The Extraterritorial Effects of US Legislation FCPA

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Abstract

With the onset of the 2007 financial debacle, the US enacted a series of regulatory reforms. These reforms were implemented to protect the US market and stop the illegality that was disrupting the economy. These legislations were also intended to restore the American people’s confidence, mainly in the financial industry. However, US lawmakers need to realize that their laws have extraterritorial effects that could cause harm to US employees, businesses and the overall US economy. The financial industry is inherently globally interconnected. There is a need for US lawmakers to factor in the global effects, when creating US legislation affecting the financial markets. Thus, US legislation concerning the financial markets is having a negative impact globally, which in turn, affect the US financial markets. Mainly, in part, foreign companies experience a host of obstacles: compliance burdens, added cost to adhere to the laws, foreign laws conflict with US laws, and loss of a country’s sovereignty.

Keywords: Extraterritorial; US laws; financial industry

1. Introduction

The United States from the time of former President Roosevelt has been implementing the idea that the US is the 'police of the world'. Notably, former US President Theodore Roosevelt ended US isolationism and began this policy in the Western Hemisphere to prevent European intervention. “To preempt such action and to maintain regional stability, the President drafted his corollary: the United States would intervene in any Latin American country that manifested serious economic problems. The corollary announced that the United States would serve as the "policeman" of the Western Hemisphere, a policy which eventually created much resentment in Latin America”. This policy is still in existence, although modified. On September 10, 2013 President Obama said "America is not the world's policeman" in his speech on Syria, but says "with modest effort and
risk" limited strikes in Syria would make Syrian children and American children safer.\(^3\) The latter portion of this statement reactivates the notion that America is in fact the police of the world that needs to intervene when fundamental basic human rights are challenged even if outside the US. Thus far, America’s stance has been to intervene in foreign affairs when there are oppressive regimes violating human rights.

Many other nations pass legislation that have an extraterritorial effect. With globalization and transnational business interactions, nations are passing laws that affect outside of their own borders. For example, *In Jetivia SA and another v Bilta (UK) Ltd and others [2013] EWCA Civ 968* (31 July 2013), the Court of Appeal determined that section 213 of the Insolvency Act 1986 has extraterritorial effect.\(^4\) Canada, too, enacted the Foreign Investment Review Act, which affected mergers between Canadian companies and foreign corporations outside its borders.\(^5\) Canada’s Criminal Code also asserts jurisdiction over some offenses committed outside its borders.\(^6\) “In Australia, extraterritorial jurisdiction of the State Parliaments was authorized by s.2 of the Australia Act 1986.”\(^7\) This is not a new concept; as we see this fact evident in sanctions, codified laws, treaties and executive orders.

The US Courts generally have jurisdiction over a person or business if they are within US borders, or their actions harm a US citizen. Jurisdiction is defined as a courts “general power to exercise authority over all persons and things within its territory.”\(^8\) Extraterritorial Jurisdiction “is the legal ability of a government to exercise authority beyond its normal boundaries.”\(^9\) International laws, historically, have always been implemented extraterritorially. The defendant must purposely availed itself of the benefits and protections afforded by the US in order to legitimize the imposition of such jurisdiction. However, extraterritorial jurisdiction as it applies to business finance can have crippling effects to nation relationships and economies. The US regulatory legislation as to the foreign nations are redundant; the foreign nations, sometimes have the same laws. In terms of effectiveness, extraterritorial jurisdiction results in the inability to access foreign evidence and foreign persons due to lack of foreign government cooperation. Ethical concerns are relevant as the US government’s expansive and broad scope of territorial jurisdiction over foreign entities and individuals under these laws become more prevalent. The very same democratic principles upheld within the US are being denied to foreign nations with the imposition of


\(^4\) EWCA Civ 968 (31 July 2013).


extraterritorial legislation.

The US’s behavior to pass legislation affecting foreigners not within their borders goes beyond the scope of the aforementioned definition. The intended purpose is to eliminate corruption, which is a lofty goal. These legislations, however, create the desire for foreign countries to commit reprisal, in response to the restrictive nature of those laws. Thus, foreign nations have passed laws in retaliation to transnational US laws; and business transactions could potentially slow the global economy; and because of the interconnectedness of the economies on a whole, cause US economy to be slowed too. In terms of an ethical approach, the US is essentially passing laws to control the behavior of persons or business that are neither within their territory nor their citizens. These laws are not in the best interest and harm these nations that are already struggling to maintain their economies. Moreover these laws implement punishment in terms of hefty payments even if the particular business worked in tandem with another company that happened to do business with a corrupt company. Thus third party affiliation can cause relatively innocent persons or corporations to come into conflict with the US law.

2. Extraterritorial Effects of US Legislation FCPA

The Extraterritorial Terminology
Extraterritorial jurisdiction will be contextualized with respect to US laws. The use of the terminology extraterritorial seems to have a negative connotation, especially when the laws created in the domestic state affect foreign countries. “The use of the term extraterritorial is generally understood as having a narrower application, i.e. related to the negative effects of (a State’s) policies and activities on the people in another country.”

One reason why this negative view is espoused in the minds of foreign nations, at times, is because US laws that have an extraterritorial effect are seen “...as a means of maintaining American economic power in the world”

The notion of passing domestic US laws that extend beyond its borders ought to be done carefully, especially when applied to financial institutions worldwide. Generally, jurisdiction is equated with geographical location or subject-matter in which the US courts may exercise power to hear and decide cases before it. The reality, however, is that US Courts have been intending that its laws affect the behavior of foreign entities and foreign nations. Treaties, invoking an extraterritorial effect, allow two nations to both formalize their intentions and voluntarily bind themselves to an agreement. This aforementioned type of extraterritorial law is distinguished from recent US legislations, i.e. US Patriots Act, Dodd-Frank Wall Street Reform and Consumer Protection Act, and the US Foreign Corrupt Practices Act. Foreign entities are now being bound by these US domestic laws that seek to control their citizen’s behavior beyond the jurisdiction of US borders.

The Legality to Prescribe Extraterritorial US Legislation
The US has the power to effectuate legislation having effects outside its geographical boundaries.

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These laws can take the form of treaties, presidential executive orders, statutes, judicial cases or administrative regulations. With jurisdiction, a country can hale the person or corporation into its courts and enforce the laws. The origins of the extraterritorial jurisdiction stems from jurisdiction based on territoriality, nationality, the effects principle, and the universality principle. These are concepts espoused from international law. Under these principles, it is reasonable for the US to make corporations or even foreign persons liable for wrongs committed within the US. It is also reasonable for the US to punish corporations who commit wrongs outside its jurisdiction, but derived its powers or are incorporated within the US.

**Jurisdiction Based on Territoriality**

Territorial jurisdiction allows a state to “conduct that, wholly or in substantial part, takes place within its territory” or to “the status of persons, or interests in things, present within its territory.” In other words, territorial jurisdiction allows a state the power to make laws taking effect within its geographical boundaries. The US use territoriality jurisdiction to actually limit the effects and imposition of its laws (e.g. antitrust laws) from being applied extraterritoriality. Jurisdiction based on territoriality is limited by location US borders. Chief Justice John Marshall described this popular and least controversial principle:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other source.

**Jurisdiction Based on Nationality**

Another concept was jurisdiction based on nationality. A person’s citizenship could allow a country to have jurisdiction over the person. Mainly, the “nationality played an important role in the establishment of special communities to administer the laws and customs of people traveling abroad” It allows for extraterritorial privileges to extend to “foreigners, who by a treaty or by custom and usage are exempt from local jurisdiction, and, instead, are subject to their national authorities” Presently, jurisdiction based on nationality is used on persons overseas when there is

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a “commission of crimes or civil offenses by nationals beyond the territorial jurisdiction of their home state.”

**Jurisdiction Based on Territoriality: The Effects Principle**

The US also derives jurisdictional power based on objective territoriality, which is also known as the effects principle. The US adopted the effects principle in the 1945 case called United States v. Aluminum Co. of America (ALCOA). In that case, the court decided to try a person in the jurisdiction where their conduct took effect. The aforementioned approach is a departure from jurisdiction based on the location of their conduct. This means that the US can have jurisdiction, even if the wrong originated outside its borders; so long as the negative effects are evidenced within the States. A person who caused a wrong in the State is seen as forming a relationship with the forum State, thereby allowing that forum state to now have jurisdiction over them. Judge Hand, in that case, specifically gave the reasoning that supported its decision. He stated that “any state may impose liabilities, even upon persons not with its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.” The principle effects doctrine was a controversial doctrine because it seemed to be an “imperialistic” approach. This imperialistic approach was seen by other nations as opposing the accepted way of allowing a country to have jurisdictional power when an offense occurred within its borders. The effects principle doctrine has now been adopted by many other countries. The Long-Arm Statute is the modified version of the effects principle, which the US courts now require that the effects be “substantial” and “direct.” A later case, Timberlane Lumber Co. v Bank of Am., N.T. & S.A. led to a further modification. The US Court is powerless in asserting power over a foreign person when “the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction.” Timberlane introduced the balancing of interest approach to extraterritorial jurisdiction:

- the degree of conflict with foreign law or policy;
- the nationality or allegiance of the parties and the location or principal place 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

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Jurisdiction Based on Universality

Lastly, a jurisdiction based on universality allows a country to hale the person into the courts for “...offenses recognized by the community of nations as universal concerns, such as piracy, slave trade, hijacking of aircraft, genocide war crimes and terrorism. Thus the nationality or the location of the offence will not prevent the court from exercising jurisdiction. Jurisdiction is wholly based upon the nature of the offence under the universality concept. Jurisdiction is gained when the alleged offender commits a crime against humanity and violates ethical concerns denoting human rights principles. This principle is not controversial and thus is agreed upon between nations in official agreements.

The aforementioned discussion shows the principles and theories that the Courts have used to hold foreign incorporated businesses liable for wrongs committed in its home state. Jurisdiction based on territoriality, nationality, the effects principle, and the universality principle are all used to pass extraterritorial legislation. These principles have given rise to economic sanctions with extraterritorial impacts, such as the Trading with the Enemy Act (sanctions against Cuba), or the International Emergency Economic Powers Act (sanctions against Iran). These principles have also created laws pertaining to US antitrust laws, as well as employment standards abroad. The effects of extraterritorial laws, when applied to the financial arena, pose a greater danger. For example, the Foreign Corrupt Practices Act (FCPA) subjected foreign entities and persons to US laws absent any consent. The emergence of the FCPA as an extraterritorial law is an outgrowth of globalization. Many of these businesses might have believed they would only be responsible to adhere to local laws in which their company was physically situated. Globalization, as it pertains to finance, has brought about an end to borders. The FCPA, to effectuate its purpose to eliminate corruption, creates borderless nations. These laws allow for transnational corporations to be held liable for any wrongs committed, even though they are not physically within the State and the harm committed does not directly affect the US.

US Foreign Corrupt Practices Act

The US initially enacted the Foreign Corrupt Practices Act (FCPA) in 1977 to curb corruption and restore public trust. Congress enacted the FCPA, part of the Securities Exchange Act (SEC) of 1934, to combat corruption globally. Congress promulgated the idea that businesses work efficiently and thrive without the presence of corruption; thereby eliminating bribery or money-laundering, and promoting lawful business practices. “Stronger US Department of Justice (DOJ) and SEC enforcement increased the prominence of the FCPA from 2010 onwards. This stronger enforcement was in response to the Financial Crisis in 2007-8 (aka Global Financial Crisis), where

23 Timberlane 549 F.2d at 614; see also Timberlane Lumber Co. v. Bank of Am., 749 F.2d 1378, 1384-86 (9th Cir. 1984).
24 Zimmerman, 166, as stated in Restatement (Third) Foreign Relations Law, supra note 11, at 404, comment b.
there was rampant fraudulence. The FCPA has been quite successful in terms of the number of persons brought under its jurisdiction, although majority of persons settle. The Act allows for US lawmakers to hold parent companies liable for human rights abuses or criminal wrongs committed by their overseas operations.27 The FCPA holds liable corporate legal persons and “it makes use of variety of bases of jurisdiction to extend its coverage as broadly as possible.”28 The FCPA is extraterritorial in its reach because it applies to US businesses or foreign corporations, irrespective of whether they are physically present in the US.

The FCPA has an anti-bribery provision and an accounting provision. The FCPA accounting provisions prohibit falsity in accounting and "strengthen[s] the accuracy of the corporate books and records and the reliability of the audit process which constitutes the foundations of [the] system of corporate disclosure”29 The accounting provision mandates that books, records and accounts must accurately reflect an issuer’s transactions and actual assets30 It also mandates that one maintain internal controls that reflect responsibility of the firm’s assets. Thus, businesses are required to maintain good record-keeping and internal controls. The Act also prohibits knowingly falsifying financial records. This provision would enable stakeholders, and all affected persons the ability to rely on accurate figures and not falsified ones. The anti-bribery provision prohibits bribery between businesses and foreign governments, in order to acquire or retain business. “U.S. companies or persons may be subject to the anti-bribery provisions even if they act outside the United States”31 The FCPA’s reach beyond US borders illustrates its broad scope to place persons outside of the US under the court’s jurisdiction. There are many criticisms against the FCPA’s reach beyond its borders and negative affects at a highly sensitive market.

The DOJ and SEC can apply laws extraterritorially to foreign nations based on Federal Civil Procedure Law, Long Arm Statute. There is both a Long-Arm statute applicable to the states and federal government. With respects to the FCPA, US Long-Arm Statute enables the US to subject a foreign person to the federal court’s jurisdiction; provided that the foreigner’s contact with the United States satisfied Due Process requirements under the US Constitution.32 The US obtains jurisdiction over foreign entities with the use of the Long-Arm Statute based on the person having “sufficient minimum contacts” with the US. The plaintiff must show that the defendant has sufficient minimum contacts with the United States as justification of personal jurisdiction under Rule 4(k)(2). In order to exercise jurisdiction, the US Courts also look to see if the ‘minimum contacts’ with the United States are "continuous and systematic."33 The court will analyze to see if the foreign person has “purposely availed itself of the benefits” from the US to determine whether there is

sufficient minimum contacts. The FCPA’s greatest achievement is to cultivate the war on poor ethics and take a stance against corruption. The FCPA also has the ability to influence other countries to oppose corruption within its own territories. The FCPA’s approach becomes questionable, though, when the accused person has never set foot in the US and no harm was committed against US citizens. The sufficient minimum contacts, in theory, necessitate an individual having some form of contact with the US; but there are instances when the person has absolutely no contact and are held in violation for the FCPA. The presence of globalization and monies passing through the US unintentionally by way of a clearing house makes it impossible for a person not to violate the FCPA, especially if there is bribery or corruption involved.

The US government’s expansive application of the FCPA is notably seen in a recent case, SEC v. Straub. In Straub, the U.S. District Court for the Southern District of New York decided in favor of the US government against foreign defendants who were employees of a non-U.S. issuer. In particular, the Court ruled that the defendants’ emails were routed through network servers located within the United States, and this fact was sufficient to establish the FCPA’s jurisdictional requirement of “corruptly” making “use of the mails or any means or instrumentality of interstate commerce” even though the defendants did not intend to email to US servers. The defendant’s company, Magyar Telekom, is also listed on the New York Stock Exchange (NYSE) and the court asserted that this led to the company intentionally deceiving American investors. However, in a subsequent case, SEC v. Steffen, the Court ruled for the defendant, a non-U.S. executive of Siemens AG for lack of personal jurisdiction. Defendant Steffen allegedly engaged himself in a bribing scheme against the Argentine government officials amounting to a contract for a billion-dollar project to create national identity cards. The SEC also alleged that Siemens AG falsified SEC certifications. Although similar to the Straub case, the court stated Steffen had not authorized the bribes or facilitated any bribery. In Straub, the court found the defendant “participated in a fraud directed to deceiving United States shareholders” by “signing or directly manipulating financial statements to cover up illegal foreign action, with knowledge that those statements [would] be relied upon by United States investors.” However, the Steffen defendant was had not falsified SEC filings, even though Siemens AG is listed on the NYSE. In Straub, we see the broad scope in which the FCPA will be applied as to foreign persons and entities. Globalization and technology, especially in business, promotes interconnectedness. Therefore, any transaction that a foreign entity takes, such as sending an email or wiring money that happens to pass through the US by way of a clearing house (even though not intended), seems to satisfy the personal jurisdictional requirements of minimum contacts. This broad application of satisfying minimum contacts pushes the FCPA’s boundaries.

35 See Memorandum and Order, SEC v. Elek Straub (Magyar Telekom), No. 11 Civ. 9645 (S.D.N.Y. Feb. 8, 2013).
36 See Memorandum and Order, SEC v. Elek Straub (Magyar Telekom), No. 11 Civ. 9645 (S.D.N.Y. Feb. 8, 2013).
38 See Memorandum and Order, SEC v. Elek Straub (Magyar Telekom), No. 11 Civ. 9645 (S.D.N.Y. Feb. 8, 2013).
Criticism against the FCPA

Harm to Financial Institutions
There is reason to analyze these extraterritorial regulatory reforms as they may be causing problems in the transatlantic capital market. For one the FCPA does impact publicly-held companies, whether domestic or foreign, as to whether they have access to enter U.S. capital markets. With the onset of the Financial Crisis beginning in 2007, people realized the US had difficulty understanding how some of these financial products worked, i.e. derivatives. Many financial institutions do not agree with the passage of legislation when the government does not understand the product or how it is used. The Transatlantic Capital Markets Forum engages senior industry leaders from Europe and the United States to discuss, explore and compare the current state and outlook for real estate capital markets on both sides of the Atlantic. The Global Financial Markets Association (GFMA), The Financial Services Roundtable, the International Banking Federation (IBFed), and the International Swaps and Derivatives Association (ISDA) met on April 19, 2012 to discuss their concerns as to the extraterritorial reforms, sending a report to the US Department of Treasury. They asserted six types of concerns:

- Duplicative requirements;
- Incompatible or conflicting requirements;
- Distortion of competition/reduction of customer choice;
- Unintended impact on clients / counterparties who are not directly subject to regulation;
- Lack of process for mutual recognition or comparability; and
- Regulatory uncertainty and disproportionate compliance burden

From these criticisms, one can see that government regulators are passing laws on an industry in which they do not fully understand. With this lack of understanding, the law can either be too overreaching or narrow, strengthening the argument that the FCPA is ineffective and is actually hurting the financial industry. The financial institutions are incurring added costs simply to comply with the Act, but this added cost does not provide complete protection against a violation.

FCPA Lacks of Definitive Guidance
In November 2012, the Justice Department and Securities Exchange Commission (SEC) promulgated an FCPA Resource Guide that familiarizes businesses as to the law’s scope.

Due diligence in regard to FCPA compliance is required in two aspects:

1. Initial due diligence – this step is necessary in evaluating what risk is involved in doing business with an entity prior to establishing a relationship and assesses risk at that point in time.
2. Ongoing due diligence – this is the process of periodically evaluating each relationship overseas to find links between current business relationships overseas and ties to a foreign official or illicit activities linked to corruption. This process will be performed indefinitely as long as a relationship exists, and usually

involves comparing the companies and executives to a database of foreign officials. This process should be performed on all relationships regardless of location and is often part of a wider Integrity Management initiative.\textsuperscript{41}

This came in part because companies demanded clearer guidelines for compliance purposes, specifically when applied to various types of business practices. Businesses and critics argue that the FCPA lacks a definitive guidance for correct compliance measures and at times seems to make companies feel that no matter what they do in terms of operating their business, they will be liable. Thus the Chamber of Commerce on behalf of more than thirty businesses issued a February 2013 letter, detailing criticisms against the FCPA. Notably, companies requested a ‘compliance defense exception’ in the FCPA because they realized fines will still be imposed, even if an employee independently engaged in foreign bribery by ignoring internal measures intended to prevent such misconduct.\textsuperscript{42} Companies must show due diligence in complying with the FCPA as a way of staving off fines. The lack of a due diligence of a company’s agents, vendors, and suppliers, as well as merger and acquisition partners in foreign countries could lead to doing business with an organization linked to a foreign official or state owned enterprises and their executives. This link could be perceived as leading to the bribing of the foreign officials and as a result lead to noncompliance with the FCPA. This third-party due diligence requirement is broad in scope and it is open to interpretation. The FCPA causes companies to still ask how much third-party due diligence is enough.

\textit{American Workers Lose their Jobs}

As effective as the FCPA appears to be in fighting corruption, when the corporations are penalized, they can choose to cut their workforce in order to pay those fines. As of 2012, 58 companies paid a combined $3.74 billion to settle under the FCPA corruption charges.\textsuperscript{43} But, prior to the Financial Crisis of 2007, the US government did not prioritize its war on corruption. In 2013, the FCPA conducted investigations, revealing a foreign bribery by Wal-Mart Stores Inc in its Mexican subsidiary and elsewhere, and causing Wal-Mart to spend over $100 million dollars in preparation of the trial.\textsuperscript{44} If a company such as Wal-Mart has already spent over $100 million in preparation for the trial, then it is questionable as to how Wal-Mart will pay those fines: freezing hiring endeavors, retaining current employees or discharging employees. Critics have echoed similar criticisms against the FCPA. “...[T]he United States Chamber of Commerce has pushed back against the law by


arguing that it hampers American businesses because of how broadly it can be applied.”

Bank of America was ordered to pay $863 million for its acquisition of Countrywide who dealt in corrupt mortgaged backed loans. With the beginning of the Financial Crisis of 2007, companies fired their workers to cut costs. As companies now are penalized monetarily, it is likely the American workers will continue to suffer the consequences of unethical corporate actions. If more Americans lose their jobs, the US economy will continue to suffer. The US economy will continue to suffer because laws, i.e. FCPA, slow business and limits profitability.

Make US Companies Less Competitive with Foreign Businesses
With so much compliance burdens, the FCPA slows business mergers, acquisitions and company activity. Companies struggle to comply with the FCPA by spending millions of dollars as a pre-compliance attempt. The DOJ and SEC state a company can reduce the FCPA’s risks, especially as to third-party agents, by utilizing a compliance program and imploring due diligence. Thus, companies have introduced new teams to their corporate structure (i.e. on-boarding teams, compliance committees) to avoid a US investigatory probe and possible fines. In past years, one employee performed compliance checks, but now the process necessitates a whole team. A team performing compliance checks calls for more money being spent on the larger workforce. Performing due diligence, may be an added cost to some companies; meanwhile their competitors may not face those costs due to their noncompliance. Reputational damage can compute to financial losses sustained by an FCPA preliminary investigation. It is a lofty goal to stomp out corruption. However, the FCPA’s compliance burdens, consisting of due diligence, documentation, reporting measures, outweigh the benefits that were intended to be derived by imposing unnecessary costs to an innocent company. Furthermore, companies, whether a US based or foreign, must manage the FCPA’s unintended impact on clients and counterparties. The FCPA forces companies to investigate whom they are doing business with in order to comply with the due diligence portion; the clients and the clients’ client become subjected to the FCPA’s broad scope.

Duplicative and Conflicting Requirements
Foreign nations have reacted to extraterritorial legislation by duplicating US laws. Some countries have patterned the US’s lead, and either codified or expanded their anti-bribery laws. For

example, the Senate of Canada proposed a bill that sought to expand the foreign bribery law to reach conduct by any Canadian company or citizen throughout the world.  

And, some nations have taken a rather oppositional stance to the FCPA. Such noncooperation by foreign nations will limit the FCPA’s effectiveness. Notably, foreign entities have adopted blocking statutes, which is the enactment of a law in one jurisdiction to ‘block’ the effects of the law of the originating country. Foreign nations have passed blocking statutes to insulate and protect itself from US laws. For example, France and Switzerland have enacted ‘blocking statutes’ in opposition to the FCPA. The French blocking statute, French Penal Code Law No. 80-538, imposes criminal sanctions for French citizens who comply with the FCPA’s discovery process. US courts have enforced sanctions against persons if they oppose discovery due to the French blocking statute. Nonetheless, foreign nations view the FCPA as incompatible with their laws and US attempt to subjugate it to conflicting requirements. In Strauss v. Credit Lyonnais, S.A., 242 F.R.D. 199 (E.D.N.Y. 2007), the court ruled “American courts are not required to adhere blindly to the directives of a foreign blocking statute” and insisted the defendant must comply with the plaintiffs’ discovery requests. Supporters of extraterritorial laws may argue that the FCPA will lead other nations to enforce stricter ethical considerations as to business. However, non-US citizens face conflicting requirements, disproportionate compliance burdens and regulatory uncertainty, even when attempting to comply with the FCPA.

An Erosion of Sovereignty

Extraterritorial laws have the effect of taking away a country’s freedom based on remote, external control. The FCPA prohibits payment, or the offer of payment, to foreign governmental officials in order to secure or retain business. The U.S. Department of Justice and the SEC take a broad approach as to whom is deemed a ‘government official’ under the Act. Thus, the Act extends coverage to any officer or employee of any foreign government-controlled entity. The Act leaves virtually no justifiable reason to excuse the appearance of a violation. Even if a payment is “customary or vital to conduct business in the place where it was made” it “is not a defense under the Act – the person making or directing the payment is [still] liable under the FCPA even if he believed the payment to be legal or if the payment was solicited by the government official.” It is recommended that US companies obtain warranties and contractual agreements from foreign

50 Bill S-14, An Act to amend the Corruption of Foreign Public Officials Act, June 19, 2013.
third-party agents to ensure compliance with the FCPA.\(^{57}\) These foreign third-party entities, in order to comply with the FCPA, will have to disclose their business ties and customs associated with those relationships. Although most countries have the right to have their laws take extraterritorial effect, the FCPA unreasonably erodes a foreign country’s sovereignty, and even its privacy. The Act also burdens a sovereign country with extraneous US foreign laws. It is an ethnocentric view to support the imposition of the FCPA on a foreign nation because it will supposedly enable such a nation to employ higher, principled US laws. The FCPA’s reach into the jurisdiction of foreign nations is imperialistic by attempting to convince the other nation that its laws are lower in standard. Cultural autonomy is lost because the “aggrieved state” complies “either because it sympathizes with the object of the extraterritorial jurisdiction...or because the interests at stake are not sufficiently important to the government or because it is subject to political pressure.”\(^{58}\) There is no true compliance, and the FCPA, like other extraterritorial laws, encumber an independent nation with the US's ever-evolving ethical standards.

3. Conclusion

Businesses are dependent on trust and relationships. The FCPA harms and destroys the fluidity of American business relationships with foreign business. Although businesses have caused regulations to be imposed on them based on their unethical conduct, these legislations should not destroy business relationships, thereby further stagnating the US economy. The goal of making a profit defines the very existence of a corporation. Thus we see the corporations’ common response to a fine: the firing of US workers. We also see duplicative foreign laws, mimicking US laws, which will further serve to stagnate our economy. The FCPA, too, is too expansive in its reach as it finds foreign entities in violation simply because a third-party happens to be affiliated with the US; although the business deal had nothing to do with the US.

References


\(^{57}\) Id. http://www.dechert.com/files/Publication/