CASENOTES

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Transnational Securities Fraud: Are the United States Courts Closing Their Doors to Foreign Plaintiffs?

I. The Facts

Klaus Zoelsch, a West German citizen, along with an unspecified number of other West Germans,[1] participated in a complex investment and tax shelter program known as "Condo Conversion III."[2] Under the plan, the investors placed their capital either directly into a West German limited partnership, Dr. Loescher und Co. KG (Loescher), or indirectly through investment payments to a West German accounting firm.[3] The investors understood that their funds would be funneled through these entities to a United States limited partnership based in Miami, Florida, known as First American International Real Estate Partnership (FAIR).[4] FAIR then invested the funds in property and condominium conversions in Memphis, Tennessee, and Atlanta, Georgia.[5]

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1. Brief for Appellant Klaus Zoelsch at 2, Zoelsch v. Arthur Andersen & Co., 824 F.2d 27 (D.C. Cir. 1987) (No. 86-5351) [hereinafter Appellant]. When Zoelsch filed the suit in the U.S. District Court for the District of Columbia, he brought the action on behalf of himself, all other persons similarly situated who invested in the program, and as assignee of the claims of thirty-one other investors in the program.

2. *Id.* at 3. This program was specifically designed to solicit investment participation by West German citizens and residents and was marketed exclusively to them.

3. *Id.* The firm was ICT Wirtschaftpruefungsgesellschaft G.m.b.H. of Munich, a limited partner of Loescher, acting as trustee.

4. *Id.*

5. *Id.*

Loescher and the FAIR entered into an investment agreement and, in September 1981, Loescher commissioned Arthur Andersen & Co. G.m.b.H. (AA-W. Ger.), a West German limited liability corporation,[6] to prepare an audit report.[7] The audit report, dated September 29, 1981, identified AA-W. Ger. as its author on the signature page.[8] The report included an analysis of the FAIR's written description of the American investments.[9] Loescher solicited investments by distributing to prospective investors a package of materials containing the audit report and other materials prepared by FAIR.[10]

None of the statements, facts, opinions, and conclusions in the materials distributed to prospective investors by Loescher were attributed to Arthur Andersen & Co. (AA-USA).[11] AA-USA was not directly involved in the solicitation of these investors or in preparing any documents that induced purchasers of the securities.[12] AA-W.Ger. made only one reference to AA-USA in the audit report and this reference constituted the only connection between AA-USA and the materials distributed by Loescher.[13]

Klaus Zoelsch, on behalf of himself and as assignee of the claims of thirty-one investors against Andersen (all citizens of the Federal Republic of Germany), brought this action in federal court in the District of Columbia on July 31, 1985.[14] Zoelsch claimed misrepresentation by virtue of the reference to AA-USA in the audit; he sought relief under the federal securities laws and alleged federal jurisdiction on the bases of diversity of citizenship and federal claims.[15] The district court dismissed the action, and Zoelsch appealed the court's refusal of jurisdiction over the federal

6. *Id.* Zoelsch claimed that Arthur Andersen & Co. was a worldwide single entity and AA-W.Ger. was merely a branch establishment.

7. *Id.*

8. Brief for Appellee Arthur Andersen & Co. at 6, Zoelsch v. Arthur Andersen & Co., 824 F.2d 27 (D.C. Cir. 1987) (No. 86-5351) [hereinafter Appellee]. The audit report also contained the individual signatures of two German nationals employed as auditors by AA-W.Ger. in Munich.

9. Appellant, *supra* note 1, at 4.

10. *Id.*

11. Appellee, *supra* note 8, at 7.

12. *Id.* at 8.

13. *Id.* at 7. The audit report had to be translated because it was in German. The parties disputed the translation of the reference to AA-USA, which appeared on page 17 of the audit report. Zoelsch's translation read: "with respect to a number of data and particulars in the prospectus in conjunction with the economic fundamentals we have made inquiries thereabout by way of our branch-establishment Arthur Andersen & Co., Memphis." *Id.* Andersen contended that the translation should have read: "with respect to some general prospect data relating to the overall environment we have made inquiries through the office of Arthur Andersen & Co., Memphis." *Id.*

14. Appellant, *supra* note 1, at 2.

15. *Id.*

claims.[16] *Held, affirmed:* A securities law claim against a defendant who acted in the United States when the securities transaction occurred abroad and no effect was felt in this country will not support American court jurisdiction. *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987).

II. The Legal Background

A. International Law and Rule 10b-5

Federal courts have given no clear answer on the question of to what extent the antifraud provisions of Securities and Exchange Commission (SEC) Rule 10b-5[17] apply to security dealings involving both foreign and domestic action. International law principles limit American courts' ability to regulate international conduct.[18] Under traditional principles of international law a state could assert jurisdiction over conduct occurring within its boundaries[19] and over extraterritorial conduct that had domestic repercussions.[20]

The American Law Institute (ALI) proposed a revision of extraterritorial jurisdiction in 1981.[21] Section 416 of the Draft Restatement, set forth four jurisdictional tests: 1. a transaction occurring in a U.S. securities market; 2. representations or negotiations conducted in the United States; 3. the issuer's securities traded in a securities market in the United

16. *Id.* at 1.

17. 17 C.F.R. § 240.10b-5 (1987). The Rule states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or 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.

Id.

18. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

19. Restatement (Second) of the Foreign Relations Law of the United States § 17 (1965) [hereinafter Restatement]. According to § 17(a), any conduct within a nation's territory may serve as a basis for jurisdiction. *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

20. Restatement, *supra* note 19, § 18. Section 18 provides:

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

21. Restatement (Third) of the Foreign Relations Law of the United States (Tent. Draft No. 2, 1981) [hereinafter Draft Restatement].

States; and 4. defendants or other persons to be protected are U.S. citizens or residents.[22] These tests incorporate the traditional "conduct" and "effects" tests with one important change. These tests are subject to a rule of "reasonableness."[23] Jurisdiction under the first test is deemed reasonable,[24] while the remaining three tests are subject to section 403(2) of the *Draft Restatement* regarding the reasonableness of asserting jurisdiction.[25] Under the section 403(2) reasonableness requirement courts must balance between competing interests. In order to determine the appropriateness of asserting jurisdiction, courts must weigh the U.S. interest in the "foreign" dispute against the interest of restraining extension of U.S. substantive law to judge the dispute.[26]

The legislative history[27] of the Securities Exchange Act of 1934[28] and the Act's general antifraud provision, section 10(b)[29] have provided the courts with little guidance. The SEC has given even less guidance regarding rule 10b-5.[30]

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22. *Id.* § 416 provides:

> (1) Any transaction in securities carried out, or intended to be carried out, on a securities market in the United States is subject to United States jurisdiction to prescribe, regardless of the nationality or place of business of the participants in the transaction or of the issuer of the securities.
> (2) As regards transactions in securities not on a securities market in the United States, but where
> (a) securities of the same issuer are traded on a securities market in the United States; or
> (b) representations are made or negotiations are conducted in the United States in regard to the transactions; or
> (c) the party subject to the regulation is a United States national or resident, or the persons sought to be protected are residents of the United States, the authority of the United States to exercise jurisdiction to prescribe depends on its reasonableness in light of evaluation under Section 403(2).

23. *Id.* § 403(2).

24. *Id.* § 416(1).

25. *Id.* § 416(2). Section 416(2) requires that the reasonableness provision of § 403(2) be applied to it. Section 403(2) provides that:

> Whether the exercise of jurisdiction is unreasonable is judged by evaluating all the relevant factors, including:
> (a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;
> (b) the links, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or 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 other 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 in question;
> (e) the importance of regulation to the international political, legal or economic system;
> (f) the extent to which such 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;
> (h) the likelihood of conflict with regulation by other states.

Id. § 403(2).

26. Timberlane Lumber Co. v. Bank of America, 574 F. Supp. 1453, 1464 (N.D. Cal. 1983), *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

27. The legislative history indicates little about § 10(b) except that it is designed as an antifraud catch-all. *See Hearings on Stock Exchange Regulation Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 115 (1934).

28. 15 U.S.C. §§ 78a–78kk (1982 & Supp. IV 1986) [hereinafter 1934 Act].

29. *Id.* § 78j(b).

30. 17 C.F.R. § 240.10b-5 (1987); *see supra* note 17.

B. Judicial Approach to Transnational Securities Fraud

The Court of Appeals for the Second Circuit is considered the leading source of judicial analysis in the securities area.[31] In *Schoenbaum v. Firstbrook*[32] the court upheld jurisdiction based on the domestic effects of the conduct. In *Schoenbaum* an American shareholder claimed that corporate executives of a Canadian-based company, which was listed on the American Stock Exchange, violated rule 10b-5 by issuing shares to a Canadian co-defendant for an inadequate consideration. Despite the absence of any illegal conduct in the United States, the court based its finding of jurisdiction on the effect the fraudulent activity had on the value of the plaintiff's stock.[33]

In *Leasco Data Processing Equipment Corp. v. Maxwell*[34] the court seriously diminished the possibility that *Schoenbaum* would be liberally interpreted to include any security transaction in the world in which an American shareholder was involved.[35] In *Leasco*, the court upheld jurisdiction under the "conduct" test.[36] *Leasco* involved foreign defendants who made material misrepresentations to an American plaintiff in the United States. In both of these cases the courts sought to protect Americans; thus, they found it relatively simple to impose the protections of rule 10b-5.

The Second Circuit then faced the more difficult question of what circumstances would warrant jurisdiction if the injured party were a foreigner. In *Bersch v. Drexel Firestone Inc.*[37] plaintiffs brought a class action on behalf of persons who had purchased common stock in a Canadian corporation. The plaintiffs included American investors living in the United States and abroad, as well as foreign investors. The court held that U.S. jurisdiction did not exist "where acts simply have an adverse effect on the American economy or American investors generally."[38] For jurisdic-

31. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (1975) (referring to Second Circuit as "Mother Court" in securities area); AVC Nederland B.V. v. Atrium Investment Partnership, 740 F.2d 148, 153 (2d Cir. 1984).

32. 405 F.2d 200 (2d Cir.), *modified on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969).

33. 405 F.2d at 208.

34. 468 F.2d 1326 (2d Cir. 1972).

35. In dictum the court stated: "[T]he language of § 10(b) of the Securities Exchange Act is 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 . . . bought or sold a security." *Id.* at 1334.

36. *Id.*

37. 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

38. 519 F.2d at 989.

tion to be based on domestic effects, the effects must be a direct and foreseeable result of the conduct.[39] The court further held that the transaction must directly injure specific purchasers or sellers.[40] The *Bersch* court found jurisdiction over both the American resident plaintiffs and the defendants. Jurisdiction over the American plaintiffs existed because the prospectuses upon which they relied were mailed into the United States from abroad.[41] The court conferred jurisdiction over the defendants with regard to the American citizens residing abroad because the defendants had engaged in "prepatory activities" in the United States and these activities were significant contributors to the plaintiffs' losses.[42] With respect to the foreign investor plaintiffs, the court held that the same conduct would warrant jurisdiction only if "acts (or culpable failures to act) within the United States directly caused [their] losses."[43] In *IIT v. Cornfeld*[44] the Second Circuit discussed the factors to be considered in determining whether losses were caused by a particular activity. The court recognized expressly that the "[d]etermination whether American activities 'directly' caused losses to foreigners depends not only on how much was done in the United States but also on how much (here how little) was done abroad."[45]

Other circuits considering questions of transnational securities jurisdiction have expanded the Second Circuit's test by looking only to whether the alleged conduct was prepatory or significant.[46] Relying on the distinction between significant and prepatory[47] acts allows other circuits to find subject matter jurisdiction on almost any act in the United States that furthers a fraud.

39. RESTATEMENT, *supra* note 19, § 18(b).
40. 519 F.2d at 989.
41. *Id.* at 991.
42. *Id.* at 993.
43. *Id.*
44. 619 F.2d 909, 920–21 (2d Cir. 1980).
45. *Id.* at 920.
46. *See* Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409 (8th Cir. 1979) (partial negotiation and final signing of a contract in the United States satisfied the conduct test); SEC v. Kasser, 548 F.2d 109 (3d Cir.), (no domestic effects because victim of allegedly fraudulent conduct was a corporation entirely owned by Canadian Province of Manitoba; yet the court found a sufficient basis for jurisdiction based on the negotiation and execution of a contract in New York), *cert. denied*, 431 U.S. 938 (1977).
47. In Fidenas AG v. Compagnie Internationale pour L'Informatique CII Honeywell Bull S.A., 606 F.2d 5, 8 (2d Cir. 1979), the court distinguished between "prepatory" and "significant" and held that where an American parent of a defendant company merely knew of an attempted cover-up of the fraud by the defendant, the situation was not significant enough to warrant jurisdiction.

III. The Court's Analysis—*Zoelsch v. Arthur Andersen & Co.*

Since this precise issue had never been presented to the D.C. Circuit, Judge Bork divided his opinion into two parts. Judge Bork devoted the first part of the opinion to adopting a test for the D.C. Circuit to determine when American courts should exercise jurisdiction over transnational securities claims.[48] The second part applied the court's newly adopted test[49] to Zoelsch's claims.[50]

A. The Test Adopted

As long as it does not overstep the boundaries of the Due Process Clause, Congress can prescribe the limitations of federal jurisdiction to enforce the federal securities laws.[51] Section 30(b) of the 1934 Act addressed the issue surrounding when American courts have jurisdiction over extraterritorial transactions involving securities.[52] Section 30(b), however, does not address the unique question presented to this court.[53]

The court next turned to an analysis of existing case law. The D.C. Circuit noted that those courts that had previously addressed the issue had based jurisdiction of extraterritorial conduct on both conduct[54] and effects.[55] The court, however, decided that an analysis of the "effects" test was unnecessary because Zoelsch had not argued that jurisdiction could be premised on domestic effects caused by foreign conduct.[56] After rejecting other tests,[57] the D.C. Circuit explicitly adopted the Second Circuit's test[58] for finding "jurisdiction over domestic conduct that is

48. 824 F.2d at 31.

49. The court adopted the Second Circuit's test for finding jurisdiction based on domestic conduct. *Id.* at 33.

50. *Id.*

51. 15 U.S.C. § 78b (1982).

52. *Id.* § 78dd(b) (1934 Act, *supra* note 28, § 30(b)). Section 30(b) states that the 1934 Act: "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." *Id.*

53. 824 F.2d at 30.

54. Schoenbaum v. Firstbrook, 405 F.2d 200, 206–208 (2d Cir.), *modified on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969).

55. Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 991–93 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

56. 824 F.2d at 31.

57. *Id.* at 30.

58. *Id.* The court characterized the Second Circuit's test: "jurisdiction is appropriate when the fraudulent statements or misrepresentations originate in the United States, are

alleged to have played some part in the perpetration of a securities fraud on investors outside this country."[59]

In its reasoning the court stated that "legislation of Congress . . . is meant to apply only within the territorial jurisdiction of the United States . . . based on the assumption that Congress is primarily concerned with domestic conditions."[60] Similarly, the main purpose of the Securities Exchange Act of 1934 is to protect American investors and markets.[61] Here, the court also cited Section 30(b)[62] of the 1934 Act to support its contention that the statute "does not apply to persons transacting business in securities abroad unless the Securities and Exchange Commission issues rules and regulations making the statute applicable to such persons. . . ."[63] From this the court inferred that Congress was interested in protecting only American investors and markets.[64] Furthermore, because the SEC has never promulgated any rules or regulations of this type, the Act applies only to American investors and markets.[65]

The court rejected the balancing test of the *Restatement (Second) of the Foreign Relations Law of the United States* Section 403(2)[66] because "such tests are difficult to apply and inherently unpredictable."[67] Moreover, the opinion goes on to say that if the Second Circuit were not the preeminent court in the field of securities law,[68] the D.C. Circuit court would probably never assert jurisdiction when domestic conduct caused losses to foreign investors.[69] In the D.C. Circuit's view, courts should not try to divine Congress's intention but rather look to see "what jurisdiction Congress in fact thought about and conferred."[70] Congress could easily have conferred this type of jurisdiction on the federal courts; but since Congress did not, this lack of action implies that the courts should not exercise such jurisdiction.[71] Because of the Second Circuit's preem-

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made with scienter and in connection with the purchase or sale of securities, and 'directly cause' the harm to those who claim to be defrauded, even if reliance and damages occur elsewhere." *Id.* at 33.

59. *Id.* at 30.

60. *Id.* at 31 (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)); *See also* Sandberg v. McDonald, 248 U.S. 185, 195 (1918); Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487, 493 (D.C. Cir. 1984); FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson, 636 F.2d 1300, 1322-23 (D.C. Cir. 1980).

61. 824 F.2d at 31.

62. 15 U.S.C. § 78dd(b) (1982).

63. 824 F.2d at 32.

64. *Id.*

65. *Id.*

66. *See supra* note 25.

67. 824 F.2d at 32 n.2.

68. *See supra* note 31.

69. 824 F.2d at 32.

70. *Id.*

71. *Id.*

inence in the field of securities law, however, the *Zoelsch* court deferred to the Second Circuit and adopted its test.[72]

The *Zoelsch* court characterized this new test as "a slight recasting . . . of the traditional view"[73] and stated that: "jurisdiction is appropriate when the fraudulent statements or misrepresentations originate in the United States, are made with scienter and in connection with the purchase or sale of securities, and 'directly' cause the harm to those who claim to be defrauded, even if reliance and damages occur elsewhere."[74]

B. Application of the Test

The D.C. Circuit concluded that if any fraud actually occurred, it occurred in West Germany and therefore any damage or reliance occurred there also.[75] The appellant first contended that AA-USA and AA-W.Ger. were "branch-establishments"[76] and could be held liable for each other's misrepresentations.[77] Since the appellant failed to raise this issue on appeal, the court declined to address it.[78]

The appellants next contended that AA-USA "willfully and recklessly" failed to provide material information to AA-W.Ger.[79] Zoelsch alleged that AA-USA could have foreseen that its misrepresentations would harm future purchasers and that the damages would not have occurred absent the misrepresentations.[80] The court rejected this argument, noting that AA-USA's statements "were not themselves made for distribution to the public" but rather made to AA-W.Ger., who credited AA-US when drawing up its report.[81] The court found it significant that AA-USA was only one of many sources upon which AA-W.Ger. relied and that the audit report was certified by AA-W.Ger. alone.[82] The court held, therefore, that any misrepresentation made by AA-USA was not "in connection with the purchase or sale of any security;"[83] and since section 10(b)

72. The court went on to say that it would be more likely to find jurisdiction in a case brought by the SEC than one brought by a private foreign individual. The court reasoned that the SEC would be more likely to take foreign policy concerns into account. *Id.* at 33 n.3.

73. *Id.* at 33. The court claimed that the test would not decide the jurisdictional issue along with the merits.

74. *Id.*

75. *Id.* at 34.

76. *See supra* note 13.

77. 824 F.2d at 34.

78. *Id.*

79. Appellant, *supra* note 1, at 4.

80. *Id.* at 14.

81. 824 F.2d at 34.

82. *Id.*

83. 15 U.S.C. § 78j(b) (1982).

presupposes this requirement, no liability under that section could be found.[84] The D.C. Circuit, following the Second Circuit,[85] held that the plaintiff must show that the alleged fraud induced him to engage in the transaction and caused economic harm.[86] Since AA-USA's statements never reached Zoelsch, the court concluded that such statements could not have induced him into the transaction.[87]

Zoelsch's final argument urged the court to consider all activities in the United States in furtherance of the fraudulent scheme.[88] The court summarily dismissed this argument as "antithetical" to the test the court had adopted in that the argument did not relate to the 1934 Act's purpose of protecting American investors and markets.[89] In conclusion, the court found that AA-USA's statements did not directly induce anyone into transacting business and since AA-USA's statements were not meant for public disbursement, AA-USA had not violated section 10(b) of the Securities Exchange Commission Act of 1934.[90] Thus, the D.C. Circuit affirmed the dismissal of the complaint.[91]

IV. Practical Implications and Conclusions

The court in *Zoelsch* could have reached the conclusion that it did without adopting such a restrictive test. The connection between AA-USA's activities and the alleged fraudulent scheme was so slight that even under a less restrictive test the court would have found no basis for jurisdiction. By adopting such a restrictive test the court virtually closed the door on many potentially valid claims by foreign investors.[92] Indeed, had it not been for the preeminence of the Second Circuit in the area of transnational securities fraud, the court might have adopted an approach that would never confer jurisdiction when the plaintiff comes from foreign country.[93]

The court further displayed this attitude in its analysis of the Securities Act of 1934 and rule 10b-5. Since neither Congress nor the SEC directly

84. 824 F.2d at 34.

85. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

86. 824 F.2d at 35 n.5.

87. *Id.*

88. Appellant, *supra* note 1, at 9.

89. 824 F.2d at 36.

90. *Id.* ("We therefore find no theory of liability in Zoelsch's complaint that supports American federal jurisdiction over the securities law claims brought against this defendant.").

91. *Id.*

92. Unless the acts alleged by the defendant "directly cause" the injury and are made for disbursement to the public, the defendants acts will be seen as "merely prepatory" and not substantial. *Id.* at 35.

93. *Id.* at 32.

expressed guidelines for jurisdiction over extraterritorial fraudulent conduct, the court inferred that courts should never exercise jurisdiction (or only in exceptional cases) when considering claims by injured foreign residents.[94] Since, however, the Securities Act expressly applies to foreign commerce, this type of application should be proper.[95] Indeed, another circuit stated: "[i]t is an absurd notion that Congress intended activity . . . to be exempt from the provisions of the securities acts simply because the victims are not American citizens."[96]

Courts have advanced three policy rationales for the conduct test. First, Congress did not intend that the United States become a haven in which fraudulent activities could be aimed against foreign citizens.[97] Second, if American courts find jurisdiction when only foreign citizens have been harmed yet there has been significant domestic activity, other nations might "take appropriate steps against parties who seek to perpetrate frauds in the United States."[98] Finally, the antifraud provisions of the Securities Act should seek "to elevate the standard of conduct in securities transactions."[99]

Had it adopted a balancing test as enumerated in the *Draft Restatement*,[100] the court could have accomplished the policy rationales developed for the "conduct" test and yet allowed courts to remain open to address the potential wrongs committed against foreign citizens. Section 416 of the *Draft Restatement* enumerates the threshold level of domestic conduct necessary before a court may apply securities regulations to extraterritorial conduct.[101] These provisions differentiate between the tests on the basis of reasonableness. Under this reasonableness requirement courts should analyze interests, examine links, and search for the center of gravity of the activity.[102] This approach would allow courts to balance all interests involved and assert jurisdiction when the situation warranted. The D.C. Circuit noted the reasonableness of this approach and stated: "[t]his examination . . . satisfies the prohibition of international law against unreasonable assertion of jurisdiction."[103]

94. *Id.* at 29-30.
95. SEC v. Kasser, 548 F.2d 109, 114 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).
96. United States v. Cook, 573 F.2d 281, 283 (5th Cir.), *cert. denied*, 439 U.S. 836 (1978).
97. IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975); 548 F.2d at 116.
98. *Kasser*, 548 F.2d at 116; *see also* Continental Grain v. Pacific Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979).
99. *Continental Grain*, 592 F.2d at 421; *see also* SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963).
100. *See supra* note 25 and accompanying text.
101. *See supra* note 18 and accompanying text.
102. DRAFT RESTATEMENT, *supra* note 21, at 93.
103. Laker Airways v. Sabena, 731 F.2d 909, 952 n.169 (D.C. Cir. 1984).

Many federal courts have faced the difficult problem of deciding when to assert jurisdiction over transnational securities activities. Courts could facilitate this decision by adopting the balancing test of the *Draft Restatement*, thereby eliminating the "per se" unfairness to foreign citizens of the present approach.