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NOTES

Expanding the Transnational Scope of Federal Subject Matter Jurisdiction Under the Commodity Exchange Act

During the past two decades, federal courts have confronted an increasing number of transnational suits alleging violations of United States securities and commodities laws.[1] Lacking explicit congressional guidance, courts have relied upon general foreign relations law to delimit the proper scope of federal subject matter jurisdiction. The courts have relied on two variants of the territorial principle[2]—the conduct test[3] and the effects test[4]—which establish

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[1] There has been a prodigious amount of commentary on this topic. *See, e.g.*, Comment, *The Transnational Reach of Rule 10b-5*, 121 U. PA. L. REV. 1363 (1973); Note, *The Extraterritorial Application of the Antifraud Provisions of the Securities Acts*, 11 CORNELL INT'L L.J. 137 (1978); Note, *Expanding the Jurisdictional Basis for Transnational Securities Fraud Cases: A Minimal Conduct Approach*, 6 FORD. INT'L L.J. 308 (1983); Note, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553 (1976); Note, *Extraterritorial Application of § 10(b) of the Securities Exchange Act of 1934 —The Implications of Bersch v. Drexel, Inc. and IIT v. Vencap, Ltd.*, 33 WASH. & LEE L. REV. 397 (1976).

[2] See SAHOVIC AND BISHOP, THE AUTHORITY OF THE STATE: ITS RANGE WITH RESPECT TO PERSONS AND PLACES, MANUAL OF PUBLIC INTERNATIONAL LAW 311 (M. Sorenson ed. 1968) for a discussion of the five bases of international law: the territorial, nationality, universality, protective, and passive personality priciples.

[3] The Restatement states that:

> A state has jurisdiction to prescribe a rule of law
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> (a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by effects of the conduct outside the territory, and
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> (b) relating to a thing located or a status or other interest localized, in its territory.

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965).

[4] The Restatement states that:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
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> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
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> (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with principles of justice generally recognized by states that have reasonably developed legal systems.

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).

limits on a nation's power to regulate transnational conduct. Recognizing, however, that Congress may not have intended its regulatory schemes to reach to the full extent permissible under international law,[5] federal courts have considered competing policy rationales to approximate congressional intent.

The decision of the Seventh Circuit Court of Appeals in *Tamari v. Bache & Co. (Lebanon) S.A.L.*[6] is a recent example of the efforts of the federal judiciary to refine the conduct and effects tests and to define the policies that support the exercise of subject matter jurisdiction. In *Tamari* foreign plaintiffs alleged violations of the Commodity Exchange Act (CEA)[7] by a foreign corporation. The *Tamari* court held that while all contacts between the parties occurred outside the United States, the execution of transactions on United States commodities markets as part of the alleged fraudulent scheme justified the exercise of jurisdiction under both the conduct and effects tests. Such a result, the court stated, effectuates congressional intent by preserving the integrity of American commodity markets.[8] The *Tamari* court's willingness to accept generalized effects within the United States as sufficient under the effects test represents an expansion of the scope of jurisdiction beyond that recognized in previous cases.

Plaintiffs in *Tamari* were Lebanese citizens residing in Lebanon. Defendant, Bache & Co. (Lebanon) S.A.L., was a Lebanese corporation, wholly owned by Bache and Company, Inc., a Delaware corporation, with its only office in Lebanon.[9] Plaintiffs opened two commodity futures trading accounts with Bache Lebanon in 1972.[10] Commodity futures orders solicited by Bache Lebanon from plaintiffs were sent by wire to its parent corporation in Chicago for execution on Chicago commodity exchanges.[11] Plaintiffs alleged excessive

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[5] Subject to constitutional limitations, Congress has the power to prescribe rules that regulate conduct by non-nationals outside the United States that has domestic consequences. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945). In the absence of congressional direction, however, "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

[6] 730 F.2d 1103 (7th Cir.), *cert. denied*, 105 S. Ct. 221 (1984).

[7] Plaintiffs alleged violations under 7 U.S.C. §§ 6(b)-(c) (1982).

[8] *Tamari*, 730 F.2d at 1108.

[9] Tamari v. Bache & Co. (Lebanon) S.A.L., 547 F. Supp. 309, 310 (N.D. Ill. 1982), *aff'd*, 730 F.2d 1103 (7th Cir.), *cert. denied*, 105 S. Ct. 221 (1984). The Delaware corporation was previously dismissed from the action as a result of arbitration. *Id.*

[10] *Tamari*, 730 F.2d at 1105.

[11] *Tamari*, 547 F. Supp. at 310. The commodity futures orders were sent by Bache Lebanon to London where the orders were relayed to Chicago via a communications system operated by Bache Delaware. Bache Lebanon contended that it was Bache Delaware that had sent the orders to Chicago. For purposes of the motion to dismiss, the district court assumed that Bache Lebanon had sent the wire to Chicago. *Id.* at 315 & n.8.

trading and churning of their accounts,[12] the making of false representations, reports, and statements to plaintiffs, and a covering up by Bache Lebanon of the "true condition of the accounts."[13]

The District Court for the Northern District of Illinois denied Bache Lebanon's motion for summary judgment for lack of subject matter jurisdiction. The court held that the conduct test was satisfied because the execution of orders in the United States was a "necessary and foreseeable step" in the alleged fraudulent scheme, and thus, constituted "substantial" conduct within the United States.[14] Applying the effects test, the court held that "in a case such as this, where the challenged transactions involve trading on domestic exchanges, [domestic] harm can be presumed, because the fraud alleged implicates the integrity of the American market."[15]

On interlocutory appeal, Bache Lebanon challenged the finding of subject matter jurisdiction.[16] In a three-part analysis, the Seventh Circuit affirmed the ruling of the district court. First, the court determined that although the language of the CEA and its legislative history do not reveal express congressional intent to extend the provisions of the Act to transnational disputes of the kind at issue, there is no indication that such an extension is proscribed.[17]

Second, the *Tamari* court applied the conduct and effects tests to determine whether subject matter jurisdiction existed under international law.[18] In applying these tests, the court relied on principles derived from analogous cases involving transnational securities transactions.[19] Adopting the conduct analysis of the district court, the Seventh Circuit found that "[t]he transmission of commodity futures orders to the United States would be an essential step in the consummation of any scheme to defraud through futures trading on United States exchanges."[20] Applying the effects test, the court held that in transnational trading on American commodity exchanges, "the pricing and hedging functions of the domestic markets are directly implicated, just as they would be in an entirely domestic trans-

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[12] Black's Law Dictionary describes "churning" in the following manner:

> Churning occurs when a broker, exercising control over the volume and frequency of trades, abuses his customer's confidence for personal gain by initiating transactions that are excessive in view of the character of account and the customer's objectives as expressed to the broker.

BLACK'S LAW DICTIONARY 220 (rev. 5th ed. 1979).

[13] *Tamari*, 730 F.2d at 1105

[14] *Tamari*, 547 F. Supp. at 315.

[15] *Id.* at 313.

[16] *Tamari*, 730 F.2d at 1104. Appeal was brought under 28 U.S.C. § 1292(b) (1982).

[17] *Id.* at 1106-07.

[18] *Id.* at 1107. "When the question instead is whether Congress intended a statute to have extraterritorial application, the analysis of legislative intent becomes intertwined with these principles of foreign relations law." *Id.* at n.11.

[19] *See infra* note 24 and accompanying text.

[20] *Tamari*, 730 F.2d at 1108.

action."[21] The result in such cases is that domestic markets are "artificially influenced," and "public confidence in the markets could be undermined."[22]

Finally, the *Tamari* court determined that the "assert[ion of] jurisdiction under the conduct and effects rationales" was proper, because "the fundamental purpose of the Act is to ensure the integrity of the domestic commodity markets."[23]

The significance of the *Tamari* decision, in particular its alternative holdings that subject matter jurisdiction existed under either the conduct or effects tests, is clear only after an analysis of the cases that precede it.[24] Several earlier decisions indicated that both the conduct and effects tests must be satisfied before subject matter jurisdiction exists,[25] but the weight of authority holds that satisfaction of either test is sufficient to establish jurisdiction.[26]

Federal courts have relied most frequently on the conduct rationale in finding subject matter jurisdiction over transnational fraud cases.[27] An early example of the application of the conduct test is *Leasco Data Processing Equipment Corp. v. Maxwell*.[28] In *Leasco* an American corporation brought an action against predominantly foreign defendants, alleging fraud in the sale of foreign securities on a foreign market. The Second Circuit found that defendants had made misrepresentations and had used telephone and postal services in the United States to advance their fraudulent scheme. Further, it found that the signing of a stock purchase agreement with plaintiff in the United States constituted an "essential link" in the fraudulent plan. This conduct was sufficient to confer jurisdiction.[29]

In *Travis v. Anthes Imperial Ltd.*[30] United States shareholders in the defendant Canadian corporation alleged that they were misled by

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Much of this case law involves litigation under federal securities statutes. But as the court in Mormels v. Girofinance, S.A., 544 F. Supp. 815 (S.D.N.Y. 1982) observed, "[s]ecurities cases and principles are used as persuasive aids to interpretation of the CEA." *Id.* at 817 n.8.

[25] *See, e.g.*, Selzer v. Bank of Bermuda, Ltd., 385 F. Supp. 418 (S.D.N.Y. 1974).

[26] *See e.g.*, Grunenthal GmbH v. Hotz, 712 F.2d 421, 424 (9th Cir. 1983) (conduct test alone); Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 416-17 (8th Cir. 1979) (either test); Straub v. Vaisman Co., 540 F.2d 591, 595 (3d Cir. 1976) (conduct test).

[27] *See, e.g.*, Psimenos v. E.F. Hutton & Co., Inc., 722 F.2d 1041 (2d Cir. 1983); Alemano v. ACLI International Inc., [1982-83 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,898, at 27,894 (S.D.N.Y. 1983); IIT v. Cornfeld, 619 F.2d 909 (2d Cir. 1980); Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5 (2d Cir. 1979); *Continental Grain*, 592 F.2d 409; Securities and Exchange Commission v. Kasser, 548 F.2d 109 (3d Cir.), *cert. denied sub nom.* Churchill Forest Industries, Ltd. v. SEC, 431 U.S. 938 (1977).

[28] 468 F.2d 1326 (2d Cir.1972).

[29] *Id.* at 1335.

[30] 473 F.2d 515 (8th Cir. 1973).

corporate directors into believing that another Canadian corporation would make a tender offer for exchange of securities similar to a previous offer made only to Canadian shareholders. They asserted that they relied on this misrepresentation and held onto the corporate stock to their detriment. Noting numerous communications between plaintiffs and defendant corporation using United States telephone and postal systems and the ultimate exchange of stock in the United States, the court held that the conduct test had been satisfied. "If the incidents listed above are considered in their totality, it is clear that they were of such significance as to subject defendants to the jurisdiction of the trial court."[31]

Bersch v. Drexel Firestone, Inc.[32] and its companion case, *IIT v. Vencap, Ltd.*,[33] further refined the conduct test. *Bersch* was a class action brought by an American plaintiff on behalf of American and foreign purchasers of stock in a Canadian investment corporation, alleging material nondisclosures in a stock offering made outside the United States. Moving away from the more quantitative "totality" application of the conduct test employed in *Travis*, the *Bersch* court established different qualitative guidelines for the determination of substantiality of conduct in the United States depending upon the nationality and residence of the plaintiffs. Whereas resident American plaintiffs need not allege conduct by defendants in the United States of "material importance" in terms of losses suffered, foreign plaintiffs must allege that "acts (or culpable failures to act) within the United States directly caused such losses."[34] In defense of this qualitative division, the court stated:

> When, as here, a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of the United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries.[35]

In *Vencap* plaintiff, a Luxemburg investment trust, brought an action for fraud against defendant Bahamian corporation. Finding that conduct in the United States by defendant's agents was in furtherance of a fraudulent scheme, the court upheld subject matter jurisdiction. The court admonished, however, that its finding of jurisdiction "is limited to the perpetration of fraudulent acts them-

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[31] *Id.* at 526 (footnote omitted). A similar quantitative approach was used in *Kasser*, 548 F.2d 109. This approach seems to be less restrictive than the more qualitative approach used in Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.), *cert. denied sub nom.* Bersch v. Arthur Anderson & Co., 423 U.S. 1018 (1975). The less restrictive approach has been endorsed in Note, *Expanding the Jurisdictional Basis for Transnational Securities Fraud Cases: A Minimal Conduct Approach*, 6 FORD. INT'L L.J. 308, 331 (1983).

[32] 519 F.2d 974 (2d Cir.), *cert denied sub nom.* Bersch v. Arthur Andersen & Co., 423 U.S. 1018 (1975).

[33] 519 F.2d 1001 (2d Cir. 1975).

[34] *Id.* at 993.

[35] *Id.* at 985.

selves and does not extend to mere preparatory activities or the failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries."[36] The policy for allowing jurisdiction in *Vencap* was to prevent the United States from becoming "a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."[37]

In *IIT v. Cornfeld*[38] foreign plaintiffs brought an action against American and foreign defendants alleging fraud in the sale of United States securities not listed on an American exchange. While apparently arranged abroad, the sale was ratified in the United States. Applying the conduct test, the *Cornfeld* court held that a combination of the facts that the issuer of the securities was an American and that the sale was consummated in the United States was sufficient to support subject matter jurisdiction.[39]

Schoenbaum v. Firstbrook[40] is the first case involving transnational securities fraud to adopt the effects rationale for the exercise of subject matter jurisdiction. *Schoenbaum* was a shareholder derivative suit brought by an American shareholder in Banff Oil Ltd. Banff, a Canadian corporation, had common stock registered on both United States and Canadian exchanges. Plaintiff alleged that Banff directors had conspired with two Canadian corporations to sell Banff treasury stock at a market price that defendants knew did not reflect the true value of the stock.[41]

Although the transaction occurred outside the United States, the court held that subject matter jurisdiction existed because of the effects of the transaction in the United States. This holding was based on the belief that Congress must have intended the Securities Exchange Act to have "extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities."[42]

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36 *Vencap*, 519 F.2d at 1018.

37 *Id.* at 1017.

38 619 F.2d 909 (2d Cir. 1980).

39 *Id.* at 918. "None of our cases or any others intimate that foreigners engaging in security purchases in the United States are not entitled to the protection of the antifraud provisions of the securities laws." *Id. See also Continental Grain*, 592 F.2d 409 (use of mails and "instrumentalities of commerce" were in furtherance of fraudulent scheme); *but see Fidenas*, 606 F.2d at 8 (activities in the United States were clearly "secondary or tertiary," where sales of securities by allegedly defrauded plaintiff occurred largely outside the United States); *Mormels*, 544 F. Supp. 815 (foreign plaintiff allegedly defrauded by foreign commodities broker in Costa Rica, with no conduct by the broker in the United States; failure of U.S. broker to inform plaintiff that foreign broker was not its agent was of a "relatively minor" and "secondary" nature.).

40 405 F.2d 200 (2d Cir), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968)(en banc), *cert. denied sub nom.* Manley v. Schoenbaum, 395 U.S. 906 (1969).

41 *Id.* at 204.

42 *Id.* at 206.

The Second Circuit limited *Schoenbaum* in *Leasco*,[43] indicating that while international law may give Congress the power to circumscribe foreign activities that have deleterious effects on United States investors and exchanges, it would be "much too inconclusive . . . to believe that Congress meant to impose rules governing conduct throughout the world in every instance where an American company bought or sold a security."[44] Although the court found jurisdiction in *Leasco* under the conduct rationale because of defendant's conduct in the United States, that court stated that it "doubt[ed] that impact on an American company and its shareholders would suffice to make the statute applicable if the conduct had occurred solely" outside the United States.[45] Thus, without defining all the factors to be considered, the *Leasco* court intimated that not all domestic effects would satisfy the effects test for subject matter jurisdiction in transnational securities cases.

In *Bersch* the Second Circuit attempted to define the types of domestic effects that would be sufficient to confer subject matter jurisdiction. Plaintiffs had argued that the ultimate failure of the Canadian investment corporation, whose stock offering outside the United States was allegedly flawed by material misrepresentations, had led to a loss of confidence in American underwriters, a "steep decline in the purchase of United States securities by foreigners," depression of prices on domestic securities markets due to the resulting sale of United States securities by mutual funds controlled by the Canadian corporation, and an inhibited growth of the offshore investing industry "whereby funds of European investors were channelled into American securities markets."[46] The *Bersch* court rejected the notion that because the collapse of the Canadian corporation had an "adverse effect on this country's general economic interests or on American security prices," the effects test was satisfied. Such generalized effects were held insufficient to confer jurisdiction.[47]

More recently, the conduct and effects tests have been applied to actions arising under the CEA. In *Alemano v. ACLI International*[48] plaintiff, a Paraguayan corporation, employed Poppe & Co., a German corporation, to handle hedging operations on a Chicago commodities market. The employee of Poppe engaged ACLI Germany,

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43 *Leasco*, 468 F.2d at 1334. *See supra* notes 29-30 and accompanying text.

44 *Id.*

45 *Id.* at 1337. It has been suggested that while the *Leasco* court claimed to find jurisdiction based on conduct analysis, it in fact relied on the effects of fraudulent conduct by foreign defendants on American plaintiffs. Note, *The Extraterritorial Application of the Antifraud Provisions of the Securities Acts*, 11 CORNELL INT'L L.J. 137, 143 (1978).

46 *Bersch*, 519 F.2d at 987-88. *See supra* notes 32-35 and accompanying text.

47 *Id.* at 988-89.

48 [1982-83 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,898, at 27,894 (S.D.N.Y. 1983).

a German broker and affiliate of ACLI, an American broker, to arrange the hedging contracts. Limited transactions by ACLI Germany were authorized by plaintiff. Plaintiff alleged that Poppe's employee engaged in unauthorized trading, resulting in substantial losses to plaintiff that "could not have been accomplished without ACLI Germany's negligence or assistance."[49]

Because ACLI, the American affiliate, executed the disputed contracts on United States exchanges and maintained the account and records in the United States, and because the underlying contracts were in American futures, the *Alemano* court held that subject matter jurisdiction existed under the conduct test.[50] The opinion emphasized that "[p]ublic policy dictates that ACLI should not be able to evade the responsibility of complying with the rules and regulations of the Commodity Exchange Act by utilizing affiliates based in foreign countries."[51]

In *Psimenos v. E.F. Hutton & Co.*[52] the Second Circuit found subject matter jurisdiction over a dispute arising under the CEA involving a foreign plaintiff and a domestic commodities broker. The court held that the sending of a misleading brochure from the United States to plaintiff and the "far weightier" execution of commodities contracts on United States commodity markets constituted substantial conduct in the United States warranting a finding of subject matter jurisdiction.[53] The *Psimenos* court concluded that trading on domestic commodities markets was substantial conduct in furtherance of a fraudulent scheme,[54] favorably citing the district court's decision in *Tamari*, and indicating that the "lawfulness" of the parent company's execution of the orders of its foreign subsidiaries "does not cure any prior fraud."[55]

Thus, when *Tamari* was decided, subject matter jurisdiction would exist under the conduct test where the foreign plaintiff could successfully allege that the defendant had engaged in conduct in the United States that was essential to the fraudulent scheme. Generalized effects of the fraudulent conduct within the United States were insufficient to support jurisdiction under the effects test.

The *Tamari* decision is consistent with prior applications of the

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[49] *Id.* at 27,895.

[50] *Id.* at 27,896.

[51] *Id.* at 27,898.

[52] 722 F.2d 1041 (2d Cir. 1983).

[53] *Id.* at 1046.

[54] The *Psimenos* court commented:

> Just as Congress did not want the United States to be used as a base for manufacturing fraudulent securities devices, irrespective of the nationality of the victim, . . . neither did it want United States commodities markets to be used as a base to consummate schemes concocted abroad, particularly when the perpetrators are agents of American corporations.

Id.

[55] *Id.*

conduct test. The execution of commodities contracts on United States exchanges was the consummation of the alleged fraudulent scheme. The wiring of orders by Bache Lebanon to its United States parent, while only a small part of the essentially foreign scheme, was conduct within the United States that was necessary for the execution of the contract. Because this domestic conduct was essential to the success of the alleged fraudulent plan, the substantiality test established in *Vencap* is satisfied.[56]

Further, the *Tamari* facts are analogous to those in *Cornfeld*, in which the issuance of securities by an American corporation and the consummation of the sale of those securities in the United States were dispositive factors in finding subject matter jurisdiction under the conduct test. As indicated by the court in *Psimenos*, securities differ from commodity futures in that "securities often 'can be moved from place to place, bought, sold, traded or borrowed outside a central market,'" whereas, "a commodity futures contract has no lawful existence or being independent of the designated contract market upon which it is traded.'"[57] Thus, like the American-issued securities in *Cornfeld*, the commodity futures contracts in *Tamari* had situs in the United States. Combining this situs with the consummation of the sale in the United States, the finding of subject matter jurisdiction in *Tamari* is consistent with the *Cornfeld* criteria.

In *Tamari*, however, there was some dispute as to who actually sent the commodity futures orders to the United States. While proceeding on the assumption that Bache Lebanon had sent the orders, the court recognized that at trial it might be shown that Bache Lebanon's American parent, not a present party to the suit, actually sent the orders.[58] If this were to be shown, Bache Lebanon would have a stronger argument that it had not engaged in any conduct, substantial or insubstantial, in the United States.

Thus, on these or other facts in similar cases, the Seventh Circuit should have realized the likelihood that unscrupulous foreign brokers might attempt to "launder" their fraudulent foreign deals by having a foreign intermediary send a legitimate order to the United States. This may be the reason for the district court's application of the far more demanding effects test to the Tamari-Bache Lebanon dispute.

The market-distorting effects of the fraudulently procured orders would be the same regardless of who sent the orders. The primary question is whether those market-distorting effects were

[56] *See supra* note 11 and accompanying text.

[57] *Psimenos*, 722 F.2d at 1047 (quoting *In re Wiscope, S.A.*, [1977-80 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,785, at 23,199 (C.F.T.C. Mar. 19, 1979), *vacated on other grounds sub nom.*, *Wiscope S.A. v. Commodity Futures Trading Comm'n*, 604 F.2d 764 (2d Cir. 1979)).

[58] *See supra* note 11 and accompanying text.

sufficiently particularized to meet established effects criteria. *Bersch* specifically rejected as insufficient any generalized adverse effects on the American economy, its investors, or its markets. The effects alleged in *Bersch*, however, did not result from the sales of securities on United States markets; rather they were the result of the collapse of an investment conglomerate whose challenged stock offering took place outside the United States. In *Tamari*, by contrast, the transactions in American futures on American markets, not the failure of a foreign corporate empire, resulted in the market-distorting effects. Thus, as the district court in *Tamari* properly emphasized, whether triggered by domestic conduct or conduct outside the United States, the transactions directly caused harm to domestic markets.[59]

The *Tamari* effects test is thus a modification of the test employed in *Bersch*. The *Tamari* decision concentrates not on the generalized nature of the effects, but on the remoteness of such effects from the alleged fraudulent conduct. While many purely foreign fraudulent schemes may have indirect adverse effects on American markets, every domestically executed commodity futures contract that is executed through fraud may be presumed to have aberrant effects on domestic markets.

The district court decision in *Tamari* emphasized that the effects test must be applied on a case by case basis. It specifically limited its finding of subject matter jurisdiction to "dispute[s] involving the allegedly fraudulent solicitation of orders for American commodities."[60] As indicated in the foregoing discussion, securities, unlike commodity futures contracts, do not derive their legal existence from the markets on which they are traded. Consequently, unlike commodity futures contracts, securities may be traded on a variety of exchanges, both domestic and foreign.

It remains to be seen whether federal courts will extend the *Tamari* effects test to securities fraud cases. Future decisions may continue to apply the *Bersch* effects analysis to securities cases, requiring more than the allegation of generalized harm accepted as sufficient in *Tamari*. Courts might choose to extend the *Tamari* effects test only to those cases that involve securities trading on United States exchanges.[61] Even in these cases, however, where the trading might have occurred on a number of international exchanges, courts might view transactions on the United States exchanges as merely

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[59] *Tamari*, 547 F. Supp. at 313.

[60] *Id.*

[61] See Restatement § 416, which states:

> (1) Any transaction in securities carried out, or intended to be carried out, on a securities market in the United States is subject to United States jurisdiction to prescribe, regardless of the nationality or place of business of the participants in the transaction or of the issuer of the securities.

RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 416 (Tent. Draft No. 2, 1980).

fortuitous events. Were courts to so hold, the onus once again could be put on the plaintiff to particularize detrimental effects in the United States.

A more expansive extension of the *Tamari* effects analysis would be to find subject matter jurisdiction in all cases involving fraudulent transactions in securities that are traded on both United States and foreign markets, regardless of the actual trading site. Assuming intermarket communication, aberrant effects on the prices of internationally traded securities would not vary with the market chosen for the transaction. An extension of jurisdiction would depend on whether the foreign conduct was a sufficiently direct and foreseeable cause of domestic market distortions.[62]

In determining whether Congress intended the CEA to be enforced in suits involving only foreign parties, federal courts must balance those competing policies that would be likely to influence congressional intent. First, due respect should be given to the rights of foreign states to protect their nationals from being subjected to distant legal actions. One commentator convincingly argued that this policy for limiting the scope of subject matter jurisdiction has less force when viewed in terms of the protections afforded foreign parties by the United States legal system in the form of *forum non conveniens* and the minimum contacts requirements of in personam jurisdiction.[63]

Second, the rights of foreign states to regulate the conduct of their own citizens and corporations must be respected. This policy recognizes that the regulatory scheme of one state might conflict with that of another state. The potential for such conflict is exemplified in the growing number of concurrent jurisdiction conflicts involving antitrust laws, where the domestic goals of one nation conflict with the goals of other nations.[64] Although an international consensus on the proper scope of antitrust legislation is unlikely to be achieved, a near consensus exists in the field of commodities and securities fraud. Since fraud is generally recognized as tortious conduct that all nations have an interest in curbing, the potential for interstate jurisdictional conflicts is a less compelling reason for refusing to recognize subject matter jurisdiction.[65]

Finally, there is the overriding interest of the United States in

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[62] *See* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 416(2) & 403(2)(Tent. Draft No. 2, 1980).

[63] Note, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553, 565 (1976).

[64] *See, e.g.*, Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984). *See also* Note, *Thoughts on Extraterritorial Application of the United States Antitrust Law*, 52 FORD. L. REV. 350 (1983).

[65] Comment, *The Transnational Reach of Rule 10b-5*, 121 U. PA. L. REV. 1363, 1399 (1973).

maintaining the integrity of its markets. The uniquely domestic character of commodity futures contracts traded on American exchanges, recognized in both *Psimenos* and *Alemano*, means that every fraud-tainted transaction has a direct, albeit often slight, market distorting effect. Congress designed the CEA to prevent precisely such distortions.

The *Tamari* decision establishes an expansive view of the scope of subject matter jurisdiction where the execution of a commodity futures contract occurs on a domestic market as part of a transnational plan to defraud. The execution of such a contract by a foreign defendant on an American market constitutes the consummation of the fraudulent scheme and is sufficient conduct within the United States to justify the exercise of subject matter jurisdiction under the conduct test. Even where the foreign defendant does not engage in conduct within the United States, if the plan to defraud includes the execution of contracts on American exchanges, the effects of such transactions directly implicate the integrity of the exchanges. These effects, while generalized, may be presumed, and thus, are sufficient to satisfy the effects test. By emphasizing the degree of remoteness of the effects from the fraudulent conduct alleged rather than the generalized nature of the effects, *Tamari* modifies the effects test formula established in *Bersch*.

Future decisions based on the *Tamari* effects test in which the use of American commodities markets is alleged will likely focus on whether the market transactions were a foreseeable part of the plan to defraud, not on whether the harm suffered in the United States was sufficiently particularized. More importantly, *Tamari* may provide an impetus for broadening the scope of subject matter jurisdiction in transnational securities fraud cases in which the integrity of United States exchanges is implicated.

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