWISS CREDIT BANK
AM. STOCK EXCHANGE

FIGURE 3

these four mutual funds liquidated their portfolios of readily marketable American securities; of the $224 million in proceeds, $125 million is unaccounted for, and the remainder has been "invested" in Vesco's thinly capitalized shell corporations.[8]

The complaint alleges numerous violations of the reporting and anti-fraud provisions of the Securities Exchange Act[9] with regard to the shareholders of International Controls who were deceived by Vesco as to the purpose of the I.O.S. transactions,and to the mutual funds that were duped into believing that the proceeds of their portfolio sales would be used to benefit their investors.[10] The S.E.C. takes the position that these securities sales for the purpose of misappropriating the proceeds are covered by the broad anti-fraud prohibition of §10(b) and Rule 10 b-5 of the Securities Exchange Act. The problem is whether in this fact situation the Securities Exchange Act confers subject matter jurisdiction on American courts, and whether that jurisdiction should be exercised. Although the securities were sold in United States securities markets, they were sold by order of a company that did not offer or sell stock in the United States or to United States citizens,[11] and the proceeds went to Vesco controlled shell corporations which were incorporated under foreign laws.[12]

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[8]The "investment" was in the form of nonvoting stock in these shell corporations which were, for the most part, newly formed to receive the monies.
Brief for Plaintiff, *supra* note 4, at 3.

[9]Section 10(b) of the Securities Exchange Act states:

> 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 any national securities exchange . . . (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 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 1938, 15 U.S.C.A. § 78j (1934).

Rule 10b-5 promulgated thereunder declares:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or by the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme or artifice to defraud,
>
> (2) 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
>
> (3) 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.

17 C.F.R. § 240.10b-5.

[10]Brief for Plaintiff, *supra* note 4, at 37.

[11]I.O.S. was registered with the S.E.C. as a broker dealer from 1960 until June 5, 1967, when, pursuant to a Commission order dated May 23, 1967, accepting an offer of sttlement, I.O.S. withdrew its broker dealer registration and agreed that it and its affiliates would not do any business in the United States or with United States nationals. Securities Exchange Act Release No. 8083 (June 5, 1967).

[12]Brief for Plaintiff, *supra* note 4, at 24.

The S.E.C. brief states alternative bases for jurisdiction. Its first contention is that sufficient conduct occurred within the United States to make this a domestic matter.

> These massive sales [of the mutual fund securities] were made in the United States securities markets pursuant to directions given by defendant Vesco and his group . . . to the United States banks which were then acting as custodians of the United States securities for the Dollar Funds and to the United States brokers which executed the numerous transactions required to liquidate these multi-million dollar portfolios—all of which required the repeated use of the means of transportation and communication in interstate and foreign commerce, the United States mails, and the United States securities markets. Moreover, the actual planning and execution of the fraud by the defendants was accomplished in part at meetings which took place in New York and New Jersey.[13]

But should this argument fail, S.E.C. also contends that, "the defendants are subject to the jurisdiction of the courts of the United States where, as here, their unlawful activities have a harmful effect on the United States securities markets."[14] There is case law support for this proposition that jurisdiction over an extraterritorial activity is present in the courts of a nation in which the "effects" of that activity are felt.

American Extraterritorial Precedent

The courts of the United States very early restricted the extraterritorial application of laws. In 1808 the Supreme Court in *Rose v. Himley* declared, "the legislation of every country is territorial; that beyond its own territory, it can only effect its own subjects or citizens."[15] Chief Justice Marshall said of this territorial concept:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible to no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.[16]

This was still the underlying approach in 1908 when the Supreme Court was faced with an alleged extraterritorial violation of the Sherman Antitrust Act (Sherman Act)[17] in *American Banana Company v. United Fruit Company*.[18] Adhering to the traditional territorial doctrine, the Court refused to apply the

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[13]*Id.* at 43.

[14]*Id.* at 48.

[15]Rose v. Himley, 8 U.S. (4 Cranch) 241, 279 (1808).

[16]The Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116, 136 (1812).

[17]Sherman Antitrust Act, 15 U.S.C.A. §§ 1-7 (1890).

[18]American Banana Co. v. United Fruit Co., 213 U.S. 347 (1908).

restrictions of the Sherman Act to conduct that occurred outside of the territorial limits of the United States:

> For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only could be unjust, but could be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.[19]

So long as the courts applied this approach, it was obvious that such regulatory legislation as the Sherman Act could be circumvented if the activity which produced the unlawful effects took place outside of the territorial United States. A broader concept of jurisdiction emerged with *United States v. American Tobacco Company*,[20] in which the Court permitted foreign corporations to be included among the defendants charged with making agreements controlling the American tobacco market. The Court was not going to allow this activity, even though it took place outside of the United States, to escape the restrictions of the Sherman Act because the intended effect of this activity was to accomplish results which were unlawful in the United States.

> [I]n view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form . . . .[21]

The classic statement of this "intended effects" approach, which became the principal basis for extraterritorial application of the Sherman Act, was made by Justice Holmes in *Strassheim v. Daily*,

> Acts done outside a jurisdiction but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he [the perpetrator] had been present at the effect, if the State should succeed in getting him within its power.[22]

From Learned Hand's later articulation of this "intended effects" approach, it became apparent that what the courts had adopted was a scheme under which both the jurisdictional and possible conflict of laws questions were resolved by reference solely to Congressional intent.

> [W]e are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it. That being so, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so: as a court of the United States we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this [Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those

[19] *Id.* at 356.

[20] United States v. American Tobacco Co., 221 U.S. 106 (1911).

[21] *Id.* at 181.

[22] Strassheim v. Daily, 221 U.S. 280, 285 (1911).

> fixed by the "Conflict of Laws." We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.[23]

So long as the courts could determine that Congress intended to attach liability to certain conduct without the United States that had illegal consequences within the United States, it was not incumbent upon the courts to find intent on the part of the defendants to produce such consequences. "Intended effects" was therefore not the outer limit of permissible statutory interpretation, and the seed of an "effects" approach was sown. Hand commented on the breadth of this new approach:

> [A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.[24]

The minimal, or nonexistent, attention given to intent requirements under evolving concepts has been demonstrated:

> a United States court may exercise its jurisdiction as to acts and contracts abroad, if . . . such acts and contracts have a substantial effect upon our foreign and domestic commerce.[25]

This approach to extraterritoriality has been embraced with less than open arms by foreign observers.[26]

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[23]United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).

[24]*Id.*

[25]United States v. Watchmakers of Switzerland Information Center, Inc., TRADE REG. REP. ¶ 71, 415, at 7757 (S.D.N.Y. 1963).

[26]The objective application of the territorial principle is certainly now part of the general principles of law recognized by civilized nations; and there seems to be no good reason why it should not be used in the enforcement of antitrust laws. The United States courts cannot be expected to refuse jurisdiction over agreements which primarily intend, and produce, illegal activities within United States territory. But it may, with respect, be submitted that the *Alcoa* [*supra* footnote 23] pattern of case goes too far when 'jurisdiction' is assumed over foreigners' foreign agreements, merely because it has been possible to allege some 'effects' on United States imports or exports, and because the agreement would have been illegal if made in the United States. This kind of jurisdiction seems to offend in two ways. First, since this jurisdiction is rested by the court on the objective test of *territorial* jurisdiction, it must be kept within the confines of that concept. But to extend that concept to cover effects in the sense of mere repercussions—sometimes repercussions ancillary to the purpose of the scheme as in the *Alcoa* case—is not only to extend it beyond the limits covered by authority but also to reduce it to an absurdity. Practically unlimited extraterritorial jurisdiction cannot reasonably be founded on a territorial principle. Secondly, even allowing a most liberal view of the limits of *extra*territorial jurisdiction, these cases still offend against the ultimate limit because they are an attempt to export into other countries and to make operate there what are after all peculiarly American political notions.

Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 BRIT. Y.B. INT'L L. 146, 175 (1957); *See also* THE INTERNATONAL LAW ASSOCIATION, REPORT OF THE FIFTY-FIRST

Extraterritoriality and the Securities Exchange Act

When considering an alleged violation of the Securities Exchange Act, a court has before it both the case law generated by the Sherman Act and other precedents, as well as a specific statutory limitation within the Act. That limitation is § 30(b) which states:

> The provisions of this chapter and 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.[27]

The following are the principal cases which have dealt with the extraterritorial application of the Securities Exchange Act; the discussions are limited to a consideration of jurisdictional issues.

In *Kook v. Crang*[28] a Canadian broker registered with the S.E.C. was charged with extending credit to the plaintiff American investor beyond the limits imposed by the Securities Exchange Act. The court found this conduct to be specifically[29] exempted from the restrictions of the Act by § 30(b) as an activity leading to a transaction on a foreign exchange.[29] The fact that there was incidental use of interstate communication facilities (mail and telephone) was held insufficient to confer jurisdiction.

In *Ferraioli v. Cantor*[30] § 30(b) was deemed inapplicable because the conduct there took place at least partially within the United States. This case involved the transfer of control of an American corporation between two Canadian corporations without a disclosure of the offer to all shareholders giving them equal opportunity to sell their shares and, hence, violated § 10(b) of the Act. The court held that the use of the mails and instrumentalities of interstate commerce by the defendant Canadian corporation to cause the resignation of the directors of the American corporation and the actual transfer of corporate

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CONFERENCE 304-592 (1964). American commentators have also been critical of the approach, *see* Haight, *International Law and Extra-territorial Application of the Anti-trust Laws*, 63 YALE L.J. 639 (1954), Whitney, *Sources of Conflict between International Law and the Anti-trust Laws*, 63 YALE L.J. 655 (1955).

[27]Securities Exchange Act of 1934, 15 U.S.C.A. § 78dd(b) (1934).

[28]Kook v. Crang, 182 F. Supp. 388 (S.D.N.Y.1960).

[29][P]laintiff must show some act done within the United States either in furtherance of the direct or indirect extension of credit or in furtherance of the direct or indirect maintenance of credit. We find none.

[T]he use of the mails and telephone within the United States does not change the locale. We hold that . . . "jurisdiction" as used in Section 30(b) contemplates some necessary and substantial act within the United States.

We conclude that the transactions pleaded were without the jurisdiction of the United States and were specifically exempted from the coverage of the Securities Exchange Act of 1934 by Section 30 of the Act . . . .

Id. at 390, 391.

[30]Ferraioli v. Cantor, 259 F. Supp. 842 (S.D.N.Y. 1966).

control within the United States constituted a sufficient basis to avoid the § 30(b) limitation.

When an American shareholder sued derivatively for damages to a Canadian corporation listed on the American Stock Exchange resulting from fraudulent sales of its treasury shares to another Canadian corporation in violation of § 10(b), the court in *Schoenbaum v. Firstbrook*[31] held that jurisdiction was present. The limitation of § 30(b) did not eliminate jurisdiction to protect an American investor in a security carried on the American Exchange.

In *Roth v. Fund of Funds*,[32] American investors brought a derivative action against a Canadian corporation for making "quick swing" profits in violation of § 16(b) of the Securities Exchange Act. Since the plaintiffs were Americans and the purchase and sale of the securities took place on the New York Stock Exchange and were accomplished by the use of interstate telephone calls, it was held that the American courts had jurisdiction and that § 30(b) was not applicable.

Although the contracts were minimal in *Leasco Data Processing Equipment Corporation v. Kerman*,[33] jurisdiction was present when defendant, a British issuer, induced plaintiff, an American corporation, to purchase securities through its foreign subsidiary in reliance upon misrepresentations, some of which were made in the United States. Altough a transaction on a foreign exchange was the subject of the complaint jurisdiction was found because the transaction was fraudulently induced by conduct within the United. States.

Mail and telephone communication by the defendant to American shareholders proved sufficient to avoid the operation of § 30(b) in *Travis v. Anthes Imperial Ltd.*[34] As in *Leasco*, misrepresentations, nondisclosures and self-dealing within the United States constituted sufficient conduct to maintain jurisdiction for violations of § 10(b).

In *S.E.C. v. United Financial Group*,[35] misrepresentations and nondisclosures by foreign based mutual funds gave rise to the complaint. The mutual funds were directed through the use of interstate communications by an American corporation (United Financial Group) in which Americans invested. The court held that the term "jurisdiction" in § 30(b) does not mean "territorial limits" but, rather, the complex of activities within and without the United States that have an impact on Americans. The presence of American investors and the offer and sale of stock in the United States provided a sufficient basis for jurisdiction.

In each of the preceding cases, with the exception of *Kook* and *Schoenbaum*, there was a nexus between the contacts with the United States and the conduct that was the subject of the complaint. In *Kook* this nexus was specifically found

[31]Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968).

[32]Roth v. Fund of Funds, 279 F. Supp. 935 (S.D.N.Y. 1968).

[33]Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

[34]Travis v. Anthes Imperial Ltd., 473 F.2d 515 (8th Cir. 1973).

[35]SEC v. United Financial Group, Inc., 474 F.2d 354 (9th Cir. 1973).

lacking and the court determined itself to be without jurisdiction.[36] *Schoenbaum*, however, held that the fact the allegedly fraudulent transaction involved a security listed on an American exchange was in itself a sufficient jurisdictional basis to protect an American shareholder. The Second Circuit in *Leasco* indicated the difficulty in broadening the *Schoenbaum* basis:

> If all the misrepresentations here alleged had occurred in England, we would entertain most serious doubt whether, despite United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1954), and *Schoenbaum*, § 10(b) would be applicable simply because of the adverse effect of the fraudulently induced purchases in England of securities of an English corporation, not traded in an organized American securities market, upon an American corporation whose stock is listed on the New York Stock Exchange and its stockholders.[37]

The *Schoenbaum* decision to consider jurisdiction present to protect an American investor in a situation otherwise totally foreign and the temptation to follow it in the *Leasco* case is a parallel to the *U.S. v. Watchmakers of Switzerland* anti-trust decision in which the "effects" concept was stretched perhaps beyond reason.

The developing case law suggests that the Securities Exchange Act will be applied to a "foreign transaction" if either there is a nexus between the contacts with the United States and the prescribed conduct, thereby reducing the "foreign transaction" to a domestic matter, or a need to protect an American investor from a prescribed transaction abroad involving a security listed on an American exchange.

Vesco and Extraterritoriality

It is in this setting that the Southern District Court of New York confronts the *Vesco* situation. As noted earlier, in form, I.O.S. and its subsidiaries had contact with the United States only through the depository and custodial banks that handled its securities transactions there. The *Schoenbaum* tie of corporate registration with the S.E.C. and the direct protection of an American investor is not present. Therefore, comparing the situation in the *Vesco* case with the facts in the previous cases, it would seem that United States subject matter jurisdiction is not present in *Vesco*. One way to avoid this conclusion is to decide that, in substance, International Controls and Vesco remained in control of I.O.S. and its subsdiaries. This would make the case similar to *United Financial Group* but for the lack of American investors to protect. Jurisdiction could then be based upon Vesco's significant contacts with the United States.[38] But perhaps this case presents an appropriate point for the courts to re-examine their approach to the extraterritorial application of such regulatory statutes. After all, there is no reason why the *Vesco* scenario could not be repeated where

[36]Kook v. Crang, 182 F. Supp. 388, 391 (S.D.N.Y. 1960).

[37]Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972).

[38]Brief for Plaintiff, *supra* note 4, at 43-44.

the "mastermind" and his corporate tool were not United States citizens. Would a United States District Court have jurisdiction in that situation?

A total approach to extraterritoriality that does not go beyond domestic statutory interpretation is crippled from conception. The intended jurisdiction of a statute and the judicial exercise thereof are two separate issues. The process utilized by federal courts to determine congressional intent is appropriate to the former but the latter is an issue of the particular controversy and its determination is a judicial responsibility. Assuming that the court has found the alleged conduct to be within the intended coverage of the Act, and if neither party has introduced a foreign law, the court's decision to exercise jurisdiction should be restricted at least by a determination that this intended coverage of the Act is within acceptable standards of due process and international law.[39] Within the United States, the applicability of one state's laws in another state is a problem that often arises and one with which courts do not attempt to deal solely in the vacuum of their local law.[40] There is not such a quantum difference between the interstate and international situations as to justify relegating possible international regulatory conflict of laws determinations to the status of domestic statutory interpretation, while treating interstate conflicts as complex issues requiring independent judicial resolution.[41]

Assuming that securities transactions by their nature require some regula-

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[39]In Home Ins. Co. v. Dick, 281 U.S. 397, 411 (1930) the Court said, "[the claims here asserted] rest upon the Fourteenth Amendment. Its protection extends to liens." For a discussion of the repercussions of decisions contrary to international law, *see* Becker, *Extraterritorial Dimensions of the Securities Exchange Act*, 2 N.Y.U.J. INT'L L. & POL. 233 (1969).

[40]RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 (1971). Comment on Subsection (2) states:

> *c. Rationale.* Legislatures usually legislate and courts usually adjudicte, only with the local situation in mind. They rarely give thought to the extent to which the laws they enact, and the common law rules they enunciate, should apply to out-of-state facts. When there are no adequate directives in the statute or in the case law, the court will take account of the factors listed in this Subsection in determining the state whose local law will be applied to determine the issue at hand.

The factors of § 6 Subsection (2) are:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and,
> (g) ease in the determination and application of the law to be applied.

[41]RESTATEMENT (SECOND) CONFLICT OF LAWS § 10 (1971):

> The rules in the Restatement of this Subject apply to cases with elements in one or more States of the United States and are generally applicable to cases with elements in one or more foreign nations. There may, however, be factors in a particular international case which call for a result different from that which would be reached in an interstate case.

See also Home Insurance Co. v. Dick, 281 U.S. 397 (1930); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

tory scheme, the following format is submitted as a possible approach to territoriality by an American court:

A.(1) Is a transaction in securities traded on an American exchange involved?

If yes—jurisdiction exists.

(2) Are the personalities issuing the securities or holding assets derived therefrom citizens in either a corporate or individual capacity?

If yes—jurisdiction exists.

B. Is the United States the only interested jurisdiction which has enacted a regulatory scheme?

If yes—then jurisdiction must be exercised and United States law applied.

C. Where another jurisdiction is interested and its regulatory scheme is introduced as the relevant law by a party the court must determine whether to:

(1) Exercise its jurisdiction, and

(a)apply United States law, or
(b)apply another jurisdiction's law, or

(2) Refuse to exercise its jurisdiction on *forum non conveniens* considerations.

In reaching this determination some of the basic factors for the court's consideration include:

Naionalities of the parties;

Impact of the transaction on American and foreign securities markets, both long and short term;

Access of the parties to a forum in another jurisdiction;

Protection of investors and issuers

Policy differences in the concerned regulations.

It should be noted initially that this "format" is meant to apply to a "foreign transaction." In all the cases discussed with the exceptions of *Kook* and *Schoenbaum*, the transactions were found through a conduct/contact analysis to be, at least in part, domestic and therefore extraterritoriality was not in issue in terms of statutory interpretation. However, such a conclusion should not prevent the court from examining the extraterritoriality issue again in reaching its decision to exercise that jurisdiction.

The above format attempts to focus attention, first on whether the United States is so interested as to justify a claim of subject-matter jurisdiction (paragraph A), second, on whether there is in fact a possible conflict (paragraph B), and, finally, on the possible decisions where a true conflict in laws may exist

and parameters upon which to base that decision (paragraph C). An "interested" jurisdiction is one in which the transaction occurred, where the market handling the securities involved is located, or where the issuers or parties holding assets derived from issuance are located. In applying this approach to the *Vesco* situation, the conduct is reasonably within the coverage of the Act since the transfers of American securities were an integral part of the transactions. If neither party introduces foreign laws and if the court is satisfied that the United States is an interested jurisdiction, the inquiry may stop and United States law be applied.[42]

Conclusion

The present concept of extraterritoriality leads to unpredictability in that the conduct/contacts analysis can be articulated to make many transactions either domestic or foreign depending upon emphasis on the various facts presented.[43] It is too limited in that some situations calling for the exercise of jurisdiction would be excluded.[44] To allow for adequate treatment of legislative intent as well as for proper judicial discretion, subject matter jurisdiction in an extraterritorial context should be considered in light of both these related but separate issues.

William A. Aileo

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[42]Foreign law, unless introduced by a party, is not commonly a matter of judicial notice. *See* UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT, 9A UNIFORM LAWS ANNOTATED 569, § 5 (1965); FEDERAL RULE OF CIVIL PROCEDURE 44.1.

[43]*Compare* Kook v. Crang, 182 F. Supp. 388 (S.D.N.Y. 1960) *with* Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

[44]The *Vesco* situation where United States citizens or corporations were not among the allegedly involved defendants would, under the present status of the law, be outside United States jurisdiction unless significant conduct within the United States were found.