

**THE NEGATIVE IMPACT OF EXTRATERRITORIAL APPLICATION OF NATIONAL
LEGAL NORMS ON INTERNATIONAL BUSINESS TRANSACTIONS**

POLICY STATEMENT

Key messages:

1. Predictably limit the application of national laws and regulations to matters connected to their national territory.
2. Consult at an early stage businesses likely to be affected.
3. Consider drafting of a multilateral convention limiting the extraterritorial application of national norms.

Implementation:
See Annex II

Document review:
After 24 months

The negative impact of Extraterritorial Application of National Legal Norms on International Business Transactions

Policy statement

Introduction

The purpose of this draft policy statement would be to consider urging the international community and policy-makers, including legislators, regulators, courts and others, to devote renewed attention on the negative impact and lack of predictability of the extraterritorial application of national laws on international business transactions.

For the recall, this paper was initially based on the former ICC Policy Statement on Extraterritoriality and Business issued on July 13th, 2006. It was reactivated in consideration of all the latest and increasing concerns of the topic.

Defining Extraterritoriality

By virtue of the territoriality principle, a State has the authority to regulate persons and conducts within its territory. However, this principle is not absolute. Exceptions may exist in different categories of rules, such as universal jurisdiction over genocide, piracy or slavery, among others.

For the purposes of this paper, the term 'extraterritorial' will refer to any regulation, text or case-law, issued by one State or more, whether organized or not, which intends to govern legal relationships or legal situations located mainly on the territories of one or more foreign States.

Extraterritoriality arises under a variety of contexts. Legislatures, regulators, and courts frequently render decisions or policies having an extraterritorial effect such as embargo measures (economic sanctions unilaterally adopted by a State), anti-money laundering regulation, export control, antitrust law, corruption of foreign public agents, regulation of stock-market, tax regulations and protection of personal data.

A barrier to cross-border trade, investment and business

ICC is strongly committed to promoting cross-border investment and trade as vital for sustainable economic development and global growth. Clear and predictable rules of law are essential to achieve these goals. Although in some instances extraterritoriality does not lack legitimacy, ICC believes that the extraterritorial application of national laws could have significant negative effects on international trade and investment.

The consequences of extraterritorial application of national laws are several:

— **Overlapping regulations.** Extraterritorial application of national laws puts companies in a position where they face conflicting or overlapping legal requirements. For instance, national corporate governance legislation regulating companies listed on national stock exchanges might lead a company that is cumulatively listed on at least two national stock markets to having to fulfill incompatible legal duties according to the two sets of rules, regarding accountability presentation or more generally the information of potential investors.

— **Weakening investment.** Extraterritorial norms might also have an impact on credit. For instance, businesses might have a hard time obtaining credit or insurance or even maintaining ongoing credit or insurance when dealing with some countries, even though the regulations of their countries of establishment or incorporation don't necessarily forbid such activity.

— **Fostering legal uncertainty.** Extraterritorial application of national laws fosters considerable commercial and legal uncertainty, which not only discourages international businesses from engaging in trade and investment but also distorts trade and investment decisions by international businesses. It also increases the risks involved in commercial activities, exposes companies, inflates legal and other transaction costs and might create a risk of double-punishment of businesses under different regulations for the same wrongdoing.

— **Competition distortion.** The extraterritorial application of national laws affects companies of all sizes and sectors of industry. As their application is not limited to the territory of the State from which they originate, this has for consequence to distort competition and to hinder businesses' activities outside of the concerned country.

— **International transaction cost increase.** By imposing a considerable burden on international businesses, extraterritoriality has a significant negative impact on economic growth and development. It increases international transaction costs for companies and may result in steep compliance and regulatory costs.

— **Political tension increase.** Extraterritoriality may encourage forum shopping, duplicative legal proceedings, and potentially divergent outcomes. It also increases tensions among governments, resulting both from disagreements by States on the means of regulating activity or the policies underlying extraterritorial measures and discord in addressing such conflicts.

— **Disclosure of business secrecy.** The demand of investigative authorities or monitors to have access to all internal and external communications of a corporation or a group of corporations when implementing an anti-bribery, anti-money laundering or international sanction regulations on behalf of a foreign authority, may lead to the disclosure of business secrecy or worse, to the infringement of internal privacy laws such as personal data protection regulations or even to blocking statute laws.

— **Side effects on third parties.** The side effects for third parties may be out of proportion. The co-contractors of operators targeted by extraterritorial norms might thus be indirectly affected by these measures. Their contracts may not be performed, which can lead to financial losses.

— **Negative effects on employment and communities.** Having a negative impact on the running of business by targeted companies; extraterritorial norms also impede local employment. It follows that local communities, i.e. employees and their personal environment, directly or indirectly undergo the effects of these norms of foreign origin.

Recommendations

In light of the significant costs of extraterritoriality on international business transactions, ICC makes the following recommendations, with the aim of mitigating the adverse effects of extraterritoriality on trade and foreign investment:

1. **On extraterritorial norms issuance** - all types of policy makers, whether they are legislators, regulators, courts among others, are encouraged to:
 - a. *recognize the principle of international comity and of moderation* and respect for other States' interest when enacting legislation, enforcing rules, or otherwise exercising jurisdiction.
 - b. *limit the application of national laws and regulations to matters connected to their national territory by a substantial and predictable link.*
 - c. *consult at an early stage international businesses likely to be affected by proposed legislations with an extraterritorial impact.* Businesses should be able to give

observations as to these proposed legislations, and States may take into consideration relevant observations to improve the legislations.

2. **On extraterritorial norms predictability** - all types of policy makers, whether they are legislators, regulators, courts among others, are encouraged to:
 - a. *include a precise definition of the scope of application* of any new rules likely to have a cross-border effect. Precise criteria such as targeted persons, businesses, deals, etc. should be defined within the text.
 - b. *establish a system of precise block exemption regulation*. A committee may be created within the regulating authority to this end. Its mission shall be to grant exemptions in accordance with clear, precise and publicly available guidelines.
3. **On extraterritorial norms side-effects** - all types of policy makers, whether they are legislators, regulators, courts among others, are encouraged to:
 - a. *respect one's right not to be tried or punished twice for the same wrongdoing*, in application of the widely accepted *non bis in idem* principle.
 - b. *take into consideration the interests of third parties* likely to be affected by the economic sanctions inflicted upon the entities concerned.
4. **On international cooperation** – States are encouraged to:
 - a. *consider greater use of intergovernmental organizations and processes* as vehicles for raising, discussing, and resolving Extraterritoriality disputes. The G20, OECD or WTO are particularly well suited to play such a role.
 - b. *consider the drafting of a multilateral convention limiting the extraterritorial application of national norms*, especially under the aegis of UNCITRAL. Such a convention could provide for arbitration in order to resolve such extraterritorial matters, and even build on the ICC's long-standing experience in this regard.

Annex I: Examples of extraterritorial applicability of national laws

1. In the field of economic sanctions:

- The French company BNP Paribas Group was prosecuted in 2015 for violating the US embargo regulations in Cuba, Sudan and Iran. As the legal ground for these prosecutions consisted in transactions being made in USD, the underlying idea was that using USD induced compensation on the US territory, and therefore created a US nexus.
- The German company DF Deutsche Forfait AG, another non-American company, was informed in 2014 that it was placed on the Office of Foreign Assets Control's Specially Designated Nationals and Blocked Persons List (OFAC's SDN List), due to alleged violations of US economic sanctions for facilitating oil deals in circumvention of sanctions targeting the National Iranian Oil Company (NIOC).

2. In the field of export control:

- A 2017 Chinese draft Export Control Law provides a set of comprehensive and unified export control of categories of controlled items, including dual-use items, military items, nuclear items, as well as other goods, technologies and services. The text is not only applicable to the re-exportation of these very same items from one overseas jurisdiction to another.

3. In the field of Anti-money laundering regulation:

- The U.S. 2001 Patriot Act authorizes the U.S. Government to seize funds held by a non-U.S. bank in the United States when a customer account maintained overseas in such bank is subject to forfeiture proceedings under the U.S. anti-money laundering regime. There is no requirement that the non-U.S. bank's funds seized by the U.S. Government be traced to the funds deposited by the customer in the non-U.S. bank outside the United States.

4. In the field of Antitrust law:

- In 2017, the European Commission only authorized the mergers of two American businesses, namely Alere and Abbott Laboratories, provided that they divest some of their activities in the U.S. and Canada.
- The 2013 Microsoft's sanction by the European Commission for abuse of dominant position impacted the way the company integrates accessory services/functions to its software and how its system incorporates with competitors' software.

5. In the field of Corruption of foreign public agents:

- The 2010 UK Bribery Act is applicable to acts of corruption regardless of where they took place as long as the company concerned has an establishment, a subsidiary, or has conducted business in the UK, even if the corruption acts were made on its behalf by another entity which is not located on British soil.

- The 2016 French Sapin II Law provides that foreign residents of France or any person that has business in France can be prosecuted for acts of corruption and influence peddling committed abroad in contradiction with French law.

6. In the field of personal data protection:

- The 2016 General Data Protection Regulation (GDPR), which entered into effect end of May 2018, provides that a company operating from outside the EU should comply with the European regulation in case it targets EU residents or offers goods and services to individuals residing in the EU.

7. In the field of tax regulations:

- The 2010 U.S. Federal Law Foreign Account Tax Compliance Act (FATCA) requires all U.S. persons including those living outside of the U.S. territory to yearly disclose their non-U.S. financial accounts to the U.S. Administration. On an extraterritorial basis, it also imposes on all non-U.S. financial institutions the obligation to report the assets of U.S. persons to the U.S. Department of Treasury.

Annex II: Towards the implementation of recommendations

1. *ICC may raise awareness among States, international organizations and professional bodies towards the conclusion of multilateral international conventions.*

Ultimately, the effectiveness of actions towards the implementation of recommendations relies upon the adoption of texts of a hard law nature, first and foremost through multilateral international conventions.

ICC may get the attention and support of government leaders and key public policy makers through the Organization for Economic Co-operation and Development (OECD), which already incidentally addressed the issue of the extraterritorial application of regulations. For instance, the OECD held a roundtable discussion to debate on the challenges related to the imposition of extraterritorial remedies in the competition field in 2017 and undertook an in-depth impact assessment study of extraterritoriality within the foreign bribery framework in 2016. Through the support of these public figures, a study on extraterritoriality may be commissioned and eventually lead to the reaching of a multilateral agreement, according to Article 5 (c) of the Convention on the Organization for Economic Co-operation and Development of 14th December 1960.

In addition, ICC may encourage key decision makers to request further support from the United Nations Commission on International Trade Law (UNCITRAL) through several concrete actions, such as holding international colloquia on the matter of rules of extraterritorial application, creating a working group to carry out an economic and legal analysis to assess the impact thereof, and ultimately ensuring that a draft text is submitted by the Commission to the UNCITRAL General Assembly in order for it to adopt a binding resolution.

From the perspective of global economic policy-making, ICC may as well use its privileged relationship with public authorities in order to urge the World Trade Organization (WTO) to discuss about the impact of extraterritorial regulations on the global economy.

2. *ICC may seek expressions of interest from international forums.*

ICC may refer the issue of the negative impact of extraterritorial regulations to international forums for the purpose of initiating joint actions.

In this respect, ICC may cooperate with host countries of the G7 Summit, in view of the forthcoming forty-fifth summit which will convene government and business leaders between 25th and 29th August 2019, to discuss and generate initiatives in order to give an appropriate response to the actual worldwide challenge of the extraterritorial application of laws.

Furthermore, regarding the upcoming thirteenth G20 Summit, which will be held in Buenos Aires between 30th November and 1st December 2018, ICC may use its legitimacy as a representative voice so as to guide further work on the theme of rules of extraterritorial application.

Finally, in the prospect of the World Economic Forum's annual meeting which will take place between 22nd and 25th January in Davos, ICC may take part in this think-tank to exchange ideas that support the adoption of a common discourse on the need for a limited use of extraterritorial regulations. Discussions during the Davos Forum might lead to increase

pressure on the States that have a tendency to have majorly recourse to rules of extraterritorial applications in the conduct of their political and business affairs.

3. ***ICC may obtain a final text of a soft law nature that promotes a territorial application of laws and regulations.***

Pursuant to Article 12 of the Convention on the Organization for Economic Co-operation and Development of 14th December 1960 which enables non-member organizations to be invited to participate in activities of the OECD, ICC could attend meetings of the OECD whose agenda may be to find solutions, on an economic scale, to the interrelation between extraterritorial rules and other applicable laws. In addition, Article 2 (c) and (d), and Article 5 (b) thereof enables the OECD to adopt recommendations which purpose is to ensure the financial stability and economic development of Member States. Through its involvement in meetings, ICC could leverage for the implementation of an OECD recommendation inviting Members to limit the use of extraterritorial regulations.

Finally, considering the need to take joint and efficient actions at an international level, ICC may take advantage of its UN Observer Status in order to urge for the initiation of studies regarding the impact of extraterritorial regulations on the development of international cooperation in the economic and political fields. Such actions might lead to the adoption of a recommendation by the UN General Assembly, as provided by Article 13 of the UN Charter of 26th June 1945.



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