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Extraterritorial Application of United States Securities Laws

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"entitlement" and "grievous loss" tests that the Court has used in the past but seems to apply those tests more strictly than Justice Douglas. With the addition of Justice Stevens to the Court, the minority in *Goss* may now be the majority, with resulting restrictions on the types of interests that are protected by the fourteenth amendment.

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EXTRATERRITORIAL APPLICATION OF UNITED STATES SECURITIES LAWS

IIT v. Vencap, Ltd.[1]

Richard Pistell, an American citizen residing in the Bahamas, organized a venture capital firm in the Bahamas. The firm, Vencap Limited (Vencap), was incorporated in July of 1972 with the aid of a New York law firm and a Bahamian law firm. Pistell, an internationally known financial analyst and investment banker, controlled the Vencap stock.[2] Pistell apparently came to an oral agreement in August with Stanley Graze about a large investment in Vencap by IIT, an international investment trust organized under the laws of Luxembourg. Graze, a United States citizen and resident of London, had management control over certain assets of IIT. An undated memorandum of the understanding was prepared at Pistell's instructions sometime thereafter in the Bahamas. During September, Vencap's New York lawyers prepared a draft of an agreement for an IIT subscription to $3,000,000 of Vencap preferred stock.[3] Before the subscription, Vencap's capitalization totalled $5,000. The terms expressed in the memorandum and in the final agreement were not favorable to the preferred shareholders.[4] Although it is

711 (7th Cir. 1974); Shirck v. Thomas, 486 F.2d 691 (7th Cir. 1973) (opinion written by Justice Stevens); Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973) (opinion written by Justice Stevens).

1. 519 F.2d 1001 (2d Cir. 1975).

2. Pistell and a second internationally known financier, Court Armoury de Reincourt, a French citizen residing in Paris or Geneva, held virtually all the common stock. *Id.* at 1005.

3. The agreement also provided IIT warrants to purchase an additional $3,000,000 of such shares exercisable at the same price within three years of closing. *Id.* at 1006.

4. The preferential capital investors of $3,000,000 would receive only a 6% non-cumulative dividend, if earned and declared by directors elected solely by the common stockholders, and a further dividend of a third of the remaining profits, if and when so declared, whereas the common stockholders, with a $4,000 investment would have the benefit of two-thirds of such earnings. *Id.* at 1011. The preferred stock was redeemable at par plus 6% dividends at any time. *Id.* at 1012.

not clear whether the agreement was prepared in New York or in the Bahamas, drafts were exchanged between the law firms of New York and Nassau. The agreement, dated September 29, 1972, was signed in the Bahamas on behalf of IIT by Milton Meissner, the president of IOS, Ltd. and IIT Management Co., S.A. Closing occurred in the Bahamas in October.

Beginning in January, 1973, Pistell allegedly began to funnel substantial amounts of Vencap's funds into his own hands for his personal use. He did so by causing Vencap to initiate a series of transactions, in large part from the address of the New York law firm which performed services for Vencap. An action for fraud, conversion, and corporate waste was brought in the U.S. District Court for the Southern District of New York by IIT and three Luxembourg citizens appointed in Luxembourg to liquidate IIT. The district court issued an order enjoining Vencap, Pistell, and other corporate defendants controlled by Pistell, from exercising control over the assets of IIT or corporations in which IIT held an interest. The court also appointed a receiver pending a final hearing. Defendants appealed the order, claiming, *inter alia*, that the court lacked subject matter jurisdiction. The Second Circuit held that a finding of jurisdiction could be based on defendants' activities in the United States, and retained jurisdiction pending further findings and conclusions by the district court.

After dismissing other possible bases of subject matter jurisdiction as inappropriate, the court determined that jurisdiction depended on the provisions of the securities laws—section 22(a) of the Security Act of 1933[5] or section 27 of the Securities Exchange Act of 1934,[6] under which various theories of fraud were alleged. Three grounds were advanced by which the United States securities laws might be applied to the alleged fraud, as distinguished from law of any other country: (1) the American citizenship of one defendant Richard Pistell, (2) the effects of fraudulent activities on American interests, and (3) the occurrence of fraudulent activity within the United States.

1. *Citizenship of the defendant (nationality principle)*

The American citizenship of defendant Pistell could provide subject matter jurisdiction according to the nationality or personality principle of jurisdiction, whereby the United States clearly has the power to prescribe the conduct of its nationals everywhere in the world.[7] No United States court has yet applied the securities law solely on the basis of the defendant's nationality. Accordingly, the *IIT* court did not consider Pistell's citizenship sufficient, on the ground that Congress never intended the securities laws to be

5. 15 U.S.C. § 77v(a) (1970).
6. 15 U.S.C. § 78aa (1970).
7. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 30 (1965). *See also* Comment, *The Transnational Reach of Rule 10b-5*, 121 U. PA. L. REV. 1363, 1387 (1973).

applied to the full extent of constitutional power.[8] This decision is consistent with prior cases where the finding of jurisdiction was supported by other grounds, although the nationality of the defendant was clearly considered significant.[9]

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8. As Judge Friendly stated in the companion case of *Bersch v. Drexel Firestone, Inc.*, "[I]t would be . . . erroneous to assume that the legislature always means to go to the full extent permitted." 519 F.2d 974, 985 (2d Cir. 1975), *cert. denied* Bersch v. Arthur Andersen & Co., 96 S. Ct. 453 (1975). The *Bersch* case was a class action for fraud and misrepresentation brought by a shareholder of I.O.S. Ltd. purporting to represent up to 100,000 purchasers of shares, both American and foreign. The major defendants were underwriters involved in three separate large offerings of I.O.S. stock. The court found that the prospectus emanated from a foreign source and therefore could not be a proper basis for jurisdiction. The court also found that the adverse effects of the collapse of the I.O.S. empire on United States general economic interests and the prices of other American securities were an insufficient jurisdictional basis. The court stated that for adverse effects of foreign activity to support jurisdiction there must be injury to purchasers or sellers of those securities in whom the United States has an interest—either purchasers or sellers of the very securities concerned or other securities of the same issue. *Id.* at 991. The precise holding of *Bersch* was that the anti-fraud provisions of the federal securities laws:

> (1) Apply to losses from sales of securities to Americans resident in the United States whether or not acts (or culpable failures to act) of material importance occurred in this country; and
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> (2) Apply to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto; but
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> (3) Do not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses.

Id. at 993. Judge Friendly authored the opinions in both *Bersch* and *IIT*, and also in the *Leasco* decision. *See* Note, 11 TEX. INT. L.J. 173 (1976).

9. *See, e.g.*, SEC v. United Financial Group, Inc., 474 F.2d 354, 357 (9th Cir. 1973) (jurisdiction based on findings that foreign companies were controlled from the United States. Americans held some shares and defendants used the U.S. mails. The *IIT* court felt the result would have been the same in this case even if the defendant had not been an American). *Cf.*, Finch v. Marathon Securities Corp., 316 F. Supp. 1345 (S.D.N.Y. 1970) (no finding of jurisdiction. In an otherwise wholly foreign transaction, the American nationality of parties who controlled an off-shore mutual fund was considered significant but not sufficient).

The court in *Leasco Data Processing Equip. Corp. v. Maxwell* indicated that Congress did not intend the Act to govern every instance throughout the world where an American company buys or sells a security. 468 F.2d 1326 (2d Cir. 1972). The *Leasco* court expressed doubt that § 10(b) would apply if all misrepresentations were made in England, securities were purchased in England of an English corporation not traded in an organized American securities market, and the only U.S. connection was that the buyer was a U.S. corporation listed on the New York Stock Exchange with U.S. shareholders. *See also* Garner v. Pearson, CCH FED. SEC. L. REP. ¶ 94,549 (M.D. Fla. 1974), which states that § 10(b) would not cover foreign transactions and foreign securities if the only connection with the U.S. were the citizenship of the purchaser or seller.

Judge Friendly expressly held in *Bersch* that the American citizenship of investors resident abroad would not of itself be sufficient to invoke subject matter jurisdiction. This holding, however, addressed the nationality of the plaintiffs rather

2. *Effects in the United States (objective territoriality principle)*

Pistell's activities were alleged to have had significant effects within the United States because 300 of the fundholders of IIT, who allegedly suffered harm, were resident citizens of the United States. When the effects of certain activity have occurred within the territory, jurisdiction may be asserted on the principle of objective territoriality.[10] The *IIT* court rejected this basis of jurisdiction, explaining that the 300 Americans would represent only .2% of all IIT's fundholders, and their investment would represent only .5% (about $15,000) of the total IIT investment in Vencap. In comparison with the effect outside the United States, the effect within was deemed insignificant.[11] The court again concluded that Congress had not intended the Act to apply to such a transaction. It decided that the investment losses to American investors were not a substantial effect within the United States as contemplated by the *Restatement of Foreign Relations Law.*[12]

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than that of the defendants. The Securities Exchange Commission has suggested that the issuing of securities by an American firm only to foreign nationals on foreign markets is generally understood as not "a public offering" within the meaning of the Act. Securities Act Release No. 4708, 29 Fed. Reg. 9828 (1964). *See also* Comment, *The Transnational Reach of Rule 10b-5,* 121 U. PA. L. REV. 1363, 1387-89 (1973).

10. Legislation is presumed to apply only territorially, unless a contrary intent is clearly manifest. American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909); Lauritzen v. Larsen, 345 U.S. 571, 577-79 (1953); Kook v. Crang, 182 F. Supp. 388, 390 (S.D.N.Y. 1960). The concept of territoriality was extended in the Case of the S.S. "Lotus" P.C.I.J. Ser. A, No. 10 (1927), [1927-1928] Ann. Dig. 153 (No. 98), 22 AM. J. INT'L. 8 (1928), which stated that legislative assertion of jurisdiction over conduct outside the territory of a state is lawful unless it violates a prohibitive rule of international law. Support for the principle of *Lotus* is found in RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965), which goes beyond the pure territorial principle, asserting jurisdiction over an alien for activity that takes place wholly abroad if a substantial effect occurs within the state. *See generally Committee Report by the Committee on International Law,* 21 RECORD OF N.Y.C.B.A. 240 (1966).

11. Because IIT itself, rather than its fundholders, was allegedly defrauded, "[t]he American residence or citizenship of certain fundholders . . . [is] . . . important only on a theory akin to that of piercing the corporate veil." 519 F.2d at 1017. But piercing the veil would lead to a result almost wholly non-American because most of the fundholders were not Americans. The fraud in *Bersch* was allegedly perpetrated on individual American purchasers directly. The nationality of the shareholders was more significant because these shareholders rather than the corporation were the defrauded parties.

12. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) provides in part:

> 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) . . . , 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 substantial;
> (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and

The court said that the transaction did not come within the formulation of *Schoenbaum v. Firstbrook.*[13] *Schoenbaum* involved the sale of stock of Banff Oil Ltd., a Canadian corporation which conducted all its operations in Canada. Negotiations, the exchange of offer and acceptance, the delivery of shares, and payment all took place in Canada. Banff stock was listed on the American Stock Exchange and on the Toronto Exchange, and there were many American shareholders. The court's reason for asserting jurisdiction was the protective principle, under which jurisdiction exists because of the potentially adverse effect upon United States interests. There need not be any actual effect in the country, even when all the elements of the crime occur abroad.[14] The *Schoenbaum* court applied the United States securities laws to protect the interests of the United States and its investors from the harmful effects of improper foreign transactions. The interests of the United States involved protection of its securities market and its domestic stock exchange. *Leasco Data Processing Equipment Corp. v. Maxwell*[15] limited the broad *Schoenbaum* formulation. Now an adverse effect alone is insufficient for subject matter jurisdiction, if all fraudulent conduct occurred abroad and the securities were foreign securities not traded on a United States exchange.[16]

The *Restatement of Foreign Relations Law* requires that the effect within the territory be substantial and occur as a direct and foreseeable result of the conduct outside the territory.[17] The *Restatement* expands the rule laid down in *United States v. Aluminum Company of America,*[18] which found certain

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(iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

13. 405 F.2d 200 (2d Cir. 1968), *rev'd on other grounds,* 405 F.2d 215 (2d Cir. 1968), *cert. denied,* Manley v. Schoenbaum, 395 U.S. 906 (1969).

14. The *Schoenbaum* court did require an actual adverse effect in the U.S., which was alleged in the losses suffered by American investors and the use of an American stock exchange. But the protective principle as enunciated in the *Restatement* refers to jurisdiction of a state to prescribe rules of law attaching legal consequences to extraterritorial conduct threatening "its security as a state," provided that the conduct is generally recognized as a crime. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 33 (1965).

15. 468 F.2d 1326 (2d Cir. 1972).

16. The *Bersch* court followed this approach, stating that the "adverse effects" test is limited to fraudulent acts resulting in injury to purchasers and sellers of those securities in whom the U.S. has an interest. 519 F.2d at 989. *See also* Note, *Securities Regulation,* 11 TEX. INT. L.J. 173, 179 (1976); Mizrack, *Recent Developments in the Extraterritorial Application of Section 10(b) of the Securities & Exchange Act of 1934,* 30 BUS. LAWYER 367, 379-81 (1975).

17. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Explanatory Notes § 18, comment f at 50 (1965). The *Schoenbaum* court did not mention foreseeability as a test of jurisdiction, although the result may have been foreseeable. *See* Becker, *Extraterritorial Dimensions of the Securities Exchange Act,* 2 N.Y.U. J. INT'L L. & POL. 233, 241 (1969). *See also* Roth v. Fund of Funds, Ltd., 405 F.2d 421 (2d Cir. 1968), *cert. denied,* 394 U.S. 975 (1969) (the movement of millions of dollars between New York banks was a direct and foreseeable consequence).

18. 148 F.2d 416 (2d Cir. 1945) (Anti-trust action).

agreements unlawful, although made abroad, if they were intended to affect imports and did affect them.[19] This requirement of intention or foreseeability as to effects in the United States may prove to be very important in the application of the securities laws.[20] The *IIT* court found that the Vencap shares apparently were not intended to be offered to American residents or citizens.[21]

The court's determination that the losses to American investors were not a substantial effect in the United States initially seems questionable. A loss of $15,000 involving 300 Americans appears substantial when viewed alone.[22] Commentators have suggested that the requirement of substantiality of *Schoenbaum* for protective jurisdiction should be defined with respect to the significance of the harm threatened, and not in relation to the importance of a domestic act in the overall transaction.[23] Protective jurisdiction concerns the impact of foreign activities on domestic markets viewed independently, whereas territorial jurisdiction is concerned with the relative magnitude of the domestic event in relation to effects abroad.[24] The *IIT* court did not adopt the protective principle of *Schoenbaum* in this regard, but rather employed the territorial principle. The concept of territoriality is

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19. Both *Aluminum Co.* and *Schoenbaum* relied in part on a statement of Justice Holmes from *Strassheim v. Daly*, 221 U.S. 280 (1911):

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

Id. at 284-85. Becker applies the *Aluminum Co.* rule to securities law and arrives at the following formulation: " . . . [I]f a securities transaction would be unlawful under the Exchange Act were it made in the United States, it is unlawful though made abroad if it is intended to and does affect securities transactions in the United States." Becker, *supra* note 17, at 236. The rule of course is subject to the broader or narrower scope of the Securities Exchange Act itself.

20. *Cf.* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 989 (1975), *cert. denied*, Bersch v. Arthur Andersen & Co., 96 S. Ct. 453 (1976), where adverse effects on general U.S. economic interests or on prices of American securities, when it was not intended or foreseeable that securities would be offered to anyone in the United States, were an insufficient ground for jurisdiction. *See generally* Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127 (1966).

21. 519 F.2d at 1017. The court also noted that IIT's prospectus stated that shares were "neither offered for sale nor sold to U.S. citizens or U.S. residents." *Id.* at 1016.

22. In *SEC v. United Financial Group, Inc.*, 474 F.2d 354 (9th Cir. 1973), involving conduct within the United States and injury to United States domestic investors, the court stated that it was not the number of investors involved that was crucial, but rather activities in the United States and the impact on American investors—a clear application of the protective principle according to *Schoenbaum*.

23. *See* Brown, *Offshore Mutual Funds: Extraterritorial Application of the Securities Exchange Act of 1934*, 13 B.C. IND. & COM. L. REV. 1225, 1241-54 (1972); Mizrack, *supra* note 16, at 380.

24. *See* Brown, *supra* note 23, at 1248-49.

inconsistent with a result whereby a corporation, the shares of which are internationally owned, would be subject to the valid assertion of plenary jurisdiction to regulate its internal affairs by each state in which it happened to have shareholders.[25] According to the territorial principle, an effect in the United States, which may be deemed "substantial" when viewed purely internally, may become totally insubstantial when measured on a broader scale.[26] The *IIT* court adopted this approach on the basis that Congress would not have intended otherwise.

3. *Conduct in the United States (subjective territoriality principle)*

The final ground considered by the court for finding jurisdiction was activity within the United States.[27] The applicable principle has sometimes been called subjective territoriality.[28] The *IIT* court said, "We do not think 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."[29] A number of cases have found jurisdiction because of conduct within the United States, although in none of these cases was domestic activity the sole link with the United States.[30]

Leasco is as important a case to the development of the subjective territoriality principle as it is to the objective territoriality principle. For jurisdiction, *Leasco* required injury to a protected United States person or interest, a transaction violative of the Act, and significant conduct in the United States directly related to the ultimate act which caused the harm. *Leasco* limited *Schoenbaum* by requiring conduct within the United States in

25. *See Committee Report by the Committee on International Law,* 21 RECORD OF N.Y.C.B.A. 240, 252 (1966).

26. *Id.* at 251. The court in *Investment Properties Int'l, Ltd. v. I.O.S. Ltd.*, CCH FED. SEC. L. REP. ¶ 93,011 (S.D.N.Y. 1971), *aff'd by an expedited appeal,* [1971-72 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,446, *mandamus granted to allow limited discovery to determine jurisdiction and standing,* 459 F.2d 705 (2d Cir. 1972), framed the test as follows: if a transaction has occurred outside the U.S. is there significant impact on the domestic securities market or on domestic investors, so that extraterritorial application is necessary to protect securities trading in the U.S. or U.S. investors?

27. *See* Mizrack, *Recent Developments in the Extraterritorial Application of Section 10(b) of the Securities and Exchange Act of 1934,* 30 BUS. LAWYER 367, 384 (1975).

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

29. 519 F.2d at 1017.

30. *See, e.g.*, Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (suit by American company to enjoin U.S. citizen residing in Texas from using company's trademark, registered under U.S. law, in Mexico on watches assembled in Mexico from parts purchased in Switzerland and the United States); Travis v. Anthes Imperial Ltd., 473 F.2d 515 (8th Cir. 1973) (use of telephone, mails, and other facilities of interstate commerce between Canada and St. Louis, Mo.); Ferraioli v. Cantor, 259 F. Supp. 842 (S.D.N.Y. 1966) (transfer of control to a Canadian corporation of a U.S. corporation in New York was sufficient conduct in the United States for jurisdictional purposes. Securities of the American corporation were also traded on the New York Stock Exchange).

addition to an adverse effect, rather than an adverse effect alone. At the same time, the *Leasco* case established conduct within the United States as a primary basis of subject matter jurisdiction. The protective principle discussed above is inapposite here, because it relates to effects within the United States or the possibility of effects in the United States of activity abroad.

IIT goes beyond *Leasco* and *Schoenbaum*, because there was no finding in *IIT* of an injury to a protected United States person or interest. Section 17 of the *Restatement of Foreign Relations Law* provides that a rule of law prescribed by a nation may deal with effects of any conduct that occurs in its territory, whether or not such effects take place in its territory.[31] Therefore, the *Restatement* directly supports the *IIT* decision.

The *IIT* court restricted the basis of jurisdiction to "the perpetration of fraudulent acts themselves and . . . not . . . to mere preparatory activities or the failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries."[32] The court admitted that the distinction is a fine one. It could present serious problems of application, but was useful to the court in disposing of the five asserted theories of fraudulent activity.

The manner of perpetrating the fraud could be decisive as to whether the court had subject matter jurisdiction over the claim. For purposes of three of the five theories of fraud advanced, the only apparently relevant conduct in the United States was the exchange of drafts of the purchase agreement between American attorneys for IIT and Vencap. Even if the agreement was merely a memorialization of a previously completed deal, the exchange of drafts was little more than preparatory or incidental activity. As for the remaining two theories advanced, numerous transactions originating from the address of the New York law firm after the sale of the shares could well have been the substantive acts consummating the fraud. This would certainly be significant conduct within the United States.

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31. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Explanatory Notes § 17, comment (a) and Illustration 2 at 45 (1965). Illustration 2 is quoted approvingly in *Leasco*, 468 F.2d at 1334, n.3:

> *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.

SEC v. Kasser, 391 F. Supp. 1167 (D.N.J. 1975), decided one month before *IIT*, reached the opposite result. The court found no direct impact, and decided that a considerable amount of conduct in the United States alone was not sufficient for subject matter jurisdiction. The court also framed its inquiry in terms of congressional intent. The court in *F.O.F. Proprietary Funds, Ltd. v. Arthur Young & Co.*, 400 F. Supp. 1219 (S.D.N.Y. 1975), decided several months after *Bersch* and *IIT*, stated that the *Bersch/IIT* analysis requires an evaluation of whether Congress would have intended the Act to apply to the circumstances of the case. The court found no acts in the United States directly causing losses abroad, and therefore no subject matter jurisdiction.

32. 519 F.2d at 1018. Judge Friendly stated the same day in *Bersch*, "While merely preparatory activities in the United States are not enough to trigger application of the securities laws for injury to foreigners located abroad, they are sufficient when the injury is to Americans so resident." 519 F.2d at 992.

The amount and type of conduct within the United States sufficient to be deemed significant is not clear. In *Kook v. Crang*[33] use of the mails and telephone was insufficient for jurisdictional purposes. The court in *SEC v. Gulf Intercontinental Finance Corp.*,[34] applying a broader rule than that of *Kook*, stated that the use of interstate facilities, including the mails, as an essential part of a fraudulent scheme, is a valid jurisdictional base.[35] The court in *Ferraioli v. Cantor*[36] decided that transfer of control of a corporation in New York, as an inseparable part of a total transaction, was sufficient conduct in the United States. The *Leasco* court declined to decide if use of the telephone or mails alone would constitute jurisdictional grounds.[37] *Leasco* seems to require that the actual misrepresentation occur in the United States.

A case from the Eighth Circuit, *Travis v. Anthes Imperial Ltd.*,[38] may indicate the minimum contacts with the United States necessary for a finding of jurisdiction. *Travis* involved foreign securities not purchased on a United States exchange. The defendants were never present in the United States (Missouri) for purposes of the fraud,[39] but there was extensive use of the mails and telephone across state and national borders. This was held sufficient, along the lines of the *Restatement.*[40]

The exchange of drafts of the agreement in *IIT* and the exchange of letters and telephone calls in *Travis* may appear to be equally tenuous contacts with the United States. However, the exchanges in *Travis* were the very acts of misrepresentation, and so supported subject matter jurisdiction; while the exchanges in *IIT* were insufficient contacts because they were merely preparatory to the alleged fraud. The *IIT* transactions subsequent to the sale of the preferred Vencap stock, *i.e.*, purchases and sales of other securities in the United States, movement of funds, and extensive use of the mails and telephone from New York, clearly seem a sufficient basis for jurisdiction in light of *Gulf Intercontinental* and *Travis.*

33. 182 F. Supp. 388 (S.D.N.Y. 1960).
34. 223 F. Supp. 987 (S.D. Fla. 1963).
35. *Id.* at 995-96.
36. 259 F. Supp. 842 (S.D.N.Y. 1966).
37. The case of *Garner v. Pearson*, CCH FED. SEC. L. REP. ¶ 94,549 (M.D. Fla. 1974), involved use of the mails and other facilities of interstate commerce. There were a number of transactions, only three of which occurred in the United States. It is not clear, but *Garner* may indicate that the purchase or sale in the United States of securities not traded on an organized market is itself enough for subject matter jurisdiction. *Cf.* Madonick v. Denison Mines, Ltd., 63 F.R.D. 657 (S.D.N.Y. 1974), where dissemination in the United States of a proxy statement was considered significant conduct in the U.S.
38. 473 F.2d 515 (8th Cir. 1973). The court noted that the use of the facilities of interstate commerce must be more than incidental. 473 F.2d at 526, n.21.
39. The defendants never appeared in Missouri except for the closing of the sale of the plaintiffs' securities to one of the defendant companies, at a time when plaintiffs were aware of the defendants' true intentions and thus were not misled.
40. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965).

A requirement that conduct within the territory be significant or an essential link in the transaction is a flexible standard well-suited for protecting the interests of a state in regulating conduct within its borders.[41] It applies the protective principle of jurisdiction more truly than does *Leasco*, which may require that the actual misrepresentation occur internally.[42] The requirement may be less compatible with the territorial principle, although it does protect the interests of all nations wherein substantial conduct has occurred.

The courts consistently frame the inquiry of whether United States securities laws should be applied extraterritorially in terms of congressional intent.[43] The approach to a finding or denial of jurisdiction is pragmatic rather than mechanical.[44] Indeed, jurisdictional analysis should not wholly depend on rigid categories of principles.[45] A comprehensive policy analysis wherein categorized jurisdictional principles serve a descriptive function rather than a normative one would seem more useful. Congress has indicated its intention to limit the applicability of the securities laws by section 30(b) of the 1934 Act.[46] Enforceability of the United States securities laws is also limited by domestic policies of other nations.[47] Application of United States securities laws in violation of international choice-of-law principles would result in serious problems, not only of enforceability outside United

41. *See* Comment, *The Transnational Reach of Rule 10b-5*, 121 U. PA. L. REV. 1363, 1375 (1973). As to the standard of substantiality for jurisdiction over adverse effects within the territory, *see* Brown, *Offshore Mutual Funds: Extraterritorial Application of the Securities Exchange Act of 1934*, 13 B.C. IND. & COM. L. REV. 1225, 1254 (1972); Goldman & Magrino, *Some Foreign Aspects of Securities Regulation: Towards a Reevaluation of Section 30(b) of the Securities Exchange Act of 1934*, 55 VA. L. REV. 1015, 1020 (1969).

42. The requirement that the actual misrepresentation take place in the United States does not take account of the nature of transnational securities dealings. The situs of a particular misrepresentation may be unimportant for purposes of the transaction. The interest of the state is identical whether the particular misrepresentation occurs within or without its territory. *See* Comment, *The Transnational Reach of Rule 10b-5*, 121 U. PA. L. REV. 1363, 1375 (1973).

43. *See* Brown, *Offshore Mutual Funds: Extraterritorial Application of the Securities Exchange Act of 1934*, 13 B.C. IND. & COM. L. REV. 1225, 1238-49 (1972).

44. *See* Mizrack, *Recent Developments in the Extraterritorial Application of Section 10(b) of the Securities and Exchange Act of 1934*, 30 BUS. LAWYER 367, 384-86 (1975).

45. Both the *Bersch* court, 519 F.2d at 986, and the *Travis* court, 473 F.2d at 523-24, n.14, noted that they were not bound by the facts of prior cases. *See* Comment, *The Transnational Reach of Rule 10b-5*, 121 U. PA. L. REV. 1363, 1384 (1973).

46. 15 U.S.C. § 78dd(b) (1970) exempts certain professionals transacting business outside United States' territory.

47. The principles expressed in RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 17, 18 (1965) reflect principles of United States municipal law (i.e. domestic law) rather than principles of international law. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971), "Causing Effects in State by Act Done Elsewhere," provides that the power of a state to exercise judicial jurisdiction is limited by considerations of reasonableness.