Florida Journal of International Law

Volume 10 | Issue 3 Article 4

January 1996

# United States Extraterritorial Subject Matter Jurisdiction in Securities Fraud Litigation

Michael Wallace Gordon

# UNITED STATES EXTRATERRITORIAL SUBJECT MATTER JURISDICTION IN SECURITIES FRAUD LITIGATION

*Michael Wallace Gordon**



## I. INTRODUCTION

It is always an interesting task to attempt to assist foreign colleagues from civil law tradition nations in understanding a complex area of U.S. jurisprudence. The task becomes more than interesting, it indeed becomes a challenge, when the subject area is one that has gained its contours over the years in the courts, creating an evolutionary development from origins in legislative enactment of doubtful meaning in the distant past. The task is compounded when the subject is procedural law, the development of which in the common law has often preceded the formulation of substantive rules. The idea of procedure as possessing substance, or even having independent value as a worthy academic focus, is not always welcome in civil law tradition nations. This article is intended to assist in understanding the judicial development of extraterritorial jurisdiction specifically in the field of

* Chesterfield Smith Professor of Law, College of Law, University of Florida. The author wishes to thank his research assistant Daniel Visiou for his assistance in researching the materials for this article. This article was first presented as a lecture at a Max Planck Institute Symposium in Konstanz, Germany.

securities fraud litigation, but with some background outlining the extraterritorial application of antitrust law. Increased international trade and investment have resulted in more conflicts and often in a dissonant clash of overlapping subject matter jurisdiction rules of different nations.[1]

The development of extraterritorial subject matter jurisdiction may be compared to a system of pyramids. Envision a series of twelve securities fraud law pyramids, one for each federal circuit. The various federal district court decisions for that circuit on extraterritorial subject matter jurisdiction in securities fraud cases form the base of each pyramid. Not all circuits have many district court decisions; the Second Circuit pyramid has the most district court decisions. The apex of each pyramid, above the often inconsistent rulings on the lower lines, is the appeals court for that circuit, which expresses the controlling reasoning of the circuit for a specific field, in this case securities fraud.

Next to the series of twelve securities fraud law pyramids are similar groups of twelve pyramids, each representing a different area of extraterritorial application of U.S. law, such as antitrust, civil rights, labor, and environmental regulation. For a few areas of the law, there is a larger pyramid on top of one group of twelve in the specific area, with its lower base line the twelve circuit courts. This larger pyramid represents where the U.S. Supreme Court, the apex, has addressed the issue and resolved what may have been inconsistent views among two or more of the circuits. The Supreme Court has rendered decisions on extraterritorial subject matter jurisdiction involving areas such as antitrust and civil rights (equal employment laws).[2] The securities fraud group has no such higher apogee to its lower pyramids because the Supreme Court has not yet addressed the issue of extraterritorial subject matter jurisdiction in securities fraud litigation.

This article may help in understanding how the Supreme Court might rule in such a case, and how Supreme Court decisions in other areas, such as antitrust and civil rights law, might affect that decision. The search for answers extends across the tops of the securities fraud pyramids, in an attempt to predict which federal circuit court decisions are most apt to find favor in a future Supreme Court decision, and to look at parallel specific fields, such as antitrust and civil rights law, where the Supreme Court has given guidance. The danger of the latter is that these Supreme Court decisions may be based on a legislative intent to extend one very specific law's application extraterritorially. The legislative intent of one law, for

1. *See generally* THE INTERNATIONAL CHAMBER OF COMMERCE, THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS (Dieter Lange & Gary Born eds., 1989); A.V. LOWE, EXTRATERRITORIAL JURISDICTION (1983).

2. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244 (1991) [hereinafter *Aramco*].

example, the antitrust law, may be quite different from that of another, such as the securities fraud law. Thus, one must consider a Supreme Court decision in one field to have constraints. While many of the laws in question, including the antitrust and securities fraud laws, have no clear legislative guidance as to their intended reach abroad, each law may have definable purposes that justify different extensions abroad.

United States Supreme Court decisions sometimes establish very broad principles. These often are the decisions that receive the most publicity and the most criticism for "social engineering." But many, if not most, Supreme Court decisions are carefully crafted to address statutory interpretation of federal laws. It is these latter decisions that we will consider. In doing so, it is worth remembering that the apexes (the circuit court decisions) of the lower pyramids, if influenced by different levels of legislative intent in different specific fields, do not necessarily form a level base from which to suggest that a Supreme Court ruling in one field is clearly applicable to another. There may be no common limits to extraterritorial application of laws from different fields, although there must be some point of extraterritoriality beyond which no application will apply under international comity rules. However, we are often disinclined to consider that a Supreme Court ruling directly applicable to one field of law might be useful in resolving disputes in another. One purpose of this article is to consider whether U.S. Supreme Court decisions, such as *Hartford Fire Insurance Co. v. California*[3] (antitrust law), and *Equal Employment Opportunity Commission v. Arabian American Oil Co. (Aramco)*[4] (civil rights law), speak to the application of extraterritorial law beyond their principal focus, possibly to the field of securities fraud law.

One principle that has been vigorously promoted in the United States as a means of resolving extraterritorial subject matter issues is interest balancing, which might be better described as comparative interests theory. Interest balancing is a concept little known abroad and not fully accepted at home. It places a heavy burden on the courts to accurately identify and weigh foreign interests, which this observer believes is an inappropriate burden in the United States and an unacceptable one in most nations abroad.

Although intertwined with the international law concept of comity, comparative interests theory extends much further. Although its origins are largely in antitrust law for determining liability or relief rather than jurisdiction, contemporary advocates of comparative interests theory do not limit it to any specific field; therefore, we might expect the Supreme Court to be the forum that would establish or adopt interest balancing as a test to

3. 509 U.S. at 764.
4. 499 U.S. at 244.

be applied for any extraterritorial application of U.S. law. But the Supreme Court has avoided embracing interest balancing. The Supreme Court has at the very least severely limited the usefulness of interest balancing, although probably not eliminated its potential applicability.

As yet, there are no clear answers, and there may never by any clear answers. Therefore, this article is not intended to present U.S. law as a completed, marble work of art, a legal parallel to the sculpture of David, but is related more to one of Michelangelo's works with unfinished contours, perhaps a few clear ideas, leaving some rejected pieces lying visibly on the studio floor. Interest balancing is either one of the discarded pieces on the floor or one still remaining on the uncompleted marble statue, but being chipped away by the master builders in the courts. This article will outline the early creation of the securities statute, as opposed to the marble statue, and then address the progress to date in carving the clearly still unfinished product.

The U.S. Securities and Exchange Commission (SEC) is rarely viewed within the United States as an overzealous, securities fraud police force. Certainly some purchasers and sellers of securities, both professional brokers and individuals who have been charged with securities fraud, have been displeased with the challenge to their conduct by the SEC. But no more so than domestic persons accused of violations of other federal statutes, from Justice Department challenges to price fixing agreements as violations of the antitrust laws to Treasury Department challenges to transfers of funds abroad as violations of foreign assets control regulations. The SEC has been functioning for more than sixty years. It has gained acceptance within the United States as an institution with an important role in maintaining fair securities markets and fair trading within those markets.

When alleged securities fraud involves acts not of U.S. citizens in the United States, but of foreign citizens acting largely abroad, actions of the SEC may not be well received or fully understood.[5] This also has been true of Department of Justice actions under the antitrust laws. Both laws provide for a mix of civil and criminal actions, which sometimes creates confusion or sends mixed signals abroad.[6] When private actions claiming treble

5. The extraterritorial application of securities fraud provisions may be more extensive than the reporting and registration requirements indicate. *See, e.g.,* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989) (Great Britain) (holding that a transaction involving a target company in which 2.5% of the shareholders were U.S. citizens has a substantial effect with the United States so to allow the court to find subject matter jurisdiction); Plessy Co. Plc v. General Elec. Co. Plc, 628 F. Supp. 477, 477 (D.Del. 1986) (exempting U.K. company from disclosure filings in contest for control of second U.K. company).

6. The *In re Uranium* antitrust litigation is perhaps the best example. *See In re* Uranium Antitrust Litig. v. Rio Algom Ltd., 480 F. Supp. 1138 (N.D. Ill. 1979). Foreign courts were

damages are initiated along with SEC actions, or are undertaken without separate SEC action, the reaction from abroad is often of even greater displeasure. What creates the greatest concern abroad is the elusive U.S. version of extraterritorial subject matter jurisdiction.[7]

The law of extraterritorial application of laws has developed in the United States principally in the federal circuit courts of appeal,[8] with only occasional but important rulings from the Supreme Court. This judicial development of the law has been influenced, not always helpfully, by the two successive Restatements of Foreign Relations Law produced by the American Law Institute (ALI).[9] Sections of the Restatements have been important to the development of the conduct and effects tests, when courts have searched for a way to express the uncertain congressional intent regarding whether U.S. laws have extraterritorial reach.[10] But other sections of the Restatement have proven ineffective and even a hinderance to the resolution of international disputes.[11] These include the interest balancing or comparative interests theory provisions, which have their source less in what the courts or Congress have said than in what the drafters of the Restatement thought the law should be. Their creation has contributed to considerable confusion as to what courts ought to do. While the courts have ignored interest balancing for the most part, its advocates continue to promote it as the best solution to international conflict.

This author agrees with the advocates of interest balancing that it may be the ideal solution, but it is unworkable and unpredictable, and in practice has proven inconsistent in application. Interest balancing had its moment of

---

concerned with allowing civil litigation discovery in their nations where there were criminal investigations in progress that might have benefitted from the civil discovery. *In re* Westinghouse Uranium Contract, 1978 A.C. 547, 549, 592 (United Kingdom). Discovery was prohibited or severely restricted by laws in five nations: Australia, Canada, South Africa, Switzerland, and the United Kingdom. *In re Uranium Antitrust Litig.*, 480 F. Supp. at 1143.

7. *See* Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 579 (1983); Tina Kahn, Comment, *The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement*, 2 NW. J. INT'L L. & BUS. 476, 476 (1980).

8. Some federal district court opinions are helpful, but they often tend to be inconsistent even within the circuits.

9. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter SECOND RESTATEMENT]; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter THIRD RESTATEMENT]. The two Restatements have been labelled Second and Third. There were discussions regarding a First Restatement of Foreign Relations Law, but it was never completed.

10. THIRD RESTATEMENT, *supra* note 9, § 402 (stating that "[s]ubject to s 403, a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory"). Perhaps more importantly, the Restatement has influenced the development of these tests, whether or not they accurately reflect legislative intent.

11. *Id.* § 403.

glory in antitrust litigation, but it has not proven its merit in other areas, including securities litigation. Efforts to promote interest balancing might be better spent attempting to assist the development of positive rules regarding what quality and quantity of conduct and what effects in the United States justify the application of extraterritorial jurisdiction, regardless of the fact that another forum or law also might be an appropriate, or even a more appropriate, forum on law. Furthermore, foreign courts seeking to interpret international law, especially international comity, do not consider the Restatement to be anything more than what it is, a U.S. view of the world as interest balancing advocates in the United States would like it to be.[12] It has limited relevance in the resolution of international disputes in foreign or international forums.

Originally, the intent of this article was to explore the development of extraterritorial subject matter jurisdiction in securities fraud cases and to present some thoughts on how the U.S. Supreme Court decisions in *Hartford Fire Insurance*[13] and *Aramco*[14] might affect the conflict among the federal circuit courts in securities fraud cases. But on February 8, 1996, the Ninth Circuit handed down its decision in *Butte Mining Plc v. Smith*.[15] The *Butte Mining* decision in the United States and several related decisions in the United Kingdom, which created a serious conflict between these two jurisdictions involving the use of antisuit injunctions,[16] have changed some of the questions that need to be discussed.

It is this author's view that the Ninth Circuit decision in *Butte Mining* would have been different in the absence of the *Hartford Fire Insurance* decision and the U.K. High Court rulings in *Simon Engineering Plc v. Butte Mining Plc*.[17] Although the Second Circuit had crafted a relatively consistent rule of subject matter jurisdiction in international securities fraud cases,[18] a view which was departed from partly by the Third and Eight Circuits, the Ninth Circuit in *Grunenthal GmbH v. Hotz* made a significant departure by interpreting the securities laws far more broadly to allow subject matter jurisdiction where the conduct in the United States was at best marginal.[19] *Hartford Fire Insurance* must have affected the Ninth Circuit's

12. If interest balancing is a world vision, it ought to be the product of a world organization and not of the A.L.I.

13. *Hartford Fire Ins.*, 509 U.S. at 764.

14. *Aramco*, 499 U.S. at 244.

15. 76 F.3d 287 (9th Cir. 1996).

16. *See* Simon Eng'g Plc v. Butte Mining Plc, [1996] 1 Lloyd's Rep. 104 (Feb. 27, 1995), [1996] 1 Lloyd's Rep. 91 (Oct. 3, 1995) (Eng.).

17. *Simon Eng'g*, [1996] 1 Lloyd's Rep. 104; [1996] 1 Lloyd's Rep. 91.

18. The Second Circuit includes New York City, which is the location of much important securities litigation.

19. 712 F.2d 421 (9th Cir. 1993).

possible use of interest balancing in *Butte Mining*.[20] Furthermore, the level of judicial conflict between the United States and the United Kingdom in the Butte Mining litigation may have caused the Ninth Circuit to adopt a stricter test for subject matter jurisdiction, more in line with the Second Circuit's decisions and inconsistent with the Ninth Circuit's earlier *Grunenthal* decision. The Supreme Court *Aramco* decision casts some doubt on the extraterritorial application of any congressional act where there is no clear intent for such extension abroad.[21]

Supreme Court resolution of conflicting views among federal circuit courts is always welcome, especially when it informs foreigners acting abroad when their conduct might subject them to liability in the United States by the application of a U.S. law with an extraterritorial reach.[22] It is no less reasonable for U.S. citizens subjected to developing subject matter jurisdiction theories in foreign nations to expect such theories to have some measure of predictability, fairness, and consistency. Foreign nations, which have long objected to the extraterritoriality of U.S. laws, recently have been responding in several ways. One response has been to adopt defensive measures in the form of blocking laws, sometimes including clawback provisions, which create further conflict between the two nations.[23] A second response has been to grant antisuit injunctions when one of their nationals is the plaintiff and another is a principal defendant in a U.S. action, such as in the Laker Airways litigation and the Butte Mining litigation. A third response has been to adopt an extraterritorial approach in the application of their own laws, illustrated by the European Court of Justice acceptance of an effects test for

---

20. Interest balancing had been introduced by the Ninth Circuit in the antitrust decision *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), discussed *infra*.

21. *See* 499 U.S. at 248 (stating that there is a presumption against extraterritorial application of U.S. law unless there is a contrary intent).

22. The exposure to far greater damages in the United States, both punitive and treble damages, is a good reason for foreigners to be careful to avoid subjection to subject matter and personal jurisdiction in the United States. The dislike of U.S. damages was clearly expressed by the U.K. High Court in the *Simon Engineering* decision. [1996] 1 Lloyd's Rep. 91.

23. *See, e.g.*, Kahn, *supra* note 7, at 476. In view of the *Hartford Fire Insurance* decision, these laws may proliferate so as to attempt to create a true conflict in the U.S. courts allowing application of principles of international comity. Some blocking laws include what are known as "clawback" provisions, which allow a national subjected to a treble damage judgment in the United States to take back the amount of the damages from any assets the plaintiff has in the country enacting the blocking, or clawback, legislation. *See* Note, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 COLUM. L. REV. 1097, 1098 (1981). More recently, the enactment of the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 has increased the pace of the enactment of foreign blocking laws. 22 U.S.C. § 6001 (1994).

Blocking laws are not favored by advocates of interest balancing. *See* Andreas F. Lowenfeld, *Sovereignty, Jurisdiction, and Reasonableness: A Reply to A.V.Lowe*, 75 AM. J. INT'L L. 629, 637 (1981).

application of the Treaty of Rome antitrust provisions.[24] Finally, a fourth response of foreign nations has been to undertake their own concept of interest balancing, which may turn into more a disparagement of the another nation's legal system than a balancing of positive national interests, as in the Butte Mining litigation in the English courts.

This article will attempt to work through the maze of various concepts of international securities fraud subject matter jurisdiction, that are found in the decisions of the U.S. federal circuit courts. If the maze is not understood by foreign jurists, it may well be rejected, promoting the adoption and use of responses by foreign nations that are as described above, which was the experience following the extraterritorial application of U.S. antitrust laws to foreign conduct. The extraterritorial application of law and foreign responses to it have created a distinct dissonance in international commercial relations.

Attempts have been made to add limits to the exercise of extraterritorial jurisdiction in U.S. courts by the mysterious process of interest balancing.[25] But interest balancing has neither functioned well nor been accepted by many courts.[26] Attempts to interest balance may lead to the unpleasant result of raising and discussing one nation's dislike of the another nation's legal culture.[27] In such a hostile environment, interest balancing is misconceived and rendered of limited value. Furthermore, statutes increasingly express a clear extraterritorial intent, as do such foreign responses as blocking laws, leaving little latitude in the procedure for interest balancing.

Interest balancing, which has a very limited and largely academic following in its country of origin, the United States, is being challenged and rejected because it (1) is so complex that it is unfair to expect judges to properly apply the test, (2) includes a broad range of areas to consider, reaching beyond reasonable time and expense limitations of the litigation system, (3) mistakenly suggests that judges of one nation are able to correctly and fairly measure the public interests of another nation, (4) offers no guidance as to which factors are more or less important or what weight is to be given to each, (5) constitutes an inappropriate test for harmonizing legal norms applied in the courts of various nations because of the different role

---

24. *See Re* Wood Pulp Cartel v. ECC, Joined cases 89, 104, 114, 116, 117 & 125-129/85, [1988] E.C.R. 5193, [1988] 4 C.M.L.R. 901. Although the decision stated it was applying the territorial principle because the producers, including foreign companies, had implemented their pricing agreement within the market, the principal conduct of making such agreements occurred outside the European Union, with intended effects occurring within the European Union.

25. *See, e.g., Timberlane*, 549 F.2d at 614.

26. John B. Sandage, Note, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 YALE L. J. 1693, 1702 (1985) (citing *Laker Airways*, 731 F.2d at 951).

27. British Airways Bd. v. Laker Airways, Ltd., [1985] 1 App. Cas. 58, 78.

and function of civil law attorneys and judges and fact-gathering procedures in civil law nations, and (6) has not been especially well received by U.S. courts during the years (now several decades) since it was introduced.[28] If the area is ever to be the subject of international harmonization efforts, a less idealistic but more predictable and functional test is needed. One of the questions raised by the *Hartford Fire Insurance* decision and the Butte Mining litigation is whether interest balancing theory should continue to have any role, especially in complex litigation involving such fields as antitrust and securities fraud litigation.

## II. EXTRATERRITORIAL SUBJECT MATTER JURISDICTION IN ANTITRUST LITIGATION

Before embarking upon a consideration of the variations on a theme of extraterritoriality in securities fraud law subject matter jurisdiction, some comment on the development of the antitrust law effects test and interest balancing will illustrate the most important precedents to the subsequent development of extraterritorial application of securities fraud law. This review is necessary to understand the *Hartford Fire Insurance* decision, which dictates the future course of antitrust law and likely influences other areas where the extraterritorial application of law is involved, including securities fraud.

### A. *Pre*-Hartford Fire Insurance *Antitrust Decisions*

Both the initial antitrust laws and the initial securities fraud laws in the United States were enacted to address domestic problems. The Sherman Antitrust Act of 1898 was intended to reduce the anticompetitive conduct of the various "trusts" of the late nineteenth century, which were harming competition in the United States.[29] The Act was not drafted to reach any then existing foreign conduct causing anticompetitive effects in the United States, but it does refer to "trade or commerce . . . with foreign nations."[30]

Although the first major test of the reach of the Act abroad was the

28. Ruggero J. Aldisert, *Federal Courts and Extraterritorial Law: Enlightened Self Interest or Yankee Imperialism?*, 5 J. L. & COM. 415, 415, 421-22, 427 (1985); Sandage, *supra* note 26, at 1701-07.

29. ALBERT H. WALKER, HISTORY OF THE SHERMAN LAW OF THE UNITED STATES OF AMERICA 10, 13 (1980).

30. The act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1994). This provision is expanded in the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), which constitutes the current status of statutory law and is discussed *infra*. 15 U.S.C. § 6a.

*American Banana Co. v. United Fruit Co.* decision in 1910,[31] Justice Oliver Wendell Holmes' territorial based limitations of the Act did not long survive.[32] These limitations were based on a rigid conflict of laws theory that the law of the place of the act determines both the existence and the extent of an obligation.[33] Even if conflict of laws principles were the proper approach to resolve the current lack of clarity over the extraterritorial application of laws, the rigid conflicts views that prevailed in the first half of the century were moderated in subsequent decisions and legislative amendments in the antitrust field. Antitrust developments may be a precursor to changes in other areas such as securities fraud.

The first important challenge to territorial based limits on extraterritorial application of domestic law was the 1945 *United States v. Aluminum Co. of America (Alcoa)* decision, where the Second Circuit Court of Appeals introduced the "effects" test.[34] This test interpreted the Sherman Antitrust Act language as applicable to conduct that is wholly or partly foreign, and where that conduct is intended to and does have an effect in the United States.[35] As becomes evident in subsequent antitrust cases, as well as in cases involving securities fraud discussed below, "conduct" and "effects" as the basis for jurisdiction carry the debate into more complex dimensions than where the limits on jurisdiction stop at the water's edge or the border under the territorial approach. As long as conduct and effects (or conduct *or* effects) remain unburdened by a complex interest balancing test, they retain

31. 213 U.S. 347 (1909). The territorial approach, also reflected in writings of Beale and the original RESTATEMENT OF CONFLICT OF LAWS, does not necessarily exclude extraterritoriality, if it simply expresses a preference for the application of the law of the forum to govern actions occurring in the nation. It is beyond the scope of this Article to debate the territorial view in the first four decades of this century. Such a discussion would be largely irrelevant to this Article, which suggests the need for international unification of securities fraud standards.

32. An interesting discussion of this decision, offering some insight into Justice Oliver Wendell Holmes' notion of territoriality, which he formulated after being injured in the U.S. War Between the States, is contained in JOHN T. NOONAN, PERSONS AND MASKS OF THE LAW, ch. 3 (1976). John Noonan, 20 years later as Judge Noonan of the Ninth Circuit, would pull back the Ninth Circuit from its efforts to broaden extraterritorial subject matter jurisdiction, in the *Butte Mining* decision discussed *infra*.

33. Justice Holmes drew on the existing rigid territorial choice of law doctrine, as expressed in *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 125 (1909), an earlier opinion he had written.

34. 148 F.2d 416, 416 (2d Cir. 1945). The decision could not be rendered by the Supreme Court because it could not obtain a quorum. It was referred to the Second Circuit by the Supreme Court. These events, plus the fact that the decision was written by Learned Hand and rendered by a court that included Learned and Augustus Hand, have given the decision status somewhere between a decision of the Circuit Court and the Supreme Court, probably closer to the latter.

35. *Id.* at 443.

some predictability.[36]

Thirty-one years passed before the next significant case law development in the evolution of subject matter jurisdiction in antitrust law. This relative inaction on the subject by the courts should not suggest a period of dormancy in thinking and debate on the issue. In the interim, Professor Kingman Brewster suggested in 1958 that judges should consider, *when determining liability or relief* in antitrust cases,[37] a list of factors representing the interests of each affected nation.[38] This list would be amended and altered by successive supporters of Brewster's work.[39] More importantly, the use of the list would extend beyond the suggestion for consideration to determine liability or relief to whether there should be subject matter jurisdiction, or whether the court should go forward after determining that there is jurisdiction.[40]

One of the first uses of a list to consider different national interests appeared in 1965 in the *Restatement (Second) of Foreign Relations Law of*

---

36. Furthermore, there is a danger when interest balancing is applied that a court may overlook the prerequisite to interest balancing, that is, the presence of effects sufficient to satisfy the *Alcoa* test. *Id.* at 416.

37. Such determination is in contrast to determining whether there is subject matter jurisdiction, or to deciding not to go ahead for reasons of comity after determining that there is such jurisdiction.

38. KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958); JAMES R. ATWOOD & KINGMAN BREWSTER, 1 ANTITRUST AND AMERICAN BUSINESS ABROAD (2d ed. 1981). Professor Brewster suggested:

> (a) the relative significance to the violations charged of conduct within the United States as compared with conduct abroad;
> (b) the extent to which there is explicit purpose to harm or affect American consumers or Americans' business opportunity;
> (c) the relative seriousness of effects on the United States as compared with those abroad;
> (d) the nationality or allegiance of the parties or in the case of business associations, their corporate location, and the fairness of applying our law to them;
> (e) the degree of conflict with foreign laws and policies; and
> (f) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country.

BREWSTER, *supra*, at 446; *see also* WILBUR L. FUGATE, 1 FOREIGN COMMERCE AND THE ANTITRUST LAWS (2d ed. 1973) (1958).

39. *See* SECOND RESTATEMENT, *supra* note 9; THIRD RESTATEMENT, *supra* note 9; Lowenfeld, *Hague Lectures*, *infra* note 43.

40. Deciding whether to go forward could be based on comity without reaching the issue of choice of law. Comity would consider the various interests in the lists offered as tests. A court would not consider what law is applicable, but whether the court has subject matter jurisdiction and whether it should go forward for reasons of comity. Assuming the court chooses to go forward under a comity test, under choice of law principles it then could decide not to apply U.S. antitrust law, but the law of the foreign nation. But does this mean application of foreign, local antitrust law, which is not present in many nations, or recognition of foreign blocking statutes as substantive law?

*the United States*.[41] This list was intended by the Restatement drafters to limit *enforcement* jurisdiction.[42] Professor Andreas Lowenfeld in his 1979 Hague Lectures soon enlarged the list to ten factors for courts to consider when exercising legislative jurisdiction.[43] The enlargement of the list and expansion of its scope of application served the intellectual demands of the Hague Lectures admirably,[44] but it did not present a realistic test that would be welcomed by U.S. courts or by lawyers seeking the smallest measure of predictability. Use of such a test would require an extensive judicial discretion, which might function in a smaller and more homogeneous legal system such as in England, but it would not assist in the development of a consistent judicial theory in the larger and less homogeneous system in the United States. Furthermore, it was unlikely to be welcomed abroad, especially in civil law based systems, where such discretion would be

---

41. SECOND RESTATEMENT, *supra* note 9, § 40. It listed five factors to consider:

(a) vital national interests of each of the states,
(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon 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 the enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

*Id.*

42. *Cf.* THIRD RESTATEMENT, *supra* note 9, § 403(2)(a-h) (applying its longer list to jurisdiction to legislate).

43. Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 311, 328-29 (1979) [hereinafter Lowenfeld, *Hague Lectures*]. Professor Lowenfeld suggested:

(i) the character of the activity to be regulated;
(ii) the basic policies underlying the regulation;
(iii) the link between the State under whose authority the regulation is to be carried out and the person or persons principally responsible for the activity to be regulated;
(iv) the needs and traditions of the international political, legal, and economic system;
(v) the protection of justified expectations;
(vi) the conflicts, if any, between the regulation in question and the exercise of legislative jurisdiction pursuant to the authority of another State;
(vii) the conflicts, if any, between the regulation in question and the potential exercise of legislative jurisdiction pursuant to the authority of another State;
(viii) the territory in which the activity is principally carried on;
(ix) the direct and foreseeable effect of the activity;
(x) in the case of exercise of delegated authority, the intention of the person or body that has delegated the authority.

*Id.* Professor Lowenfeld stated that he sought "reasonableness, not certainty." *Id.* at 329.

44. Professor Lowenfeld would not necessarily limit consideration to the ten factors, which he describes as illustrative rather than complete. *See* Lowenfeld, *Hague Lectures*, *supra* note 43, at 328.

inconsistent with the function allocated to most civil law judges.[45] Professor Lowenfeld's list nevertheless offered a carefully considered suggestion for an ideal but hypothetical world from which we may develop a less demanding test for a less ideal but real world.[46]

As Associate Reporter for the 1987 *Restatement (Third) of the Foreign Relations Law of the United States*, Professor Lowenfeld had considerable influence in developing a new Restatement list of factors for courts to consider in limiting what the Restatement refers to as "jurisdiction to prescribe."[47] It is better understood by foreign jurists, especially those with a civil law tradition as jurisdiction to legislate.[48] The provision of the Third Restatement that is important to this article is its basis for jurisdiction to prescribe, which includes "conduct outside its territory that has or is intended to have substantial effect within its territory."[49] Left without further clarification, this provision would allow development of a theory with far greater predictability than the confusion created by the Third Restatement's section 403, which lists eight limitations on jurisdiction.[50] This list includes three more factors than the Second Restatement to consider, but it contains two less than Professor Lowenfeld's Hague Lecture list.[51] The Third

---

45. Any theory of such importance in international disputes such as the governance of conduct that occurs abroad ought to gain the respect and understanding of jurists in other systems. Perhaps it also should be a theory that would be expected to gain favor in international attempts of harmonization of the law. Any theory that is inconsistent with the function of judges in much of the world would not pass such a test.

46. Nearly two decades have proven Professor Lowenfeld's list to be theory versus practice. This author has not read any significant case that attempted to use this intimidating test to resolve the issue. It is an aspirational test, not one of "how things really work." But in aspirations lie far more appropriate solutions than when the "way things ought to work" is absent from our thinking. For that alone Professor Lowenfeld deserves the appreciation and admiration of the full international, not just the Hague, "academy."

47. THIRD RESTATEMENT, *supra* note 9, § 403.

48. Professor Lowenfeld had used this more commonly found term, "jurisdiction to legislate," in his Hague Lectures. Drafters of old ideas sometimes attempt to give them greater credibility with new labels. The attempt was to clarify that in addition to the legislature, other branches of government, such as the executive branch, legislate. They prescribe rules. The definition of legislate is to make laws, without specifying the source. Jurisdiction to legislate remains the more universally accepted term.

49. THIRD RESTATEMENT, *supra* note 9, § 402(c).

50. *Id.* § 403(2)(a-h).

51. *Compare id.* § 403, *with* SECOND RESTATEMENT, *supra* note 9, § 40 *and* Lowenfeld, *Hague Lectures*, *supra* note 43, at 311, 328-29. Section 403 suggests that jurisdiction to prescribe as defined in § 402 is limited and requires the consideration of all relevant factors, specifically listing eight:

> (1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.
>
> (2) Whether exercise of jurisdiction over a person or activity is unreasonable

Restatement also considers the section 403 interest balancing test applicable

---

is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

THIRD RESTATEMENT, *supra* note 9, § 403(1)-(3).

If the use of the term "state" is confusing to foreign readers, "state" means a nation rather than a state within the United States. The Restatement of Foreign Relations, perhaps more than any other of the Restatement series, is an exercise in drafting not what the law is but what the drafters would like it to be. While that also is true to various degrees with regard to the restatements that address domestic law, such as agency or contracts, it is more troublesome when dealing with international law. Although the title of the restatement is THE FOREIGN RELATIONS LAW OF THE UNITED STATES, the language does seem to attempt to craft international principles, which are better left to international groups than the A.L.I. The Restatement suggests some opinion within the very prestigious A.L.I. as to what U.S. law ought to be in numerous cross-border situations. It is a remarkable effort, but should not be mistaken for positive law. The Restatement has been used as a basis of the adoption of principles of law by some state legislatures and courts. It has been rejected or completely ignored by others. One example of rejection involved interpretation of the language of the Foreign Sovereign Immunities Act of 1976 (FSIA), in the third part of the commercial activity exception. The language stating an exception is granted to an "act outside . . . the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States," caused a split in the federal circuit courts. 28 U.S.C. § 1605(a)(2) (1994). Some followed the view that the effect must be "substantial" and "foreseeable," drawing specifically on the language in the Restatement's jurisdiction to prescribe provisions, which had seemingly been approved by the House Report in drafting the FSIA. But other circuits rejected this view and held that the direct effect requirement was satisfied where there was some financial loss. The U.S. Supreme Court accepted the latter view in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). Lack of attention to the Restatement's specific provisions regarding securities law is discussed *infra*.

to specific problems of antitrust[52] and securities regulation.[53] Section 403 has not been well received by the courts in either area of litigation.[54]

Midway between the adoption of the Second Restatement in 1965 and the Third Restatement in 1987,[55] the often adventuresome Ninth Circuit Court of Appeals, in 1976, addressed an antitrust case where conduct had occurred outside the United States but the alleged effect was within the United States.[56] In *Timberlane Lumber Co. v. Bank of America*, the Ninth Circuit, departing from the Second Circuit, viewed the direct and substantial effects test introduced in *Alcoa* as inadequate because it failed "to consider other nations' interests . . . [or] take into account the full nature of the relationship between the actors and this country."[57]

---

52. THIRD RESTATEMENT, *supra* note 9, § 415 (affirming that antitrust matters are "subject to the jurisdiction to prescribe" rules, which include the section 403 interest balancing provisions). Since the adoption of the Third Restatement, no significant antitrust case has endorsed the section 403 test, and the *Hartford Fire Insurance* decision reduced the significance of section 403 as a useful or acceptable theory. 509 U.S. at 764.

53. THIRD RESTATEMENT, *supra* note 9, § 416. Jurisdiction to prescribe or legislate is specifically limited by section 403 in section 416(2), which adds three additional interest balancing provisions related to the uniqueness of the securities markets. No significant securities case has used interest balancing, and interest balancing under this Restatement section has been ignored.

54. There have been only a few significant securities fraud cases since the adoption of the Third Restatement in 1987. In fact, the decision most likely to have used the Restatement's list of limitations, the Ninth Circuit's 1983 decision in *Grunenthal*, occurred several years before the Restatement. *See* 712 F.2d at 421. The court did not refer to Professor Lowenfeld's Hague Lecture suggestions, but this is not unusual as the Hague Lectures are rarely referred to in U.S. cases. Usually, they are presented not with the idea of influencing the future shape of the law in the presenter's country, but rather as an intellectual challenge for the multinational audience to think about a subject in manner different from the norm. Professor Lowenfeld's Hague Lectures certainly have achieved that goal.

55. The case also was decided before the Lowenfeld Hague Lectures in 1979.

56. 549 F.2d 597 (9th Cir. 1976), *on remand*, 574 F. Supp. 1453 (N.D.Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

57. *Id.* at 611-12. The factors that the court considered relevant for its jurisdictional rule of reason approach include:

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

*Id.* at 614.

The court considered the effects test to be only a prelude to a comity analysis of respective interests. *Id.* at 613. Indeed, the court only believed that there needed to be some effect on commerce, allowing a very nominal effect which contrasts with the substantial effect required under the line of decisions following the effects test theory. *Id.* at 612. The court's application of the interests test is perhaps the best evidence to date of its shortcomings.

As we will see, with regard to international securities fraud decisions regarding subject matter jurisdiction, the Ninth and Second Circuit Courts of Appeal are not only a continent apart geographically, but also philosophically.[58] The *Timberlane* decision obviously brought forth considerable comment.[59] One concern with *Timberlane* was its insignificant effect in the United States, which suggested no need to undertake interest balancing. The decision seemed to substitute the interest balancing test for the effects test. The more appropriate method would be to first determine whether there were sufficient effects in the United States to apply antitrust law, and then consider interest balancing as a means of limitation either on jurisdiction or on going forward. While *Timberlane* may have pleased jurists who support this part of the Restatement, it contributed to the development of inconsistent views among the various federal circuits. Although the Ninth Circuit's interest balancing theory has been accepted in several circuits,[60] it has been questioned or ignored in others.[61] *Timberlane*'s value was diminished by the enactment in 1982 of the Foreign Trade Antitrust Improvement Act (FTAIA).[62] The FTAIA, which seems largely ignored by those scholars and judges who are determined to develop interest balancing theory, provided that the challenged conduct in export commerce or wholly foreign conduct must have a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce, or on the trade of a person who is engaged in export commerce.[63]

---

58. The denial of certiorari in *Timberlane* does not constitute an expression of acceptance of the Ninth Circuit's interest balancing theory, nor is it a rejection of that theory. *Timberlane*, 472 U.S. at 1032.

59. *See* Jo Rachel Backer, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247 (1977); Jean Bernstein, *Recent Developments:* Timberlane Lumber Co. v. Bank of America, 4 BROOKLYN J. INT'L L. 97 (1977); Elizabeth H.W. Fry, *Recent Developments: Antitrust — Extraterritorial Jurisdiction Under the Effects Doctrine — A Conflicts Approach*, 46 FORDHAM L. REV. 354 (1977); R. Roelofs, *Antitrust Law: Extraterritoriality* — Timberlane Lumber Co. v. Bank of America, 18 HARV. INT'L L.J. 701 (1977).

60. The most frequently cited decision is the Third Circuit case Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979). Interest balancing was used in *Mannington* to reverse an early dismissal. *Id.* The parties settled, perhaps to avoid the difficult task in establishing interests under the test, as suggested by Professor Harold Maier. Maier, *supra* note 7, at 589 n.41. Neither *Timberlane*, 549 F.2d at 613, nor *Mannington*, 595 F.2d at 1301, required proof of a substantial effect in the United States caused by required, privileged, or encouraged foreign actions. On remand in *Timberlane*, the district court required proof of substantial effect, and its decision that the effect in the United States of conduct in Honduras was minimal appears to have been important to the district court's dismissal and circuit court's affirmance. *Timberlane*, 549 F.2d at 613; Timberlane Lumber Co. v. Bank of Am., 574 F. Supp. 1453, 1467 (N.D. Cal. 1983).

61. The strongest criticism was in the D.C. Circuit in *Laker Airways v. Sabena, Belgian World Airlines* , 731 F.2d 909, 913, 948-52 (D.C.Cir. 1984).

62. 15 U.S.C. § 6a (1994).

63. 15 U.S.C. § 6a(1)(A)-(B).

The FTAIA does not apply specifically to *import* commerce,[64] but courts seem unlikely to apply a test to give imports into the United States greater protection than export commerce under the FTAIA. There seems to be a reluctance to accept the idea that the FTAIA replaced the *Timberlane* decision's unpredictable rule with a more specific and predictable, but perhaps less ideal and aspirational rule. Although the opportunity was presented, the FTAIA did not address interest balancing theory specifically or international comity generally.

The impact of the FTAIA beyond its specific application to export trade rests in the logic of the assumption that the "direct, substantial and foreseeable" effect language is the norm for any extraterritorial application of the antitrust law.[65] That of course does not preclude a court from (1) finding such effect to exist as a result of foreign conduct, and (2) refusing to go forward under principles of international comity. This process seemed to be an alternative until the Supreme Court in the 1993 *Hartford Fire Insurance* decision severely restricted comity usage.[66] While that Supreme Court decision postdated the 1976 *Timberlane* decision by seventeen years, other cases in the interim illustrated the increasing isolation of extensive interest balancing under international comity and the diminishing value of attempting to draft interest balancing guidelines.

One of the more forceful rejections of interest balancing came in the 1984 Laker Airways antitrust litigation.[67] The Laker Airways litigation first involved a suit brought in the United States by U.K.-chartered Laker Airways against several U.S. and foreign airlines, including British Airways and British Caledonian, which were both chartered in the United Kingdom.[68] The complaint alleged predatory pricing on Laker routes, secret commissions to travel agents to not book flights on Laker Airways, and attempts to prevent Laker Airways from receiving loans.[69]

The D.C. Circuit followed the effects test.[70] The court rejected interest balancing and suggested that the approach "is unsuitable when courts are forced to choose between a domestic law which is designed to protect domestic interests, and a foreign law which is calculated to thwart the

64. The House Report states that "it is important that there be no misunderstanding that import restraints . . . remain covered by the law." H.R. REP. NO. 97-686, at 9 (1982) (prepared statement of James R. Atwood, Apr. 8, 1981).

65. 15 U.S.C. § 6a(1)(A)-(B).

66. *Hartford Fire Insurance*, 509 U.S. at 798-99.

67. The principal decision in the United States is *Laker Airways*, 731 F.2d at 909, which also contains a lengthy discussion of international comity. The principal decision in England is *British Airways Bd. v. Laker Airways, Ltd.*, [1984] 1 Q.B. 142, [1985] 1 App. Cas. 58.

68. *Laker Airways*, 731 F.2d at 909.

69. *Id.* at 917.

70. *Id.* at 915.

implementation of the domestic law in order to protect foreign interests allegedly threatened by the objectives of the domestic law."[71] Courts increasingly are faced with interpreting legislative expressions of strongly expressed domestic interests that effectively nullify judicial interest balancing.[72]

The *Laker Airways* decision would seem to leave few if any domestic legislative statutes, including the securities fraud laws, outside its scope, since every legislative enactment seems to be based on some "domestic interest."[73] The more difficult determination is what constitutes a foreign nation's expression of an intention to "thwart the implementation of the domestic law in order to protect foreign interests."[74] The *Laker Airways* decision nevertheless suggests that whether or not there is such foreign legislation, interest balancing is inappropriate.

Another significant group of antitrust cases that rejected interest balancing after *Timberlane* involved the *In re Uranium Antitrust Litigation*.[75] The Westinghouse company sold nuclear power plants to numerous power companies in the United States and abroad. To assure these sales, Westinghouse also contracted to provide uranium for long terms at rates that soon thereafter proved to be so far below the increasing market price that Westinghouse could not fulfill its agreements. As one defense to breach of contract claims, Westinghouse argued that there was an international uranium suppliers cartel: therefore, Westinghouse was relieved of performance under frustration of contract theory.[76] In attempts to establish the cartel theory by obtaining evidence abroad, much of which was frozen by blocking statutes, a Federal District Court in Illinois rejected the Second Restatement's interest balancing approach, stating that "[a]side from the fact that the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country, such a balancing test is inherently unworkable in this case."[77]

---

71. *Id.* at 948.

72. There may be no clearer case than that expressed in the U.S. legislation regarding trade with Cuba through third-nation affiliates and subsidiaries. The United States Cuban Democracy Act of 1992 and the Cuban Liberty and Democratic Solidarity Act of 1996 include powerful statements of U.S. interests. *See generally* 22 U.S.C.A § 6021 (1996). Blocking statutes of Australia, Belgium, Canada, Denmark, Finland, France, Norway, Sweden, and the United Kingdom express equally clear domestic interests.

73. 731 F.2d at 937-48.

74. *Id.* at 948.

75. *In re* Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980).

76. *Id.*

77. *Uranium Antitrust Litig.*, 480 F. Supp. at 1148. The court also noted that "[t]he competing interests here display an irreconcilable conflict on precisely the same plane of national policy." *Id.* This view was shared in the United Kingdom associated litigation, where Lord Wilberforce stated, "It is axiomatic that in antitrust matters the policy of one state

*Laker Airways* and *In re Uranium* were two of the most complex international antitrust litigations of the past two decades. These early 1980s experiences seemed to have had little effect on the development of section 403 of the 1987 Third Restatement.[78] They underline the fact that the interest balancing theory of section 403 is an interesting exercise at most, that is, a benign theoretical blip on the intellectual continuum of academe, essentially useless as a dispute resolution assist for resolving the most important international litigation that had occurred over the past decades.

### B. Hartford Fire Insurance

The attempt of the Third Restatement in 1987 to supply principles for resolving complex litigation involving the extraterritorial application of U.S. law received its most serious shock six years later in *Hartford Fire Insurance*.[79] The case has been criticized for failing to apply the "reasonableness" test of section 403 of the Third Restatement,[80] accused of misunderstanding the Restatement,[81] and praised for having buried the purported test.[82] The latter two views have been challenged.[83]

---

may be to defend what it is the policy of another state to attack." Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] App. Cas. 547, 617. It is this author's belief that these statements would equally, if not more so, apply in civil law nations, where the judiciary's discretion is more restrained than in the United States and some other common law nations.

78. *See* THIRD RESTATEMENT, *supra* note 9, § 403 reporter's notes (citing several of the Uranium and Laker decisions, but making no reference to the comments in those cases rejecting interest balancing). Although the notes to section 415 on jurisdiction to legislate in antitrust matters refer both to *Timberlane* and its sole important follower, *Mannington Mills*, nowhere do they refer to the Laker decisions, the Uranium litigation, or federal circuits that had not accepted the ideas of *Timberlane* and *Mannington Mills*. *Id.* § 415 reporter's notes.

79. *Hartford Fire Ins.*, 509 U.S. at 764.

80. *See* David G. Gill, Note, Hartford Fire Insurance Co. v. California, 88 AM. J. INT'L L. 109, 114 (1994). Gill further criticizes what he views as the court's failure to consider the fact that a case involving private plaintiffs should be analyzed differently than one involving a government plaintiff. *Id.* In *Hartford Fire Insurance* the plaintiffs were both private and government. *Hartford Fire Ins.*, 509 U.S. at 764.

81. Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisprudence to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42, 50 (1995). Professor Lowenfeld, who helped prepare the brief for the losing side, attempts to elevate the Restatement to the level of "Aristotle, the Bible, the Koran, the American Constitution, and other authorities" in his defense of § 403 and explanation of how the majority got it wrong. *Id.* at 48.

82. Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403, Editorial Comment*, 89 AM. J. INT'L L. 53, 57 (1995).

83. Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750 (1995). Professor Kramer suggested that the Court, in its first opinion on the application of the Sherman Antitrust Act to conduct abroad with intended effects in the United States, overlooked its earlier *EEOC v. Arabian American Oil Co.* opinion, which established a general principle of territorial jurisdiction for all U.S. federal laws in the absence of contrary intent.

*Hartford Fire Insurance* involved a claim by plaintiffs, who included nineteen states and some private parties, that the London defendants had violated U.S. antitrust law by conduct occurring in England that involved their refusal to offer reinsurance to cover certain pollution damage claims to the U.S. insurers.[84] The London defendants did not deny such conduct (refusal to reinsure) nor that there was a consequent direct and substantial effect.[85] Rather, their defense was that their conduct was legal in London under a regulatory scheme adopted in England, and that *Timberlane, Mannington Mills*, and the Restatement provided the legal principles to limit the exercise of subject matter jurisdiction.[86] It was a defense that overlooked the questionable value of *Timberlane*, *Mannington Mills*, and the Restatement after the enactment of the FTAIA and the *Laker Airways* and *In re Uranium Antitrust Litigation* decisions.

As expected, the Ninth Circuit turned to its earlier *Timberlane* ruling and applied an interest balancing test.[87] Judge Noonan, writing for the Ninth Circuit, further recognized the "significant conflict" the case created with

---

499 U.S. 244, 248 (1991). There is a debate over the intent of the Sherman Antitrust Act, but at the time of its enactment it did not address a foreign issue, but exclusively a domestic problem. Professor Kramer expected that lawyers for defendants in future cases involving the extraterritorial application of U.S. law, such as the securities laws, would argue the *Aramco* decision. That did not appear to be the case in Butte Mining (discussed below), where the district and circuit courts make no reference to *Aramco*.

Professor Kramer also noted the confusion over the meaning of subject matter jurisdiction and jurisdiction to prescribe, concluding that the Court's ruling appeared to be that extraterritoriality of U.S. law is a question of subject matter jurisdiction (jurisdiction of the federal courts arising from the Constitution, laws or treaties) rather than prescriptive jurisdiction (the authority to apply the law to particular actions). Kramer, *supra*, 750 n.3.

84. *Hartford Fire Ins.*, 509 U.S. at 764. In the view of some observers of the industry, this created an insurance crisis in the United States because the inability of insurers to obtain reinsurance resulted in the primary insurers refusing to insure, which in turn resulted in the demise of enterprises. *But see* Richard N. Clarke et al., *Sources of the Crisis in Liability Insurance*, 5 YALE J. ON REG. 367, 369 (1988).

85. *Hartford Fire Ins.*, 509 U.S. at 798. With the wisdom of hindsight, such defenses should have been presented, at least in the alternative. Further surprising is the apparent lack of a defense arguing that customary international law would not allow the exercise of jurisdiction in this case.

86. *Insurance Antitrust Litig.*, 938 F.2d at 919. Because the litigation was in the federal district court in San Francisco, which is in the Ninth Circuit which had rendered the *Timberlane* decision, such a defense seemed appropriate at the time. Both the district court and circuit court applied interest balancing, although each in its own fashion. *Insurance Antitrust Litig.*, 938 F.2d at 919; *In re* Insurance Antitrust Litig., 723 F. Supp. 464 (N.D.Cal. 1989). However, the applicability of interest balancing as assisting or replacing rules of international comity was not fully, if even significantly, accepted in the United States. Since the U.S. Supreme Court had not yet spoken on the matter, a defense based on other circuit's views would have seemed prudent.

87. *Insurance Antitrust Litig.*, 938 F.2d at 919. The application of law by the circuit court, and earlier by the federal district court, share the same shortcomings regarding interest balancing as did *Timberlane*.

U.K. law and policy, and suggested that this conflict was outweighed by the "significance of the effects" and "their foreseeability and their purposefulness" on U.S. commerce.[88]

Although interest balancing was applied, it was subordinated to the effects. Judge Noonan to some extent resurrected the importance of the extent of the effect in the United States, which *Timberlane* had minimized in its focus on interest balancing theory. Granting certiorari, the U.S. Supreme Court was given the opportunity to measure the success of the framers and supporters of the Restatement theory in changing U.S. law from an effects theory to a comparative interest theory.[89] That group did not fare well and is now relegated to minimizing the impact of the *Hartford Fire Insurance* decision in reducing interest balancing theory, at least for the near future, to a footnote in the history of the development of resolving international conflicts arising from the extraterritorial application of law.

Justice Souter, writing for the majority in *Hartford Fire Insurance*, stated that there was only one question, "whether 'there is in fact a true conflict between domestic and foreign law.' "[90] He thought that a U.S. court should not engage in interest balancing unless there is a true conflict between the law of the United States and the law of the foreign state.[91] A true conflict would exist only when the U.S. party is required by the foreign law to violate U.S. law, or when it is impossible for the party to comply with the laws of both the United States and the foreign state.[92]

Justice Scalia, writing for the dissent, thought this a "breathtakingly broad proposition, which . . . [will cause] the Sherman Act and other laws . . . [to] conflict with the legitimate interests of other countries."[93] Justice Scalia preferred the use of the interest balancing factors of the Third Restatement's section 403 and thought they would "rarely . . . point more

88. *Id.* at 934.

89. Or to an effects *plus* comparative interests theory, except that with the addition of the latter, courts have sometimes overlooked the former in their haste to deal with interest balancing.

90. *Id.* at 765, 798 (quoting Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)).

91. *Id.* at 799.

92. *Id.* This statement sounds very close to, if not the same as, foreign compulsion theory. Under foreign compulsion, a state would not require a person to act in a foreign state in a manner prohibited by the law of the foreign state, or to refrain from acting in compliance with a requirement of that foreign state. However reasonable it may sound, it has not been uniformly accepted or applied. *See* United States v. Davis, 767 F.2d 1025, 1034 (2d Cir. 1985) (rejecting foreign compulsion); *Laker Airways*, 731 F.2d at 936 (rejecting foreign compulsion); United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 345-46 (7th Cir. 1983) (accepting foreign compulsion).

93. *Hartford Fire Ins.*, 509 U.S. at 820.

clearly against application of United States law."[94] Justice Souter did not specifically reject the Restatement, but without so stating, apparently reserved its use to situations presenting the undefined "true conflict."[95]

A troubling element is that true conflicts may be creatively formulated. A true conflict indeed may have existed in *Hartford Fire Insurance*, but may not have been made clear,[96] for example, the British government directive to the London insurers to act as they did is more conflict raising than when the insurers act alone, without a government directive. The government directive would raise a clearer defense of foreign compulsion. Justice Souter must have meant that there is some form of true conflict creation that falls short of foreign compulsion, otherwise his ruling seems to have merged a conflict of jurisdiction with foreign compulsion.[97]

Justice Souter may have meant that a court should act in a different way in each of three situations. First, where there is no conflict of any significance, there is no international rule to be applied at all. The U.S. statute is applied according to its intent. Second, where there is a significant conflict which is less than a true conflict, customary international law would allow a considerably greater exercise of subject matter jurisdiction than is provided in the Third Restatement's section 403.[98] Third, where there is a true conflict, another approach is appropriate. It is not clear what that is.

On the one hand, the court might undertake some comparative interest analysis, most likely with the Restatement as a guide. Thus, the Restatement

---

94. *Id.* at 819.

95. *Id.* at 820. Justice Souter does not explain how a true conflict is to be resolved. One might suspect that interest balancing analysis of some form might occur. When it does, the Restatement provides as thoroughly considered a test as has been developed, although Professor Lowenfeld's Hague Lectures also admirably address the theory. *See generally* Lowenfeld, *Hague Lectures*, *supra* note 43. However, where there is a true conflict, the two nations' interests may be so clearly expressed by legislation that a national court will feel compelled to follow the legislature's intent. In such event, perhaps the Restatement's foreign compulsion rules in § 441 will require some amendment to explain the meaning of "In general," which prefixes each part.

96. There certainly was a conflict regarding the policy towards the conduct of the London insurers. The conduct was prohibited in the United States but permitted in the United Kingdom.

97. Professor Lowenfeld suggests that

> there is a significant space between such indifference of state *B* to a given activity carried on in its territory as to remove all doubt about the reasonableness of the exercise of jurisdiction by state *A*, and such compulsion by state *B* as would be required to create a "true conflict" as defined by the majority in *Insurance Antitrust.*

Lowenfeld, *supra* note 81, at 51.

98. Justice Scalia's dissent differs; he would turn not to customary international law but to the Restatement's § 403, which speaks to the U.S. view of what international law ought to be. 509 U.S. at 818-21. The Supreme Court has been criticized for its application of customary international law. *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655 (1992).

would not have fully met its demise.[99] It has been left as a possible assist when there is a true conflict. On the other hand, where there is a true conflict, if that conflict is caused by a clash of clearly stated conflicting national interests, perhaps the state must avoid interest balancing and return to the first solution: to simply follow the law and ignore the foreign interests. Although it is not a very diplomatic solution, it is perhaps the better solution because it identifies a conflict between nations that should be solved in a diplomatic forum rather than a judicial forum.[100] National courts were never created to cure diplomatic conflicts. Such thoughts are strengthened when one analyzes the defects of undertaking interest balancing in a court. Interest balancing too easily becomes little more than one nation identifying its interests and then referencing and discounting the importance of the other nation's interests. Worse, it may cause a court to turn to a castigation of specific elements of the foreign legal system, rather than undertake a true balancing of the legitimate interests of the two nations.

The *Hartford Fire Insurance* decision has left a troubling legacy. Future lower courts will have to address the nature of a true conflict. Those who were disappointed in the *Hartford Fire Insurance* decision for its absence of interest balancing will wish to expand the concept of "a true conflict."[101] Those who are pleased that the court disregarded interest balancing may prefer to confine the definition of a true conflict to where a foreign mandate compels action (or inaction) by the person in violation of U.S. law, which creates a defense of foreign compulsion. With the *Hartford Fire Insurance* decision now an important precedent, cases involving the extraterritorial application of U.S. laws beyond the field of antitrust law must defer to its directives. One such area is securities fraud.

## III. EXTRATERRITORIAL SUBJECT MATTER JURISDICTION IN SECURITIES FRAUD LITIGATION

The first international securities fraud case of note was *Schoenbaum v. Firstbrook*[102] in 1968. At that time, Professor Brewster's 1958 comments and the 1965 Second Restatement's section 40 limitations on jurisdiction to adjudicate were the only significant sources on which a court might have

99. *See* Trimble, *supra* note 82, at 57.

100. Perhaps an even better solution would be to retain it as a judicial issue, in an international conflicts adjudicating forum, that would be better able to balance interests than any one nation's domestic courts.

101. That is only if interest balancing analysis is the proper focus after a true conflict has been established. That was not decided. The nearer a true conflict comes to foreign responses raising the foreign compulsion doctrine, the less need there is for use of the Restatement's interest balancing.

102. 405 F.2d 200, *modified en banc*, 405 F.2d 215 (2d Cir. 1968).

relied on for interest balancing. Professor Lowenfeld's Hague Lectures and the Third Restatement would not appear until 1979 and 1987, respectively which also was true regarding what had been available to the court in *Timberlane* in 1976.

The above history of the development of subject matter jurisdiction in international antitrust litigation is essential to understanding the securities cases that were decided prior to the *Hartford Fire Insurance* decision and to predicting how future courts will address this issue. Antitrust developments began much earlier than those in the securities field.

### A. *The Securities Exchange Act of 1934*

The Securities Exchange Act (SEA) of 1934 is the federal legislative source of governance of activities considered securities fraud.[103] The principal theme of the SEA, as well as that of the Securities Act of 1933, is disclosure.[104] Disclosure is an essential feature of the securities fraud provisions. Enacted in the midst of the great economic depression caused by the stock market collapse, which began in 1929 and extended into the early 1930s, the securities laws were enacted to address domestic problems, similar to the focus of the earlier enactment of the antitrust laws. The securities laws were intended to protect domestic investors, which in turn was thought to help assure a sound economy and successful domestic capital markets. Nowhere in the statutory history was there any attention to the international dimension of fraud in trading securities. But it did not take the courts long to determine that the intent of Congress was to protect domestic investors who had purchased *foreign securities* on U.S. exchanges, as well as to protect the domestic securities market itself from the effects of *foreign transactions* in U.S. securities.

The antifraud rules of the SEA are enforced both by federal actions brought by the Securities and Exchange Commission (SEC)[105] and by private actions under a judicially-created implied private right of action by persons whom the SEA was intended to benefit.[106] In using its power to define conduct that constitutes deception or manipulation, the SEC issued

---

103. 15 U.S.C. § 78aa (1994).

104. The Securities Act of 1933 is a comparatively narrow enactment, which focuses nearly exclusively on the issuance of new securities to the public. 15 U.S.C. § 77d(1). The SEA, contrastingly, includes a broad range of provisions involving many areas of trading securities and regulating securities exchanges and professionals. 15 U.S.C. § 78c.

105. 15 U.S.C. § 78d(a). The SEC was created by the SEA 1934 Act and has authority to undertake actions in court, to act quasi-judicially, and to define improper conduct.

106. *See generally* Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D.Pa. 1946) (first announcing the implied right of a private action). It was confirmed by the Supreme Court in *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971).

Rule 10b-5 in 1942,[107] which has become the most famous SEC pronouncement under its rulemaking power.[108] The statutory authority for Rule 10b-5 is the brief but broad antifraud principle in section 10 of the SEA.[109] This provision makes no reference to international securities fraud. But "interstate commerce" is defined in section 3(a)(17) of the SEA as "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State."[110] Rule 10b-5, issued to supplement section 10, makes no reference to international transactions.[111]

### B. *Judicial Enforcement of the Securities Exchange Act of 1934*

Judicial application of the Securities Exchange Act of 1934 (SEA) to international transactions involving allegations of securities fraud began with the same briefly expressed and unclear basis for subject matter jurisdiction that was true with the Sherman Antitrust Act adopted in 1898.[112] While the first expression of an effects test basis to apply the Sherman Antitrust Act

---

107. Rule 10b-5, 17 C.F.R. 240.10b-5.

108. Rule 10b-5 is a "judicial oak which has grown from little more than a legislative acorn." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 738 (1975).

109. Section 10 states:

> It shall be unlawful for any person, directly or indirectly, by use of any means of instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o 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.

15 U.S.C. § 78j, 78j(b).

110. 15 U.S.C. § 78c(a)(17). Other evidence of congressional awareness of the possible application of the SEA to international transactions is § 30(b), which is entitled "Foreign securities exchanges" and essentially exempts fully foreign transactions. 15 U.S.C. § 78dd(b). The sections states:

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

*Id.*

The rulemaking power granted to the SEC to bring these foreign transactions under the SEA has not been used; no regulations have been issued. Section 30 has been raised as a defense by foreign defendants, but has generally not been successful. In *Schoenbaum*, the court stated § 30(b) "was intended to exempt persons conducting a business in securities through foreign securities markets, . . . [but was not intended to exempt] extraterritorial application of the Exchange Act to persons who engage in isolated foreign transactions." 405 F.2d at 207.

111. 17 C.F.R. § 240.10b-5.

112. 15 U.S.C. § 1.

to international transactions came in the 1945 *Alcoa* decision,[113] the first opportunity to determine the test under the securities antifraud provisions was not until 1969 in *Schoenbaum*.[114]

*Schoenbaum* involved the Banff Oil Company, a Canadian chartered corporation, the shares of which were registered on the American Stock Exchange and traded in the United States.[115] A U.S. shareholder brought a derivative action in federal district court in New York City on behalf of the Banff company against the Canadian members of the Board of Directors and against the Aquitane Company of Canada, a wholly-owned subsidiary of a French corporation. Aquitane had purchased treasury shares of Banff in Canada, allegedly without prior disclosure of inside information that would have increased the price and the benefit received by Banff. The defendants argued that the district court lacked subject matter jurisdiction because the transactions, which constituted the challenged conduct, had occurred in Canada between foreign corporations.[116] *Schoenbaum* nevertheless was not viewed by the circuit court as a very difficult case. The court did not believe it was necessary to address some hard questions regarding conduct, because Banff stock was registered on the American Stock Exchange, and there was harm to U.S. persons.[117] That connection alone made the company subject to the SEA and granted the court subject matter jurisdiction.[118] Other factors, specifically foreign connections, which may have been quite extensive, could not override both the important relationship established by registration in the United States and the detriment to U.S. investors.[119] The

113. *Alcoa*, 148 F.2d at 443. As noted above, *Alcoa* essentially rejected use of the territorial test of the earlier *American Banana* decision. *Id.*; *see supra* note 32 and accompanying text (discussing the territorial test).

114. *Schoenbaum*, 405 F.2d at 200 (2d Cir. 1968). The district court agreed that the SEA was not to apply extraterritorially, referring to § 30(b) and its exemption for fully foreign transactions. Schoenbaum v. Firstbrook, 268 F. Supp. 385, 391 (S.D.N.Y. 1967). The circuit court would begin to diminish the possible scope of § 30(b). *Schoenbaum*, 405 F.2d at 207. Effects in the United States would not make the transaction "completely" foreign. *Id.* at 207-08. *Schoenbaum* was decided only a year after insider trading began to gain the attention of courts in domestic securities fraud cases. *See* SEC v. Texas Gulf Sulphur Co., 258 F. Supp. 262 (S.D.N.Y. 1966), *aff'd in part, rev'd in part*, 401 F.2d 833 (2d Cir. 1968).

115. *Schoenbaum*, 405 F.2d at 204-06

116. *Id.* at 204. This defense was accepted by the district court, which ruled that the SEA did not have extraterritorial application. *Schoenbaum*, 268 F. Supp. at 385-86. The court believed that nothing in the Act suggested an intent to have extraterritorial effect, a presumption reinforced by Section 30(b). *Id.* at 392. The court further stated that in determining Congressional intent, "choice of law principles are not determinative." *Id.* at 393. The district court also held that the complaint failed to state a cause of action under Section 10 and Rule 10b(5). *Id.* at 390. The circuit court affirmed this portion, but with a dissent. 405 F.2d at 200, 214-15 (Hays, J., dissenting in part).

117. 405 F.2d at 208-09.

118. *Id.*

119. *Id.* at 208, 210.

appellate court thus did not discuss the *reasonableness* of any extraterritorial application of U.S. law.[120]

The court rejected the claim that no Americans were injured.[121] Injury to the foreign corporation reduced the equity of the shareholders, which would be reflected in lower share prices on the American Stock Exchange.[122] This was an impairment of value of American shareholders and a sufficient effect on U.S. commerce to justify jurisdiction.[123]

The court concluded that there was subject matter jurisdiction where the transactions involved stock registered on a U.S. securities exchange and were "detrimental to the interests of American investors."[124] Although the *Schoenbaum* appeal was before the important Second Circuit Court of Appeal, the case did not offer a very appropriate opportunity for the court to explore the margins of extraterritorial subject matter jurisdiction, because of the connection of the Canadian corporation with the United States by means of registration on the American Stock Exchange.[125] But another opportunity soon was presented to the same Second Circuit in *Leasco Data Processing Equipment Corp. v. Maxwell*.[126]

A U.S. corporation, Leasco Data Processing Equipment Corp., acting through its Netherlands Antilles incorporated subsidiary, Leasco N.V., purchased shares on the London stock exchange of Pergamon Press Ltd., a U.K. corporation controlled by Robert Maxwell.[127] The purchase contract was signed in the United States, where some meetings had been held to negotiate the purchase.[128] The plaintiff Leasco claimed that they had been fraudulently induced to pay an excessive price and brought suit against British individuals and corporations.[129] Unlike in *Schoenbaum*, the shares were purchased from a foreign corporation that was not registered on an U.S. exchange. However, the negotiations and the contract execution occurred in

120. Extensive comments regarding § 30 disclosed the courts view that extraterritorial effect was not precluded by the SEA. *Id.* at 207-08. Section 30(b) gave the SEC the authority "to prevent evasion of the domestic regulatory scheme." *Id.* at 207. But the decision did not address the dimensions of permissible extraterritorial effect. Nor did it comment on the district court's view that choice of laws principles were not determinative in determining congressional intent. *See* 268 F. Supp. at 387.

121. 405 F.2d at 208-09.

122. *Id.* at 208.

123. *Id.* at 208-09.

124. *Id.* at 208.

125. Those urging the use of interest balancing theory might disagree if they reject registration on a U.S. exchange connection as singularly important, rather considering it only one factor of state interest, which ought to be evaluated.

126. 468 F.2d 1326 (2d Cir. 1972).

127. *Id.* at 1332.

128. *Id.* at 1331.

129. *Id.* at 1333. The wholly owned British subsidiary of Leasco, Leasco World Trade Co. (U.K.) Ltd., was also a plaintiff.

the United States.[130] These negotiations included fraudulent misrepresentations. This conduct in the United States was sufficient for the appellate court to find subject matter jurisdiction. The fraud may have been partly induced in England, but the execution of the contract was in the United States.[131] The court in *Leasco* focused upon a conduct test, which held subject matter jurisdiction to exist where the conduct of the defendant in the United States had some significance, at least more than being merely preparatory to the fraud.[132]

The "merely preparatory" language seemed to be the dividing line for jurisdiction. If merely preparatory acts without more were a basis for subject matter jurisdiction, the extraterritorial application of U.S. law would be viewed abroad as just as extraordinary and unreasonable as is personal jurisdiction based on the service of process on persons merely passing through the United States.[133] The issue was becoming one of how much conduct in the United States is sufficient to justify jurisdiction when the larger part of the conduct occurs abroad. Not only the *quantity* of conduct in the United States was important, but also the nature or *quality* of the conduct justifying jurisdiction. Defining "merely preparatory" acts has not been part of the development of antitrust subject matter jurisdiction theory, although such development may occur if courts begin to focus more on the existence of aspects of conduct and the effects test after the *Hartford Fire Insurance* decision.[134]

Only three years after *Leasco*, the Second Circuit decided two additional, important cases involving international securities fraud allegations. The first, *Bersch v. Drexel Firestone, Inc.*,[135] challenged alleged misrepresentations and omissions in prospectuses used in the offering of stock in I.O.S., Ltd. (IOS), a Canadian corporation that sold and managed mutual funds.[136]

---

130. *Id.* at 1330-31. There were several meetings, first in New York, then in London, again in New York, and finally another meeting in New York to execute the contract.

131. *Id.* at 1335.

132. *Id.* at 1337. This important language earlier appeared in *Koal Industries Corp. v. Ashland S.A.*, 808 F. Supp. 1143 (S.D.N.Y. 1992), where the court applied an effects test to find subject matter jurisdiction where acts abroad caused substantial effects in the United States.

133. The court noted that it would be difficult to find jurisdiction when there was no evidence of fraudulent conduct in the United States and the purchase of the securities occurred abroad. 468 F.2d at 1334.

134. 509 U.S. at 764. For further discussion, *see supra* text at notes 80-102.

135. 519 F.2d 974 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975).

136. *Id.* at 974, 978. IOS was initially organized by Bernard Cornfeld and some associates. It later came under the control of Robert Vesco. At the time of the case, Vesco was a fugitive living in Costa Rica. Both Cornfeld and Vesco had numerous difficulties with securities authorities, as had Robert Maxwell, principal defendant in the above *Leasco* case. Whether or not the participation in international securities transactions by persons with records or reputations of alleged securities fraud influences courts is beyond the scope of this article.

Bersch, a U.S. citizen, representing himself and other persons from several countries, filed suit against IOS as well as some individuals.[137] Acts preparatory to the fraud had occurred in the United States,[138] but the actual alleged fraudulent act occurred outside the United States. The appellate court ruled that acts that were merely preparatory or were "culpable nonfeasance" and therefore, relatively small in comparison to the acts that had occurred abroad, could not be the basis of subject matter jurisdiction.[139] The court found sufficient conduct to justify subject matter jurisdiction with respect to the U.S. residents or citizens who were purchasers.[140] The conclusion of the court included three observations on when the securities antifraud provisions apply to international transactions:

> (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
>
> (2) Apply to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material

---

137. *Id.* at 974. The action was brought as a class action with possibly as many as 50,000 members from numerous countries. There were alleged to be 386 U.S. purchasers. *Id.* at 978 n.2.

138. *Id.* at 985 n.24. While these actions may seem extensive and sufficient for subject matter jurisdiction, when viewed in the context of the entire transactions, they were clearly "preliminary or ancillary to the work done in Europe." *Id.*

139. *Id.* at 987. The district court had found subject matter jurisdiction due to three factors: (1) activity in the United States principally in the form of underwriting, counseling, and accounting services in connection with an offering by Drexel; (2) sales to an estimated 386 Americans, although the defendants tried to prevent any sales to Americans and none occurred in the Drexel offering; and (3) generally adverse effects on the U.S. securities markets from the decline in the price of the IOS shares. *Id.* at 983-84 (citation omitted).

The circuit court addressed each of these three factors. *Id.* at 987-93. As to the first, the court suggested these activities were more involved in making the gun than firing it. In addition, the firing took place abroad. These acts were "merely preparatory" or assumed the form of "culpable nonfeasance." The court considered the second factor as raising questions as to how U.S. citizens (both in the U.S. and abroad) were able to subscribe to shares, concluding that there were "some mailings of prospectuses into the United States and some reliance on them." The court felt that for the U.S. purchasers in the United States, subject matter jurisdiction could be based on the misleading statements sent to those purchasers in the United States. As to Americans purchasing the securities abroad, there would have to be significant activities in the United States on the part of the defendants. The court accepted the district court's conclusion that such sales might have been based on the primary offering activity in the United States which was necessary for a successful sale abroad to Americans. Finally, even though the third factor may have occurred, the court determined that the effects were insufficient to confer subject matter jurisdiction. Interestingly, the court referred to the antitrust *Alcoa* decision for this brief treatment of an effects test. The court noted, consistent with the developing effects test, that there would have to be intent to offer securities to persons in the United States (or perhaps to Americans anywhere) to apply the effects test.

140. *Id.* at 992-94. This reduced the class and also eliminated the court's concern about absent foreign plaintiffs.

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 failures to act) within the United States directly caused such losses.[141]

The *Bersch* court recognized that the coverage of the law might be viewed as "greater, or less" than the court had concluded, which suggests the court had used its "best judgment as to what Congress would have wished if these problems had occurred to it."[142] The rule from *Leasco* that merely preparatory conduct (or minor conduct in contrast to the conduct abroad) is insufficient for jurisdiction (unless the purchasers were Americans resident in the United States) was given added status by *Bersch*.[143] It was given further support in another securities fraud case decided by the same three judges in the same court on the same day in *IIT v. Vencap, Ltd.*[144]

Brought by the Luxembourg investment trust, IIT, against the Bahamian corporation, Vencap, and several individual defendants, the case also dealt with the troubled dealings of IOS Much of the activity in *IIT* involved Richard Pistell, a U.S. citizen, residing in the Bahamas and engaged in investments and finance. The lengthy facts outlined the activities of Pistell, which involved the President (U.S. citizen) of Incap, a U.K. corporation that managed some of the investments of IOS, including in IIT, located in the Bahamas, and the organization of a venture capital firm, Vencap Ltd., also

---

141. *Id.* at 993. The court noted that the Securities Act and its legislative history offered little help in reaching its conclusions, Congress having passed the provisions in the midst of a depression when they could hardly foresee international transactions involving offshore funds thirty years later. The court further stated that "[o]ther fact situations, such as losses to foreigners from sales to them within the United States, [were] not before [the court]." *Id.*

142. *Id.* at 993 n.44 (citing Richard Mizrack, *Recent Developments in the Extraterritorial Application of Section 10(b) of the Securities Exchange Act of 1934*, 30 BUS. LAW. 367 (1975)); Comment, *The Transnational Reach of Rule 10b-5*, 121 PENN. L. REV. 1363 (1973).

143. The *Bersch* court did state that "neither *Schoenbaum* nor *Leasco* was decisive." 519 F.2d at 985. The court thought *Bersch* to raise a different and "serious" problem (being a class action) of the effect of a judgment for the defendants or an inadequate judgment for the plaintiffs on absent foreign plaintiffs. *Id.* at 993-94. Also of concern was the effect on such absent foreign plaintiffs of a binding settlement. There was no assurance that a judgment would be recognized abroad as binding all members of the class.

While the conduct did not reach the level to assert jurisdiction, there had been sufficient foreign conduct with an accomplished intent to have an effect in the United States. Acknowledging a potential conflict, the court stated, "An analogous problem is presented here insofar as the United States may be asserting jurisdiction in order to apply its laws to activities that more properly are the subject of regulation by other sovereign states, and which currently are the subject of litigation there." *Id.* at 989 n.35.

The Butte Mining litigation two decades later would involve such a situation and illustrate how such conflict might impact these developments of subject matter jurisdiction.

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

located in the Bahamas.[145] The circuit court was concerned with the analysis of the evidence in the district court and suggested that the lower court was "plainly wrong on the facts" in one instance,[146] wrong in weighing conflicting evidence, and generally lacking in the "precision" needed in establishing how the alleged fraud occurred.[147] It concluded that "we cannot look with favor on a series of 'findings' which simply adopt plaintiff's accusations and leave Pistell's explanations unmentioned and undecided,"[148] which had led the district court to conclude that it had subject matter jurisdiction. The circuit court undertook its own lengthy reconstruction of the events and found little support to the view that Pistell's activities had a significant effect in the United States merely because IIT allegedly had some U.S. fundholders. There were some 300 U.S. fundholders, but they constituted at most only .5% of the total IIT fundholders. Unlike *Bersch*, any fraud on these U.S. fundholders was practiced indirectly against the trust in which they invested. The court thought the U.S. citizens' holdings were too small to apply the U.S. securities laws to Pistell, who acted in London and defrauded a British investment trust, which had only .5% U.S. fundholders, by selling it foreign securities.[149] These U.S. investors in a fund that acquired shares that were not intended to be offered to U.S. residents or citizens, did not raise the case to the level of "substantial effect" within the United States that the Restatement had suggested as the appropriate standard.[150]

The conduct that occurred in the United States also was important to the issue of subject matter jurisdiction. One of several meetings between Pistell and the President of Incap was held in the United States, and some legal work for IIT's subscription to Vencap shares was performed in New York.[151] Following its earlier decisions, the court would not allow merely preparatory activity or the failure to prevent fraudulent acts in the United States to be the basis of jurisdiction where the "bulk of the activity" was undertaken abroad.[152] What transpired in the United States "simply

145. *Id.* at 1004-05.
146. *Id.* at 1007.
147. *Id.* at 1009.
148. *Id.* at 1010-11.
149. *Id.* The court suggested that such activity fell short of the *Schoenbaum* decision's formulation of the SEA's protection to domestic investors who purchase foreign securities on U.S. exchanges, and to the domestic securities market from effects of improper foreign transactions in U.S. securities.
150. *Id.* at 1017-18 (citing SECOND RESTATEMENT, *supra* note 9, § 18(b)(ii)).
151. *Id.* at 1018. This work may have pertained only to some limited and technical aspects of the preference share terms. The court expressed concern with being unable to "ascertain exactly what was done — by whom, when, and where." *Id.* at 1006 n.7.
152. *Id.* at 1018.

formalized what seems to have been a deal worked out in the Bahamas."[153] However, after Vencap received IIT's investment capital, Vencap's activities in the United States increased. It appears to have used New York as its base of activities. The court thought that these acts could be regarded both as evidence of Pistell's fraudulent intent, and as substantive acts which consummated the fraud.[154] The case was remanded for additional findings on the conduct in the United States.

The *Leasco*, *Bersch*, and *Vencap* decisions provided a fairly uniform standard, at least in the Second Circuit. The focus was on the location, nature, and amount of the conduct. Where conduct in the United States was merely preparatory or minor in comparison to conduct abroad, there would be no subject matter jurisdiction. In contrast, the Second Circuit's antitrust law decision in *Alcoa* has required that there be both conduct abroad and an intended substantial effect in the United States, which is a view that has continued, but has been subject to some criticism.[155]

The early securities fraud decisions of the Second Circuit were more involved with *where* the conduct occurred, which had not been a major issue in *Alcoa*. If some significant part (at least more than preparatory activities) of the antitrust acts that were challenged in *Alcoa* had occurred in the United States, there might not have been any focus on effects. Clearly, conduct in the United States in violation of U.S. law allows subject matter jurisdiction. The United States has an interest in prohibiting violations of its antitrust and securities laws occurring in the United States, even when the effects are abroad and cause injury exclusively to foreigners. When there are insufficient acts within the United States to constitute the minimum amount of conduct necessary for jurisdiction, which is often the case with international antitrust activities, the emphasis shifts to *effects* within the United States.

*Bersch* and *Vencap* were decided in 1975. At that time, there had been no significant international securities fraud decisions outside the Second Circuit that gave any hint that the line of reasoning in the Second Circuit would be viewed as an incorrect interpretation of the securities laws. The Second Circuit had been referred to by Justice Blackmun of the U.S. Supreme Court as "the 'Mother Court' in . . . [the securities] area of the law."[156] The Second Circuit also held this status in the international antitrust area, which is illustrated by its *Alcoa* decision.

The Second Restatement in 1965 had included some interest balancing theory, developing Professor Brewster's 1958 ideas. However, those

153. *Id.*

154. Again, the court felt the district court's decision was unclear, and the case to be in need of further findings.

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

156. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (1975).

provisions were applicable to jurisdiction to enforce, not legislate. It is thus not surprising that the securities cases discussed above had not referred to interest balancing theory in references to the Second Restatement.[157] In 1976, the year after *Bersch* and *Vencap*, the Ninth Circuit decided the antitrust law *Timberlane* case and raised the likelihood that given an opportunity, the circuit might apply its interest balancing theory to securities law cases as well.[158] But *Bersch* and *Vencap*, building on *Leasco* and *Schoenbaum*, had been fine tuning international securities fraud law in a way that might make it difficult for other circuit courts to make significant departures from the Second Circuit's opinions. The *Alcoa* antitrust decision was three decades old when *Timberlane* was decided. If there been a similar refinement of *Alcoa* in the antitrust law area in the years between *Alcoa* and *Timberlane*, the *Timberlane* court might have been more moderate. But the Ninth Circuit has never paid homage to the Second Circuit, its distant cousin across the continent.

As securities cases began to be contested in circuits other than the Second, the tests developing in the Second Circuit were generally accepted and applied. Two years after the *Bersch* and *Vencap* decisions, the Third Circuit addressed *SEC v. Kasser*.[159] In *Kasser*, the SEC, seeking an injunction, claimed that several individual defendants (a California corporation and a Delaware corporation, both principally owned by a U.S. national, Kasser) defrauded and made misrepresentations to a Canadian incorporated fund, owned by a Canadian province. The defendants allegedly induced two companies, one incorporated in Canada and the other in the United States, to invest in the fund. In a complex "ponzi"-like scheme, the defendants fraud and misrepresentations resulted in the bankruptcy of the two corporations.[160] A number of the acts occurred in the United States, including some of the allegedly fraudulent misrepresentations.[161] The circuit court found "significant conduct" occurring in the United States. It also thought

157. The court in *Leasco* referred to the Second Restatement § 18 as suggesting that a state had jurisdiction to prescribe extending to foreign conduct with an effect in the United States. *Leasco*, 468 F.2d at 1333-34. The court was concerned with the intent of Congress, not interest balancing. *Id.* at 1334. The court in *Bersch* discussed the Second Restatement §§ 17-18, also in search of the intent of Congress, noting that "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 [foreign transactions] rather than leave the problem to foreign countries." *Bersch*, 519 F.2d at 985 (alteration in original). *Vencap* also mentions the Restatement in its search for Congressional intent. *Vencap*, 519 F2d. at 1017.

158. *Timberlane*, 549 F.2d at 611.

159. 548 F.2d 109, 110-11 (3d Cir. 1977).

160. *See generally* Christopher R. Leslie, *Den of Iniquity: The Case for Equitable Doctrines in Rule 10b-5 Cases*, 81 CAL. L. REV. 1587 (1993) (discussing Ponzi schemes).

161. 548 F.2d at 111. The court cited the district court's listing of five specific acts occurring in the United States. The circuit court added three of its own.

it was "questionable" whether there was any effect in the United States.[162] The district court previously had dismissed the complaint because the "essentially foreign transactions [were] without impact in this country,"[163] and the conduct in the United States was "merely miscellaneous acts, . . . [which did not] alter the foreign nature of the transaction."[164]

The appellate court turned briefly to its own decision only the year before, in *Straub v. Vaisman & Co.*,[165] which found jurisdiction over an American broker engaged in fraudulent sales to nonresident foreigners, because "[c]onduct within the United States is alone sufficient to apply the federal [securities] statutes."[166] The *Kasser* court recognized *Straub* as being quite different because the shares in the *Straub* fraud were traded on an American exchange.[167] What is troubling is the court's use of a statement from *Straub* that the conduct in this country, standing alone, is enough for jurisdiction.[168] To expand this into a view that merely preparatory acts in this country are sufficient would be not only a mistaken interpretation of the *Straub* decision, but establish a conflict with the line of Second Circuit Court decisions. It was to these decisions that the *Kasser* court turned to next.

The court referred to the two written decisions of Judge Friendly, *Bersch* and *Vencap*, as "[p]erhaps the leading opinions which have delved into the problem of jurisdiction."[169] Finding *Vencap* to be more supportive, the court was impressed with the fact that the Second Circuit had suggested that the conduct in the United States might have been sufficient for jurisdiction, but had remanded the case for further inquiry.[170] Emphasizing that Judge Friendly had found "little factual support for [finding any] . . . significant effect in the United States,"[171] the court stated that "Judge Friendly declared that jurisdiction still could exist."[172] Judge Friendly discussed in detail why the nominal effect in the United States alone was insufficient for

---

162. *Id.* at 112.

163. *Id.* (quoting 391 F. Supp. at 1177).

164. *Id.* One might suspect that this would point to the Canadian law as being more appropriate to resolve the issue, but the *Kasser* court did not view the issue as one of choice of law, but of congressional intent. *Id.* at 114.

165. 540 F.2d 591 (3d Cir. 1976).

166. *Id.* at 595 (citing the SECOND RESTATEMENT, *supra* note 9, § 17).

167. 548 F.2d at 113 (citing *Schoenbaum*, 405 F.2d at 200, where the shares were also listed on an U.S. exchange); *see supra* notes 114-125 and accompanying text for further discussion. Even from a choice of law perspective, U.S. law seemed the proper choice because of the numerous links with the United States.

168. *Kasser*, 548 F.2d at 113.

169. *Id.* Judge Friendly also had written the opinion in *Leasco*.

170. *Id.* (citation omitted).

171. *Id.* (quoting *Vencap*, 519 F.2d at 1016).

172. *Id.* (citation omitted).

jurisdiction. He did not then state that "jurisdiction could still exist," nor imply that if it means basing jurisdiction on merely preparatory acts when the effect was nominal.[173] He shifted to a discussion of activity within the United States, and stated, "Our ruling on this basis of jurisdiction is limited to the perpetration of fraudulent acts themselves and does not extend to mere preparatory activities or the failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries, such as in *Bersch*."[174]

The *Kasser* court then suggested that *Vencap* required "substantial or even some impact in this country."[175] Judge Adams use of the word "impact" is sometimes confusing, since he seems to use it to mean "effect" *or* "conduct." The court next stated that the securities laws "do grant jurisdiction . . . where at least some of the activity designed to further a fraudulent scheme occurs within this country."[176] That was never in doubt, since conduct "designed to further a fraudulent scheme" should mean more than merely preparatory acts. The court supports this by stating that it declined "to immunize . . . defendants who unleash from this country a pervasive scheme to defraud a foreign corporation," words which clearly require more than merely preparatory acts.[177] Although one may view *Kasser* as treading upon the merely preparatory language, the court held the conduct in the United States not to be merely preparatory, but more substantial than the conduct that occurred in *Vencap*. The court also found sufficient evidence that the acts in the United States were sufficient to have "directly caused" the losses.[178] *Kasser* is generally categorized as a departure from the Second Circuit's view, and it does contain language that occasionally "drifts" from the merely preparatory standard.[179]

---

173. *Id.*

174. *Vencap*, 519 F.2d at 1018. At this point Judge Friendly stated that the fraud theory presented suggested a lack of significant activity in the United States, but that other theories using further acts of *Vencap* needed exploration, and remanded for further findings. *Id.*

175. *Kasser*, 548 F.2d at 113.

176. *Id.* at 114.

177. *Id.* Judge Adams next comments are troubling. He notes that *Vencap* "did narrow its decision somewhat by . . . 'not extend[ing jurisdiction] to merely preparatory activities.'" *Id.* (quoting *Vencap*, 519 F.2d at 1018). *Vencap* did not do that narrowing, such basis for jurisdiction came directly from *Leasco* and *Bersch*.

178. *Id.* The court stated that the defendant's conduct in the United States was "essential to the plan to defraud the Fund." *Id.*

179. This is true of the court's final paragraphs, when it states that upon remand dismissal should be granted if "the allegedly fraudulent conduct of any of the defendants within this country was nonexistent or was so minimal as to be immaterial." *Kasser*, 548 F.2d at 116. This seems to lower the test the court had earlier applied using *Vencap* and *Bersch*.

The court also discussed policy implications of finding jurisdiction in such cases in its closing page. *Id.* at 116. It feared that a holding of no jurisdiction might cause similar responses from other nations in similar cases, while finding jurisdiction raises the "prospect of reciprocal action against fraudulent schemes aimed at the United States from foreign sources." *Id.* at 116. It felt that if merely preparatory actions do count, reciprocal action could

The *Kasser* decision's final comments on policy might be viewed as judicial interest in considering how other nations will react to a particular ruling. But the court never went beyond a few brief comments. It did not refer to the Second Restatement, and *Timberlane* was not yet available. The Third Circuit has not since revisited the securities fraud area. Subsequent decisions in other circuits have identified *Kasser* as a departure from the Second Circuit,[180] which was followed later by the Eighth and Ninth Circuits. But the difference between the circuits may be less in the required mix of conduct and effects than in causation. The Second Circuit's requirements for conduct as the basis of subject matter jurisdiction seem to look more to *linking* the conduct with the elements of a violation of Section 10(b) of the SEA and Rule 10b-5, than does the more permissive view, adopted by the Third, Eighth, and Ninth Circuits. These circuits require conduct that is "in furtherance" of a fraudulent scheme, but the conduct may not necessarily constitute elements of a Section 10(b) or Rule 10b-5 violation.

The next significant case in the United States was decided by the Eighth Circuit in 1979. In *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*,[181] the securities fraud was alleged to have resulted from activities undertaken in the United States and to have had effects in Australia.[182] In reviewing the district court's dismissal for lack of subject matter jurisdiction, the court turned to the several Second Circuit decisions and to *Kasser* in the Third Circuit. Reversing the district court, the circuit court found "the scheme of fraudulent nondisclosure *devised* in the United States . . . [to be] conduct significant enough to establish subject matter jurisdiction."[183] The court further stated its view was consistent with Section 17 of the Second Restatement, and that the decision was "largely based on policy considerations."[184] Without the presence of helpful

---

mean foreign courts might find subject matter jurisdiction over U.S. nationals who have performed only merely preparatory acts in the foreign country and have not caused any substantial effect in that country. Is that the kind of reciprocity we ought to be seeking?

180. The emphasis in the decision is expressly on the Second Circuit precedent, notwithstanding the comments that might lead to a later preference for an expansion of jurisdiction into acts that are "merely preparatory."

181. 592 F.2d 409, 414 (8th Cir. 1979). In *Continental Grain*, the Eighth Circuit presented an analysis that the court called consistent with *Vencap*, and dismissed the complaint on subject matter grounds because the acts in the United states were "preparatory or secondary" to the fraudulent conduct abroad.

182. *Id.* The facts were not disputed, but their jurisdictional significance was.

183. *Id.* (emphasis added). The court thought that in this case, and in similar transnational securities cases, the same facts address both the question of whether there is subject matter jurisdiction, and whether there is sufficient use of the mail or interstate commerce to meet the jurisdictional requirements of Section 10 of SEA.

184. *Id.* at 415-16.

guidance from the legislative history, the court thought general principles of international law, the language of the securities statutes, and the remedial purpose of the statutes were judicially-accepted guides to subject matter jurisdiction.[185]

Acknowledging two principle theories applied in the previous cases, conduct (subjective territorial) and effects (objective territorial), the court noted a lack of uniformity in application.[186] It chose the view, already supported by the cases discussed above, that either test was a legitimate basis for subject matter jurisdiction and that both tests did not have to be met. Using Section 18 of the Second Restatement for support, the court had little trouble finding the effect within the United States to have been insubstantial and too remote.[187] Turning to conduct in the United States as the second test, referring to *Leasco* as authority, the court found the U.S. conduct to be an "essential link in the perpetration of the fraudulent transaction."[188] After extensively discussing the Second Circuit quartet of decisions, the court turned to *Kasser*, which the court suggested "extended the boundaries of the necessary domestic conduct required to find subject matter jurisdiction" from *Bersch* and *Vencap*.[189] The court referred to the "'at least some

185. *Id.* For authority that the courts have used international law principles to decide jurisdictional issues, the court quoted from a student note in an international law journal, a surprising source of authority. *See* Note, *The Extraterritorial Application of the Antifraud Provisions of the Securities Act*, 11 CORNELL INT'L L.J. 137, 139, nn.12-16 (1978). Whatever value there might have been in the court's comment, the Supreme Court's *Hartford Fire Insurance* decision 14 years later would raise doubts about the usefulness of principles of international law in deciding subject matter jurisdiction in all but a very few instances. *See supra* notes 80-102 and accompanying text. The *Continental Grain* court seemed to prefer as sources several law review notes on the extraterritorial application of securities laws, as opposed to the considerable experience that went into the Second Restatement. 592 F.2d at 416. Although the court noted its agreement with the Second Restatement § 17, it apparently preferred to add more recent law review commentary about what courts had actually done. *Id.* at 415-16.

186. *Id.* at 416. After referring to the *Bersch* three part test, the court suggested in a footnote that in reality courts may use a more flexible approach, "balancing the competing interests presented." 592 F.2d at 416 n.11 (citing three student works: Note, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553 (1976); Comment, *Transnational Reach of Rule 10b-5*, *supra* note 142, at 1370-91; *cf.* Comment, *Jurisdiction in Transnational Securities Fraud Cases* — SEC v. Kasser, 7 DEN. J. INT'L L. & POL'Y 279, 286 n.46 (1978)). The case did not attempt to balance interests. Giving the conduct and effects tests the imprimatur of an international law basis seems to be the court's way of implying that no matter how it might subsequently apply one of those tests, the decision would have the support of international law.

187. *Id.* The court thought the nationality of the defendants (California corporation and California resident) lacked independent significance for the purpose of subject matter jurisdiction. *Id.* (citing *Vencap*, 519 F.2d at 1016).

188. *Id.* (citing *Leasco*, 468 F.2d at 1335). "Essential link" would certainly seem to meet the more than merely preparatory standard.

189. *Id.* at 418.

activity' "[190] comment in *Kasser*, and to its conclusion that " 'there was significant conduct' " within the United States in support of its position.[191] The court viewed *Kasser* as consistent with the court's own (Eighth Circuit) *Travis* decision, where the court based subject matter jurisdiction on the finding of " 'significant conduct' " in the United States.[192] This hardly seems a diversion from of the Second Circuit's repeated views on what constitutes conduct. It is more an adoption of those views. What was a diversion, however, was the court's rejection of language of *Bersch* "interpreted to require that the domestic conduct constitute a rule 10b-5 violation."[193] The court next turned to the domestic conduct and said that it could not be "merely preparatory" and must "directly cause the losses."[194] The facts in *Continental Grain* outlined conduct in the United States that the court believed met that test and that disclosed a "fraudulent scheme of nondisclosure was devised and completed in the United States."[195] While the court found "significant" conduct in the United States, when it acknowledged that subject matter jurisdiction in the United States is "largely a policy decision,"[196] it added that the case involved "a substantially foreign transaction, little if any domestic impact, and domestic conduct which consisted for the most part of use of the mail and telephones."[197] That use was nevertheless significant, and the court further stated that its finding was not "an extension of previous cases."[198]

*Continental Grain* added the Eighth Circuit to the Third Circuit in essentially following the conduct test views established in the Second Circuit. While one may find language in both *Kasser* and *Continental Grain* that suggests the appropriateness of a less demanding test of conduct than applied in the Second Circuit, the court in each case found sufficient significant conduct in the United States that was more than merely preparatory. In so finding, the courts avoided having to define and justify allowing merely preparatory conduct to be the basis of subject matter jurisdiction. The court in *Continental Grain* noted that even where there is significant conduct in the United States, the conduct may be little more than the use of the mail and

190. *Id.* (quoting *Kasser*, 548 F.2d at 114).

191. *Id.* at 419 (quoting *Kasser*, 542 F.2d at 111-12).

192. *Id.* (quoting *Travis*, 473 F.2d at 524).

193. *Id.* at 418. The court acknowledged an extension of the boundaries of the required conduct by such rejection, but viewed it as consistent with *Kasser*.

194. 592 F.2d at 420 (quoting *Vencap*, 519 F.2d at 1018 and *Bersch*, 519 F.2d at 993, respectively).

195. *Id.*

196. *Id.* at 421.

197. *Id.*

198. *Id.* "Like the Second Circuit, we are reluctant to conclude that Congress would have intended the securities laws to have a global reach when the domestic conduct is insubstantial or the domestic impact is too generalized or insignificant." *Id.*

telephones and may be overshadowed by the extent of the activities abroad.[199] This position approaches the margin of reasonable jurisdiction, but obviously depends more on the substance of the use of the mail and telephones than merely the presence of the use. However close these two circuits had come to diluting the standard of the Second Circuit, the standard clearly had been important to the courts, which preferred to identify their decisions with the decisions of the Second Circuit rather than break out into new territory. But a clearer differentiation would soon appear in a decision by the California-based Ninth Circuit, which is perhaps the most adventurous circuit court in the United States.[200]

*Grunenthal GmbH v. Holtz* involved the sale of foreign securities between foreign corporations and foreign individuals.[201] The district court had found the only conduct in the United States to be "a mere repetition of misrepresentations first spoken abroad."[202] The circuit court reversed and found a single meeting of the foreign defendants in Los Angeles, where misrepresentations originally made abroad were repeated, to be sufficient for subject matter jurisdiction.[203]

The Ninth Circuit wandered nearly as far astray in *Grunenthal* from established subject matter jurisdiction theory in the securities fraud case as it had a few years before when it decided the antitrust case, *Timberlane*.[204] The departure perhaps was even more significant in *Grunenthal*, since there were the four Second Circuit decisions and single decisions from the Third and Eighth Circuits, which in the aggregate appeared to have established a clear policy mandating more than merely preparatory conduct in the United States for subject matter jurisdiction.[205] But Judge Reinhardt believed his reasoning was consistent with both *Continental Grain*, which he stated "best

199. *Id.*

200. Grunenthal GmbH v. Hotz, 712 F.2d 421 (9th Cir. 1983). This case was addressed by one of the Ninth Circuit's most self-professed liberal judges, Stephen Reinhardt. *Id.* at 421.

201. *Id.* at 422.

202. Grunenthal GmbH v. Hotz, 511 F. Supp. 582, 588 (C.D.Cal. 1981). The district court had referred to the Second Circuit precedent because the Ninth Circuit had no controlling precedent and it believed "the Second Circuit's approach to subject matter jurisdiction was 'in keeping with . . . [that in] the Ninth Circuit.' " *Grunenthal*, 712 F.2d at 423 (quoting 511 F. Supp. at 588).

203. *Grunenthal*, 712 F.2d at 425.

204. *See Timberlane*, 549 F.2d at 597. The departure was of course different. *Timberlane* adopted interest balancing theory. *Grunenthal* did not go that far, although the subsequent Restatement might imply it should have. In *Grunenthal* the departure was the essential elimination of "significant" from the requirement of "significant conduct" for jurisdiction.

205. *Timberlane*, on the other hand, had only one significant decision to consider, the nearly 30-year-old *Alcoa* case.

satisfies . . . [the] objectives" of the federal securities laws,[206] and with *Kasser*. Little credit was given to the Second Circuit developments, other than suggesting that the decision was not inconsistent with the approach of the Second Circuit. Judge Reinhardt was concerned with the intent of Congress and stated that assertion of jurisdiction in this case, which involved no U.S. parties, would encourage U.S. lawyers, accountants, and underwriters who might be involved in international securities sales "to behave responsibly and thus may prevent the development of relaxed standards that could 'spill over into work on American securities transactions.' "[207] The foreign participants were to be punished as a warning to Americans.[208] In concluding that the conduct, the sole meeting in the United States, was "significant" and "furthered the fraudulent scheme," Judge Reinhardt merged the meaning of "merely preparatory" and "significant" and sent a warning to foreign parties engaged in international securities transactions to avoid even the slightest contact with the Ninth Circuit's turf.[209]

Why would the Ninth Circuit, which had adopted the interest balancing theory in antitrust litigation in *Timberlane*, not consider an interest balancing theory in *Grunenthal*? Interest balancing was used in a few antitrust cases when conduct abroad was intended to and did have a significant effect in the United States. If *Grunenthal* had involved conduct abroad causing significant effects in the United States rather than conduct in the United States, the Ninth Circuit court might have found interest balancing appropriate.[210]

---

206. *Grunenthal*, 712 F.2d at 424. Using the objectives sought by the legislation is appropriate when the language of the law is not clear, quite certainly the case with the Securities Act when the limits of subject matter jurisdiction are at issue.

207. *Id.* at 425 (quoting Note, *American Adjudication of Transnational Securities Fraud*, *supra* note 186, at 570-71). It seems hard to accept that this was an "American securities transaction." It appeared to be the location in the United States that established the sufficient link, not the nationality of the lawyers. What if the law firm offices had been a Paris branch of the Los Angeles firm? The desire to send a warning to the lawyers would not diminish by the different location. Would Judge Reinhardt have nevertheless ruled the same?

208. The court thought that to rule otherwise would "make it convenient for foreign citizens and corporations to use this country and its lawyers, accountants and underwriters to further fraudulent securities schemes." *Id.*

209. The court found it meaningful that the meeting was held in the Los Angeles law office of Grunenthal's counsel, even though it acknowledged that it is unknown whether any lawyers were present at the meeting or perhaps even passed by the door while the meeting was in progress. *Id.* at 425 n.7.

210. If the Third Restatement had been adopted prior to *Grunenthal* (the Restatement was adopted four years later in 1987), *Grunenthal* would not seem consistent with the Third Restatement § 416. Section § 416(1)(d) bases jurisdiction to prescribe in securities matters on conduct "occurring predominantly in the United States." THIRD RESTATEMENT, *supra* note 9, § 416(1)(d). Were the language of the Restatement to reflect the law, it would include "merely preparatory" as the dividing line in the majority of circuits. "Predominantly" is presumably equated to conduct more than "merely preparatory." But predominantly addresses quantity, while merely preparatory addresses quality.

The Third Restatement, adopted four years later, would attempt to extend comparative interest theory to subject matter jurisdiction in securities litigation whether it was based on effects or conduct.[211] The Reporters' notes suggest that in contrast to antitrust litigation, which often involves conflicts between permitted or prohibited activity, securities litigation "has not resulted in state-to-state conflict."[212] This view perhaps remains true where the issue is foreign regulation mandating conduct prohibited in the United States, but is not true, as the Reporters' notes state, with regard to securities discovery,[213] and has proven not to be true with the Lloyd's of London insurance litigation involving United States "names,"[214] nor with the conflicts over the "natural forum" as discussed *infra* in the Butte Mining litigation.[215]

Between *Grunenthal* in 1983 and the recent Butte Mining litigation decisions in 1995-1996, two federal circuit courts, which had not previously spoken, aligned themselves with either the Second or Ninth Circuits. The D.C. Circuit in *Zoelsch v. Arthur Andersen & Co.*[216] followed the Second Circuit, in which Judge Bork articulated a preference for the "more restrictive test."[217] In suggesting that the court should inquire as to "what jurisdiction Congress in fact thought about and conferred" rather than "what 'Congress would have wished' if it had addressed the problem,"[218] Judge Bork added a footnote that indicated the counterproductiveness in attempting to use a balancing test when determining Congressional intent, because it was not

---

211. THIRD RESTATEMENT, *supra* note 9, § 416(2)(a).

212. *Id.* § 416 n.3.

213. *Id.* § 416 n.5.

214. The dispute has involved differences in opinion regarding the need of Lloyd's of London to register with state securities departments before it solicited names for membership in various Lloyd's syndicates.

215. *See infra* text at notes 251-89. The Butte Mining litigation leaves one with little reason to think that a garden variety securities fraud case involving foreign persons cannot rise to a nation-to-nation conflict, if the foreign person is able to convince it's own nation's courts to grant an antisuit injunction.

216. 824 F.2d 27 (D.C.Cir. 1987).

217. *Id.* at 31. Judge Bork thought that the Third, Eighth and Ninth Circuits had "relaxed" the Second Circuit's test, referring to *Continental Grain's* rejection of the Second Circuit's requirement that " 'domestic conduct constitute the elements of a rule 10b-5 violation.' " *Id.* (quoting 592 F.2d at 418). In a concurring opinion, Judge Wald said, "I therefore wish to distance myself from the majority's labeling of these courts' efforts as an attempt to usurp the role of Congress," because those circuits had been exercising a proper role in interpreting the meaning of a statute with little legislative history. *Id.* at 37.

218. *Id.* at 32 (citation omitted). The "would have wished" language was from *Bersch*, which Judge Bork otherwise tended to approve. Judge Bork clearly prefers determining the intent of Congress by addressing the language of the statute, rather than peremptorily dismissing the intent as unclear and turning to what purpose the statute was trying to achieve. The latter form of judicial interpretation may encourage the judge to momentarily discard the judicial robes and envision himself sitting as a legislator.

clear that applying such a test would be a wise expenditure of U.S. judicial resources, experience in attempting to balance interests had proven to be difficult in application, and the tests were "inherently unpredictable."[219]

In a ruling three years later, *MCG, Inc. v. Great Western Energy Corp.*,[220] the Fifth Circuit noted the different views among the circuits and indicated no preference for a restrictive or a liberal view.[221] The court referred to the views developed in the Second Circuit and the "more relaxed" standard of the Third, Eighth, and Ninth Circuits that allows jurisdiction when the conduct is not necessarily fraudulent itself but occurs in the United States in furtherance of a fraudulent scheme.[222] The facts did not require the court to choose between the two developing theories. The court affirmed dismissal for lack of subject matter jurisdiction where the plaintiff's conduct, rather than that of the defendant, was in question. The plaintiff had employed a scheme to avoid U.S. securities laws, to participate in a foreign offering from which plaintiffs were disqualified, and then to gain the protection of the securities laws.[223]

While these other circuits have addressed the subject matter jurisdiction issue, securities fraud cases continued to come before the Second Circuit. Three cases of some significance after *Bersch* and *Vencap* generally continued to follow the Second Circuit's strict approach and bring us up to date. The court in *Consolidated Gold Fields Plc v. Minorco, S.A.*,[224] found "sufficient effects" in the United States to justify subject matter jurisdiction.[225] The British chartered Gold Fields Corp. held significant natural resource exploration, mining, and marketing properties in the United States. These interests were in the form of wholly owned or partly owned (but controlled) U.S. chartered corporations. Nearly thirty percent of Gold Fields Corp. was owned by Minorco, which was chartered in Luxembourg and mostly owned and controlled by two entities: (1) Anglo, a South African

219. *Id.* at 32 n.2 (citing *Laker Airways*, 731 F.2d at 948-52, and essentially rejecting the then nearly completed Third Restatement's interest balancing provisions). Judge Bork also cited the argument that interest balancing was "not faithful to the principle of comity," and "deemphasized foreign sovereign interests"; in addition such balancing usually did not lead a court to decline to accept jurisdiction. *Id.* (citing Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1323-25 (1985)).

220. 896 F.2d 170 (5th Cir. 1990).

221. *Id.* at 175.

222. *Id.*

223. The court stated that having gone to considerable lengths to structure the transaction, however lawful such structure might be, the plaintiffs should not be allowed to "wrap themselves in their protective mantle when the deal sours." *Id.* The defendants knew nothing about the actions of the plaintiffs in avoiding the securities laws.

224. 871 F.2d 252, 255 (2d Cir. 1989).

225. The court referred only to the line of Second Circuit decisions to allow subject matter jurisdiction. *Id.* at 262.

corporation, and (2) De Beers. The latter two corporations owned 39.1% and 21% of Minorco, respectively.[226] Minorco wished to acquire the remaining 70% of Gold Fields, about 2.5% of which was owned by U.S. residents.[227] Offering documents were not sent to shareholders in the United States, but they were sent to the U.K. nominees of U.S. resident shareholders.[228] Thus, the tender offer occurred exclusively abroad and affected a small percentage of U.S. residents. Plaintiffs were both the target Gold Fields and some of its controlled entities in the United States.[229]

They brought challenges under both the antitrust and securities laws.[230] Because there was no conduct in the United States, the court focused on the effects test. The earlier *Bersch* court had allowed subject matter jurisdiction where only 22 U.S. residents purchased 41,936 shares, which was barely more than one percent of the 3,950,000 shares offered.[231] While in *Bersch* it was only assumed that the documents were transmitted to the U.S. shareholders, in this case the tender documents were clearly so transmitted. That constituted a "direct and foreseeable result of conduct" abroad and satisfied the effects test.[232] The court also noted it would be inconsistent with *Bersch* to rule otherwise.

Two years later the same court decided *Alfadda v. Fenn*,[233] and used

---

226. The Oppenheimer family of South Africa apparently controls Anglo and De Beers, and thus Minorco.

227. The 2.5% constituted about 5,300,000 shares. Only about 50,000 were held directly by residents, 2.15 million shares through the ownership of American Depositary Receipts (ADR), and 3.1 million through nominee accounts in the United Kingdom.

228. *Id.* at 262.

229. *Id.* at 252.

230. The district court rejected the securities fraud claims for lack of subject matter jurisdiction, but allowed injunctive relief on the antitrust claim. Consolidated Gold Fields, Plc. v. Anglo Am. Corp., 698 F. Supp. 487, 487 (S.D.N.Y. 1988). The circuit court upheld the antitrust claim, and reversed the securities fraud decision. *Consolidated Gold Fields*, 871 F.2d at 263.

231. *Consolidated Gold Fields*, 871 F.2d at 262.

232. *Id.* (citing THIRD RESTATEMENT § 402(1)(c)). The court made note of interest balancing provisions of § 403(2)(b) and (g) only as an added reference to its comment on enforcement jurisdiction, citing principally § 431(2) of the Restatement. It further noted that international comity might suggest nonenforcement when the "extraterritorial effect of a particular remedy is so disproportionate to harm within the United States," as had been argued in an amicus curiae brief by the SEC, but the court left this determination to the district court on remand. *Id.* at 263 (citing Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3rd Cir. 1979); *Timberlane*, 549 F.2d at 597; THIRD RESTATEMENT, *supra* note 9, § 431; *and contrasting Laker Airways*, 731 F.2d at 909). On remand the district court did little to enhance the usefulness of interest balancing, only briefly considering the international interests. Consolidated Gold Fields, Plc. v. Anglo Am. Corp., 713 F. Supp. 1457, 1464 (S.D.N.Y. 1989); *see* Case Note, *Application of U.S. Law to Foreign Transactions — Antitrust Law — Securities Law*, 83 AM. J. INT'L L. 923 (1989).

233. 935 F.2d 475 (2d Cir. 1991).

the conduct test to find subject matter jurisdiction.[234] Consistent with earlier rulings, the court held that the conduct had to be more than merely preparatory, but this holding seemed to depart from the *Bersch* requirement that the conduct directly cause the plaintiff's loss.[235] The conduct appeared to have occurred after the fraud had been perpetrated, rather than to have been part of the perpetration. But the court believed that the prospectuses "did not become fraudulent" until additional shares were sold.[236] The negotiations and sales included conduct within the United States. Judge Lumbard referred to the Restatement section 416(d),[237] allowing jurisdiction where there is conduct occurring "predominantly" in the United States, "even if the transaction takes place outside the United States."[238] The "predominance" of the conduct being in the United States was certainly subject to question. It was more a question of whether there was "sufficient" conduct to justify jurisdiction.[239]

The last significant Second Circuit decision was the 1995 decision, *Itoba Ltd. v. LEP Group PLC*.[240] Like both *Minorco* and *Alfadda*, the court reversed a district court dismissal for lack of subject matter jurisdiction.[241] Like several of the above decisions, the case involved a foreign corporation, LEP Group, Plc, of the United Kingdom, which had deposited about ten percent of its shares in a U.S. depository to create a market in the United States. The resulting American Depository Receipts (ADR) were traded on the NASDAQ and subject to reporting and disclosure requirements of the U.S. securities laws. A Bahamas chartered company, A.D.T. Ltd., which was registered on the New York Exchange and with about fifty percent of its shareholders U.S. residents, owned Itoba, Ltd., which was chartered in the Channel Islands. Itoba in turn was the parent of A.D.T. Securities Systems,

234. *Id.* The circuit court reversed the district court, which had held that the fraud had been perpetrated "by placing the misleading prospectus into the hands of the plaintiff outside the United States," a rather narrow interpretation of what constitutes the meaningful conduct. Alfadda v. Fenn, 751 F. Supp. 1114, 1114 (S.D.N.Y. 1990).

235. *Alfadda*, 935 F.2d at 475.

236. *Id.* at 478.

237. *Id.* at 479. Incorrectly identifying it as the 1987 "Second" Restatement. It is the Third Restatement, despite the fact that there was no First Restatement.

238. *Id.*

239. There was also a RICO claim, which the district court had dismissed for lack of subject matter jurisdiction. The circuit court reversed on this count as well, acknowledging the lack of Second Circuit precedent on the issue, but concluding that the legislative intent in enacting RICO was not to limit RICO to domestic enterprises, and finding sufficient acts within the United States to justify jurisdiction. *Id.* at 479-80.

240. 54 F.3d 118, 120-22 (2d Cir. 1995).

241. Three different judges (Newman in *Minorco*, Lumbard in *Alfadda*, and Van Graafeiland in *Itoba*) wrote the opinions in these three Second Circuit decisions. The district courts are apparently having as much difficulty as law review notewriters in understanding the standards being developed by the successive circuit court opinions.

which was chartered in Delaware. A.D.T. Ltd. decided to jointly purchase LEP along with a Canadian company, Canadian Pacific. LEP was evaluated for Canadian Pacific by a London investment analysts and for A.D.T. Ltd. by an in-house analyst.[242]

A.D.T. Ltd. then had Itoba acquire LEP shares. Before the purchase was complete, LEP disclosed some business reversals, its share price dropped ninety-seven percent, and LEP's holdings by Itoba declined by about $111 million. Itoba's suit for securities fraud was against both LEP and its officers.[243] In reversing the district court, the circuit court turned to the conduct test. Judge Van Graafeiland found the investment decisions, while made abroad, relied partly on U.S. securities filings.[244] Since the decision to purchase LEP shares was made upon recommendations partly based on SEC filings, the SEC reports became a "substantial and significant cause" of the purchase decision.[245] The court stated that because SEC filings are the "type of 'devices' " investors rely upon, the fact that the false and misleading statement was made regarding a security that was not the security purchased would not bar the action.[246] The court disagreed that making the false statements in reports to the SEC was "merely preparatory."[247] The court said the situs of the preparation of the report should not be decisive, otherwise securities law protection could easily be avoided. There were material, undisclosed facts in the report that created a duty to correct, which was not fulfilled. This failure was not "incidental or preparatory."[248]

The *Itoba* court also found sufficient effects in the United States in the form of trading of A.D.T.'s shares on the New York Exchange and the possession of fifty percent of A.D.T.'s shares by U.S. residents. The court seemed to acknowledge its doubt about the sufficiency of its ruling on either conduct or effects grounds alone, by stating, "[W]e hold that a sufficient combination of ingredients of the conduct and effects tests is present . . . to justify . . . jurisdiction."[249] Less than adequate fulfillment of each test seems in sum to be sufficient to Judge Graafeiland, which is a view not likely to be fully appreciated. This view might also cause cases where the

242. *Id.* at 118. Canadian Pacific abandoned plans to participate in the purchase, but the in house analyst of A.D.T. Ltd. continued to use and rely upon the London financial report made for Canadian Pacific.

243. *Id.*

244. *Id.* at 122.

245. *Id.* Although the board members of Itoba had not read the SEC filing, derivative reliance was sufficient.

246. *Id.* at 123. The reports evaluated the shares of LEP ordinary shares, not the ADRs. The court noted the obvious linkage between the price of the ordinary shares in London, and the price of the ADRs in the United States.

247. *Id.* Which decision the district court had avoided.

248. *Id.* at 124.

249. *Id.*

conduct is merely preparatory to result in a finding of jurisdiction if the court also is able to find less than sufficient effects standing alone, but in combination with the less than sufficient conduct to add up to jurisdiction.

The two lines of authority in the circuit courts outlined above, which diverge less with regard to the nature of the effects test than with the meaning of the conduct test and the need to prove conduct that caused the securities fraud, will undoubtedly be addressed in some future Supreme Court decision. The frequent overruling of district court rulings that dismiss actions on subject matter jurisdiction grounds suggests that better guidance is needed than that provided by in the circuit courts. There is not only a distinction between groupings of circuits, but also in the view of district court judges, a considerable lack of clarity within some of the circuits. While Supreme Court assistance on the nature of the conduct test would be useful, the recent decision in the Ninth Circuit in *Butte Mining Plc v. Smith*[250] may have begun to draw the two circuit court positions closer, if not checkmate the Ninth Circuit's broadening of jurisdiction in *Grunenthal*.[251] The *Butte Mining* decision is especially important because, like some of the significant recent antitrust decisions such as the Laker Airways litigation, it involves separate cases addressing the same matter initiated in the United States and in other nations.[252] Furthermore, the U.K. court ruling that the principal plaintiff in the United States *Butte Mining* litigation *must* bring its actions in the United Kingdom rather than the United States,[253] raises far more questions about the future of subject matter jurisdiction than are answered by traditional choice of law norms, which some critics of the various circuit court decisions outlined above seem to believe would best resolve these jurisdictional conflicts.[254]

Butte Mining Plc initially commenced its securities fraud litigation in May 1992, in federal district court in Montana on fraud and RICO claims.[255] Butte Mining sued seventy-seven defendants, twenty-seven of

250. 76 F.3d 287 (9th Cir. 1996).

251. Such convergence is especially true if *Alfadda* and *Itoba* are viewed as the adoption of a more liberal attitude in the Second Circuit, now that Judge Friendly is no longer writing opinions.

252. *See id.*; Simon Eng'g Plc v. Butte Mining Plc, [1996] 1 Lloyd's Rep. 91, [1996] 1 Lloyd's Rep. 104 (Eng.).

253. *Simon Eng'g*, [1996] 1 Lloyd's Rep. 91.

254. *See generally* Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Law: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799 (1992).

255. Butte Mining Plc v. Smith, 876 F. Supp. 1153, 1153-54 (D. Mont. 1995). The RICO Act claims are a new element of securities litigation. 18 U.S.C. § 1964(c) (1994). With damages claimed of at least $325 million, the RICO Act would treble that to about $1 billion. Of course, the securities fraud violations also might result in treble damages. The *Butte Mining* suit was a shareholders' derivative action, and was taken by the lawyers on a

whom were residents of or entities incorporated in England or Wales.[256] The principal defendants were the Robertson Group Plc, Ltd. (three companies acquired by Simon Engineering Plc in May 1991) and the auditors Ernst & Young International.[257] A group of promoters who were citizens of foreign countries, including England and Australia (referred to in the U.S. action as the Control Group), formed some fifteen U.K. companies (referred to as Controlled Entities), which in turn controlled fifteen Montana corporations (referred to as the Montana Shell Corporations).[258] One of these companies, Montana Mining Properties Inc., a Montana corporation, was to be the agent for a later formed public corporation intended to purchase and lease mining properties and equipment in Montana.[259] There was a stock swap outside the United States between Butte Mining and one of the Controlled Entities, at an exchange rate that was not favorable to Butte Mining.[260] Butte Mining shortly thereafter issued shares on the London exchange at an inflated price with the condition that no shares could be sold " 'directly or indirectly, in the U.S. to or for the benefit of any North American Person.' "[261] But some of the shares went to a resident of Montana, as partial payment for property he had originally sold. The conduct in Montana was preparatory to the securities fraud; the alleged fraud and losses occurred when the transactions were undertaken in England.

Six days after Butte Mining filed its action in Montana, Ernst & Young brought an action against Butte Mining in England seeking professional fees of over £300,000.[262] In July, Robertson also sued Butte Mining in England, for failing to pay a bank overdraft that Robertson had guaranteed. In October, the Montana court enjoined Ernst & Young from pursuing the English action because the defense of Butte Mining would be the same as its complaint in Montana.[263] Ernst & Young's appeal of that antisuit injunction was denied in May 1994. Butte Mining also had sought a similar injunction against Robertson, but judgment was withheld since a decision was

---

contingent fee basis. The RICO charges were dismissed because the plaintiff did not allege any effect on either U.S. citizens or securities markets. The English court would later view the RICO charges as a remedy rather than a cause of action, and thus not raise the single forum issue since England has no RICO equivalent.

256. *Butte Mining*, 876 F. Supp. at 1158-59. Twenty-four defendants did not enter an appearance, twenty-six agreed to submit to the jurisdiction of the English court.

257. *Butte Mining*, 76 F.3d at 188-89.

258. *Id.* at 289.

259. *Id.* at 288.

260. *Id.* at 289.

261. *Id.*

262. *Simon Eng'g*, [1996] 1 Lloyd's Rep. 104.

263. Butte Mining Plc v. Smith, No. 92-36890, 1994 WL 192428, at 2* (9th Cir. May 17, 1994) (unpublished). The English complaint, in the view of the Montana judge, had to be brought as a counterclaim in Montana.

soon expected on the issue of subject matter jurisdiction, and Robertson had not proceeded with the English action.

In January 1995, the Montana district court dismissed the securities fraud charges for lack of subject matter jurisdiction.[264] The dismissal was under both the effects test and the conduct test.[265] The only comment made by the Montana district court with regard to the English action was the next to last sentence in the decision, stating that "[t]he anti-suit injunction issued by this court on October 2, 1992, is dissolved."[266] The decision in no way disclosed the serious conflict between Butte Mining and the two principal defendants regarding the proper forum. If the district court had decided in favor of subject matter jurisdiction, it would have had to address the issue of forum non conveniens, which the defendants also had raised. That would have brought the two nation's courts into sharper conflict. But the issue was not over because of the appeal of *Butte Mining*.

Because Butte Mining stated its intent to appeal, the Simon group, which had acquired the Robertson group, obtained an antisuit injunction in England prohibiting Butte Mining and its attorney Lloyd-Jacob from pursing its claims in the Montana action, including its appeal to the Ninth Circuit.[267] Butte Mining and Lloyd-Jacob requested that the English court discharge its antisuit injunction.[268] In February, 1995, the English Commercial Court in the Queen's Bench Division of the High Court granted the injunction requested by Ernst & Young and declined to set aside its previous injunction granted to the Simon group.[269] The English court expressed the basis of restraining foreign proceedings "where they are vexatious, in the sense of being frivolous or useless, but also where they are oppressive."[270] Further, they may be restrained when there are new circumstances such as the possibility of bringing suit in a nation with "exceptionally broad jurisdiction and which offer[s] great inducements, in particular greatly enhanced, even punitive,

264. *Butte Mining*, 876 F. Supp. at 1168.

265. The court referred to *Grunenthal* as a case where the "material misrepresentations were made in the United States which induced the plaintiffs to execute a sales agreement," but thought all the conduct in *Butte Mining* occurred abroad. *Id.* at 1166.

266. *Id.* at 1168.

267. *Simon Eng'g*, [1996] 1 Lloyd's Rep. 104.

268. Ernst & Young sought a similar injunction and the two interests were heard together.

269. *Id.* Butte Mining had not acknowledged that the litigation in England was on the merits. The English judge, in addition to the antisuit injunction, gave orders for a speedy trial, including ruling that the affidavits filed by the parties should be considered pleadings and evidence. *Simon Eng'g*, [1996] 1 Lloyd's Rep. 91.

270. *Simon Eng'g*, [1996] 1 Lloyd's Rep. 104. The court later said the Butte Mining suit in the United States was not vexatious, and focused only on the "oppressive" nature of the Montana action.

damages."[271] The court said it would not grant an injunction were it to deny the foreign plaintiff of advantages of the foreign forum. Acknowledging that the best court to determine whether a matter should proceed is the court in which the action is brought, the court thought that this was an "exceptional case," where justice required intervention.[272]

Turning to whether England or the United States was the "natural forum," the court was influenced by the Montana district court's conclusion that there was no subject matter jurisdiction.[273] For additional reasons common to forum non conveniens analysis, the court concluded that England was the natural forum.[274] The "oppressive" issue concentrated on several elements of the legal system held in disdain in England, including punitive damages, treble damages under RICO, contingent fees, high costs that were not recoverable by the successful party,[275] and the likelihood of a long delay in the Montana court.

The uniqueness of the case was also of concern to the English court. The U.S. case involved a lower court ruling dismissing the jurisdiction, which concluded the matter in the way the English court thought to be correct, whether under jurisdictional or forum non conveniens analysis, but an appeal was pending.[276] The English court considered the grounds of the appeal, as well as the time and expense of the appeal. It found the delay of the English actions by the appeal to itself be oppressive conduct.[277]

The court found the treble and punitive damages, the contingent fees, and

---

271. *Id.* The court thought forum non conveniens would normally cause the foreign court to exercise jurisdiction, protecting the plaintiff by a stay upon terms. The court rejected the idea that an antisuit injunction could be based solely on the ground that England was the natural forum, believing that would be inconsistent with comity. The court instead required both a ruling that England was the proper forum, and that pursuit in the foreign forum was vexatious or oppressive.

272. *Id.* The court also acknowledged that a court may be compelled to "give effect to the policies of its own legislation."

273. *Id.* The Montana court did not reach the issue of forum non conveniens.

274. Although the court had suggested that the best court to determine whether it is a natural forum is the court of that forum, it later suggested that it had not been convinced that Montana was a natural forum.

275. This viewer of the English legal system has long considered the English to use cost analysis, when considering changes to the legal system, far more extensively than do Americans. For example, the lack of a voir dire in criminal proceedings is partly due to the added cost. Adding costs differs from allocating costs, although allocating costs to the loser tends to reduce overall costs of the system, because fewer suits are filed that are clearly frivolous.

276. *Id.*

277. Butte Mining had not been willing to agree in England not to seek an antisuit injunction in the Montana court preventing Ernst & Young and the Simon group from pursuing the actions in England. Butte Mining preferred to rely on the Montana appeal, rather than shift its fight to England where it had said it could not proceed because of the lack of contingent fee arrangements.

the use of a jury trial,[278] gave Butte Mining an illegitimate advantage. It would not be an illegitimate advantage were it to be a natural forum, however, the court referring to a decision where both Texas and England could be proper and natural forums.[279] But where the foreign forum has no connection with the subject matter, the English courts have ruled differently.[280] Rendering punitive and treble damages illegitimate is the United Kingdom Protection of Trading Interests Act of 1980, which disallows enforcement of a foreign judgment with multiple damages.[281] The court noted that absent the jurisdictional links with the foreign country that exclude application of the Act, such damages justified their being considered oppressive.

Turning to the contingent fee issue, the court suggested U.S. juries are inclined to grant larger awards since plaintiffs must give so much over to their counsel.[282] The court said that separate from this was the fact that having Butte Mining's lawyers finance the action, plus the irrecoverability of costs by successful defendants, is under the English view an illegitimate advantage. The court finally considered both that certain claims against third parties could only be pursued in England and the alleged lack of funds of Butte Mining to pursue the matter outside the United States,[283] and ended with what the court said was its "balancing exercise that the Court must perform in the interests of justice."[284] The English court concentrated on the characteristics of the U.S. legal system that English jurists have long disliked, and which differ significantly from how the English system functions.[285]

The conclusion of oppression was not difficult to predict. Such a

278. In England the trial would be before a judge without a jury, which is used for a very limited number of civil actions.

279. Castanho v. Brown & Root (UK) Ltd., [1981] App. Cas. 557 (Eng.).

280. *See* Société Nationale Industrielle Aérospatiale v. Lee Kui Jak (SNIA), [1987] App. Cas. 871 (P.C. 1987). A suit had been brought in Texas, which ruled favorably to the plaintiff on forum non conveniens grounds. *Id.* at 832. The U.K. Privy Council granted an antisuit injunction, despite the Texas plaintiffs being willing to agree to a trial by judge alone, and to accept the application of foreign law which did not allow punitive damages. *Id.* at 876. Such agreements may reduce the level of oppression, but are not an assurance of acceptance by the foreign court. *Id.*

281. See further discussion of this blocking law at *supra* note 24 and accompanying text.

282. *Simon Eng'g*, [1996] 1 Lloyd's Rep. 91.

283. The court thought this neutral, referring to the large sums Butte Mining had spent "squandering its resources" in Montana and preventing the English actions. *Id.* at 36. Butte Mining's alleged inability to pursue an action in England proved illusory as it soon thereafter filed suit in England. Butte Mining did not allege lack of funds at the hearing for a permanent injunction in England. *Simon Eng'g*, [1996] 1 Lloyd's Rep. 91.

284. *Simon Eng'g*, [1996] 1 Lloyd's Rep. 104.

285. *See also* MARY ANN GLENDEN ET AL., COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL, Part Two (1982).

balancing test is not what has been suggested by the advocates of interest balancing in the United States. The form of balancing advocated in the United States looks to essentially positive economic, social, and political interests of each nation, rather than using balancing to disparage the legal system of the other.[286] In March the English court dismissed an application of Butte Mining to modify the injunction and file notice of appeal. The Court of Appeal reversed and allowed that filing. In March, April, and May, Butte Mining tried to expedite its U.S. appeal, but its persistence brought only an order on May 23 to cease submitting further such motions.[287] In October, the English Commercial Court made the antisuit injunction permanent.[288]

If interest balancing by U.S. courts such as the Ninth Circuit's *Timberlane* decision is thought to be little more than a process by which a court justifies a decision by excessive weight to its own nation's interests, the interest balancing in this U.K. decision could be thought to be little more than a process by which a court justifies a decision by weight of disregard of or disdain for the other nation's interests. The use of such language as "unjust" and "oppressive" when referring to aspects of a nation's legal system are harsh and unlikely to be viewed as legitimate elements of interest balancing.[289] *Timberlane* in the United States and *Simon Engineering* in the United Kingdom speak strongly for a more effective means of resolution of extraterritorial application of laws.

What seems strange to this author is the Ninth Circuit's total lack of any reference to the English proceedings when it heard the appeal of the Montana district court decision.[290] Even though the case was argued on December 7, 1995, long after the English decision allowing the antisuit injunction, Ninth Circuit Judge Noonan spoke only to the issue of subject matter jurisdiction. The circuit court agreed that the effects test was not met, and indeed the plaintiffs had not alleged any effects in the United States. The court stated that *Grunenthal* established the governing principles for the

---

286. One might rather easily label the English system oppressive for failing to adopt the very characteristics of the U.S. system it disparages since those characteristics all have quite sound reasons for their presence even though they do not all function as intended. An effective balancing of interests does not evolve from the English model of criticism for not being more English.

287. *Simon Eng'g*, [1996] 1 Lloyd's Rep. 91; *Butte Mining*, 76 F.3d at 287.

288. *Simon Eng'g*, [1996] 1 Lloyd's Rep. 91.

289. The English court attempted to differentiate between such characteristics of the U.S. civil process as contingency fees and discovery when the United States would be the only natural forum. When England is the natural forum those characteristics become oppressive. The court did not clearly answer the question about whether oppression existed when either England or the United States were natural forums. Perhaps that does not occur under English law. If England is a natural forum, is it therefore the only natural forum?

290. *Butte Mining*, 76 F.3d at 287.

conduct test.[291] But if *Grunenthal* is to be read as a liberal departure from the Second Circuit's line of cases, this new reading is very different. Judge Noonan began by repeating *Grunenthal*'s base of operations test, reaffirming that the United States should not be used as a "haven for such defrauders and manipulators."[292] The court thought that owning mining property in Montana did not mean Montana was the operational base.[293] The court also did not believe that it was significant that one of the defendants and his lawyer were Montana residents.[294]

Further, the court went through its *Grunenthal* test of "responsible behavior" by lawyers, accountants, and underwriters and found no underwriters involved, and only insignificant involvement by accountants[295] and lawyers.[296] The final focus was on whether the conduct in the United States was merely preparatory. Recognizing that "merely preparatory [conduct] . . . is not a basis for jurisdiction," the court stated that the plaintiffs affirmed that the conduct in the United States was merely preparatory by their own allegations.[297] But was it? It consisted of the purchase of the Montana lands, the formation of the Montana shell corporations to hold the acquired mining interests, payment of the Montana seller of the land partly with Butte shares that were undervalued because of the fraud, and use of "communications systems" in the United States.[298] This conduct seems to have been more than enough to come under the *Grunenthal* test, but *Grunenthal* was not decided in the shadow of a hostile foreign antisuit injunction. The court certainly knew of the English injunction and that a decision in favor of Butte Mining would raise the level of conflict between the U.S. and English courts.

Why is Judge Noonan's opinion in Butte Mining so different than Judge Reinhardt's opinion in *Grunenthal*? Judge Reinhardt had little trouble in finding subject matter jurisdiction on the slimmest of contacts with the United States. There was no similar foreign litigation involving the parties

291. *Id.* at 290.
292. *Id.* (citing *Grunenthal*, 712 F.2d at 424-25).
293. *Id.*
294. *Id.* A Montana law office is apparently less significant than one in Los Angeles, where the one act of significance in *Grunenthal* occurred.
295. *Id.* at 291. Accountants had given an opinion on the implications of the U.S. tax laws. Had their opinion been different might the deal have been canceled, that is, was their involvement an essential link to the final decisions?
296. The lawyer who participated in the initial sale. Apparently a Montana lawyer participating in a substantive sales agreement is of less weight than a Los Angeles lawyer who allows use of his office, without further participation, as in *Grunenthal*.
297. *Id.*
298. *Id.*

in *Grunenthal*,[299] and thus no likely hostile reaction to the finding of subject matter jurisdiction. Perhaps Judge Noonan's decision is a disguised decision based actually on forum non conveniens, impliedly accepting the English court's conclusion that the United Kingdom was the proper and natural forum, thereby avoiding having to address the oppression characteristics of the U.S. civil legal process. Judge Noonan may be more territorialist in his approach to subject matter jurisdiction than is Judge Reinhardt.[300]

Perhaps of significance was the fact that after the English injunction was made permanent on October 3, 1995, Butte Mining initiated an action in the English courts for £100 million, contrary to its earlier claims that it could not afford to pursue an action in England where contingent fees were not allowed. Thus, when the appeal was argued before the Ninth Circuit in December, that court must have known of Butte Mining's actions in the United Kingdom. The litigation had for all intents moved to the United Kingdom. The remaining link in the United States was hope for Butte Mining that the Ninth Circuit would be consistent and find subject matter jurisdiction as it had in *Grunenthal*. If that hope had been fulfilled, it would have left Butte Mining to decide whether or not to go forward in violation of the English order. As a U.K. company, it could not disobey an English court order. Even if Butte Mining were to go forward, the English blocking laws would have limited discovery and would effectively block it from reaching any assets in the United Kingdom to satisfy a judgment.[301]

*Butte Mining* may reflect a decision by the Ninth Circuit to move away from a liberal grant of subject matter jurisdiction to avoid a conflict with foreign nations' interests. Alternately, the Ninth Circuit might retain the liberal position it had developed in *Grunenthal* by addressing whether to go forward under international comity or the *Timberlane* interest balancing. However, if it retains the latter, the court must deal with the Supreme Court's decision in *Hartford Fire Insurance*. If Justice Souter's "true conflict" in *Hartford Fire Insurance* includes the kind of conflict raised in *Butte Mining*, does that mean interest balancing theory has survived? While there are no answers as yet, there are some possible observations.

---

299. At least there was no similar foreign litigation of which this author is aware. However, it would have been easy to miss the English litigation involving the parties in *Butte Mining*, except for the brief reference to the antisuit injunction by the district court.

300. For a discussion by Judge Noonan (then Professor Noonan) of the *American Banana Co. v. United Fruit Co.* decision, 213 U.S. 347 (1909), where Justice Holmes based his decision on a territorial limitation to the application of a nation's laws, see *supra* note 33 and accompanying text. But it was Judge Noonan who had used interest balancing in his opinion in *Hartford Fire Insurance*, which was reversed by the Supreme Court. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993)

301. Also, the clawback provisions of the U.K. law could have been applied by the defendants, allowing them to recover any treble damages from a United States ruling out of any assets of Butte Mining in the United Kingdom.

## IV. THE FUTURE OF INTERNATIONAL SECURITIES FRAUD LITIGATION

In the absence of the *Hartford Fire Insurance* and *Aramco* Supreme Court decisions, and the U.K. *Simon Engineering* antisuit injunction, this article would end with some suggestions on how the Supreme Court might be expected to decide an appeal of a securities fraud subject matter jurisdiction case and define the limits of extraterritorial jurisdiction. The Court most likely would have followed the line of Second Circuit decisions. It would have allowed jurisdiction if there were some level of effects or conduct in the United States. One would hope that the court would define more clearly what constitutes effects and conduct, especially where the line between actionable conduct and merely preparatory conduct would be drawn. Quite probably the Court also would require some linkage between conduct and a violation of the securities fraud provisions, thus rejecting the deviations in the Third and Eighth Circuits. If the question had arose, I suspect the Court would have rejected interest balancing.

However, I believe the Court will be more forceful in a future ruling because of the presence of the *Hartford Fire Insurance* and *Aramco* decisions, and the Butte Mining litigation. I do not believe the outcome will necessarily be different, but the Court's decision is likely to contain more clarity both in rejecting or very severely limiting interest balancing and in concentrating on defining the intent of Congress and probably the purpose of the legislation.

How might each of these three cases or groups of cases affect a future Supreme Court decision addressing extraterritorial application of securities fraud laws? Let me offer a few thoughts.

### A. Hartford Fire Insurance v. California

I am inclined to favor Professor Trimble's observations more than those of Professor Lowenfeld. But I believe it was an overstatement by Professor Trimble to refer to the demise of section 403 of the Third Restatement.[302] It lies quite severely wounded, but it has strong supporters who will attempt to nurse it back to health. Indeed, the good Dr. Lowenfeld, in his best bedside manner, understated the extent of the injury.[303] It is quite possible that when the Supreme Court addresses a securities fraud extraterritorial subject matter jurisdiction case, the court will not have to address section 403, because it may well deal with a case from a circuit that already ignores that section. But the Court probably will have to deal with international law,

302. *See generally* Trimble, *supra* note 82.
303. *See generally* Lowenfeld, *supra* note 81.

and may even, if confronted with the opportunity, limit subject matter jurisdiction by the application of international comity rules without any reference to the Restatement. What does seem clear is the Court will consider the intent of Congress of primary importance, which leads us to the possible reference to the *Aramco* decision.

*Hartford Fire Insurance* will require some careful elucidation of Justice Souter's "true conflict between domestic and foreign law"[304] for a future Court to reject exercising extraterritorial jurisdiction on international comity grounds. The London insurers in *Hartford Fire Insurance* neither argued that English law required them to act in a manner prohibited by U.S. law, nor claimed that compliance with the laws of both countries was not possible. In a future case, defendants are likely to allege both that they are required to act in a manner under their nation's law that is prohibited by U.S. law, and further claim that compliance with the laws of both countries is impossible. Furthermore, foreign nations may react to U.S. extraterritorial laws with which they strongly disagree as to substance or remedies, with their own national mandates that clearly create such obstacles, or benefits, for litigants. This suggests that a conflict that ought to cause a court to avoid an extraterritorial application of its laws may have to involve a conduct directive from the foreign nation, which ought not be the case.

Whether only such a directive creates Mr. Justice Souter's "true conflict" remains to be decided. What may occur is increasing judicial deference to administrative "suggestions" as to whether the court ought to proceed, reminiscent of the unpleasant experiences between the courts and the Department of State before the adoption of the Foreign Sovereign Immunities Act (FSIA) in 1976.[305] But those experiences led to the adoption of the FSIA, which was drafted with quite reasonable clarity in outlining when a U.S. court would assume jurisdiction over a foreign state.[306]

Any new participation by the executive branch, however, is likely to lead to laws with greater expressions of clarity regarding the extraterritorial scope of the law. While the FSIA adopted immunity theory that is generally recognized throughout the world, many U.S. laws that induce conflicts when applied extraterritorially are neither clear as to their application abroad, nor acceptable in theory to other nations. Rejection by foreign states may be due to the substance of the law, as in the case of the Cuban Democracy Act of 1992[307] and Cuban Liberty and Democratic Solidarity Act of 1996,[308] or

304. *Hartford Fire Ins.*, 509 U.S. at 765 (citation omitted).

305. *See* MICHAEL WALLACE GORDON, FOREIGN STATE IMMUNITY IN COMMERCIAL TRANSACTIONS, ch. 4 (1991) (describing this experience).

306. The antitrust and securities laws claim no such clarity.

307. 22 U.S.C. § 6001 (1994).

308. 22 U.S.C.A. § 6021 (1996).

to remedies, such as treble damages under antitrust and securities laws. Rejection also may be more broadly based and apply to elements of the legal system, as illustrated by the English court in the Butte Mining litigation.[309] The broad range of conflicts which may satisfy Justice Souter's "true conflict" is yet unknown. Future decisions will clarify whether the Court will develop traditional international comity theory to deal with these conflicts, accept the factors of section 403 of the Restatement's, or reject both and apply U.S. laws extraterritorially as the legislature dictates. The first choice would receive nearly unanimous approval abroad, and I suspect very substantial approval in the United States. The second choice would receive little approval abroad and a nominal amount in the United States. The third choice would receive overwhelming condemnation both from abroad and from most jurists in the United States.

### B. EEOC v. Arabian American Oil Company (Aramco)

When the Supreme Court decided *Aramco* in 1991,[310] the obvious question it raised with regard to extraterritoriality in general was what scope the case would have. First, it might become very limited in scope and be interpreted to apply only to the extraterritoriality of Title VII of the Civil Rights Act of 1964. Second, it might constitute a rule of general application but only be applied where there were no established lines of cases that had found extraterritorial intent even in the absence of any language justifying extension such as in the areas of antitrust and securities fraud. Third, it could be applied to all federal laws, thus reversing the sequence of decisions in both the antitrust and securities fraud areas.

The court in *Aramco* said, "We assume that Congress legislates against the backdrop of the presumption against extraterritoriality."[311] Congress clearly has the authority to enact laws with extraterritorial effect, but in so doing, it may create a conflict with other sovereign nations' interests; therefore, the presumption is sound. Thus, it becomes essential to determine the intent of Congress. In the absence of any statutory language that clearly expresses extraterritorial effect, the law must be assumed to be limited to domestic acts.[312] The Court seemed to distinguish reliance upon the language of the statute from reliance upon legislative history or statutory

309. *Simon Eng'g*, 1 Lloyd's Rep. 104. Such a conflict surely would not cause a U.S. court to defer going forward for either international comity reasons or Restatement interest balancing factors.

310. *Aramco*, 499 U.S. at 244.

311. *Id.* at 248.

312. "[U]nless there is 'the affirmative intention of Congress clearly expressed,' " the presumption is that the law does not have extraterritorial effect. *Id.* (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1949)).

purpose and noted the former as controlling.[313]

Lower federal courts deciding cases in the future involving federal laws other than Title VII might interpret the *Aramco* decision so as to have little effect on the line of antitrust and securities fraud cases by either finding legislative intent essentially synonymous where there is "legislative control," and thus in effect address the presumption language of *Aramco*, or simply limiting *Aramco* to Title VII cases and rejecting (or more likely ignoring) *Aramco*'s language as statements of general application.[314]

This does not seem to be what has been happening since *Aramco* was decided. Federal courts confronting the extraterritoriality of such statutes as the Fair Labor Standards Act,[315] the National Environmental Policy Act,[316] the Copyright Act,[317] the Bank Holding Company Act,[318] and the Longshoremen and Harbor Workers' Compensation Act[319] have all viewed *Aramco* as having established a general rule of interpretation. This first alternative of *Aramco*'s impact already seems to have been eliminated.

*Aramco* has become and will continue to be the reference for any new federal law whenever a question of extraterritorial application is raised. Let me also suggest that the third alternative has been rejected, that is, the likelihood that *Aramco* will be applied to reverse years of development of extraterritorial application of laws such as the antitrust and securities fraud provisions. The *Hartford Fire Insurance* decision, where Justice Souter writing for the majority made no reference to *Aramco*, seems to be a clear rejection of *Aramco* as having any kind of retroactive application. What will happen when the Supreme Court ultimately accepts certiorari to determine the contours of extraterritorial application of the securities fraud laws? Perhaps the court will ignore *Aramco* and refer only to *Hartford Fire Insurance*. I think that Professor Kramer was absolutely correct in questioning the absence of any reference to *Aramco* in Justice Souter's opinion in *Hartford Fire Insurance*.[320] I suspect that Justice Souter's opinion is not "sloppy opinion-writing,"[321] as Professor Kramer has labeled, but a measured decision not

313. "In applying this rule of construction, we look to see whether 'language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.' " *Id.* (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 218, 285 (1949)) (alteration in original).

314. The latter is apparently how Justice Souter preferred to treat *Aramco* in *Hartford Fire Insurance*, where he did not even make reference to the earlier *Aramco* decision.

315. Cruz v. Chesapeake Shipping, Inc., 932 F.2d 218 (3d Cir. 1991).

316. Environmental Defense Fund, Inc., v. Massey, 986 F.2d 528 (D.C. Cir. 1993).

317. Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088 (9th Cir. 1994).

318. Gushi Bros. v. Bank of Guam, 28 F.3d 1535 (9th Cir. 1994).

319. Kollias v. D & G Marine Maintenance, 29 F.3d 67 (2d Cir. 1994).

320. Kramer, *supra* note 83, at 753.

321. *Id.* at 754.

to engage in a dialogue regarding the fringes of subject matter jurisdiction to get quickly to his main point: The congressional intent regarding antitrust law has been satisfactorily, if not correctly, established in previous cases and includes extraterritorial application of the antitrust laws. If *Aramco* had been decided before *Alcoa* and before *Schoenbaum*, those decisions might have been quite different. But *Alcoa* and *Schoenbaum*, which include the full line of circuit court cases described above, have "settled in" as applicable law, and to disrupt them with a finding in *Aramco* that rejects their extraterritorial application would create a disharmony in the methodology of the system itself.

### C. *Butte Mining Litigation*

The Butte Mining litigation, like the earlier Laker Airways litigation, is troubling. Antisuit (and anti-antisuit) injunctions, like blocking and clawback laws, do not produce the kind of harmonious judicial resonance that nations must seek to achieve. Legislatures are increasingly imposing upon the judiciary enactments that combine clarity and the creation of international discord. It was not the legislature in England, but the High Court that was the source of the reasons for the antisuit injunction ruling in the Butte Mining litigation in *Simon Engineering*. It must be to the judiciary that we turn for the resolution, not the creation, of these conflicts.[322] It is the judiciary that has added to the conflicts created by legislatures with the enactment of blocking laws, by the creation of the anti- and anti-antisuit injunctions. Fortunately, they have been applied in a rather narrow range of cases, as illustrated by the Butte Mining and Laker Airways litigations. In each of those episodes, the plaintiff in the United States was foreign (British), and one or more primary defendants also were foreign (British). This is not a frequent occurrence, but it happens in the United States more often than abroad because foreign plaintiffs seek out the U.S. courts to gain larger awards. The Butte Mining experience, as the Laker Airways experience before it, has limited effect. The influence of this litigation may be seen in the decisions it affects, such as the influence of the U.S. Ninth Circuit *Butte Mining* decision on the development of extraterritorial subject matter jurisdiction and possibly on interest balancing, in that federal circuit.

Was the conflict in *Butte Mining*, created by the use of antisuit injunctions because of the English view of the U.S. legal system, a true conflict under *Hartford Fire Insurance*? The answer has to be a resounding no. Use of the U.S. legal system by the English plaintiff was compelled

322. That task may confront U.S. courts faced with cases under the "trafficking" provisions of the Cuban Liberty and Democratic Solidarity Act, if the U.S. President does not continue to extend the effective date for the initiation of such cases.

neither by the United States nor England. Although the English *Simon Engineering* decision almost seems to suggest that no English national should be subjected to a civil suit in the United States, whether or not the plaintiff also happens to be English, bringing suit in either the United States or England would not interfere with the other nation's rules. The English court could only step in and grant the antisuit injunction because the plaintiff and primary defendants were English.[323] The use of an antisuit injunction attempts to deprive a foreign court of subject matter jurisdiction. The application for and possibility of receiving an antisuit injunction surely creates a "true conflict," although the reason for its being granted, if it includes the denigration of a legal system, as in *Simon Engineering*, departs from the logical meaning of a true conflict and creates a more serious conflict. When the conflict is no longer one of legislative creation, but extends to the judiciary, it is time for diplomatic resolutions. It is difficult to envision the kind of conflict that exists in the Butte Mining litigation, which threatens to engulf the type of conflict expressed in *Hartford Fire Insurance*, as being resolved without formal negotiations between the nations. The allegations of "illegitimate advantage" of a plaintiff in the United States and the "oppressive," and even possibly "vexatious," nature of civil litigation therein, expressed in *Simon Engineering*, have no foundations in international law. The Butte Mining litigation has carried the conflict beyond the capacity of the courts to resolve. No matter how certainly an English defendant charged with securities fraud may have engaged in conduct and caused effects in the United States, an English court might conclude that subject matter jurisdiction should not be exercised because the U.S. legal system is oppressive. If it is truly oppressive, no one should be subject to its rulings. But would any U.S. court conclude in such a case that it ought not go forward? Perhaps the Ninth Circuit did in *Butte Mining*. *Simon Engineering* and to some extent the earlier Laker Airways seem to have preempted the courts from ruling on subject matter jurisdiction where antisuit injunctions are granted in the defendant's home court.

How is it all to come out? The U.S. legislature is increasingly making it clear that certain laws are to have an extensive extraterritorial application, while other nations react with increasingly clear blocking and clawback laws.

---

323. That may not be the case. Under *Simon Engineering* the concern of the English court was the oppressiveness of the U.S. system to the defendant. The presence of the English plaintiff provided a way of terminating the action, at least in the minds of the English court. Why couldn't there be a similar ruling when the plaintiff is from a third nation, even from the United States? The antisuit injunction would essentially be saying that the English courts clearly would not recognize any decision ultimately rendered by the U.S. court, assuming the latter court continued with the suit. Third nation courts also might refuse enforcement, if they shared either the distaste for the extraterritorial extension of the U.S. law, or the "oppressiveness" of the U.S. legal system.

This seems to leave the legislatures out as a solution. The courts have not performed very well with interest balancing or with international comity. It may well be that were the advocates of interest balancing to rephrase much of their language in the framework of developing international comity rules, it would be better accepted abroad. Part of the problem is that as "interest balancing," it is too "American." Foreign courts have not accepted interesting balancing, unless one were to fully disparage that theory by suggesting that *Simon Engineering* engaged in true interest balancing. The executive departments are unlikely to fare any better in entering the field than the U.S. Department of State did prior to the FSIA enactment. International arbitration of the proper forum in numerous cases seems awkward and certainly time consuming. Some creative dispute resolution is certainly needed. It will not be achieved when nations' legislatures act nationalistically in enacting laws, or when nations' courts act nationalistically when deciding proper forums, or when nations' academics act nationalistically in drafting their own versions of international law. Resolution means cooperation, not co-option.