United States v. Hoskins

….and its Implications for Territorial Limits in FCPA Cases

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US Rules on Territoriality in Criminal Cases

- Unlike many code-based countries (e.g., French Code Pénal art. 113-1 et seq) there is no general statutory basis for determining the territorial reach of US criminal statutes
- Rather, the issue is left up to judges to determine in the context of specific criminal statutes (and specific factual situations)
- In the immortal words of Justice Scalia, this is "judge made law" – and thus capable of revision by judges

US Rules on Territoriality in Criminal Cases – (cont.)

- There are two basic – and classic – bases for the application of criminal laws:
  - Territory. Did the conduct take place – even in part – on US territory.
  - Citizenship. Is the defendant a US citizen (or resident, or corporation).
- Even these bases can lead to controversy:
  - "In part" can be pretty minimal (quick meeting at US airport)
  - Individuals increasingly have multiple citizenships
  - Corporations often create multiple entities of different types in different jurisdictions

US Rules on Territoriality in Criminal Cases – (cont.)

- The US authorities also assert power when the "effects" of a criminal act are felt in the US
  - Law school hypothetical of a gun fired across a national border
  - Significant development in the field of antitrust law to protect the US economy
  - The DoJ takes the position that the use of the US Dollar overseas is sufficient to assert the power to prosecute, at least in some cases
  - But this has not been definitively tested.

US Rules on Territoriality in Criminal Cases – (cont.)

- Two kinds of challenges:
  - Based on asserted rights of the defendant, claim that insufficient territorial link deprives the defendant of Due Process
  - Based on comity, the sovereign interests of other countries that might have an interest in the matter

Morrison v. National Australia Bank (2010)

- Civil case involving US securities law in the so-called "F-cubed" situation (foreign issuer, market, and purchaser)
- Quite strong statement that absent a "clear showing" of Congressional intent for specific legislation to have extraterritorial application, "it has none."
- Quoted earlier decision: there is a "presumption that United States law governs domestically but does not rule the world…."
- Overturned several decades of precedent in the securities area.
- This has led to an analysis of a number of civil, regulatory and criminal statutes to determine the intent of Congress – when often territorial reach probably had not occurred to Congress one way or another.

Morrison v. National Australia Bank (2010) (cont.)

- The Supreme Court has expanded on *Morrison*
- Applies to Alien Tort Statute notwithstanding its obvious international origins
- Applies to the RICO statute, and others

Morrison v. National Australia Bank (2010) (cont.)

- The applicability of *Morrison* in the criminal enforcement area is still being developed in the courts
- In *United States v. Vilar* (2 Cir. 2013), the DoJ made a strong argument that the reasoning in *Morrison* should be limited to civil cases, and categorically does not apply to cases that the DoJ deemed of sufficient national interest to prosecute
- This broad claim was firmly rejected by the Court:
  - *Morrison* applies to criminal cases
  - "a statute either applies extraterritorially or it does not"
- But it then found that the defendant was properly prosecuted under federal criminal securities statutes.

United States v. Hoskins

The basic facts:

- Hoskins was an officer of a UK subsidiary of Alstom SA (French company), and had significant responsibilities for the French parent
- He was at all times a UK subject/citizen
- He had no formal position with the US subsidiary
- He never went to the US on anything related to the charges against him (was arrested when coming to the US on vacation)

United States v. Hoskins (cont.)

The charges:

- Alstom SA, some of its subsidiaries, and several of its officers were indicted for alleged bribes paid in Indonesia.
- Among the corporate defendants was Alstom US, a US subsidiary alleged to have been involved in some key meetings and in transferring funds used for the bribes.
- Individuals other than Hoskins were either US citizens or worked in US. They along with the corporate entities worked out deals
- The Third Superseding Indictment alleges
  - A number of meetings in UK, France and Indonesia in which Hoskins participated, but none in US
  - Participation in telephone calls and emails

United States v. Hoskins (cont.)

The law:

- The FCPA applies to individual defendants who:
  - Commit an act on US territory, or
  - Are US citizens or residents, or
  - Act as an "agent of a domestic concern"
- Hoskins did not commit an act in the US and was not a citizen or resident
- The legal analysis focused the "territory" and "citizenship" "hooks." Hoskins did not raise an issue pre-trial relating to the "agent of a domestic concern" issue but will at trial (see discussion below)

United States v. Hoskins (cont.)

The procedures:

- Hoskins moved prior to trial to dismiss those counts of the indictment that charged him under the FCPA, claiming that the DoJ could not prosecute him since he did not commit an act in the US and is not a citizen/resident
- The US District Court in Connecticut granted his motion, but noted that the case could proceed on the allegation that Hoskins was an "agent of a domestic concern"
- The decision thus really addressed the instructions to the jury: would they need to find that Hoskins was in fact an "agent" of Alstom US (which is very debatable)
- The DoJ appealed (an unusual act, showing the importance of the issue)
- The Second Circuit affirmed on the core issues

United States v. Hoskins (cont.)

The DoJ argument:

- The DoJ claimed that even though Hoskins committed no act in the US, and was not a citizen/resident, he could be prosecuted under the FCPA on two theories (in addition to the "agent of a domestic concern" one):
  - That he aided and abetted others subject to US authority and thus was liable "as a principal" under 18 USC § 2
  - That he conspired with others subject to US authority and thus was criminally responsible under the so-called *Pinkerton* doctrine
  - Thus: two forms of "vicarious liability" well known and often used by the DoJ

United States v. Hoskins (cont.)

The issues:

- *Gebardi*: In an obscure 1932 decision, the Supreme Court held that vicarious liability theories do not permit prosecution if there is an evident Congressional intent not to prosecute a person in the class or category of the defendant
- *Morrison*: Whether the "presumption against extraterritoriality" prohibited prosecution
- The two questions are congruent – both ask, What did Congress intend? – but place the presumption differently.

United States v. Hoskins (cont.)

The decision:

- Basically affirmed the trial court
- Lengthy review of the legislative history of the FCPA, and determined that Congress was careful to avoid unnecessary intrusion on the sovereign interests of other countries
- Pointed particularly to 1998 amendments which were designed to "conform" the FCPA to the OECD Convention
- Thus held that the DoJ failed to satisfy either the *Gebardi* or *Morrison* principles because Congress did not intend to prosecute non-nationals who did not commit an act in the US
- Noted that Hoskins could still be prosecuted as an "agent of a domestic concern"

The Take-aways (one person's opinion)

The decision:

- The decision is faithful to *Morrison* and will please those concerned about over-aggressive US prosecutions abroad
- It probably will sustain a general tendency in the federal courts to rein in US prosecutions when the US interest is not evident
- Unclear whether the DoJ will change its policy; its most recent "guidelines" are ambiguous

The Take-aways (one person's opinion) (cont.)

The DoJ may well lose the "agent of a domestic concern" issue at trial

- It will argue that "agent" incorporates the broad theories of "agency" to mean that if Hoskins coordinated his acts in any way with Alstom US then he can be prosecuted as its "agent."
- The more likely interpretation is that "agent" has a specific meaning in the FCPA: the individuals (often locals) through whom a bribe-payer acts (of which two were mentioned in the Hoskins indictment)
- But this may not come out in a judicial decision but rather in an opaque jury verdict.

The Take-aways (one person's opinion) (cont.)

The opinion appropriately takes account of the need to consider the interests of other sovereigns – but could have gone further

- The spirit of the OECD Convention, and the text of Article 4.3, is that in cases of potential multiple jurisdictions the prosecutors should "consult with a view to determining the most appropriate jurisdiction for prosecution."
- While the *Hoskins* opinion recognizes non-US sovereign interests relating to US prosecution of non-US citizens, it did not really recognize the need to take into account decisions by non-US prosecutors whether – or not – to prosecute their nationals or those who commit acts on their territory.
- It is unclear whether UK or French authorities "consulted" with the DoJ about Hoskins, but it is interesting to note that both have been active in pursuing Alstom for other acts.

The End