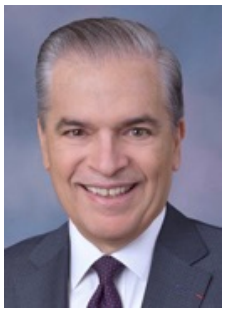
American extraterritoriality: A contrarian view



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It has become fashionable in France in recent years to criticize the allegedly extraterritorial application of US law, particularly the Foreign Corrupt Practices Act ("FCPA"), as an egregious example of American economic imperialism and the "law of the jungle." In particular, ever since the 2016 report of French Members of Parliament Pierre Lellouche and Karine Berger castigated the application of American anti-corruption legislation to French companies as "legal imperialism," some continue to describe American enforcement policy (whether under President Obama or President Trump) in highly conspiratorial terms as a "deliberate strategy of economic and political influence conducted by the strong arms of the intelligence agency, the State and Justice Departments as well as the Pentagon who have targeted a certain number of strategic sectors in which the United States believes it must dominate, and to do so, eliminate the competition."[1]

The purpose of this article is to provide a dispassionate analysis of American law without any such *procès d'intention*. This analysis demonstrates that American extraterritoriality is an exception, rather than a rule. When American law is enforced against a foreign actor, the exercise of American jurisdiction is necessarily based on intentional activity by the foreign actor within the United States, intentional activity by the foreign actor outside the United States as an agent of a US company, or intentional consequences within the United States of foreign actor activity outside its borders. Moreover, far from an exercise in American unilateralism, the FCPA in its current form is in fact the United States' response to (1) the request in the multilateral *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* ("the OECD Convention") that signatory nations enact anti-bribery laws that apply, *inter alia*, to acts within the signatory country in furtherance of foreign bribes to foreign public officials.[2]

The case law of the United States Supreme Court is clear and unequivocal in holding that there is a presumption *against* the extraterritorial application of US legislation: It is a 'longstanding principle of American law "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[3] As the Court held six years later: "It is a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world."[4]

When the US Congress considered the legislation that became the FCPA in 1977, it therefore was

[1] Remarks of Pierre Lellouche, 30 March 2017, Cabinet Carlara, Paris, published in *Bulletin Quotidien et La Correspondance Economique,* 7 June 2017.
[2] OECD Convention, art. 4, section 1, and (2) other signatory nations' failure to enact such laws themselves.
[3] [citations omitted] *Morrison v. National Australia Bank, Ltd.*, 561 US 247 (2010) (slip op. at 5).
[4] *RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090, 2100 (2016).

careful to ensure that the extraterritorial impact of the law was limited. The Carter Administration's Treasury Secretary, W. Michael Blumenthal, admitted as much in his testimony before the Senate Committee considering the bill: "There is a problem of extraterritoriality which needs to be carefully addressed. There is also a question of insuring fairness and due process, not only for American citizens but also for those foreign citizens and foreign countries who may in some way become involved and whose reputations become involved in particular allegations. We have to deal with the question of how we can write the bill in such a way that it includes protections in this regard." [5]

In its original form enacted in 1977, the anti-bribery provisions of the FCPA covered only issuers of securities registered in the United States and United States "domestic concerns" — US individuals and companies. Foreign nationals, even when acting as employees or agents of US companies, were subject only to civil penalties, not criminal prosecution. The Act prohibited any knowing act in support of a corrupt payment, offer to pay or authorization to pay or give anything of value, directly or indirectly, to a foreign official for purposes of influencing a decision to obtain or retain business, or secure any improper advantage. It covered all issuers of securities registered in the US, all US citizens and residents, and any legal person organized under the laws of any US state or that maintained its principal place of business in the US.

After enactment of the FCPA, American companies complained that it placed them at a severe disadvantage in competing for business with companies whose countries' laws contained no similar prohibitions against bribery of foreign officials. At the urging of Congress, the United States sought to level the playing field by encouraging trading partners to enact similar legislation. These efforts culminated in 1997 with the OECD Convention, which urged signatory states to cover "any person," not merely issuers of domestic listed securities or domestic nationals as the FCPA then provided.[6] The Convention also called on signatory states to assert "nationality jurisdiction" over all acts of their citizens (whether companies or individuals) committed anywhere in the world, to the extent this was consistent with the signatory's legal and constitutional principles.[7]

As the *Hoskins* court demonstrated in a detailed analysis of the legislative history of the 1998 Amendments to the FCPA, Congress strengthened the FCPA not to facilitate a unilateral policy of expanded American prosecutions of foreign companies and individuals, but rather to conform American law to the requirements of the multilateral OECD treaty in the two respects discussed above: to cover the acts of "any person," regardless of nationality, within the United States; and to cover the acts of American individuals and companies committed throughout the world. In addition, the FCPA Amendments treat employees and agents of companies alike, regardless of whether those individuals are US citizens or foreigners, and therefore impose criminal liability for the illegal acts of all agents and employees of US companies, regardless of their citizenship.[8]

In France, on the other hand, there was no rush to implement the OECD Convention by enacting similar anticorruption provisions into French law. The United States deposited its instrument of ratification in December 1998, but France did not ratify the Convention until July 2000. Even then, enforcement of antibribery prohibitions was hardly a priority. In the October 2012 report on France's implementation of the Convention, the OECD Working Group said it was "concerned by the lacklustre response of the authorities in actual or alleged cases of foreign bribery involving French companies. The Working Group finds that sanctions are not sufficiently dissuasive and expresses concern over the lack of confiscation of the proceeds of corruption." [9]

[5] Hearing on S. 305 before S. Comm. on Banking, Hous., & Urban Affairs, 95th Cong. 67, at 70, *quoted in United States v. Hoskins,* No. 16-1010-cr (2nd Cir. Aug. 24, 2018), slip op. at 43.
[6] OECD Convention, art. 1, section 1.
[7] OECD Convention, art. 4, section 2.
[8] *United States v. Hoskins, supra,* slip. op. at 54.
[9] OECD Press Release, 23 October 2012, concerning *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in France*.
http://www.oecd.org/corruption/oecdseriouslyconcernedatlacko

Two years later, in its evaluation of France's response to the Phase 3 Report of 2012, the Working Group stated in October 2014 that it "remains concerned by the lack of proactivity of the authorities in cases which involve French companies in established facts or allegations of foreign bribery. To this day, no French company has yet been convicted for foreign bribery in France, whereas French companies have been convicted abroad for that offence, and the sanctions for convictions of natural persons have not been dissuasive." [10]

To France's credit, the OECD's persistent criticisms finally spurred legislative action in November 2016, when France adopted a new "Law on Transparency, the Fight Against Corruption and Modernization of Economic Life," popularly known as the "Loi Sapin 2" named after Michel Sapin who was Finance Minister of France at the time. The Loi Sapin 2 introduced a host of reforms which have transformed the French economic landscape: the creation of the French Anticorruption Agency ("Agence française anticorruption") ("AFA"), the protection of whistleblowers, the creation of a compliance obligation to prevent corruption in larger companies (500+ employees and consolidated revenues exceeding €100 million), the creation of a French version of the American deferred prosecution agreement ("Convention judiciaire d'intérêt public") ("CJIP"), though only for corporate violators, and the authorization of corporate post-conviction monitoring by the AFA for companies convicted of corruption.

Most important from the extraterritoriality standpoint, however, was the Loi Sapin 2's adoption of the very sort of extraterritorial anticorruption authority that French companies and politicians had long decried when exercised by the United States. Article 21 of the law created new articles in the French Penal Code that are designed to implement the recommendations of the Lellouche Report that France also should prosecute corruption of foreign public officials by French companies and/or by foreign companies with a connection to France. First, the law extended the reach of corruption prosecutions to cases involving the corruption of foreign officials, where previously French law only prohibited corruption of French companies.[11] Second, the law authorized French prosecutions of corruption and influence-peddling outside of France when committed either by French nationals, by non-French individuals who reside in France, or by non-French companies and individuals that have all or part of their business in France.[12] The question remains, however, whether the French authorities will take advantage of their new authority to pursue corruption of foreign officials abroad. The initial indications are promising. It appears that the American authorities are willing to conduct joint investigations with French prosecutors and to share the fines and penalties imposed in those investigations with France. For example, in June 2018 the DOJ imposed a $585 million criminal penalty on Société Générale for FCPA violations in Libya, but agreed that half of the penalty (nearly $292 million) should be paid to the French National Financial Prosecutor *("Parquet national financier"* or "PNF") in resolution of its parallel investigation under the Loi Sapin 2. According to the DOJ, this was "the first coordinated resolution with French authorities in a foreign bribery case."[13] Société Générale entered into a DPA with the DOJ and a CJIP with the PNF, under which the criminal fines were shared equally between the two countries and the DOJ agreed to forego the appointment of a corporate monitor in the United States in reliance on the two-year AFA monitorship imposed on Société Générale as part of its CJIP in France. According to the PNF's June 4, 2018 press release: "This initial coordinated resolution agreement represents a significant advance in the fight against international corruption." [14]

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[10] OECD Press Release, 23 October 2014, concerning *Statement of the OECD Working Group on Bribery on France's Implementation of the Anti-Bribery Convention*. *http://www.oecd.org/newsroom/statement-of-the-oecd-working-group-on-bribery-on-france-s-implementation-of-the-anti-bribery-convention.htm*

[11] *See* OECD Convention, art. 3, section 1.

[12] French Penal Code, Articles 435-6-2 and 435-11-2.

[13] DOJ Press Release, 4 June 2018.

[14] Communiqué de presse PNF, 4 June 2018.

Cultural and legal barriers to continued French-American enforcement cooperation, however, remain strong. The touchstone of the exercise of the DOJ's prosecutorial discretion in FCPA cases is self-reporting of misconduct. Companies that fail to self-report are treated far more severely than those that self-disclose their own misconduct.[15]

The PNF has tried to adopt a similar policy in France, but the cultural imperative for French companies and lawyers traditionally has been defense and opposition, not cooperation, compliance and self-reporting. The fact that the CJIP is only available to companies and cannot protect individual company executives also makes it difficult for the PNF to insist on self-disclosure. The DOJ can protect a CEO who makes voluntary disclosures of corporate wrongdoing from personal criminal liability for that wrongdoing; the PNF and the AFA cannot. Nonetheless, since the enactment of the Loi Sapin 2 compliance has become the same sort of cottage industry in France as it long has been in the United States and the United Kingdom.

Indeed, the affirmative compliance obligations established by the Loi Sapin 2 are arguably even more demanding than those in the United States, since US compliance obligations are largely the consequence of DOJ enforcement policies rather than the text of the FCPA itself.[16] The DOJ's April 2016 "FCPA enforcement pilot program," which now has been made permanent, contains detailed criteria for the "[i]mplementation of an effective compliance and ethics program" that is "required for a company to receive credit for timely and appropriate mediation" under the pilot program.[17]

Although the FCPA imposes a number of broad "accounting provisions" that require US issuers of securities to maintain fair and accurate books and records, implement internal controls to ensure that corporate acts are duly authorized and designate a "control person" who is accountable for systems and procedures, the compliance obligations imposed on large French companies under the Loi Sapin 2 are far more detailed and extensive. They include implementation of an ethics code, an internal whistleblowing procedure, risk mapping, assessment procedures for customers, suppliers and intermediaries, accounting checks, employee training, internal disciplinary sanctions and internal procedures to assess the implementation of these required elements.[18] Despite the detail already present in the statute, moreover, the law also required the AFA to issue guidelines detailing its expectations for corporate compliance programs. These guidelines were issued in the *Journal Officiel* on 22 December 2017, and although they recite that they are "inspired by the best international standards," a clear reference to the DOJ's 2016 Pilot Program and 2017 "Evaluation of Corporate Compliance Programs," and the 2010 Guidance under the UK Bribery Act, they are far more detailed than any of those documents. Since the AFA Guidelines do not have the force of law, however, the extent to which the AFA will specifically enforce them remains to be seen.

In summary, American extraterritorial enforcement of the FCPA has been a response to two conditions: the imperatives of the OECD Convention, and the absence of effective anticorruption enforcement in other countries (including OECD Convention signatories such as France). Now that France has enacted a comprehensive legislative and administrative system to combat influence-peddling and bribery of foreign public officials, the United

https://www.economie.gouv.fr/files/files/directions_services/afa/Communique_CJIP_SG_LIA_-_4_juin_2018.pdf

[15] *See, e.g.*, DOJ 4 June 2018 Press Release for Société Générale's total $680 million in fines to various agencies: "The Department entered into this resolution in part due to Société Générale's failure to voluntarily self-disclose the companies' misconduct to the Department...". *See also* the DOJ's press release announcing resolution of its FCPA investigation into foreign bribery by Alstom, citing "Alstom's failure to voluntarily disclose the misconduct even though it was aware of related misconduct at a US subsidiary that previously resolved corruption charges with the department... ; Alstom's refusal to fully cooperate with the department's investigation for several years," and the fact that "Alstom and its subsidiaries also attempted to conceal the bribery scheme by retaining consultants purportedly to provide consulting services, but who actually served as conduits for corrupt payments to the government officials."

[16] *See, e.g.*, DOJ Press Release, *"The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance,"* 5 April 2016, Section 3 (*"Timely and Appropriate Remediation in FCPA Matters"*).

[17] DOJ 5 April 2016 Press Release, Section 3.

[18] *Compare* 15 USC § 78m(b) *with* Loi Sapin 2, art. 17.

States has shown readiness to cooperate with and defer to French investigations of misconduct that might previously have been the subject of American extraterritorial enforcement. From now on, foreign bribery by French citizens and French-connected companies anywhere in the world will increasingly be subject to French prosecution, and the pecuniary remedies will flow into the French Treasury rather than foreign coffers. To achieve this goal, however, France must be willing to continue to devote substantial public resources — even in this time of fiscal strain — to the fight against corruption of public officials around the world.