

# **United States**

## **Jurisdiction Abroad**

The United States applies their jurisdiction abroad under several instances. This is something very important for U.S. based corporations with global operations to understand, since they might be in a situation where U.S. jurisdiction applies as a result of actions taken by one of their subsidiaries in a foreign jurisdiction. The issue presented in this paper is when the U.S. can exercise jurisdiction abroad, so we will discuss the protective principle and universality of the five bases of jurisdiction as described below:

### *Five Bases of Jurisdiction*

- Territoriality
- Nationality
- Passive Personality
- Protective Principle
- Universality

### *Presumption - U.S. Law Does Not Apply Abroad*

In general, absent a clear indication of intent for a statute to apply abroad, there is a presumption that U.S. laws do not apply abroad.

- In general, there is a presumption that U.S. laws do not apply outside of the United States; thus, absent a clear intent for a U.S. statute to be applied abroad, U.S. courts will ordinarily interpret U.S. statutes to apply domestically, and not abroad. *F. Hoffmann-La Roche Ltd. V. Empagran S.A.*, 542 U.S. 155, 164 (2004). The purpose is to avoid unintended conflict with laws of foreign nations. *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248.

However, it is important to note that there are certain circumstances in which the United States may apply domestic law abroad:

For example, the United States may give extraterritorial effect to U.S. laws in cases involving:

1. U.S. citizens abroad.
2. Foreign citizens employed by U.S. companies abroad.
3. Violation of certain laws, such as:
  - Foreign Corrupt Practices Act (Dealing with bribery)
  - Export Administration Act of 1979 (Dealing with boycotts)
  - Iranian Assets Control Regulations (Dealing with the response to the hostage crisis)
  - Civil Rights Act, the National environmental Policy Act, and drug enforcement laws.

### Asserting Jurisdiction Abroad

The United States may assert jurisdiction over the conduct of U.S. citizens abroad, and over the conduct of others against U.S. citizens abroad.

- Nationality permits a state to assert jurisdiction over the conduct of nationals, even when they are acting outside of the state.
- In *Blackmer v. United States*, 284 U.S. 421, 438-41 (1932), the U.S. filed criminal charges against a United States citizen who failed to respond to subpoenas served upon him while traveling in France. There, the court reasoned that although Blackmer was abroad when he was subpoenaed, he remained a U.S. citizen subject to the laws of the United States. Similarly, a corporation is considered to have the nationality of the state in which it is incorporated.
- Conversely, passive personality authorizes states to assert jurisdiction over offenses committed against their citizens abroad. Here jurisdiction is based on the nationality of the victim.

The United States may assert jurisdiction abroad if doing so is necessary for its security or government functions.

- Under the protective principle, a state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its government functions.
- In *U.S. v. Pizzarusso*, 388 F.2d 8, (Ct. App., 1968), the court affirmed the conviction of a non-U.S. citizen indicted and convicted of knowingly making a false statement to an American consular officer, under oath, in a visa application.
- The United States, and any other country, may assert jurisdiction over anyone committing a heinous crime, regardless of the location of the crime or nationality of offender or victim.
- The universal principle recognizes that certain offenses are so heinous and so widely condemned that any state, if it captures the offender, may prosecute and punish that person on behalf of the world community, regardless of the nationality of the offender or the victim, or the location of the crime.
- Examples of offenses covered by the universal principle include:
  - ◆ Privacy
  - ◆ Slave Trade
  - ◆ Terrorism

Certain U.S. Laws have Extraterritorial Effect.

In 1984 Congress expanded the Age Discrimination in Employment Act (ADEA) to permit limited extraterritorial application to U.S. citizens working for U.S. companies or their subsidiaries. In *Denty v. SmithKline Beecham Corp.*, 109 F.3d 147, 150, the Third circuit stated that The ADEA had extraterritorial application, but only in those situations where an American citizen was working for an American company on foreign soil. The court further stated that the statute was carefully limited to U.S. companies and their subsidiaries with respect to claims by U.S. citizens.

In general, absent a clear purpose to extend to extraterritorial claims, the courts will rarely apply U.S. labor laws to protect foreign employees employed abroad. However, where a court finds clear extraterritorial intent, it will apply U.S. labor law abroad. For example, in *Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 73 (1995), the Second Circuit found the requisite intent when it examined the Longshore and Harbor Workers Compensation Act. There, the statute made specific reference to where injury on the high seas would be adjudicated and the legislative history and regulatory interpretation further suggested extraterritorial intent. Nonetheless, the Second Circuit cautioned that few, if any, statutes would avoid the presumption against extraterritorial application.

Additional examples of U.S. laws that have extraterritorial effect include, but are not limited to: the Foreign Corrupt Practices Act (dealing with bribery), the Export Administration Act of 1979 (dealing with boycotts), the Iranian Assets Control Regulations (dealing with the response to the hostage crisis) and the Civil Rights Act, the National Environmental Policy Act, and drug enforcement laws.

The requirements for extraterritoriality are not as stringent in cases of criminal law.

The importance of enforcing the criminal law often results in extraterritorial applications that the court might forego in a purely civil context.

Illustrating the weight of criminal law, drug enforcement laws are often given extraterritorial application.

Recent legislation states that computer security specifically applies to foreign commerce or some foreign activity. Thus, in *Four Seasons Hotels and Resorts B.V. v. Consorcio Barr, S.A.*, 267 F.Supp.2d 1268 (S.D. Fla. 2003), *aff'd in part, rev'd in part*, hotel licensees were liable in a federal civil action for interception of the licensor's electronic communications.

In *U.S. v. Chen*, 2 F.3d 330 (9th Cir. 1993), the Ninth Circuit granted the Immigration and Naturalization Service the implied authority to conduct extraterritorial enforcement activities.

Criminal statutes addressing terrorist activities and conspiracies have enjoyed extraterritorial interpretation. Thus, in *U.S. v. Yousef*, 327 F.3d 56, 86-88, 61 Fed. R. Evid.Serv. 251 (2d Cir. 2003), criminal prosecution of foreigners, captured abroad and accused of planning the 1993 World Trade center bombing in New York City, was permitted.

Examples:

United States of America v. Clifton S. Corey 232 F.3d 1166 (2000)

- ◆ The United States Court of Appeals for the North Circuit held that the district court had jurisdiction over a U.S. citizen's criminal activities while living abroad. There, the defendant, a civilian postmaster for the U.S. Air Force lived at an apartment building leased by the United States in the Philippines and at a military base in Japan. The court concluded that the United States had concurrent and primary jurisdiction over the actions of United States nationals on both the military base and the apartment building. The court also concluded that, since the properties were lands reserved or acquired for the use of the United States, they fell within the special maritime and territorial jurisdiction of the United States.

E.On Ag, et al., v. Acciona, et al. 468 F. Supp. 2d 559 (2007)

- ◆ The court held that jurisdiction existed in an action by Defendant Spanish corporations against German tender offerors, accusing them of violating United States securities laws when they acquired a Spanish issuer's stock by purchasing it from investors. There, although the transaction was predominantly foreign in nature, some of the shares at issue were traded in the United States.

In re: Royal Dutch/Shell Transport Securities Litigation 380 F. Supp. 2d 509 (2005)

- ◆ In an action by a U.S.-based company against, among others, a former executive who was a citizen of the United Kingdom, the court found it had a sufficient interest in the claims of foreign investors to exercise jurisdiction over the former executive because the executive made presentations at several United States conferences, and through the meetings, assisted in dissemination of the material misrepresentations. There, the claims stemmed from the alleged discrimination of materially false and misleading statements concerning the companies' reported proved oil and natural gas reserves.

In Re Royal Ahold N. v. Securities & Erisa Litigation 351 F. Supp. 2d 334 (2004)

- ◆ The court held that, based on the many Securities and Exchange Commission filings they signed, three of the defendants, companies domiciled in the Netherlands, had sufficient minimum contacts with the United States to support personal jurisdiction over them. There, the company announced that it was restating its reported earnings for two fiscal years due to a series of accounting inaccuracies related to promotional allowances at a subsidiary, that it would be adjusting historical financial statements to no longer fully consolidate its joint ventures, and that the company was investigating the legality of certain transactions at an Argentine subsidiary. The announcement caused the price of the company's common stock trading to drop dramatically. The court reasoned that the company's conduct in the United States was more than "merely preparatory" to the alleged securities fraud. The documented accounting fraud substantially contributed to and was material to the company's success in attracting shareholders both in the U.S. and abroad.

Therefore, while the company was domiciled in the Netherlands, it had become a primarily United States-based company.

United States of America v. Nicholas Bredimus 234 F. Supp. 2d 639 (2002)

- ◆ The court denied a motion to dismiss for lack of jurisdiction by the defendant, who was charged with sexually abusing children in Thailand and for producing images of child pornography. The court reasoned that Congress had broad authority to keep the channels of foreign commerce free from immoral and injurious uses, and its authority under the Commerce Clause was broad enough to include individuals who traveled in foreign commerce for the purpose of engaging in prohibited sexual activity with minors.

In Re Cinar Corporation Securities Litigation, et al. 186 F. Supp. 2d 279, (2002)

- ◆ The court denied the motion to dismiss for lack of jurisdiction in an action brought by shareholders, American citizens, arising out of the allegedly fraudulent disclosures made by the defendant Canadian corporation and its officers in various public financial statements issued during the period. In so holding, the court reasoned that, because fraud occurred in the United States as much as it did in Canada, the United States had a legitimate interest in enforcing its securities laws.

Howard Bresch v. Drexel Firestone, Et Al. 519 F.2d 974; 1975 U.S. App. (1975)

- ◆ The court sustained jurisdiction over defendants, a Canadian corporation, the corporation's officers, major stockholders, underwriters, and an accounting firm, in a federal securities fraud action brought by American citizens who suffered losses as a result of the fraud. The court explained that the anti-fraud provisions of the federal securities laws applied to losses from sales of securities to Americans residing in the United States, whether or not acts, or culpable failures to act, of material importance occurred in the United States.

Commonwealth v. Beneficial Finance Company & others 360 Mass. 188, 275 N.E.2d 33, (1971)

- ◆ The court held foreign corporation, operating through a subsidiary business trust in the United States, criminally liable for acts of an agent who was vested with authority to act on behalf of the corporation in the sphere of corporate business in which he or she committed the criminal act. Defendants, small loan companies, were convicted of conspiring to bribe public officials to ensure favorable interest rates and to obtain other favorable rulings. The court emphasized that the disbursement of funds was a peculiarly corporate act and that it was reasonable to infer that the payment of money for the bribes came from the corporate treasury and thus reflected corporate intent.