

**THE EXTRATERRITORIAL APPLICATION OF AMERICAN LAW:
MYTHS AND REALITIES**

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Introduction

The turmoil ignited in France by the sanctions imposed on BNP Paribas in June 2014 by the State of New York and the U.S. federal authorities for the bank's deliberate violation of the U.S. embargo against Sudan, Iran, and Cuba heightened the awareness among French economic and political leaders of the risks involved in violating U.S. economic law.

In light of the bank's guilty plea, the French authorities' primary critique concerned the disproportionate amount, in their view, of the fines, totaling close to nine billion dollars.¹ Within business and political circles, however, the case also revived the longstanding debate regarding the extraterritorial application of American law. In this context, former socialist Prime Minister Michel Rocard, usually more moderate, accused the United States of abuse of power, violation of international law, and even extortion, before predicting the subsequent decline in the international use of the dollar as a consequence of this behavior.²

The main lesson that French economic and political actors appear to have drawn from the case is indeed that BNP Paribas' major sin was its use of the U.S. currency, which placed it under the yoke of "American legal imperialism." This view is not only partially incorrect, but more importantly overlooks the real, more complex issues surrounding what has become known as the extraterritorial application of American law.

This paper first aims to clarify the legal definition of extraterritoriality and its conformity with international law, which are often misunderstood. It then highlights the recent convergence between the United States and the European Union in this area, as a result of the restriction of

¹ The aggravating circumstances referred to in the statement of facts and in the bank's guilty plea, as well as the amount of the transactions carried out in violation of the embargo, explain, in light of the criteria published by the American authorities, the severity of the sanction.

² *Le Monde*, July 9, 2014.

the extraterritorial application of U.S. law and the simultaneous expansion of the extraterritorial application of European law. Finally, it examines the deeper issues associated with extraterritoriality, stemming from the enduring discrepancy between the globalization of economic and information flows and the fragmentation of national sovereignties and legal systems.

I. Extraterritoriality and International Law

Contrary to what certain commentaries might suggest, the extraterritorial application of national law is a relatively complex notion, which has not been the subject of as detailed analysis in Europe as it has in the United States.³ The international system stemming from the 1648 Treaty of Westphalia establishes national sovereignty and territorial integrity as supreme principles of international law, thereby making the extraterritorial application of national laws an exception. Yet it is still necessary to come to agreement on what constitutes the extraterritorial application of a national law.

Extraterritoriality: What Is It All About?

Some laws are extraterritorial by nature: the 1977 U.S. Foreign Corrupt Practices Act, which prohibits bribery of foreign public officials, by definition targets acts that occur outside U.S. territory. When such a law is applied to persons subject to American law, its extraterritorial nature does not infringe upon the sovereignty of other States (other than, marginally, the sovereignty of the States in whose territory the alleged acts of corruption took place). Similarly, the ability of a State to punish acts of foreign individuals or legal entities present in its territory does not contravene the principle of territoriality.

³ See, in particular, from the American side, *Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226 (2011).

The international debate concerning extraterritoriality arises when a national standard is applied to a *foreign* person subject to the jurisdiction of the regulating State *due to acts committed, at least partially, outside the territory of that State*. Therefore, in reality, the debate relates to the links required to subject a foreign national (company or individual) to the jurisdiction of the regulating State by reason of such acts. Barring specific international conventions, the bases of jurisdiction are defined unilaterally by States. However, international law frames this prerogative according to the principles outlined below.

The principle of territoriality authorizes States to regulate acts committed in their territory. It is also commonly accepted that a State may legitimately exercise its territorial jurisdiction over foreign persons present in its territory, including, in certain cases, for acts committed abroad. A State may also condition entry into its territory or enjoyment of a particular status such as authorization to practice a profession or carry out a regulated activity, or listing on a stock exchange by a foreign person, on compliance with its laws and regulations *even if the conduct scrutinized by these standards occurs abroad*.

These principles lead to a relatively narrow definition of the extraterritorial application of a national law contravening international law, namely *the assertion of jurisdiction over foreign persons without any relevant nexus between those persons or the acts committed and the territory of the regulating State*, be it their presence in the territory or the location of the targeted conduct. Conversely, the existence of relevant links with the territory of the regulating State strongly attenuates the "extraterritorial" characterization of the application of national law, even with regard to offenses committed abroad. In this last instance, it is more accurate to refer to mere extraterritorial effects of national laws.

The real debate, therefore, concerns the extent of the required connections with the regulating State's territory for that State to legitimately exercise jurisdiction, particularly the degree or

modes of "presence" required of the defendant or the extent to which the wrongdoing took place in the territory of the regulating State. The more tenuous these connections, the more the application of national standards tends toward undue extraterritoriality.

The restrictive view taken by international law scholars regarding the notion of extraterritoriality is confirmed by legal scholars' hesitations regarding the "effects" theory, which enables States to assert jurisdiction over acts committed abroad by foreign persons when these acts have *effects* in the territory of the regulating State. The classic illustration is competition law, which can target mergers or anti-competitive agreements entered into abroad between foreign companies if the conduct produces effects in the regulating State. Both the American and European international law commentary are divided as to whether the application of the relevant law in such circumstances can be characterized as extraterritorial.

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This brief exploration shows that instances of truly extraterritorial (and potentially contrary to international legal principles) application of national standards are quite rare. The most contentious situations are limited to those in which the territorial ties serving as the basis for the regulating State's assertion of jurisdiction over a person or conduct are particularly tenuous. This is typically the case where the U.S. administrative or judicial authorities exercise international jurisdiction based *solely* on Internet use, which generally relies on U.S. telecommunications infrastructure, or on the use of the dollar in connection with the illegal conduct.

Despite French commentators' insistence on the use of the dollar as the exclusive basis for American jurisdiction in the BNP Paribas case, the bank's longstanding presence in America, its enjoyment of a government license to conduct a regulated financial activity, along with its

related financial and accounting reporting obligations, unquestionably subjected BNP Paribas to all the economic laws and regulations applicable to American banking institutions in a manner perfectly consistent with international legal principles. The frequently raised argument that the bank's conduct was not illegal in France or Europe is entirely irrelevant.

The Specificities of American Law

However, French reactions to the BNP Paribas case point to yet another source of confusion: foreign companies and individuals legitimately subject to the jurisdiction of the United States have a tendency to include in their criticism of the “extraterritoriality of American law” the unpleasant surprises in store for them as a result of the singularities and the severity of U.S. law and the U.S. justice system, particularly in criminal matters.

The earliest specificities, indeed idiosyncrasies, to confront foreign companies and senior managers were the discovery process, class actions, punitive damages and the role of juries. However, the Obama Administration's recent activism in the field of corporate criminal law following the 2007-2008 financial crisis focused attention on criminal law enforcement procedures and practices, such as the obligation for companies to develop and implement effective compliance programs, the incentivization of whistleblowers, mandatory internal investigations by companies in the event of an alleged breach of law, the requirement of immediate and full cooperation with the authorities if wrongdoing is discovered, plea bargaining, and the use of independent compliance monitors. There again, it appears that BNP Paribas did not fully comprehend the importance of these requirements and the serious consequences of ignoring them.

More fundamentally, and somewhat paradoxically in view of the often naive European notion of the "American free market philosophy," the United States has a much more intrusive and rigorous legal culture than what Europe and most of the rest of the world are accustomed to,

both in terms of government enforcement and private sector practices: respect for the law and for legal institutions (under penalty of contempt of court), systematic legalization of political, economic, and social life, the sophistication and complexity of its normative standards, a naturally global approach, and the severity of potential sanctions.⁴

The culture shock, and indeed, the conflict of laws created by the confrontation of non-American persons with these realities has nothing to do with an extraterritorial application of American law, but underscores the necessity for corporations and executives doing business in the United States to be thoroughly familiar with the rules of the game and the country's legal culture.

In this regard, what Europeans often perceive as a discriminatory treatment of foreign companies by the U.S. authorities seems more the consequence of a lack of familiarity with American law and legal culture – the source of a frequent underestimation of the legal risks associated with their activities in the United States – and of the historic time-lag between the United States and other industrialized countries in adopting and implementing certain essential aspects of corporate criminal law. This is particularly true in the area of anti-corruption compliance, as illustrated by the fact that the commissions paid to agents and other pseudo-consultants remained tax deductible in France and other countries until 2000.

II. Trans-Atlantic Convergence

Another important lesson from the discussion above regarding the actual contours of extraterritoriality is the absence of a fundamental divergence between American and European jurisdictional approaches in cross-border situations. In fact, the European Union uses the same

⁴ Concerning the differences in legal culture between the United States and France, see Laurent Cohen-Tanugi, *Le droit sans l'Etat, Sur la démocratie en France et en Amérique* [Law without the State, Democracy in France and America](Paris, Puf 1985, repub. 2007)

territorial bases of jurisdiction discussed above, including the “effects” theory in the context of competition law, to the same extent as the United States.

Furthermore, the past several years have witnessed an increasingly marked convergence between the United States and the European Union on this subject, due to a contraction in the extraterritorial application of American law and the concomitant expansion of the European Union's jurisdiction.

The Limitation of Extraterritorial Enforcement in the United States

Over the last few decades, U.S. courts have tended to assert jurisdiction over non-American parties based on tenuous ties with the United States territory, particularly in class actions. These proceedings, which had a strong extraterritorial component, were sometimes brought by a majority of foreign plaintiffs against foreign companies. These cases were generally brought in the United States as a result of the attractiveness of the American judicial system for plaintiffs: unparalleled access to potential evidence through the discovery process, the availability of the contingent fee system customary in class actions, and substantial damages awards in the event of a favorable verdict. A foreign plaintiff's decision to bring a lawsuit in the United States rather than before the courts of his/her country could prove to be both sound legal strategy and completely legitimate if the defendant was American or subject to U.S. jurisdiction. However the U.S. courts had become increasingly lenient with regard to the links to U.S. territory required of foreign defendants. The Supreme Court put an end to such abuses with its landmark *Morrison v. National Australia Bank* decision of June 24, 2010.⁵ The case involved the extraterritorial effect of federal securities laws, which had formed the legal basis

⁵ *Morrison v. National Australia Bank Ltd.*, 5661 U.S. 247 (2010).

for countless class actions for fraud brought by both American and foreign shareholders against foreign issuers under the leadership of specialized class action law firms.

Since the 1960s, the U.S. federal courts, particularly the Court of Appeals for the Second Circuit, had upheld the extraterritorial application of American securities laws based on the flexible “conduct” and “effects” test. Pursuant to this test, U.S. law applied whenever the relevant conduct took place in the U.S. or had a substantial effect in the U.S. In the absence of any legal or regulatory stipulations, federal case law effectively favored the extraterritorial application of American laws, deemed more protective of American and foreign investors, wherever the facts at issue had any connection with the United States. In 2007, approximately 15% of U.S. securities class actions targeted foreign issuers.

In *Morrison*, the defendant, National Australia Bank (NAB), an Australian bank whose shares were not listed on any regulated market in the United States, had to depreciate the assets of HomeSide Lending, a Florida-based mortgage company it had recently acquired, which caused a decline in the bank's share price. Australian investors who had purchased NAB shares prior to this depreciation filed a lawsuit in U.S. district court for violation of U.S. Securities laws, alleging that the American company and its employees had artificially inflated the valuation of the assets concerned prior to the acquisition, and that NAB and its senior management had been aware of this.

The *Morrison* decision involved an extreme situation of extraterritoriality – a “foreign-cubed” (or “f-cubed”) class action brought by Australian investors against an Australian issuer for damages resulting from the purchase of securities not listed in the United States. The Supreme Court reaffirmed the “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” and that “[w]hen a statute gives no clear indication of an extraterritorial

application, it has none."⁶ Therefore, U.S. securities laws apply only to the purchase and sale of securities listed on a regulated market in the United States, or to the purchase and sale of “other securities” in the United States.

This landmark decision benefited the French company Vivendi, the defendant in a class action filed in New York on behalf of Vivendi's shareholders, the vast majority of whom were French, a few months later. In 2010, a jury had found Vivendi liable for damages of almost nine billion dollars. However, during the relevant period, Vivendi's ordinary shares traded exclusively on the Paris Bourse, while the company's American Depositary Receipts (ADRs) were listed on the NYSE. The application of the *Morrison* decision to the facts of *Vivendi* effectively excluded ordinary shareholders (close to 90% of the certified class) and reduced the class to include only certain investors who purchased Vivendi's ADRs, thereby drastically reducing the financial stakes of the case.⁷

The *Morrison* decision has since been extended to criminal matters and to proceedings relating to securities transactions entered into outside the United States.⁸ As a general matter, despite the ingenuity of plaintiffs' attorneys, U.S. court decisions since *Morrison* have closed potential loopholes and extended its holding, even though, in numerous instances, the territorial criteria established by the Supreme Court were deemed to have been met. Even if a case-by-case analysis remains the rule for determining whether a given situation is sufficiently connected to the United States to justify the application of American law (in the absence of any express extraterritorial provision), there is a clear decline in the extraterritorial application of U.S. securities law.

⁶ *Morrison v. National Australia Bank Ltd.*, 5661 U.S. 247 (2010), quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (*Aramco*) (internal citations omitted).

⁷ *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512 (S.D.N.Y. Feb. 23, 2011).

⁸ *United States v. Vilar*, 729 F.3d 62 (2013).

There are multiple economic and political, domestic and diplomatic, reasons for this decline. In the context of growing competition from European and Asian financial centers, the extraterritorial application of U.S. laws has had a dissuasive effect on foreign issuers. Further, there has been an internal backlash in the U.S. against the abuse of class actions, excessive jury awards, and other controversial features of civil liability litigation. Finally, diplomatic pressure and the harmonization of foreign securities regulations based on the American model have played their part. The era when U.S. judges and regulators endeavored to extend the protection of American securities law to the world's investors is a thing of the past. America's economic and political partners took exception to this judicial activism, invoking the modernization of their own legislative arsenal, and the United States now abstains from asserting its jurisdiction in accordance with the old doctrine of international comity or classic legal theories such as *forum non conveniens*, except when its direct economic or political interests are at stake.

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Far from being limited to securities regulation, the decline in the extraterritorial application of American law preceded the *Morrison* decision in another critical area of American judicial activism: the sanctioning of international human rights violations. Adopted in 1789 and largely dormant until 1980, the Alien Tort Claims Act (or Alien Tort Statute, “ATS”) grants U.S. district courts original jurisdiction over civil actions brought by foreign nationals for torts “committed in violation of the law of nations or a treaty of the United States.”

Following the 1980 *Filartiga v. Peña-Irala*⁹ decision, the ATS became an instrument for combating human rights violations committed anywhere in the world. The Supreme Court

⁹ *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

began to curb this trend in 2004,¹⁰ and the federal courts adapted their decisions to this precedent, gradually restricting the extraterritorial scope of the ATS. The 2013 Supreme Court decision in *Kiobel v. Royal Dutch Petroleum Co.* sounded the death knell of the extraterritorial application of the ATS, citing the presumption against the extraterritorial application of American law referenced in the *Morrison* decision. The ATS is now no longer applicable to foreign defendants if their acts were not perpetrated on American soil.¹¹

The Expansion of the Extraterritorial Projection of European Law

At the same time, the opposite trend can be observed in the European Union, which is often described as a “normative power” whose international influence is exerted primarily through the exportation of its standards. While the European Union rarely practices extraterritoriality in the strict sense as defined above, it long ago adopted the “effects” theory, particularly in the context of competition and antitrust law. Accordingly, in 2001, the European Commission did not hesitate to prohibit the merger of two American companies – General Electric and Honeywell – that had received the green light from the U.S. antitrust authorities, in view of the potential effects of the merger on the European market.¹² Since then, the European Commission has demanded significant structural undertakings from large American technology corporations such as Microsoft and Google.

More generally, the European Union routinely practices what the author of a study on the subject terms “territorial extension.”¹³ Unlike extraterritoriality *stricto sensu*, territorial extension is characterized by the consideration, from a legal standpoint, of conduct and circumstances located abroad in the application of a standard set in motion by a territorial connection. By way of illustration, the European directive on alternative investment funds

¹⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

¹¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

¹² Case No. COMP/M.2220 *General Electric/Honeywell* [2001].

¹³ Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 *American Journal of Comparative Law* 87 (2014).

conditions access to the European Single Market by non-European fund managers on compliance with certain criteria by both the managerial entity itself and by the fund's country of origin. Similar examples of the territorial extension of European standards exist in areas such as climate change, the environment, and maritime and air transport.¹⁴

According to the author of that study, the European approach of territorial extension is distinguishable from that of the United States by its “international orientation,”¹⁵ that is, its respect for international law and by the compatibility of the European normative requirements with existing international standards, whose implementation the European Union thus encourages.¹⁶

The distinction is not entirely convincing, however. In numerous areas where the United States is accused of extraterritorial application of its laws, there is an existing international standard that adhering nations have endorsed and agreed to implement. In the context of the fight against bribery of foreign government officials, for example, the activism of Washington in the enforcement of the Foreign Corrupt Practices Act (FCPA) relies on the existence of the 1997 OECD Anti-Bribery Convention. This is perfectly consistent with the European multilateralist approach.

Finally, in areas such as data privacy, Europe, like the United States, imposes its standards on foreign persons on the basis of access to the European market. Despite the fact that concerns over data privacy are traditionally far less important in the United States and other economic powers, the European standard has been imposed *de facto* on the world's companies, particularly those in the IT sector. Following the Safe Harbor agreements negotiated between the European Union and the United States concerning the protection of the personal data of

¹⁴ Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 Am. J. Comp. L. 87, 96-102 (2014).

¹⁵ Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 Am. J. Comp. L. 87, 114 (2014).

¹⁶ Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 Am. J. Comp. L. 87 (2014).

European nationals exported across the Atlantic, the “right to be forgotten” recently imposed on Google (and its non-European users) by the May 2014 decision of the Court of Justice of the European Communities (CJEC) represents an unprecedented form of extraterritorial application of European law.¹⁷

Upon a request for a preliminary ruling filed by the Spanish Supreme Court, the CJEC ruled that the European Directive on the protection of personal data applied to Google Inc., as the company has an establishment in an EU member State (in this instance, Spain) and because personal data is processed “in the context of the [advertising and commercial] activities” of this establishment. It is worthwhile here to cite the recitals of the decision relating to the extraterritorial scope of application of the directive:

“It is to be noted in this context that it is clear in particular from recitals 18 to 20 in the preamble to Directive 95/46 and Article 4 thereof that the European Union legislature sought to prevent individuals from being deprived of the protection guaranteed by the directive and that protection from being circumvented, *by prescribing a particularly broad territorial scope.*

In the light of that objective of Directive 95/46 and of the wording of Article 4(1)(a), it must be held that the processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out ‘in the context of the activities’ of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable.

In such circumstances, the activities of the operator of the search engine and those of its establishment situated in the Member State concerned are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed.”¹⁸

In other words, the fact that Google Inc. derives advertising revenue from Spain is sufficient to subject the company's worldwide activities to European directives.

¹⁷ Decision C-131/12 *Google Spain SI & Google Inc. v. Agencia Española de Protección de Datos (AEPD) & Mario Costeja Gonzalez* [2014] (not yet published) (rendered on May 13, 2014).

¹⁸ Decision C-131/12 *Google Spain SI & Google Inc. v. Agencia Española de Protección de Datos (AEPD) & Mario Costeja Gonzalez* [2014] (not yet published) (rendered on May 13, 2014), para. 54-56 (emphasis added).

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In conclusion, there is currently no divergence between the United States and Europe concerning the principle of extraterritorial application of their respective laws, particularly since recent U.S. Supreme Court decisions put a halt to the tendency of American federal courts to consider themselves global justices of the peace.

This recent development in the United States, coupled with the growing assertion of the European Union's normative power, has led to a new convergence, allowing us to substitute transatlantic controversies with a common inquiry into the underlying stakes of extraterritoriality in the age of globalization.

III. An Effective Catalyst of the Internationalization of Law

Beyond the friction inevitably caused by the extraterritorial application of national laws, specifically American law, the issues at stake are the gap between the globalization of the economy and the persistent fragmentation of sovereign nations and legal systems.

Extraterritoriality and Globalization

Whether it is extraterritoriality *strictu sensu*, the extension of the territoriality principle, or the extraterritorial effects of the application of national laws, what we are discussing is the natural consequence of a dual reality: economic globalization and the dematerialization/deterritorialization of information flows, the regulation of which cannot stop at national borders if it is to be effective. It would serve no purpose to prohibit bribery of foreign government officials or the violation of an embargo by an American company (or by a company legitimately subject to the jurisdiction of the United States), if that company could circumvent the law by using a subsidiary located in a third country. Likewise, the territoriality principle has arguably lost its meaning in the Internet age.

In an ideal world, the regulation of a globalized and partially dematerialized economy would occur without any conflict, thanks to the harmonization of national laws on a global scale and the cooperation of equally effective regulatory bodies. We are, of course, light years away from that reality. Therefore, the tensions associated with the extraterritorial application of national laws are merely the reflection of the gap between economic and informational globalization on the one hand, and the fragmentation of sovereign nations and legal systems on the other.

Since law is an instrument of power, it is not surprising that the extraterritorial application of national law emanates primarily from the world's major economic powers: the United States,

the European Union, and, increasingly, China, which makes no secret of its normative ambitions on the international stage. The Beijing competition authorities are now a key (and often unpredictable) player, alongside Brussels and Washington, when it comes to controlling cross-border mergers and acquisitions. The first target of the new Communist Party leadership's anti-bribery campaign was GlaxoSmithKline, a global pharmaceutical company. The targeted practices were located in China, but Beijing has also enacted a law prohibiting bribery of foreign government officials (similar to the OECD Convention discussed below), and will likely apply it to foreign companies outside China, as long as these companies have a presence on Chinese soil.

American Leadership in International Economic Law Enforcement

Within that framework, the United States has the dual advantage of its historic anteriority in the international projection of economic power and a culture of enforcement supported by unparalleled resources and legal and logistical infrastructure.

This being said, however, the deployment of these assets for the enforcement of global economic regulation also results from *the inaction of other nations in response to wrongdoing by their own nationals*, even though the laws at issue may be largely identical. Whether due to a lack of resources and/or an absence of political will, the failure of America's economic partners to promote a theoretically common cause can only encourage and legitimize the propensity of American authorities to assume the role of global regulators. The fight against corruption provides an excellent illustration of the link between the passivity of some countries and the resulting activism of others.

The OECD Convention on combating bribery of foreign government officials in international business transactions was signed in 1997 by the 34 member countries of the organization and

seven non-member countries, including Russia and Brazil.¹⁹ The first international instrument for combating bribery, the Convention focuses on the “supply side” of the bribery transaction. It also provides a procedure for self-evaluation and mutual evaluation of its application by the signatories, which includes an evaluation of national laws adopted to implement the Convention, as well as an evaluation of the implementation of those laws.

In October 2012, the OECD published a rather negative evaluation of France’s implementation of the Convention.²⁰ Judging from an October 23, 2014 follow-up declaration issued by the OECD *ad hoc* working group,²¹ the situation has scarcely improved since. France is certainly not the only country to drag its feet in the implementation of both the Convention and its own anti-bribery legislation. Even the United Kingdom, where the adoption of the UK Bribery Act of April 2010 caused quite a stir, is not yet close to catching up with the United States as an international leader of global anti-bribery efforts.

It is clear, however, that as long as European and other countries fail to meaningfully apply their own laws to their own nationals, the United States will be in a position to continue to play the planet’s law enforcement officer in this field as in others, whenever its jurisdictional criteria are met.

The European Union is naturally handicapped by the challenges of legal harmonization (let alone integration) in these matters of state sovereignty. However, the member States themselves (with the recent exception of the United Kingdom) prevent themselves from playing a bigger role in international economic regulation by failing to make room in their

¹⁹ Convention on Combating Bribery of Foreign Government Officials in International Business Transactions (1997), <http://www.oecd.org/fr/corruption/conventionsurlaluttecontrelacorrupciondagentspublicsetrangersdanslestransactionscommercialesinternationales.htm>

²⁰ Phase 3 report on implementing the OECD anti-bribery convention in France OECD, (Oct. 2012), <http://www.oecd.org/fr/daf/anti-corruption/france-conventiondelocdesurlaluttecontrelacorrupcion.htm>

²¹ Declaration of the OECD Working Group on France’s implementation of the Convention on bribery of foreign public officials, OECD, Oct. 23, 2014, <http://www.oecd.org/fr/presse/declaration-du-groupe-de-travail-de-l-ocde-sur-la-mise-en-uvre-par-la-france-de-la-convention-sur-la-corrupcion-d-agents-publics-et-rangers.htm>.

legal systems for plea bargaining and the underlying philosophy of compliance.²² It is in large part thanks to such settlement mechanisms that the U.S. authorities successfully combat international fraud, bribery, money laundering, and tax evasion.

From Confrontation to Cooperation

While the United States is thus unquestionably far ahead in certain areas of international business regulation, and has the means to enforce its laws beyond its borders, it is simplistic to view this leadership solely in terms of confrontation and violation of international law.

On the contrary, over time, American legal unilateralism has arguably facilitated the international harmonization of economic regulatory standards and now serves as a model for the assertion of the international normative ambitions of other economic powers such as the European Union or China. A few illustrations are discussed below.

During the 1960s and 1970s, American antitrust proceedings were the bane of French and European companies. Twenty years later, such proceedings are not only part of the ordinary course of business, but Europe has developed the same instruments, and convergence and cooperation prevail in this field between the U.S. and E.U. competition authorities, with the latter often taking the tougher stance.

More recently, European hostility toward “secondary” economic sanctions, which are applicable to nationals of third countries, typically a European company or a company of another nation that is subject to U.S. jurisdiction because of its U.S. activities, has recently given way to harmonization of sanctions policy with regard to Iran on both sides of the Atlantic. To be sure, this harmonization reflects the convergence of the U.S. and E.U.

²² See concerning these subjects Laurent Cohen-Tanugi and Emmanuel Breen, “*Le Deferred prosecution agreement américain : un instrument de lutte efficace contre la délinquance économique internationale*” [The American deferred prosecution agreement: an effective instrument for combating international economic crime], *La Semaine Juridique*, 2013.

diplomatic positions with respect to Iranian nuclear power since Bill Clinton implemented sanctions against Iran and Libya in the 1990s, but it is also an effect of the Obama Administration's more multilateralist approach (vote on a UN resolution, consideration of European interests) and the rise in power of the European Union itself as an international player. As a result, the United States and the European Union now have a consensus regarding the principle of “secondary sanctions”– which are, by definition, applied extraterritorially.

The transatlantic agreements on personal data protection, the OECD Anti-bribery Convention, sanctions for serious human rights violations by the international criminal courts, and the affirmation of universal jurisdiction offer further illustrations of the positive contribution of an initially unilateralist approach to international regulation (whether emanating from the United States or, more recently, the European Union) to the development of consensual international standards.

Conclusion

Thus, in the context of globalization, the extraterritorial application of national legal norms can serve as a powerful, if not always peaceful, catalyst for the development of international law.

What was, in the age of Nation States and the Westphalian international order, more of an exception or anomaly – the extraterritorial application of national laws – has become, in the age of globalization, if not the norm, at least an inescapable reality and an increasingly universal driver of the regulation of world affairs.

In this new process of development of international standards, the United States has unquestionably played a pioneering role since the 1960s due to its dual status as the world's leading economic power and as a "legal empire." This conclusion is even more obvious if one

takes into account the influence of American legal principles, techniques, and practices in the international sphere over the last five decades. This mode of developing international standards is, admittedly, not free of tensions. However, experience shows that these tensions ultimately result in convergence and harmonization.

The last twenty years have seen the entry of new players – primarily the European Union and China– in this normative concert, which has helped to create balance, but also additional complexity. The fight against “extraterritoriality” as such thus now appears to be a rearguard battle. Global players will have to familiarize themselves and comply with the rules of the planet’s principal powers, and these powers will have to learn to harmonize their laws, to cooperate and to agree on the acceptable limits of their respective international normative ambitions.

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