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# Extraterritorial Application of the Antifraud Provisions of the Securities Exchange Act of 1934

by  
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## INTRODUCTION

Most of the judicial activity in the area of extraterritorial application of United States securities laws has been concerned with the application of antifraud provisions to the regulation of the affairs of foreign companies and individuals. Accordingly, this Article will focus on the application of the antifraud provisions of section 10(b) of the Securities Exchange Act of 1934, as amended (hereinafter the 1934 Act),<sup>1</sup> and Rule 10b-5 promulgated thereunder.<sup>2</sup>

Since "the starting point in every case involving construction of a statute is the language itself,"<sup>3</sup> and "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction

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1. 15 U.S.C. § 78j(b) (1976). The provision 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 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.

2. 17 C.F.R. § 240.10b-5 (1982). The rule 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,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(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.

3. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

remains,"<sup>4</sup> this Article will first address the statutory framework and legislative history of the 1934 Act and the general perspective of international law on the problem of jurisdiction, with an emphasis on the *Restatement (Second) of Foreign Relations Law of the United States* (hereinafter the *Restatement (Second)*). We will then consider the recent developments in the case law which attempt to delimit the extraterritorial application of the antifraud provisions of the 1934 Act through the use of the so-called "conduct" and "effects" tests. Although it appears highly unlikely that the Congress will act to adopt the American Law Institute's proposed Federal Securities Code (hereinafter the Code) anytime in the near future,<sup>5</sup> the relevant sections of the Code will also be discussed in analyzing and criticizing the case law.

## I

### STATUTORY FRAMEWORK AND LEGISLATIVE HISTORY OF THE 1934 ACT

The statutory framework of the 1934 Act clearly gives the federal courts subject-matter jurisdiction over extraterritorial securities transactions. Section 27 of the 1934 Act provides that the federal courts "shall have exclusive jurisdiction of violations of [the Act] or the rules and regulations thereunder."<sup>6</sup> Section 2 provides, in relevant part:

[T]ransactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto . . . and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect *interstate commerce*, . . . and to insure the maintenance of fair and honest markets in such transactions.<sup>7</sup>

Since, according to section 3(a)(17) of the 1934 Act, "[t]he term 'interstate commerce' means trade, commerce, transportation, or communication among the several States, or *between any foreign country and any State*,"<sup>8</sup> it is reasonable to conclude that where fraud in extraterritorial transactions is at issue, the 1934 Act confers subject-matter jurisdiction on the federal courts.<sup>9</sup>

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4. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *accord*, *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) [hereinafter cited as *Alcoa*]; *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972) [hereinafter cited as *Leasco*].

5. R. JENNINGS & H. MARSH, *SECURITIES REGULATION, CASES AND MATERIALS*, at xvii (5th ed. 1982).

6. 15 U.S.C. § 78bb (1976).

7. 15 U.S.C. § 78b (1976) (emphasis added).

8. 15 U.S.C. § 78c(a)(17) (1976) (emphasis added).

9. In *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), the Supreme Court established the presumption that federal law applies only within the territorial limits of the United States; this idea has since been followed by United States courts. With respect to the securities laws, in *Schoenbaum v. Firstbrook*, 268 F. Supp. 385 (S.D.N.Y. 1967),

At the time of the enactment of the securities laws, Congress was primarily concerned with the domestic conditions of securities markets. However, in light of the substantial increase in the number of securities transactions involving persons or events linked with foreign countries, the extraterritorial application of the antifraud provisions of the 1934 Act has become essential to protect domestic markets and domestic investors. Without such extraterritorial application, the remedial goals that the securities laws were designed to effectuate would be undermined.

This conclusion is supported by the fact that, in 1964, section 12(g) was added to the 1934 Act, essentially requiring *all* corporations which (i) are engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded by use of the mails or any means or instrumentality of interstate commerce, and (ii) have total assets exceeding \$3,000,000, to register under the 1934 Act each class of equity security held of record by five hundred or more persons.<sup>10</sup> Section 12(g) is given a presumptively extraterritorial application by Congress, to be modified only by the Securities and Exchange Commission (hereinafter the Commission). If the antifraud provisions of the 1934 Act were not applied extraterritorially, an anomaly would result such that some corporations that are required to register under section 12(g) would be completely out of reach of the antifraud provisions of the 1934 Act with respect to their extraterritorial transactions.

Apart from such presumptions, the securities laws themselves offer little explicit guidance as to their transnational applicability. One of the few provisions of the existing securities laws expressly recognizing that securities transactions exist outside of, as well as within, the United States is section 30(b) of the 1934 Act,<sup>11</sup> which exempts from the provisions of the Act persons who conduct securities transactions outside of U.S. jurisdiction.<sup>12</sup> The Commission has never adopted rules under section 30(b), however, nor has it issued any rules or guidelines clarifying the extent of the extraterritorial application of the antifraud provisions of section 10(b) and Rule 10b-5.

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*aff'd*, 405 F.2d 200 (2d Cir. 1968), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969), the district court did not recognize the express intent of the Congress giving the Act extraterritorial application. On appeal, the Second Circuit reversed the decision, holding that the Act did apply to extraterritorial transactions, "at least when the transactions involve stock registered and listed on a national securities exchange, and are detrimental to the interests of American investors." 405 F.2d at 208.

10. 15 U.S.C. § 781(g) (1976).

11. 15 U.S.C. § 78dd(b) (1976). This section provides:

The provisions of [the Act] 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 [the Act].

12. *Schoenbaum*, 405 F.2d at 207-08.

The task of filling the gap has been placed exclusively on the courts.<sup>13</sup> The courts have construed the exemption of section 30 narrowly. For example, in *Schoenbaum v. Firstbrook*, the court concluded that this provision exempted from the transnational reach of the 1934 Act only those who "transact a business in securities" through foreign securities markets, not those who undertake isolated transactions.<sup>14</sup>

It is well established in the American legal system that the jurisdictional principles of international law will have no bearing on the exercise of jurisdiction by the legislature or the courts, unless embodied in a properly enacted American statute.<sup>15</sup> Congress may, in enacting such a statute, extend jurisdiction beyond the limitations contemplated by international law provided it is consistent with the United States Constitution,<sup>16</sup> and even such enactments as violate international law will retain their force within the United States' legal system.<sup>17</sup> In the absence of an explicit statutory direction, however, the courts will not assume that Congress intended to violate the jurisdictional principles of international law.<sup>18</sup> Thus, the jurisdictional principles of international law must first be examined in order to ascertain the boundaries of the proper extraterritorial application of the United States' securities laws.

## II

### JURISDICTION IN INTERNATIONAL LAW

Jurisdiction, as the term is used in international law, refers to the capacity of a State under international law to prescribe or to enforce a rule of law.<sup>19</sup> This jurisdiction is determined by a body of law external to the State and the State may not extend its jurisdiction beyond that accorded it by international law.<sup>20</sup>

The bases of jurisdiction in international law are traditionally divided into five categories: (i) nationality jurisdiction; (ii) territorial jurisdiction; (iii) passive personality jurisdiction; (iv) security jurisdiction; and (v) uni-

13. Comment, *The Transnational Reach of Rule 10b-5*, 121 U. PA. L. REV. 1363, 1365 (1973).

14. 405 F.2d 200, 207 (2d Cir. 1968). The court rejected the conclusion of Ferraioli v. Cantor [1964-66 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,615 (S.D.N.Y. Dec. 28, 1965), that Congress, since it had exempted foreign business in securities, intended to exempt isolated transactions.

15. Note, *Extraterritorial Application of the Federal Securities Code: An Examination of the Role of International Law in American Courts*, 11 VAND. J. TRANSNAT'L L. 711, 726 (1978) [hereinafter cited as *Extraterritorial Application of the Federal Securities Code*].

16. See *Alcoa*, 148 F.2d at 443; *Leasco*, 468 F.2d at 1334. See generally Note, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553, 554 (1976).

17. *The Transnational Reach of Rule 10b-5*, *supra* note 13, at 1369.

18. See cases cited *supra* note 4.

19. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 6 (1965) [hereinafter cited as RESTATEMENT (SECOND)].

20. *Extraterritorial Application of the Federal Securities Code*, *supra* note 15, at 719.

versal jurisdiction.<sup>21</sup> The categories applicable to the regulation of economic activities are nationality, territorial, and passive personality jurisdiction. The United States has been reluctant to use nationality as the sole basis for the exercise of its jurisdiction, however, and passive personality jurisdiction is generally no longer recognized by the community of nations.<sup>22</sup>

For this reason, territorial jurisdiction is the principle most often relied upon by United States courts in asserting jurisdiction in transnational cases. The principle of territorial jurisdiction provides that a State has jurisdiction to prescribe rules governing conduct within its territory, regardless of the residence or nationality of those persons over whom jurisdiction is asserted.<sup>23</sup> The United States recognizes two variations of the territorial principle that give rise to extraterritorial jurisdiction. The "conduct" test<sup>24</sup> has been developed to establish the jurisdiction of United States courts over conduct occurring within the United States, but having effects abroad. Conversely, the "effects" test<sup>25</sup> confers jurisdiction on United States courts over conduct occurring outside the United States but causing effects within the United States.

While some courts have indicated that both tests must be satisfied in

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21. *Id.* at 720; RESTATEMENT (SECOND) § 10; Marcuss & Richard, *Extraterritorial Jurisdiction in United States Trade Law: The Need for a Consistent Theory*, 20 COLUM. J. TRANS-NAT'L L. 439, 440-47 (1981); Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 152-69, 190-212 (1972-73).

22. *Extraterritorial Application of the Federal Securities Code*, *supra* note 15, at 720-21, 725; Hacker & Rotunda, *The Extraterritorial Regulation of Foreign Business under the U.S. Securities Laws*, 59 N.C.L. REV. 643, 646-47 (1981). See also RESTATEMENT (SECOND) § 30(2), which provides:

A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.

23. RESTATEMENT (SECOND) §§ 10(a), 17 comment a.

24. RESTATEMENT (SECOND) § 17 states:

A state has jurisdiction to prescribe a rule of law

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

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

25. RESTATEMENT (SECOND) § 18 states:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

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

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

order to sustain subject-matter jurisdiction,<sup>26</sup> the weight of authority holds that either test is sufficient to establish jurisdiction.<sup>27</sup> Accordingly, each principle is hereinafter considered as an independent basis for the extraterritorial application of the federal securities laws. Before proceeding to a detailed analysis of the two principles, however, it will be useful to consider several general problems which arise in connection with the attempt of courts to enforce U.S. securities laws extraterritorially.

#### A. *The Restatement and Antitrust Case Law*

United States courts often refer to the *Restatement (Second)* as an accepted summary of the applicable international law in the area of extraterritorial jurisdiction.<sup>28</sup> However, the *Restatement (Second)*, especially section 18 which deals with jurisdiction, has been broadly criticized by the international community for being inconsistent with international law as recognized by the community of nations.<sup>29</sup> Section 18 of the *Restatement (Second)*, as well as the general United States law of extraterritorial jurisdiction, is primarily drawn from issues of jurisdiction arising under federal antitrust laws.<sup>30</sup> Thus, it is necessary to examine the development of case law under the antitrust laws as well as the securities laws in order to determine the validity of the *Restatement (Second)* approach to extraterritorial jurisdiction so heavily utilized by United States courts.

26. *SEC v. Kasser*, 391 F. Supp. 1167, 1175 (D.N.J. 1975), *rev'd*, 548 F.2d 109 (3d Cir. 1977), *cert. denied*, 431 U.S. 938 (1977); *Selzer v. Bank of Bermuda, Ltd.*, 385 F. Supp. 415, 418 (S.D.N.Y. 1974).

27. *Continental Grain (Australia) Pty., Ltd. v. Pacific Oilseeds Inc.*, 592 F.2d 409, 417 (8th Cir. 1979); *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 547 F. Supp. 309, 311 (N.D. Ill. 1982) (jurisdiction may be established by meeting either test); *Leasco*, 468 F.2d at 1334; *Straub v. Vaisman & Co.*, 540 F.2d 591, 595 (3d Cir. 1976) (conduct alone sufficient from a jurisdictional standpoint). *See also* FEDERAL SECURITIES CODE §§ 1905(a)(1)(D)(i), 1905(a)(1)(D)(ii) (1980) (adopting both tests as independent bases for jurisdiction).

28. *See, e.g., Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985, 988 & 989 n.35 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975) [hereinafter cited as *Bersch*]; *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) [hereinafter cited as *Vencap*]; *Leasco*, 468 F.2d at 1333. *See generally, American Adjudication of Transnational Securities Fraud*, *supra* note 16, at 554; *Curtis, The Extraterritorial Application of The Federal Securities Code: A Further Analysis*, 9 CONN. L. REV. 67, 75 (1976).

29. *See, e.g., Ellis, Extraterritorial Application of Antitrust Legislation*, 17 NETH. INT'L L. REV. 51, 58-59 (1970); The Committee on International Law, Committee Reports, *The 1964 Amendments to the Securities Exchange Act of 1934 and the Proposed Securities and Exchange Commission Rules—International Law Aspects*, 21 REC. A.B. CITY N.Y. 240, 248-49 (1966) [hereinafter cited as *The Committee on International Law, Committee Reports*]; *Riedweg, The Extra-Territorial Application of Restrictive Trade Legislation—Jurisdiction and International Law*, 51st International Law Association [ILA] Conference Report 357, 361 (1964). *But see Metzger, The Restatement of the Foreign Relations Law of the United States: Bases and Conflicts of Jurisdiction*, 41 N.Y.U. L. REV. 7, 15 (1966) (stating that RESTATEMENT (SECOND) § 18 is too restrictive and is unsupported by the authorities). Many of these objections are addressed in the ALI RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Tentative Draft No. 2, March 27, 1981) [hereinafter cited as RESTATEMENT (REVISED)]. *See infra* note 128.

30. *Norton, United States Securities Laws: A Transnational Perspective*, 7 ANGLO-AM. L. REV. 81, 94 (1978).

In *The Schooner Exchange v. McFaddon*,<sup>31</sup> the U.S. Supreme Court established the presumption that federal law applies only within the territorial limits of the United States. This presumption was the basis of *American Banana Co. v. United Fruit Co.*,<sup>32</sup> in which the Supreme Court refused to apply the Sherman Act to conduct in restraint of trade where all such conduct occurred outside the territorial limits of the United States. However, since *American Banana* involved specific acts by foreign States, and the complaint contained no allegations of activities within the United States or effects upon United States imports or commerce, subsequent decisions dealing with the question of the extraterritorial application of federal antitrust laws have easily distinguished the *American Banana* case.<sup>33</sup> Nevertheless, prior to *United States v. Aluminum Co. of America* (hereinafter *Alcoa*),<sup>34</sup> United States courts would exercise jurisdiction over foreign enterprises if, and only if, there was significant illegal conduct within the United States by the foreign party, or if the illegal conduct was pursuant to an agreement with a United States concern, which agreement was designed directly to affect United States commerce.<sup>35</sup>

In *Alcoa*, six foreign aluminum ingot producers organized a Swiss corporation called "Alliance", the purpose of which was to fix production quotas for aluminum ingots. According to the findings of fact made by the lower court, *Alcoa* was not a party to the agreement. In holding that the Sherman Act was applicable, even though Alliance was organized abroad by foreign companies with no direct U.S. involvement, Judge Learned Hand emphasized that the agreement had a direct effect upon the United States and its foreign commerce and that the agreement was intended to affect United States domestic and foreign commerce.<sup>36</sup>

Section 18(b) of the *Restatement (Second)* is directly drawn from the *Alcoa* decision.<sup>37</sup> It is clear, however, from the language of the opinion, that Judge Hand was concerned not with international law, but with congressional intent:

We 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 our own Constitution permitted it to do so; as a court of the United States, we cannot look beyond our own law.<sup>38</sup>

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31. 11 U.S. (7 Cranch) 116 (1812). See *supra* note 9.

32. 213 U.S. 347 (1909).

33. See, e.g., *U.S. v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *U.S. v. Pacific & Arctic Co.*, 228 U.S. 87 (1913); *Strassheim v. Daily*, 221 U.S. 280 (1911); *U.S. v. American Tobacco*, 221 U.S. 106 (1911). See generally Norton, *Extraterritorial Jurisdiction of U.S. Antitrust and Securities Laws*, 28 INT'L & COMP. L.Q. 575, 577-78 (1979).

34. 148 F.2d 416.

35. Norton, *supra* note 33, at 578-79.

36. *Alcoa*, 148 F.2d at 443-44.

37. RESTATEMENT (SECOND) § 18, n.2.

38. *Alcoa*, 148 F.2d at 443.

Although the *Alcoa* court made passing reference to international law,<sup>39</sup> its understanding of international law has itself been the subject of strong criticism by many commentators, particularly in Europe.<sup>40</sup> It is doubtful, therefore, that reliance in the *Restatement (Second)* on *Alcoa* for the section 18(b) rule of jurisdiction in international law is appropriate.<sup>41</sup>

The other decision on which the *Restatement (Second)* largely relied is the *Lotus* case,<sup>42</sup> which has almost no precedent or following in international law. In the *Lotus* case, an action was brought in a Turkish court against the French officer of a French vessel that had unintentionally struck a Turkish vessel on the high seas, causing it to sink. The court recognized Turkey's jurisdiction over the French officer on the ground of the "effects" test, finding:

[I]t is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offenses, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, and more especially its effects, have taken place there.<sup>43</sup>

The universally recognized principle of territorial jurisdiction grants a State jurisdiction over acts generally recognized as criminal, provided that a constituent element of the crime occurred in that State. But the Court's consideration of effects arising from conduct, which might give rise to jurisdiction over the criminal offense, is a doubtful basis for the regulation of foreign commerce.<sup>44</sup>

In the last decade or so, the European Community, which, like the U.S., has a highly developed and strict anticompetition legislation, has been confronted with the question of its jurisdiction over anticompetitive conduct occurring wholly outside the Common Market. In the case of *Imperial Chemical Industries, Ltd. and others v. Commission of the European Communities*,<sup>45</sup> the Commission of the European Communities had imposed a fine on companies domiciled outside the Common Market for violation of article 85(1) of the Treaty of Rome,<sup>46</sup> as a result of their concerted increases in

39. "Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitation customarily observed by nations upon the exercise of their powers." *Id.*

40. See articles cited *supra* note 29.

41. The Committee on International Law, Committee Reports, *supra* note 29, at 249.

42. Case of the S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 9 (Judgment of September 7). See RESTATEMENT (SECOND) § 18 n.1.

43. 1927 P.C.I.J., ser. A, No. 9, at 23.

44. *Extraterritorial Application of the Federal Securities Code*, *supra* note 15, at 723; Riedweg, *supra* note 29, at 370; Committee on International Law, Committee Reports, *supra* note 29, at 248; Ellis, *supra* note 29, at 60.

45. 11 Common Mkt. L.R. 557 (1972).

46. Treaty Establishing the European Economic Communities, Mar. 25, 1957, 295 U.N.T.S. 2 (German). The official English version is reprinted in 1979 Gr. Brit. T.S. No. 15 (Cmd. 7460). Article 85(1) provides:

the prices of dyestuffs sold within the Common Market. On appeal to the European Court of Justice, the Advocate-General claimed subject-matter jurisdiction largely relying on the "effects" test promulgated under the *Restatement (Second)*. The Court, however, affirmed the decision on the Commission's alternative claim of jurisdiction based on a parent-subsidiary relationship (the "unity of group" theory) avoiding entirely the consideration of the "effects" test. It is quite evident that the Court was not willing to adopt the full scope of the "effects" doctrine as set forth in section 18 of the *Restatement (Second)*,<sup>47</sup> and it seems that both the Commission and the European Court of Justice will continue to favor the "unity of group" theory over the "effects" doctrine of extraterritorial jurisdiction.<sup>48</sup>

In light of extraterritorial regulation practiced by the European Communities and in other countries, especially Germany, the United States position on extraterritorial jurisdiction is beginning to appear less anomalous. It should be noted, however, that with the exceptions of Germany's Act against Restraints of Competition<sup>49</sup> and the doubtful *Lotus* case, there has been no instance where extraterritorial jurisdiction was based solely on the effects within the territory of conduct occurring outside.<sup>50</sup> Thus, it appears that section 18 of the *Restatement (Second)* does not necessarily represent

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The following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the Common Market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

47. Note, *Extraterritorial Application of Antitrust Legislation in the Common Market: The Dyestuffs Cases (European Court of Justice, 1972)*, 12 COLUM. J. TRANSNAT'L L. 169, 178 (1973).

48. See, e.g., *United Brands Co. v. Commission of the European Communities*, 1978 E. Comm. Ct. J. Rep. 207, 21 Common Mkt. L.R. 429; *Instituto Chemioterapico Italiano SpA & Commercial Solvents Corp. v. Commission of the European Communities*, 1974 E. Comm. Ct. J. Rep. 223, 13 Common Mkt. L.R. 309; *Europemballage Corp. & Continental Can Co. v. Commission of the European Communities*, 1973 E. Comm. Ct. J. Rep. 215, 12 Common Mkt. L.R. 199. See generally Norton, *The European Court of Justice Judgment in United Brands: Extraterritorial Jurisdiction and Abuse of Dominant Position*, 8 DEN. J. INT'L L. & POL'Y 379, 413 (1979); Jacobs, *Extraterritorial Application of Competition Laws: An English View*, 13 INT'L LAW. 645, 654 (1979).

49. II GESETZGEGEN WETTBEWERBSBESCHRÄU-KÜNGEN [GWB] § 98, reprinted in H. SCHÖNFELDER, *GESETZGEGEN WETTBEWERBSBESCHRÄU-KÜNGEN UND EUROPÄISCHES KARTELLSRECHT: GEMEINSCHAFTSKOMMENTAR* (1980). See also *Beschluss des Bkarta* of February 24, 1982, BG, 691100-u-49/81, reversed, July 1, 1983, Kat. 10/82 ("Morris-Rothmans").

50. Jacobs, *supra* note 48, at 653.

international law as fully accepted by the international community. The U.S. federal courts' reliance on the *Restatement (Second)*<sup>51</sup> must therefore be reviewed in this context.

*B. Court's Discretion in Exercising Extraterritorial Jurisdiction*

The principles of international law establish only the outer limits of section 10(b)'s transnational reach, and U.S. courts remain free to find that Congress intended to stop short of these limits.<sup>52</sup> The question to be resolved by a U.S. court with respect to any particular statute is whether Congress in fact intended the provisions of the statute to be applied to the activities of foreign persons to the fullest extent allowed by international law.<sup>53</sup> Since Congress did not specifically address this question in drafting section 10(b),<sup>54</sup> U.S. courts have been forced to consider various factors and to speculate in each fact situation what Congress would have done if it had thought about the problem. Courts and commentators have noted as relevant factors: (i) the subject matter of the claim; (ii) the effects of an activity on national interests; (iii) the effects of the determination of extraterritorial legislative jurisdiction on international comity and enforcement of judgments; (iv) the interest of the foreign State in regulating the activity; (v) the actor's intent to affect American interests; (vi) the possible evasion of American law through transnational transactions; (vii) the nationality of the parties; and (viii) judicial economy.<sup>55</sup> In fact, narrow restrictions derived from an analysis of the United States interests involved in a controversy have been applied in Rule 10b-5 cases.<sup>56</sup> Thus, it becomes important to examine the various considerations discussed in each case as well as the limitations of international law in order to understand and analyze the recent development of case law.

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51. See cases cited *supra* note 28.

52. See *Leasco*, 468 F.2d at 1334.

53. Hacker & Rotunda, *supra* note 22, at 648.

54. See *Bersch*, 519 F.2d at 985, 993 (The legislative history of section 10(b) of the 1934 Act does not consider this issue); *Vencap*, 519 F.2d at 1017; *Leasco*, 468 F.2d at 1336-37.

55. Note, *Conflict of Laws—Extraterritorial Application of the Securities Exchange Act of 1934—“Substantial Conduct” as a Determinative Basis of Jurisdiction to Adjudicate*, 20 WAYNE L. REV. 167, 170 (1973); Comment, *Subject Matter Jurisdiction in Transnational Securities Fraud Cases*, 17 B.C. INDUS. & COMM. L. REV. 413, 422 (1976).

56. See, e.g., *Leasco*, 468 F.2d at 1335; *Bersch*, 519 F.2d at 993; *Vencap*, 519 F.2d at 1016. See *The Transnational Reach of Rule 10b-5*, *supra* note 13, at 1370 (“The court’s opinion in *Leasco* represents, in part, an attempt to impose limits on the reach of section 10(b) short of the boundaries established by international law.”).

### III SUBJECTIVE TERRITORIALITY: THE "CONDUCT" TEST

#### A. *The Leasco Case*

The first case to analyze the use of the subjective principle of jurisdiction, or "conduct test", in interpreting the securities laws was *Leasco Data Processing Equipment Corp. v. Maxwell*.<sup>57</sup> In that case, a series of alleged misrepresentations regarding an English corporation were made in the United States to officers of a publicly-held U.S. corporation that was being induced to purchase the British corporation's stock at a fraudulently high price.

Other misrepresentations were made in England and the purchase of the shares was concluded there. Having found substantial conduct in the United States in the form of communications from England and in the meetings in New York,<sup>58</sup> and characterizing this conduct as an essential link in the fraudulent scheme,<sup>59</sup> the court found that the "conduct" test of the *Restatement (Second)* conferred jurisdiction over such activities.<sup>60</sup> By requiring that substantial conduct within the United States be constituent elements of the offense before allowing the federal courts to properly assert jurisdiction in transnational matters, the *Leasco* court articulated the judicial standards for the application of subject-matter jurisdiction.<sup>61</sup>

Having concluded that principles of international law did not preclude the application of section 10(b), the *Leasco* court turned to the question of congressional intent, asking, "[w]hether, if Congress had thought about the point, it would not have wished to protect an American investor if a foreigner comes to the United States and fraudulently induces him to purchase foreign securities abroad—a purchase which its words can fairly be held to embrace."<sup>62</sup> Therefore, it should be understood that the *Leasco* court sought to establish some limitations short of those limitations imposed by international law.

The court indicated in dictum, however, that under the securities laws, the international law requirements for a cause of action are satisfied by proof of the use of the mails or facilities of interstate commerce within the

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57. 468 F.2d 1326 (2d Cir. 1972).

58. *Id.* at 1334.

59. *Id.* at 1334-35. The court relied on the opinion of the United States Supreme Court in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 385 (1970), for the position that the conduct must be an "essential link" in the consummation of the sale.

60. 468 F.2d at 1335. In so interpreting the *Restatement (Second)*, the court relied on the following example, "X and Y are in State A. X makes a misrepresentation to Y. X and Y go to State B. Solely because of the prior misrepresentation, Y delivers money to X. A has jurisdiction to prescribe a criminal penalty for obtaining money by false pretenses." *RESTATEMENT (SECOND)* § 17, illustration 2 (1962).

61. 468 F.2d at 1335.

62. *Id.* at 1337. *See also* *IIT v. Vencap*, 519 F.2d at 1018 ("the line has to be drawn somewhere if the securities laws are not to apply in every instance where something has happened in the United States.").

United States.<sup>63</sup> It seems clear that if this argument were accepted, courts in this country would have jurisdiction over any violation of section 10(b) or Rule 10b-5 wherever it occurs, since the violation of these provisions itself requires some use of interstate facilities.<sup>64</sup> However, in light of the current status of international law recognized by the community of nations, it is highly doubtful that section 17 of the *Restatement (Second)* should be read so broadly that the mere use of interstate commerce facilities within a State triggers the jurisdiction of the State when the actual substance of the fraud occurs outside the State.<sup>65</sup>

Thus, it appears that the *Leasco* case does not support the notion that the use of United States mails alone was sufficient to exercise jurisdiction over the activities outside the United States. Statements to that effect are contained in two cases,<sup>66</sup> but no court has held that the use of the mails for an incidental purpose and not to send a fraudulent document to this country—by itself—subjects an international securities transaction to Rule 10b-5.<sup>67</sup>

### B. The Bersch/Vencap Cases

To date, the most thorough consideration of the “conduct” test has been in the companion cases of *Bersch v. Drexel Firestone, Inc.*,<sup>68</sup> and *IIT v. Vencap, Ltd.*<sup>69</sup> *Bersch* involved a class action brought on behalf of persons who had purchased common stock in Investors Overseas Services, Ltd.

63. 468 F.2d at 1335.

64. See Note, *Extraterritorial Application of Section 10(b) and Rule 10b-5*, 34 OHIO ST. L.J. 342, 351 (1973).

65. See *Subject Matter Jurisdiction in Transnational Securities Fraud Cases*, *supra* note 55, at 421; Riedweg, *supra* note 29, at 361. See also 55th ILA Conference Report, Resolution on the Extraterritorial Application of Restrictive Trade Legislation, art. 3, at 139 (1972), which states:

(1) A State has jurisdiction to prescribe rules governing conduct of an alien outside its territory provided —

(a) part of the conduct being a constituent element of the offense occurs within the territory; and

(b) acts or omissions occurring outside the territory are constituent elements of the same offense.

(2) Whereas municipal law is the sole authority for the purpose of ascertaining the constituent elements of a particular offense, international law retains a residual but overriding authority to specify what is or is not capable of being a constituent element for the purpose of determining jurisdictional competence.

66. *Continental Grain*, 592 F.2d at 415; *SEC v. Gulf Intercontinental Fin. Corp.*, 223 F. Supp. 987, 995 (S.D. Fla. 1963).

67. See generally, Buschman, *Antifraud and the Water's Edge: Transnational Transactions, Rule 10b-5 and the Federal Securities Code*, 7 SEC. REG. L. J. 232, 251 (1979). In *SEC v. United Financial Group, Inc.*, 474 F.2d 354, 357 (9th Cir. 1973), the court refused to base jurisdiction on the mere use of facilities of interstate commerce, but found other conduct of the defendants sufficient to support the exercise of jurisdiction. See also *Extraterritorial Application of the Federal Securities Code*, *supra* note 15, at 729; *Extraterritorial Application of Section 10(b) and Rule 10b-5*, *supra* note 64, at 351-52.

68. 519 F.2d 974 (2d Cir. 1975).

69. 519 F.2d 1001 (2d Cir. 1975).

(IOS), a Canadian corporation, in a public offering abroad, pursuant to an allegedly misleading prospectus. The complaint alleged several violations based on common law fraud and the federal securities laws including section 10(b) and Rule 10b-5. Judge Friendly, writing for the Second Circuit, formulated the most comprehensive test to date of the application of the antifraud provisions of the 1934 Act to extraterritorial transactions in foreign securities. He concluded that the antifraud provisions of the federal securities laws:

(1) Apply to losses from sales of securities to Americans resident in the United States whether or not the act (or culpable failure to act) of material importance occurred in this country; and

(2) Apply to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failure to act) of material importance in the United States have significantly contributed thereto; but

(3) Do not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failure to act) within the United States directly caused such losses.<sup>70</sup>

In *Vencap*, decided the same day as *Bersch*, the Second Circuit determined, at least with respect to a United States defendant, that perpetration of the fraudulent acts within the United States against foreigners did confer jurisdiction.<sup>71</sup> The court stated that it did not believe that "Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."<sup>72</sup> The court further emphasized, however, that jurisdiction could not be based on mere "preparatory activities" within the United States with respect to such foreigners.

The result of *Bersch* and *Vencap* is that courts have drawn a line between American plaintiffs resident abroad and foreign plaintiffs. The American nonresidents were required to show only that "acts . . . of material importance" occurred in the United States, while the foreigners had to show the occurrence of actual fraudulent acts. This distinction was given content by reference to the defendants' "merely preparatory activities" in the United States, which were held sufficient for jurisdiction over the American nonresidents' claims but insufficient with regard to the foreigners' claims.<sup>73</sup> Thus, the *Bersch* and *Vencap* decisions indicate that domestic activities that comprise an essential element of the violation (for example, the misrepresentation, the sale, the supervision of the fraud, or the consummation) will be classified as substantial. At the same time, activities not meeting this standard, but which are nevertheless related to the fraud, such as meetings with counsel or government authorities, are deemed preparatory.<sup>74</sup>

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70. *Bersch*, 519 F.2d at 993.

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

72. *Id.* at 1017.

73. Note, *American Adjudication of Transnational Securities Fraud*, *supra* note 16, at 569.

74. Comment, *Subject Matter Jurisdiction in Transnational Securities Fraud Cases*, *supra*

As a result, a finding of substantial domestic activity in a foreign fraud establishes subject-matter jurisdiction regardless of the existence of a detrimental domestic impact. On the other hand, when the conduct within the United States is found to be merely preparatory in such a transaction, the courts will exercise jurisdiction only if the fraud produces a detrimental effect in the United States. However, in cases involving at least preparatory domestic acts, the court assumes jurisdictional authority where the effect of the conduct is far more attenuated than in cases where there is no finding of such acts.<sup>75</sup>

### C. Subsequent Cases

Subsequent decisions followed the *Bersch/Vencap* requirement that a foreigner demonstrate fraudulent conduct within the United States which directly causes losses in order to establish jurisdiction under Rule 10b-5.<sup>76</sup> In *SEC v. Kasser*,<sup>77</sup> however, the Third Circuit liberalized these jurisdictional standards. *Kasser* involved an alleged scheme to defraud a Canadian provincial government development fund. Numerous acts in connection with the alleged fraud were committed by the defendants within the United States. In light of the total absence of effects in the United States, however, the Third Circuit replaced the qualitative distinction between "fraudulent" and "preparatory" acts under *Bersch* with a more quantitative analysis of the defendants' various domestic activities, finding these activities to be substantial. Notwithstanding the legal analysis, the Third Circuit in *Kasser* made it clear that its decision was essentially one based upon policy considerations.<sup>78</sup>

In *Continental Grain (Australia) Pty., Ltd. v. Pacific Oilseeds, Inc.*,<sup>79</sup> the Eighth Circuit interpreted *Kasser* in the broadest context possible. In *Continental Grain*, an Australian corporation purchased stock in another Australian corporation from three vendors, two of whom were California residents. The vendors used the United States mails and telephone system to discuss the proposed purchase of the corporation and the problems concerning a ten year license agreement to supply seed stock, and decided not to inform the purchaser of the supplier's intentions upon the termination of such agreement. The contract of sale was signed in California, but the closing was made in Australia. The Eighth Circuit practically conceded that the given situation could not fall within the exception stated in the third

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note 55, at 429.

75. *Id.*

76. *See, e.g.,* *Straub v. Vaisman & Co.*, 540 F.2d 591 (3d Cir. 1976); *F.O.F. Proprietary Funds, Ltd. v. Arthur Young & Co.*, 400 F. Supp. 1219 (S.D.N.Y. 1975).

77. 548 F.2d 109 (3d Cir. 1977), *cert. denied*, 431 U.S. 938 (1977).

78. *Id.* at 116. *See generally* Norton, *supra* note 33, at 593.

79. 592 F.2d 409 (8th Cir. 1979).

category of foreign losses delineated in *Bersch*; the court nevertheless granted jurisdiction by relying upon the policy decision in *Kasser* that broadly extended the boundaries of subject-matter jurisdiction.<sup>80</sup>

In *IIT v. Cornfeld*,<sup>81</sup> the plaintiff, IIT, was organized under the laws of Luxembourg and comprised of investors worldwide. IIT was managed by a Luxembourg corporation, a subsidiary of Investors Overseas Services, Ltd. (IOS). Upon IIT's bankruptcy, the liquidators brought a derivative action on behalf of the corporation, attributing the company's losses to a massive conspiracy between IOS, the subsidiary, and one of its directors. Having found that some purchases of American securities were consummated entirely within the United States,<sup>82</sup> Judge Friendly reiterated the *Bersch/Vencap* requirements, stating that the transaction was sufficient to support subject-matter jurisdiction even though "the purchaser was a foreigner and the orders were transmitted from abroad."<sup>83</sup>

#### D. Criticism of the "Conduct" Test

*Leasco* and the cases that followed tried to articulate some limitations on the extraterritorial exercise of subject-matter jurisdiction. The limits thus established through the exercise of judicial restraint fairly approximate the jurisdictional principles of international law.<sup>84</sup> This concurrence has not been reached by considerations of international law itself, but rather through attempts to determine Congressional intent regarding application of United States securities laws beyond American borders.<sup>85</sup> The *Leasco* case required that the substantial conduct occurring in this country upon which jurisdiction was based be a constituent element of the offense, and the holding in *Bersch/Vencap* required actual fraudulent conduct within the United States as a necessary element, at least with respect to foreign plaintiffs.

*Kasser*<sup>86</sup> and *Continental Grain*,<sup>87</sup> however, indicated a tendency on the part of the federal courts to find any conduct in the United States, no matter how inconsequential, sufficient to support jurisdiction.<sup>88</sup> These

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80. *Id.* at 418-19.

81. 619 F.2d 909 (2d Cir. 1980).

82. *Id.* at 918.

83. *Id.*

84. Note, *Extraterritorial Application of the Federal Securities Code*, *supra* note 15, at 734.

85. The *Bersch* court, 519 F.2d 974, 985, 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 United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries.

*See also* *Fidenas A.G. v. Compagnie Internationale Pour l'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 9 (2d Cir. 1979); *Mormels v. Girofinance, S.A.*, 544 F. Supp. 815, 817 (S.D.N.Y. 1982).

86. 548 F.2d 109 (3d Cir. 1977).

87. 592 F.2d 409 (8th Cir. 1979).

88. Note, *Extraterritorial Application of the Federal Securities Code*, *supra* note 15, at 735.

cases clearly conflict with the generally recognized jurisdictional principles of international law. In addition, under a liberal reading of the policies set forth in those cases, the federal courts would be compelled to hear virtually all securities disputes involving some conduct fortuitously occurring in the United States.<sup>89</sup>

Section 905 of the proposed Federal Securities Code attempts to address this problem. Of particular relevance to an analysis of the "conduct" test is section 905(a)(1)(D)(i), which provides:

[Within the limits of international law, this Code applies] with respect to any other prohibited, required, or actionable conduct (i) whose constituent elements occur to a significant (but not necessarily predominant) extent within the United States.

A comment to section 905(a)(1)(D)(i) suggests a broad application, even to cases where mere negotiations occurred in the United States and all misrepresentations were made abroad.<sup>90</sup> As discussed above, the consistency of this interpretation with established principles of international law is questionable.

In contrast, one commentator has argued that, "[t]he Code, by its terms, is not violated by mere negotiations; it is violated where a misrepresentation occurs or a fraudulently induced transaction takes place," and has suggested that, "[t]he Code, in compliance with international law, would embrace fraudulent transactions where there is culpable conduct here or where the transaction takes place here."<sup>91</sup> Moreover, the change of the words from "substantial" to "significant" in the First Supplement to the Code seems to indicate an awareness on the part of the drafters of the potential for excessive assertion of extraterritorial jurisdiction.

A second problem in the development of case law surrounding the "conduct" test is that the Second Circuit's distinction between United States citizens and foreigners seems both unwise, as a matter of United States constitutional law and of international law and policy, and unnecessary, as a means of limiting the scope of the "conduct" principle.<sup>92</sup> Any refusal of United States courts to extend Rule 10b-5 protection to a foreigner defrauded by another foreigner within the United States, when it would extend such protection to an American defrauded by a foreigner in the same

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89. See Comment, *Continental Grain (Australia) Pty., Ltd. v. Pacific Oilseeds, Inc.: An Unjustifiable Expansion of Subject Matter Jurisdiction in a Transnational Securities Fraud Case*, 2 NW. J. INT'L L. & BUS. 264, 274-75 (1980); Note, *The Extraterritorial Application of the Antifraud Provisions of the Securities Acts*, 11 CORNELL INT'L L.J. 137, 153 (1978). See also *Grunenthal GmbH v. Hotz*, 511 F. Supp. 582, 588 (C.D. Cal. 1981) (a recent case criticizing the *Kaiser* and *Continental Grain* approach).

90. FEDERAL SECURITIES CODE § 905 comment 7 at 991. See Loss, *Extraterritoriality in the Federal Securities Code*, 20 HARV. INT'L L.J. 305, 314 (1979). It is unclear, however, whether acts that are "merely preparatory" (in *Bersch*) would rise to the level of constituent elements.

91. Buschman, *supra* note 67, at 243.

92. Note, *American Adjudication of Transnational Securities Fraud*, *supra* note 16, at 569; Buschman, *supra* note 67, at 257.

situation, raises questions under the equal protection guarantee implicit in the Fifth Amendment.<sup>93</sup> Because the *Bersch* plaintiffs were in every way similarly situated except for nationality, the court's distinction on the basis of citizenship contravenes the spirit of the Equal Protection Clause, even if it might not actually violate the Fifth Amendment.<sup>94</sup> In addition, the *Bersch* court's distinction appears to conflict with American treaty commitments pledging to give citizens of certain foreign nations judicial treatment identical to that given its own citizens. Provisions of the *Restatement (Second)* also suggest that equal treatment of citizens and foreigners, regardless of residence, is the international legal norm.<sup>95</sup>

There are, however, exceptions to a presumption that equal treatment is required. For example, when the United States has no interest in a transaction involving two foreigners, and when the laws of the victim's nation offer him protection, it is in the interest of the United States, as a member of the international community, to yield to the law of that nation. Such interest, as well as the interest of judicial economy, may indeed be sufficient to justify the refusal to provide the equal protection of United States law to such a foreign victim, even though he may be within the prescriptive jurisdiction of the United States.<sup>96</sup>

Apart from this exception, there seems to be no proper policy consideration in favor of according specific protection under the securities laws solely to United States citizens abroad, to the exclusion of similarly situated foreigners. While abroad, United States citizens are subject to foreign laws, and they should expect no more and no less of those from whom they purchase securities abroad than compliance with the laws of the State of the transaction. Similarly, foreigners who purchase securities in the United States, or who receive material representations there, should be able to expect that the sellers comply with the standards of disclosure required by Rule 10b-5.<sup>97</sup> Therefore, with respect to the claims of Americans who received a prospectus abroad, the *Bersch* court should have applied its third test irrespective of citizenship.<sup>98</sup> It should be noted that the proposed Federal Securities Code has wisely declined to adopt the distinction based upon nationality.<sup>99</sup>

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93. See generally Comment, *The Transnational Reach of Rule 10b-5*, *supra* note 13, at 1376.

94. Note, *American Adjudication of Transnational Securities Fraud*, *supra* note 16, at 569.

95. *Id.*

96. Comment, *The Transnational Reach of Rule 10b-5*, *supra* note 13, at 1378. Judge Friendly, in his famous dictum in *Leasco*, 468 F.2d at 1338, stated that the antifraud provisions of the United States securities laws do not apply "where a German and a Japanese businessman [meet] in New York for convenience, and the latter fraudulently induced the former to make purchases of Japanese securities on the Tokyo Stock Exchange." See also *Grunenthal GmbH v. Hotz*, 511 F. Supp. 582, 583 (C.D. Cal. 1981) (a recent case applying Judge Friendly's dictum).

97. Buschman, *supra* note 67, at 259.

98. *Id.* See also *supra* text accompanying note 70.

99. See FEDERAL SECURITIES CODE § 1905 (1980).

In conclusion, with the exception of the dubious distinction between United States citizens and foreigners, *Leasco* and *Bersch/Vencap* show a commendable effort on the part of the federal courts to articulate the proper scope of the extraterritorial application of the federal securities laws based on the "conduct" test. Despite the tendency in some courts to enlarge the scope of extraterritorial jurisdiction, the federal courts should remain within the limits established in *Leasco* and *Bersch/Vencap* in order to avoid any conflict with established standards of international law.

#### IV

#### OBJECTIVE TERRITORIALITY: THE "EFFECTS" TEST

##### A. Development of Case Law

The first application of the objective principle of territoriality to American securities regulation occurred in *Schoenbaum v. Firstbrook*.<sup>100</sup> *Schoenbaum* was a derivative action brought by American shareholders of a Canadian corporation which conducted all of its business in Canada but whose common stock was registered with the SEC and listed on the American Stock Exchange. Plaintiffs alleged that an issue of stock in Canada was made to insiders of the Canadian company at an inadequate price in light of a certain oil discovery not yet disclosed to the public and that this issuance had adversely affected the value and price of the company's shares listed on the American Stock Exchange. The court stated:

We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities.<sup>101</sup>

Thus, the court held that it had subject-matter jurisdiction over the violations alleged to have taken place outside the United States, primarily relying on the protective policy of the 1934 Act. Subsequent cases de-emphasized the importance of a domestic exchange listing.<sup>102</sup>

It should be noted, however, that some courts have required "direct" and "substantial" effects in order to exercise extraterritorial jurisdiction.<sup>103</sup> Although decided on the basis of the "conduct" test, *Leasco* also addressed the "effects" problem, stating in dictum:

If all the misrepresentations here alleged had occurred in England, we would entertain most serious doubt whether, despite [*Alcoa* and] *Schoenbaum*, section 10(b) would be applicable simply because of the adverse effect of the

100. 405 F.2d 200 (2d Cir. 1968).

101. *Id.* at 206.

102. *E.g.* *Travis v. Anthes Imperial, Ltd.*, 473 F.2d 515 (8th Cir. 1973), *rev'g and remanding*, 331 F. Supp. 797 (E.D. Mo. 1971); *Leasco*, 468 F.2d at 1336.

103. *E.g.* *SEC v. United Financial Group Inc.*, 474 F.2d 354 (9th Cir. 1973); *Investment Properties Int'l, Ltd. v. I.O.S., Ltd.*, [1970-71 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,011 (S.D.N.Y. Apr. 21, 1971), *aff'd mem.* No. 71-1415 (2d Cir. 1971).

fraudulently induced purchases in England of securities of an English corporation, not traded in an organized American securities market, upon an American corporation whose stock is listed on the New York Stock Exchange and its shareholders.<sup>104</sup>

The difference in posture may be in the fact that the *Leasco* court, unlike the *Schoenbaum* court, clearly indicated its intent to reach a decision in accord with principles of international law.<sup>105</sup>

The "effects" text was also considered in *Bersch*. With respect to the sales to residents of the United States, the court noted that "action in the United States is not necessary when subject-matter jurisdiction is predicated on a direct effect here."<sup>106</sup> Noting that the *Restatement (Second)* requires that the effect be a "direct and foreseeable result of the conduct"<sup>107</sup> for jurisdiction to be predicated on a domestic effect of extraterritorial conduct, the court rejected the argument that a general impact on the United States securities market would warrant the application of Rule 10b-5 to a securities transaction which did not occur in the United States.<sup>108</sup>

The *Leasco* and *Bersch* decisions in the Second Circuit have clarified the *Schoenbaum* standard, making it clear that any rule should be based upon principles of international law. This line of decisions is also supported by the proposed Federal Securities Code. Section 1905(a)(1)(D)(ii) of the Code provides:

[Within the limits of international law, this Code applies] with respect to any other prohibited, required, or actionable conduct (ii) some or all of whose constituent elements occur outside the United States but cause a substantial effect within it (of a type that this Code is designed to prevent) as a direct and reasonably foreseeable result of the conduct.

From these authorities it would appear that the assertion of jurisdiction solely on the basis of general economic effects should not be followed by United States courts.<sup>109</sup>

A Ninth Circuit case, *Des Brisay v. Goldfield Corp.*,<sup>110</sup> has, however, given *Schoenbaum* a broader reading than that indicated in *Bersch*. In *Des Brisay*, the alleged fraud occurred in a stock transaction in Canada between a Canadian corporation and a subsidiary set up for the purpose of transferring the assets of the parent to an American corporation. The court held that the decrease in the price of the shares of the American corporation and the resulting loss to United States investors as a result of the fraudulent conduct in Canada was sufficient to warrant the exercise of jurisdiction.

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104. *Leasco*, 468 F.2d at 1334.

105. *See id.* at 1334-35.

106. *Bersch*, 519 F.2d at 991.

107. RESTATEMENT (SECOND) § 18(b)(iii). For the full text of section 18, see *supra* note 25.

108. *Bersch*, 519 F.2d at 988.

109. *See Recaman v. Barish*, 408 F. Supp. 1189, 1199 (E.D. Pa. 1975); *Continental Grain*, 592 F.2d at 417 n.12 (8th Cir. 1979); *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 547 F. Supp. 309, 312-13 (N.D. Ill. 1982).

110. 549 F.2d 133 (9th Cir. 1977).

The court indicated that mere effects on the price of the stock were sufficient to warrant the assertion of jurisdiction over any transaction anywhere in the world which defrauded a corporation whose shares were traded in this country or held by American citizens. Although more recent than *Leasco* or *Bersch*, the *Des Brisay* case clearly conflicts with the recognized jurisdictional principles of international law,<sup>111</sup> and may therefore have less precedential value.

### B. Criticism of the "Effects" Test

Section 18 of the *Restatement (Second)*, which sets forth the "effects" test, has received broad criticism for being inconsistent with the principles of international law.<sup>112</sup> Many European commentators have been critical of the *Restatement (Second)* concept of extraterritorial application of a State's law to aliens.<sup>113</sup> The application of the antifraud provisions of the securities laws, however, may be different from the application of American antitrust laws or the enforcement of American disclosure requirements. The application of section 10(b) and Rule 10b-5 to securities transactions which produce effects within the United States may not involve the potential for direct conflict with the policies of foreign nations, for fraud is widely recognized as a tort.<sup>114</sup> Nevertheless, even highly industrialized countries such as the United States, Japan, the United Kingdom, and other Western European nations have significant differences in their securities regulatory schemes and market practices.<sup>115</sup> The possibility of conflict among these nations is still high and many countries, particularly Canada, are already indignant over the extraterritorial application of American regulatory legislation.<sup>116</sup>

Furthermore, an examination of the cases which used the "effects" test shows that in these cases significant misrepresentations were made in the United States which might have supported jurisdiction under the "conduct" test.<sup>117</sup> In *Schoenbaum*, for example, the court found that some conduct related to the transaction occurred in the United States.<sup>118</sup> It thus seems possible to read the *Schoenbaum* case as relying on the "conduct" test as

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111. See generally, Note, *Extraterritorial Application of the Federal Securities Code*, *supra* note 15, at 743-44.

112. *Id.* at 737.

113. See articles cited, *supra* note 29.

114. See Comment, *The Transnational Reach of Rule 10b-5*, *supra* note 13, at 1399.

115. Buschman, *supra* note 67, at 245; Liftin, *The Extraterritorial Reach of the Federal Securities Code: An Analysis of Section 1905*, 32 VAND. L. REV. 495, 510 (1979).

116. TASK FORCE ON THE STRUCTURE OF CANADIAN INDUSTRY, FOREIGN OWNERSHIP AND THE STRUCTURE OF CANADIAN INDUSTRY: REPORT OF TASK FORCE ON THE STRUCTURE OF CANADIAN INDUSTRY (1968).

117. For an argument that all the cases have involved conduct as well as effects, see Karmel, *The Extraterritorial Application of the Federal Securities Code*, 7 CONN. L. REV. 669, 678 (1975).

118. 405 F.2d at 210.

well as on the "effects" test.<sup>119</sup> Under this interpretation, the expansion of jurisdiction based on the "effects" test was not required or justified by the facts of the *Schoenbaum* case. Indeed, such expansion would be unnecessary in the vast majority of cases.<sup>120</sup>

Moreover, it has been argued that there should be a presumption in favor of the law of the territory where the conduct occurs, as the typical person expects that such law will govern the transaction.<sup>121</sup> For these reasons, the U.S. courts should be extremely careful in asserting the extraterritorial application of U.S. securities laws solely by relying on the "effects" test.

### C. *Balanced Interests Approach*

Any foreign transactions subject to the jurisdiction of courts of the United States may also be subjected to the jurisdiction of courts in the country where the transaction took place. Most United States courts, however, have not been sensitive to the interests of other nations in exercising extraterritorial jurisdiction of the United States laws.

Extraterritorial application of antitrust legislation based upon the "effects" test of the *Restatement (Second)* was a major topic of discussion in the International Law Association (ILA) for many years.<sup>122</sup> In 1972, the ILA adopted a final resolution as to Extraterritorial Application of Restrictive Trade Legislation (hereinafter the ILA Resolution)<sup>123</sup> which accepted the "effects" doctrine in its article 5:

A State has jurisdiction to prescribe rules of law governing conduct that occurs outside its territory and causes an effect within its territory if:

- (a) the conduct and its effect are constituent elements of activity to which the rule applies,
- (b) the effect within the territory is substantial, and
- (c) it occurs as a direct and primarily intended result of the conduct outside the territory.

In article 7, however, there is an important restriction on the exercise of jurisdiction:

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119. Buschman, *supra* note 67, at 253; Liftin, *supra* note 115, at 503.

120. Buschman, *supra* note 67, at 258. It should also be remembered that in EEC competition policy, both the Commission and the European Court of Justice have relied upon the "unity of group" theory rather than upon the "effects" test. See *supra* text accompanying notes 45-48. See also article 4 of the ILA Resolution, *supra* note 65, which states:

A State has jurisdiction to prescribe rules governing conduct originating outside its territory if and in so far as such conduct is implemented within its territory by any natural or legal person whose conduct can be attributed to the author of the conduct performed abroad.

121. Stokes, *Limits Imposed by International Law on Regulation of Extraterritorial Commercial Activity*, 64 AM. J. INT'L L. 135, 139 (1970).

122. See 51st ILA Conference Report, at 304 (1964), 52d ILA Conference Report, at 26 (1966), 53d ILA Conference Report, at 337 (1968), 54th ILA Conference Report, at 176 (1970), and 55th ILA Conference Report, at 107 (1972).

123. 55th ILA Conference Report, *supra* note 65, at 107 (1972).

In the event of there being concurrent jurisdiction of two or more States so as to create a conflict with respect to the conduct of any person:

(a) no State shall require conduct within the territory of another State which is contrary to the law of the latter, and

(b) each State shall, in applying its own law to conduct in another State, pay due respect to the major interests and economic policies of such other State.

In adopting this limitation, the ILA Resolution should not be considered to have accepted the full extent of *Alcoa* and its progeny,<sup>124</sup> but rather to have recognized the necessity for balancing national interests.

In *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*,<sup>125</sup> the Ninth Circuit presented a fresh analysis of the effects doctrine. Although *Timberlane* was an antitrust case, the analysis used by the court has equal applications to the jurisdictional questions involved in securities cases. *Timberlane* was an Oregon partnership organized for the purpose of importing lumber into the United States and had formed two corporations under Honduran law for the purpose of providing supplies of lumber for its United States operations. In support of its Honduran operations, *Timberlane* had acquired the operating assets of a defunct Honduran corporation. At the time, a major American bank held a substantial financial interest in the corporation. Although *Timberlane* attempted to negotiate a settlement with the bank in order to clear its title to the assets, the bank refused and its agents obtained from a Honduran court an embargo against *Timberlane's* Honduran assets for the purpose of preventing the diminution of available assets. *Timberlane* brought an action claiming the violation of United States antitrust laws by the bank. In examining the proper approach under the *Restatement (Second)*, the court stressed the importance of international comity and fairness and tried to determine at what point "the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction."<sup>126</sup>

This "balanced interests" test in *Timberlane* corresponds to the approach of section 40 of the *Restatement (Second)*,<sup>127</sup> which enumerates various factors to be considered in resolving an overlap of national jurisdictions: (a) the vital national interests of each of the States; (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose on the person; (c) the extent to which the required conduct is to take place in the territory of the other State; (d) the nationality of the person; and (e) the extent to which enforcement by action of either State

124. See especially *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951), *decree*, 105 F. Supp. 215 (S.D.N.Y. 1952); *United States v. Watchmakers of Switzerland Information Center, Inc.*, TRADE CAS. (CCH) ¶ 71,352 (S.D.N.Y. Jan. 7, 1965). European commentators strongly criticized these cases.

125. 549 F.2d 597 (9th Cir. 1976).

126. *Id.* at 609.

127. Norton, *supra* note 33, at 589.

can reasonably be expected to achieve compliance with the rule prescribed by that State.<sup>128</sup>

Although there has been criticism as to the appropriateness of the *Timberlane* approach, and some concern as to the capacity of the courts to discharge adequately the task of balancing the various interests,<sup>129</sup> the *Timberlane* court's emphasis on self-restraint and an appreciation of international comity has generally been approved by commentators and followed by subsequent judicial decisions.<sup>130</sup> Since the "balanced interests" approach should also be applicable to cases involving the securities laws, the federal courts should narrowly apply the "effects" test and should not exceed the limits set forth in section 40 of the *Restatement (Second)*.<sup>131</sup>

### CONCLUSION

In the absence of any explicit intent by Congress, the federal courts have attempted to establish limits on the extraterritorial application of the securities laws. Many courts have endeavored to comply with the limitations of international law as well as to fulfill the recognized congressional

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128. The "balanced interests" approach also finds support in the RESTATEMENT (REVISED). In Tentative Draft No. 2, sections 17, 18, and 40 of the RESTATEMENT (SECOND) were recast as sections 401 to 403. Section 402 of the RESTATEMENT (REVISED) sets out the "conduct" and "effects" tests, but conditions their application upon the limitations contained in section 403. Section 403(1) states:

Although one of the bases for jurisdiction under § 402 is present, a state may not apply law to the conduct, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.

Section 403(2) then lists factors, all of which must be considered in determining the reasonableness of an exercise of jurisdiction. These factors include the importance of regulation to the international political, legal, or economic system [section 403(2)(e)], the extent to which such regulation is consistent with the traditions of the international system [section 403(2)(f)], the extent to which another state may have an interest in regulating the activity [section 403(2)(g)], and the likelihood of conflict with regulation by other states [section 403(2)(h)]. Section 416 of the RESTATEMENT (REVISED) applies specifically to jurisdiction over securities transactions. The comments which follow section 416 make it clear that the overall test of jurisdiction under sections 402 and 403 applies.

129. Binkowski, *Timberlane: Three Steps Forward, One Step Backwards*, 15 INT'L LAW. 419 (1981).

130. See Jacobs, *Extraterritorial Application of Competition Laws: An English View*, 13 INT'L LAW. 645 (1979); Paugh, *The Application of U.S. Economic Regulations to International Commerce: A Comparison of the Sherman Act and U.S. International Trade Regulation Laws*, 13 LAW & POL'Y INT'L BUS. 961 (1981); Sornarajah, *The Extraterritorial Enforcement of U.S. Antitrust Laws: Conflict and Compromise*, 31 INT'L & COMP. L.Q. 127 (1982); Recent Development, *Antitrust Law: Extraterritoriality*, 20 HARV. INT'L L.J. 667 (1979); Norton, *supra* note 33. See also *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

131. Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1025 (1976); Norton, *supra* note 33, at 597.

The only securities case which has cited *Timberlane*, *Grunenthal GmbH v. Hotz*, 511 F. Supp. 582, 587 n.7, did not follow the balanced interests approach of *Timberlane*, stressing instead the difference between the antitrust regulation and the securities laws on the ground that "every civilized nation doubtless has this [prohibition against fraud] as a part of its legal system." However, as discussed *supra* in Part V.B, this contention rests on dubious ground.

intent to protect domestic markets and domestic investors. Unfortunately, the international law limitations that have been recognized by the federal courts do not necessarily represent the true status of international law as accepted by the community of nations. Traditional approaches to subject-matter jurisdiction have failed to adapt to the needs of international commerce and international harmony.

The growing interdependency of securities markets worldwide causes increasing concern with the extraterritorial application of United States securities laws. Courts in the United States should be sensitive to these concerns as well as to the potential ill-effects of excessive expansion of subject-matter jurisdiction. Until appropriate international treaties or agreements are negotiated, U.S. courts should proceed with the same degree of restraint which was shown in *Leasco*, *Bersch/Vencap*, and *Timberlane*. Restraint and moderate discretion by United States courts in exercising jurisdiction would go a long way toward harmonizing domestic and international law.