EXTRA TERRITORIAL APPLICATION OF SECTION 10(b) AND RULE 10b-5

I. INTRODUCTION

It has long been a general rule of statutory construction that, since Congress is primarily concerned with domestic conditions, federal legislation will be presumed to apply only within the territorial limits of the United States, absent a clear expression of contrary intent.[1] This territorial presumption presented a significant obstacle to American investors defrauded in international securities transactions when, in the early 1960's, they first began seeking redress for their injuries under federal law. The courts initially found nothing in the Securities and Exchange Act of 1934,[2] or in its legislative history, to suggest that the statute was designed to apply outside the territorial jurisdiction of the United States.[3] As a result, the highly effective anti-fraud provisions of § 10(b) of the Act[4] and rule 10b-5[5] were thought to be available only to investors defrauded in transactions conducted within the territorial limits of this country.

But as international activity in the securities market began to increase sharply toward the end of the last decade, it became increasingly apparent that limitation of the Act to a strict territorial application would considerably dilute the protection that its anti-fraud provisions had traditionally afforded the American investor. It was essentially this kind of policy consideration that prompted the United States Court of Appeals for the Second Circuit to recognize, in the landmark case of *Schoenbaum v. Firstbrook*,[6] certain circumstances in which a clear congressional intent to protect American investors was sufficient to rebut the presumption of territoriality and to require extraterritorial application of the Act.

The *Schoenbaum* decision was an important first step in expanding the jurisdiction of United States courts over foreign securities frauds affecting American investors. But it was only a first step, and the court's opinion left considerable doubt as to whether the territorial presumption had been eliminated or merely restricted. Nonetheless, as recent developments in the case law indicate, the Securities and Exchange Commission (SEC) has been sur-

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[1] Foley Bros. v. Filardo, 336 U.S. 281 (1949); Blackmer v. United States, 284 U.S. 421 (1932). *See also* Steele v. Bulova Watch Co., 344 U.S. 280 (1952), giving extraterritorial application to federal patent law only after finding sufficient congressional intent to rebut the presumption of territoriality.

[2] 15 U.S.C. §§ 78a-78jj (1970).

[3] Ferraioli v. Cantor, [1964-1966 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91,615 (S.D.N.Y. 1965); Kook v. Crang, 182 F. Supp. 388 (S.D.N.Y. 1960).

[4] 15 U.S.C. § 78j(b) (1970).

[5] 17 C.F.R. § 240.10b-5 (1972), promulgated by the Securities and Exchange Commission pursuant to its authority under the Act.

[6] 405 F.2d 200 (2d Cir. 1968), *rev'g* 268 F. Supp. 385 (S.D.N.Y. 1967).

prisingly successful in urging a broad interpretation of *Schoenbaum*. It will be the purpose of this note to examine these recent developments, beginning with *Schoenbaum*, and to assess the present extraterritorial applicability of § 10(b) and rule 10b-5.

II. THE SCHOENBAUM CASE

In *Schoenbaum* an American stockholder in a Canadian corporation, Banff Oil Limited (Banff), brought a derivative action against certain insiders and controlling shareholders of the corporation, alleging violations of § 10(b)[7] and Rule 10b-5.[8] The complaint charged that the defendants, acting on "inside information" concerning recent oil discoveries by Banff, had issued to themselves vast amounts of the corporation's treasury stock at a price far below its fair market value. The plaintiff conceded that the sale had been transacted wholly within the territorial limits of Canada, but contended that United States courts had jurisdiction since Banff's stock was listed on the American Stock Exchange and traded by American investors. The district court disagreed and dismissed the suit.[9]

The district court felt that the alleged fraud had nothing to do with those Banff shares traded on the American Exchange and thus provided no substantial nexus between the United States and the suspect transaction.[10] What the plaintiff was really seeking, in the court's view, was extraterritorial application of federal securities laws. But the court followed what it considered to be the settled rule, that the 1934 Act applied only to transactions within the territorial limits of the United States. The court also found that

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

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (1970).

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

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

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

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1972). A thorough treatment of this important rule and its place in modern federal securities law can be found in A. BROMBERG, SECURITIES LAW: FRAUD—SEC RULE 10b-5 (1967).

[9] Schoenbaum v. Firstbrook, 268 F. Supp. 385 (S.D.N.Y. 1967). The court also failed to find any violation of rule 10b-5 in the plaintiff's allegations, even assuming that the rule did have extraterritorial application.

[10] *Id.* at 391.

the traditional presumption of territoriality was reinforced by the "specific mandate" of § 30(b) of the Act,[11] which provides that the Act does not apply "to any person in so far as he transacts a business in securities without the jurisdiction of the United States . . . ."[12]

However, on appeal, the Second Circuit held that the district court had erred in its refusal to assume jurisdiction over the subject matter.[13] The court of appeals undertook a close scrutinization of § 30(b)[14] and concluded that this provision was not, as the district court had thought, intended to preclude extraterritorial application of the Act to any foreign transaction whatsoever. Rather, the statute quite specifically applies only to *persons transacting a business in securities*, that is, brokers, dealers and banks. If Congress had intended to exempt every transaction by any person outside of the United States it could have done so, but no such intention should be presumed from an exemption specifically limited to foreign business in securities.[15]

In an ingenious, if somewhat contrived, construction of the provision, the court even managed to find in § 30(b) a kind of affirmative mandate for extraterritorial application of the Act:

> We find that the language and purpose of § 30(b) show that it was not meant to exempt transactions that are conducted outside the jurisdiction of the United States unless they are part of a "business in securities." Indeed, since Congress found it necessary to draft an exemptive provision for certain foreign transactions and gave the Commission power to make rules that would limit this exemption, the presumption must be that the Act was meant to apply to those foreign transactions not specifically exempted.[16]

In contrast to those courts which had previously considered the question,[17] the appeals court in *Schoenbaum* found no reason to assume that Congress had intended the Act to apply only to transactions within the territorial limits of the United States. The court noted that the Act has as its primary

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[11] 15 U.S.C. § 78dd(b) (1970).

[12] Schoenbaum v. Firstbrook, 268 F. Supp. at 392.

[13] 405 F.2d 200 (2d Cir. 1968). The appeals court did, however, agree with the court below that plaintiff had failed to state a claim under rule 10b-5. Upon rehearing this holding was partially reversed, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969).

[14] The provisions of this chapter 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 chapter.
15 U.S.C. § 78dd(b) (1970).

[15] 405 F.2d at 207-08.

[16] *Id.* at 208. For an analysis of the court's treatment of § 30(b), *see* Goldman & Magrino, *Some Foreign Aspects of Securities Regulation: Towards a Reevaluation of Section 30(b) of the Securities Exchange Act of 1934*, 55 VA. L. REV. 1015, 1033-36 (1969); 1 L. POL. INT. BUS. 168, 171-73 (1969).

[17] Cases cited note 3 *supra.*

goal the protection of a "national public interest"[18] in securities regulation and argued that the territorial presumption should not be applied so as to frustrate a clear Congressional intent "to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities."[19]

The district court in *Schoenbaum* had been reluctant to interfere with what it viewed as an essentially Canadian transaction, involving almost exclusively Canadian conduct. The appeals court, on the other hand, took a different approach to the transaction, shifting the focus from *conduct* to *effect*. True, the allegedly fraudulent acts had been committed outside the territorial jurisdiction of the United States, but they were intended to and did have detrimental effects within this country.[20] Consequently, the court concluded that the anti-fraud provision of § 10(b) "reaches beyond the territorial limits of the United States and applies *when a violation of the [SEC] Rules is injurious to United States investors.*"[21]

Prior to *Schoenbaum*, courts had required "some necessary and substantial act within the United States" before assuming subject matter jurisdiction under the Act.[22] But at least one court had found this requirement little more than a useful fiction whereby jurisdiction could be assumed over an essentially foreign transaction without having to apply rule 10b-5 "extraterritorially."[23] In *Schoenbaum* the court chose to discard the fiction and confront the problem of extraterritoriality:

> We hold that the district court has subject matter jurisdiction over violations of the Securities Exchange Act although the transactions which are alleged to violate the Act take place outside the United States, at least when the transactions involve stock registered and listed on a national securities exchange, and are detrimental to the interests of American investors.[24]

Schoenbaum, then, managed at least to cut into the presumption against extraterritoriality. But it is not clear from the language of the holding that

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[18] 15 U.S.C. § 78b (1970).

[19] 405 F.2d at 206.

[20] There is authority in this country to support the assertion of jurisdiction under these circumstances: RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965); Steele v. Bulova Watch Co., 344 U.S. 280 (1952); Strassheim v. Daily, 221 U.S. 280 (1911); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). *See also* Note, *Extraterritorial Application of the Securities Exchange Act of 1934*, 69 COLUM. L. REV. 94, 95-99 (1969).

[21] 405 F.2d at 206 (emphasis supplied).

[22] Kook v. Crang, 182 F. Supp. 388, 390 (S.D.N.Y. 1960). The same test was applied in Ferraioli v. Cantor, 259 F. Supp. 842 (S.D.N.Y. 1966).

[23] SEC v. Gulf Int'l. Finance Corp., 223 F. Supp. 987 (S.D. Fla. 1963). Canadian newspapers, circulated in Florida for the benefit of Canadian tourists, carried an offer of Canadian securities extended to all interested parties. The court held that such conduct constituted an act within this country sufficient to support jurisdiction.

[24] 405 F.2d at 208.

the court meant to eliminate the presumption entirely. The court stated that extraterritorial application of the Act is proper to *at least* those transactions which involve stock listed on a national exchange. Is listing on an American exchange to be taken as the *sine qua non* required for extraterritorial jurisdiction? Or is it only one means of determining when application of the Act to foreign transactions is proper? If so, what other circumstances will support extraterritorial application of American securities laws? These and other questions the court left open for later development. And that development was not long in coming.

III. THE RECENT CASES

One of the most troublesome questions left unanswered by the *Schoenbaum* decision was whether extraterritorial application of § 10(b) and rule 10b-5 can ever be justified when the alleged violation does not involve securities traded on a domestic exchange. The defendants in *Leasco Data Processing Equipment Corp. v. Maxwell*[25] took the position that it cannot. In this case the plaintiffs (hereinafter collectively referred to as Leasco) alleged that the defendants had conspired to cause Leasco to buy stock of Pergamon Press Limited (Pergamon) at prices in excess of its true value, in violation of § 10(b) and rule 10b-5. Pergamon was a British corporation, owned and controlled by defendant Maxwell, a British citizen. Its stock was not traded in any United States market, nor was it listed on any domestic exchange.

According to the complaint the defendants had induced Leasco, through false and fraudulent information, to contract for the purchase of all Pergamon's outstanding stock. Although the actual purchase and sale was transacted on the London Stock Exchange through a foreign subsidiary of Leasco, the American plaintiffs alleged that the contract had been signed and at least partially negotiated in New York. Moreover, the plaintiffs claimed that sufficient misrepresentations had been made in this country, through telephone conversations and the mail, to bring the transaction within the jurisdictional requirements of § 27 of the Act.[26]

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[25] 468 F.2d 1326 (2d Cir. 1972), *aff'g in part, rev'g in part* [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,454 (S.D.N.Y. 1972).

[26] 15 U.S.C. § 78aa (1970). This section reads, in relevant part:

> The district courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district where the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

The defendants argued that the Exchange Act does not cover transactions on foreign exchanges, between foreigners, involving foreign securities not traded in any domestic market. But the district court, in holding that it did have jurisdiction over the dispute, pointed out that the instant transaction was not really between foreigners, inasmuch as Leasco's foreign subsidiary had acted simply as a conduit for Leasco in purchasing the stock.[27] The court also rejected the defendants' contention that *Schoenbaum* restricted extraterritorial application of the Act to (1) foreign securities traded domestically or (2) foreign transactions in American securities which affect the domestic securities market.

On appeal, the Second Circuit affirmed the district court's assertion of jurisdiction over the subject matter and agreed that the listing of foreign securities on a domestic exchange is not essential for extraterritorial application of the Act.[28] With respect to domestic securities transactions, it has long been settled that the broad anti-fraud provisions of § 10(b) and rule 10b-5 are not limited to securities traded on the nation's organized securities markets.[29] Thus, concluded the court, there is no reason to assume that extraterritorial application of the Act should hinge on the question of whether the securities involved were registered with a national exchange:

> Since Congress thus meant § 10(b) to protect against fraud in the sale or purchase of securities whether or not these were traded on organized United States markets, we cannot perceive any reason why it should have wished to limit the protection to securities of American issuers. The New Yorker who is the object of fraudulent misrepresentations in New York is as much injured if the securities are of a mine in Saskatchewan as in Nevada.[30]

The court was, however, unwilling to say that a detrimental impact on American investors is, in itself, sufficient grounds for asserting jurisdiction over an essentially foreign transaction. To begin with, as the court recognized, such a sweeping application of the Act might raise some delicate questions of international law.[31] And even if it did not, the language of § 10(b) is, the court felt, "much too inconclusive to lead us to believe that Congress meant to impose rules governing conduct throughout the world in every instance where an American company bought or sold a security."[32]

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[27] Leasco Data Processing Equip. Corp. v. Maxwell, [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,454 (S.D.N.Y. 1972).

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

[29] *See* L. LOSS, SECURITIES REGULATION 1466-67 (2d ed. 1961), and cases cited therein.

[30] 468 F.2d at 1336.

[31] *Id.* at 1333-34. Few countries other than the United States have given enthusiastic recognition to a state's power to regulate conduct which occurs outside its territory but produces effects within it. *See* Riedweg, *The Extra-territorial Application of Restrictive Trade Regulation—Jurisdiction and International Law*, REPORT OF THE FIFTY-FIRST CONFERENCE 357 (International Law Association, 1964); Note, *Extraterritorial Application of the Securities Exchange Act of 1934*, 69 COLUM. L. REV. 94, 95-96 (1969).

[32] 468 F.2d at 1334.

It is clear that the court in *Leasco*, like the court in *Schoenbaum*, was reluctant to abandon outright the presumption of territoriality. It declined to assume jurisdiction upon the mere allegation of harm to an American investor; some further nexus had to be found. The court took its cue from pre-*Schoenbaum* cases[33] and looked for some conduct *within the United States*. The complaint alleged that the defendants had made false statements concerning Pergamon's financial condition during meetings with the plaintiffs in New York. Telephone calls had been made, and mail sent, in which further misinformation had been transmitted to the plaintiffs in this country. The actual contract for sale of the securities had been signed in New York. Here, then, was the domestic activity which the court needed to circumvent the territorial presumption:

> Conduct within the territory alone would seem sufficient from the standpoint of *jurisdiction* to prescribe a rule. It follows that when, as here, there has been significant conduct within the territory, a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law. Defendants' reliance on the principle . . . that regulatory statutes will generally not be construed as applying to conduct wholly outside the United States, is thus misplaced.[34]

However, in holding that conduct within the United States is sufficient to warrant application of § 10(b) to essentially foreign transactions, the court somewhat surprisingly concluded that it saw "no reason why, for purposes of . . . [a jurisdictional rule], making telephone calls and sending mail to the United States should not be deemed to constitute conduct within it."[35] Of course, use of the mails or some other instrumentality of interstate commerce is a jurisdictional prerequisite of § 10(b) itself.[36] Where this requirement is lacking *no* transaction, foreign *or* domestic, can even be violative of the Act. Thus it had generally been thought that the question of extraterritorial application should be separated from the question of the interstate commerce requirement.[37] Saying that use of the mails

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[33] *See* cases cited in notes 22 and 23 *supra*, and accompanying text.

[34] 468 F.2d at 1334.

[35] *Id.* at 1335.

[36] *See* note 7 *supra*.

[37] The court in *Schoenbaum*, for instance, was careful to make this distinction:

> The trial court found that the transactions in question were essentially Canadian, with insufficient [domestic] contacts . . . to fall within § 10(b) of the Act. We are uncertain whether the Court's finding was directed at the issues of extraterritorial application of the Exchange Act or at the jurisdictional requirements of § 10. . . .
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> The present question is not whether this limited use of the mails and the facilities of interstate commerce would be a sufficient basis for subject matter jurisdiction over a foreign transaction which would otherwise be exempt from the Act . . . but whether, once it has been determined that the Act applies to a particular foreign transaction, there is a use of the mails or interstate commerce sufficient to meet the requirement of § 10(b).

405 F.2d at 210.

is conduct within this country sufficient to support extraterritorial application of the Act is tantamount to saying that any foreign transaction which in fact *violates* § 10(b) is within the jurisdiction of United States courts, at least when, as in *Leasco*, the transaction involves some injury to American investors. At any rate, this approach should significantly expand the extraterritorial jurisdiction of United States courts with respect to § 10(b) and rule 10b-5.

The effect of the territorial presumption was further limited in another important case, *Travis v. Anthes Imperial Ltd.*,[38] decided shortly after *Leasco*. This case involved a tender offer made by Molson Industries Limited (Molson), a Canadian corporation, to the Canadian stockholders of Anthes Imperial Limited (Anthes), another Canadian corporation, for the purpose of merging Anthes into Molson. Plaintiffs, who were American shareholders in Anthes, alleged that the defendant Canadian corporations had, through various communications transmitted by mail and facilities of interstate commerce, led the plaintiffs to believe that if they retained their stock until after the expiration of the tender offer to the Canadian shareholders, an equivalent offer would be made to them and other American shareholders. Later, however, the defendants advised that no separate offer would be made, and threatened to withdraw market support for the stock unless plaintiffs sold their shares to Molson. Acceding to this pressure, the plaintiffs sold their stock for allegedly $1,000,000 less than they would have realized had they sold at the time of the tender offer. Plaintiffs charged the defendants with fraud and self-dealing in violation of § 10(b) and rule 10b-5.

The district court was immediately troubled by the fact that "the transactions complained of involve two Canadian corporations, Canadian residents (except two individual defendants) and a tender offer made solely in Canada respecting shares not registered on any American exchange."[39] The court was convinced that *Schoenbaum* had limited extraterritorial application of the Act to only those situations in which: (1) a *domestic* purchaser buys *foreign* securities on an *American* exchange, or (2) an improper *foreign* transaction in *American* securities affects the *domestic securities market*.[40] Obviously, *Travis* involved neither of these situations.

Nor was the court able to find sufficient conduct within the United States to warrant application of the Act to an essentially foreign transaction. The only contacts which the defendants were alleged to have had with the United States involved their use of the mails and interstate com-

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[38] CCH FED. SEC. L. REP. ¶ 93, 718 (8th Cir. 1973), *rev'g* [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,303 (E.D. Mo. 1971).

[39] [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,303 at 91,679 (E.D. Mo. 1971). Note that the district court's opinion was handed down before the Second Circuit's decision in *Leasco*.

[40] *Id.* at 91,680 (emphasis by the court).

merce facilities to transmit communications from the defendants in Canada to the plaintiffs in Missouri. Moreover, the court found that several of these communications contained no misinformation at all and that those which did had been initiated by the plaintiffs. As a result, the court concluded that the defendants' letters and telephone calls were "not such necessary and substantial acts within the United States in connection with the alleged violation as to give this Court jurisdiction over a foreign transaction."[41]

The Eight Circuit, relying heavily on *Leasco*, reversed on appeal.[42] The appeals court, to begin with, reaffirmed *Leasco*'s position that *Schoenbaum* should not be read as limiting the extraterritorial application of the Act to transactions involving stock listed on an American exchange:

> We are not persuaded that the Second Circuit intended, in *Schoenbaum*, to set forth the exclusive circumstances in which extraterritorial application of the Act is proper. The facts in *Schoenbaum* required only that the court decide whether the Securities Exchange Act of 1934 applied to a foreign transaction in foreign securities which were registered and listed on an American exchange. The court was not required to decide whether the Act would apply to a foreign transaction in foreign securities which had never been registered or listed on an American exchange when a number of significant elements of the fraudulent scheme took place in the United States.[43]

Here, as in *Leasco*, the crucial question to be answered in determining the applicability of the Act to foreign transactions was whether the defendants' conduct within this country was sufficient to subject them to the jurisdiction of United States courts. The district court had answered that question in the negative; the court of appeals disagreed. The written and telephone communications of the defendants were, in the view of the appeals court, "essential elements in a slowly unfolding scheme to defraud the plaintiffs involving the use of the mails and instrumentalities of interstate commerce."[44]

The court was also satisfied that the requisite use of interstate commerce had been shown with respect to the charges of self-dealing on the part of the defendants. But, the court observed, *even if it were assumed that all such dealings took place in Canada*, § 10(b) and rule 10b-5 would still be applicable, since the law is well settled that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[45]

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[41] *Id.* at 91,681. The court also found subject matter jurisdiction lacking for another reason unrelated to this discussion.

[42] CCH FED. SEC. L. REP. ¶ 93, 718 (8th Cir. 1973).

[43] *Id.* at p. 93,180 n.14.

[44] *Id.* at p. 93,182.

[45] *Id.* at p. 93,184, *quoting from* United States v. Aluminum Co. of America, 148 F.2d

Strictly speaking, the court is obviously incorrect about the applicability of § 10(b) and rule 10b-5 to conduct, such as self-dealing, which occurs *entirely* outside the borders of this country, since the requisite use of the mails or interstate commerce would be lacking. Nevertheless, the court's focus upon the domestic impact of foreign transactions provides an important policy justification for extraterritorial application of the Act. If the purpose of the Act is, as the Second Circuit argued in *Schoenbaum*, to protect American investors, it would be futile for a court in this country to assume jurisdiction over a foreign transaction that had no effect at all on American investors merely because some incidental use had been made of the mails or of interstate commerce facilities.

IV. Some Observations on the "New" Extraterritoriality

One of the most intriguing questions remaining in the wake of *Travis* and *Leasco* is whether use of the mails or interstate commerce facilities is, in itself, a sufficient basis for extraterritorial application of federal securities laws. The argument, which is not without some cogency, may be framed in syllogistic fashion: Jurisdiction over foreign securities transactions is proper whenever such transactions involve conduct within this country. The use of interstate commerce facilities constitutes conduct within this country. Therefore, jurisdiction over foreign securities transactions is proper whenever such transactions involve use of interstate commerce facilities. It seems clear that if this argument were accepted, courts in this country would have jurisdiction over *any* transaction, anywhere in the world, which in fact violated § 10(b) or rule 10b-5, since the violation of either provision requires some use of the mails or interstate commerce facilities.

In a recent Ninth Circuit case,[46] the SEC took essentially this same position, arguing that the use of interstate commerce facilities was, in itself, sufficient to trigger the application of federal securities laws to foreign transactions, irrespective of whether such use was "essential or even effective in the execution of the scheme."[47] However, the court in that case, while upholding its jurisdiction over the activities of certain offshore mutual funds on other grounds, specifically declined to rule on the SEC's "interstate commerce facilities use" argument, stating that it was unnecessary to the court's decision.[48]

The court's instincts were probably sound in resisting the temptation

416, 443 (2d Cir. 1945). The principle is developed in RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).

[46] SEC v. United Financial Group, Inc., CCH FED. SEC. L. REP. ¶ 93,747 (9th Cir. 1973).

[47] Brief for SEC at 42, SEC v. United Financial Group, Inc., CCH FED. SEC. L. REP. ¶ 93,747 (9th Cir. 1973).

[48] CCH FED. SEC. L. REP. ¶ 93, 747 at 93,267.

to assert jurisdiction in that case merely on the basis of the defendants' use of interstate commerce facilities. For while it is true that the emphasis since *Schoenbaum* has been shifting to domestic conduct as the principal basis for asserting extraterritorial jurisdiction under § 10(b) and rule 10b-5, it would also seem to be true that the impact of foreign transactions on American investment interests is still an important auxiliary consideration in determining the propriety of such jurisdiction. As has already been pointed out, the court in *Travis* took careful note of the domestic consequences brought about by the foreign defendants' self-dealing.[49] And in *Leasco* it was the domestic impact of the defendants' fraudulent misrepresentations which "tipped the scales in favor of applicability" after conduct within the United States had already been established.[50]

Indeed, it could prove to be a serious mistake for United States courts to assert jurisdiction over every foreign securities transaction which involves some conduct within this country, especially when that conduct involves only an incidental use of the mails or interstate commerce facilities. It must be remembered that any foreign transaction subject to the jurisdiction of our courts will also be subject to the jurisdiction of courts in the country where the transaction took place. At least to the extent that United States law makes *illegal* conduct which is *legal* in the country where it occurs, courts of this country ought to use some discretion in asserting jurisdiction over transactions which may be technically within their reach.[51] Certainly jurisdiction would be best declined when the transaction involved had little or no detrimental impact on American investors.

This position would seem to receive some support from § 40 of the Restatement (Second) of Foreign Relations Law, which provides in the relevant part:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
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> (a) vital national interests of each of the states. . . .[52]

The comments to § 40 further note that "Vital national interest is not itself a basis of jurisdiction but is a factor favoring the exercise of jurisdiction, even though it interferes with such exercise by another state."[53]

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[49] CCH FED. SEC. L. REP. ¶ 93,718 at 93,184.

[50] 468 F.2d at 1337.

[51] For a discussion of this problem as it applies to a related area of the law, see Oliver, *Extraterritorial Application of United States Legislation Against Restrictive or Unfair Trade Practices*, 51 AM. J. INT. L. 380 (1957).

[52] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 at 116 (1965).

[53] *Id.*, Comment b at 117 (1965).

The concept of vital national interest has clear application to the federal securities laws, which specifically purport to affect a "national public interest."[54] But it is questionable whether every foreign transaction which may involve some use of interstate commerce facilities should automatically be deemed to affect a "vital national interest." The comments to § 40 of the Restatement define that term as "an interest such as national security or general welfare to which a state attaches *overriding importance*."[55] Since Congress has clearly attached overriding importance to the protection of American investors from fraudulent securities transactions, there is no reason to suspect that it did not intend extraterritorial application of the laws necessary to insure such protection. Conversely, however, when the impact of a foreign transaction on American investors is trifling or insignificant, it would seem to serve no vital national interest for courts in this country to assert jurisdiction merely on the basis of some incidental use of the mails or interstate commerce.

V. CONCLUSION

Despite the fact that subject matter jurisdiction would now seem relatively easy to establish, it is not altogether true that there are no remaining restrictions on the extraterritorial application of § 10(b) and rule 10b-5. For one thing, merely because a court can establish jurisdiction over a given foreign securities transaction, it does not necessarily follow that the court automatically has jurisdiction over all of the actors involved in that transaction. It is well settled that due process requires sufficiently "affiliating circumstances" with this country on the part of each defendant before personal jurisdiction can attach.[56] The court in *Leasco*, for instance, dismissed for lack of personal jurisdiction the British accounting firm which had certified the defendant Pergamon's fraudulent public financial statements. The court held that it would not be consonant with due process requirements that "accountants operating solely in London could be subjected to personal jurisdiction in any country whose citizen had purchased stock of a company they had audited. . . ."[57]

One other limiting factor that deserves attention from the courts in cases such as these is the doctrine of forum non conveniens. The Second Circuit apparently found this doctrine an insignificant obstacle to the exercise of extraterritorial jurisdiction in *Leasco*, citing authority to the effect that:

> [C]ourts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is man-

[54] 15 U.S.C. § 78b (1970).

[55] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40, Comment b at 117 (1965) (emphasis supplied).

[56] Hanson v. Denckla, 357 U.S. 235, 246 (1958).

[57] 468 F.2d at 1342.

> ifest before exercising any such discretion to deny a citizen access to the courts of this country.[58]

Nonetheless, the doctrine could provide a useful rationale for courts which are convinced that, although a foreign transaction may be technically within their reach, policy considerations, such as a minimal impact on American investors, militate against the exercise of jurisdiction.

Apart from these limitations, there seems to be little question that the presumption against extraterritorial application has little, if any, remaining vitality with respect to § 10(b) and rule 10b-5. And, at least when the requisite use has been made of the mails or other facilities of interstate commerce, courts in this country should have few problems in asserting jurisdiction over any foreign securities transaction which involves some detrimental impact on American investors.

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[58] *Id.* at 1344, *quoting from* Burt v. Isthmus Development Co., 218 F.2d 353, 357 (5th Cir. 1955), *cert. denied*, 349 U.S. 922 (1955).

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