International Chamber of Commerce
The world business organization

Policy Statement

Extraterritoriality and business

Prepared by the Task Force on Extraterritoriality

Introduction

The International Chamber of Commerce (ICC) has prepared this policy statement to urge the international community and policy-makers, including legislators and regulators, as well as courts, to focus renewed attention on the negative impact that the extraterritorial application of national laws has on international commerce. ICC has established a task force to examine this subject and will issue a more detailed report.

A barrier to cross-border trade and investment

ICC is strongly committed to promoting cross-border investment and trade as indispensable elements of sustainable economic development and world growth. Clear and predictable rules of law are essential to achieve these objectives. The increasing globalization of business and expanding regulation of commerce by states have led to a significant rise in the extraterritorial application of national laws, with states frequently applying or seeking to apply their laws and regulations to persons or conduct outside national borders. Although in some instances this extraterritoriality is an outgrowth of states' efforts to combat terrorism, crime, corruption, cartels, and other concerns on a cross-border basis, ICC believes that the extraterritorial application of national laws and attempts by states to exercise jurisdiction extraterritorially can and does have significant negative effects on international trade and investment. The extraterritorial application of national laws frequently subjects companies to conflicting or overlapping legal requirements, fosters unpredictability, increases the risks involved in commercial activities, exposes companies to overly burdensome litigation in foreign jurisdictions, and inflates legal and other transaction costs.

Examples of extraterritoriality

Extraterritoriality arises in a variety of contexts. Legislatures, regulators, and courts frequently impose rules or policies that have an extraterritorial effect. In some cases, the extraterritorial assertion of jurisdiction is overt, with one State explicitly or implicitly purporting to extend its jurisdiction to conduct or persons outside its territory. Other examples may be less apparent but no less problematic.

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Examples of laws and regulations with extraterritorial impact abound. For example, in 2001, the United States enacted the USA Patriot Act, which *inter alia* authorizes the U.S. Government to seize funds held by a non-U.S. bank in the United States if a customer account maintained overseas in the non-U.S. 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. This provision may thus have a significant impact on the non-U.S. bank, because seizure of the funds by the U.S. Government may not extinguish the non-U.S. bank's contractual obligation to its depositor outside the United States. The USA Patriot Act provision provides that the seizure may be suspended by the U.S. Attorney General upon a determination that a conflict exists between U.S. law and the law where the non-U.S. bank is located if such suspension is found to be in the interest of justice and would not harm U.S. national interests.

A notable series of cases involving Yahoo! highlights extraterritoriality problems seemingly inherent in e-commerce. Pursuant to a French law prohibiting the exhibition of Nazi propaganda and the sale of Nazi memorabilia, a French court ordered Yahoo! to bar access to Nazi-related items in France and to remove related messages, images, and literature from websites accessible in France, including from Yahoo!'s U.S. website. Although Yahoo! removed the material from its French website, Yahoo! initiated proceedings in U.S. court seeking to prohibit enforcement of the French court's decision with regard to its U.S. website on the grounds that enforcement would violate its free speech rights under U.S. law. Following changes by Yahoo! to its U.S. website, the U.S. case was ultimately dismissed on procedural grounds, without resolving the extraterritorial conflict.

Extraterritoriality problems may also occur when laws, rules, and decisions that are purportedly applicable only to persons or conduct within the national territory nevertheless have significant extraterritorial effects. For example, several states have recently enacted corporate governance legislation regulating companies listed on national stock exchanges. Although these laws are purportedly national in scope, they frequently have significant extraterritorial impact far beyond national borders as they may conflict or overlap with other states' laws. Similarly, decisions by merger review authorities can have far-reaching extraterritorial impact -- particularly in the absence of adequate consultation and cooperation among various national authorities. For example, in July 2001, the European Commission unexpectedly blocked a proposed merger between General Electric and Honeywell, two U.S. companies, even though the U.S. Justice Department had previously cleared the deal.

A heavy burden on business

The extraterritorial application of national laws affects companies of all sizes and across industries. Multinational companies frequently face extraterritoriality problems and bear heavy costs. However, small and medium-sized businesses too are affected and are often the least able to bear the costs that these measures impose. By imposing a considerable burden on international business, 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. Extraterritoriality also creates considerable commercial and legal uncertainty. This uncertainty discourages international businesses from engaging in trade and investment and distorts trade and investment decisions by international businesses.

Extraterritoriality may encourage forum shopping, duplicative legal proceedings, and potentially divergent outcomes. Extraterritoriality also increases tensions among governments, stemming both from disagreements by states on the means of regulating activity or the policies underlying extraterritorial measures and from discord in addressing such conflicts. In some instances, governments have enacted blocking statutes to prevent the application of another state's laws from having extraterritorial effect, which can leave companies in an impossible quandary where compliance with one state's laws constitutes a violation of another's.

ICC action to resolve extraterritoriality problems

Over the past two decades, ICC has voiced the concern of international business regarding the negative effects of extraterritoriality on world trade and investment. In 1986, ICC adopted a policy statement urging governments to avoid application of their laws to situations unconnected or only loosely connected with their territory and to promote intergovernmental consultation and cooperation to avoid and, where necessary, resolve extraterritoriality disputes. ICC also established an international task force, which produced in 1987, under the leadership of Dieter Lange, a report on the many aspects of extraterritoriality and its adverse consequences on international business (*The Extraterritorial Application of National Laws*, 1987, Kluwer and ICC Publishing). This report has provided the basis for continued international dialogue promoting the importance of international comity and consultation and cooperation to further international trade and investment.

In recent years, ICC has continued to pursue its efforts against extraterritoriality, including by acting as amicus curiae before courts such as the U.S. Supreme Court in cases in which the extraterritorial application of national laws represented a threat to international commerce. For example, in 2004, two cases in which ICC acted as amicus curiae resulted in decisions mitigating to some extent the extraterritorial impact of specific legislation. First, in the *Sosa* case, the U.S. Supreme Court sought to confine the scope of the U.S. Alien Tort Statute, which has significant extraterritorial impact. That statute grants U.S. federal courts jurisdiction to hear claims against U.S. and non-U.S. defendants alleging that a tort has been committed -- ostensibly anywhere in the world -- in violation of international law, as interpreted by U.S. courts. Often, cases brought under the ATS have little to no connection with the United States or U.S. nationals. The Supreme Court's decision narrowed the types of violations of international law that can be pursued under the ATS, which is likely to curtail some -- but by no means all -- of the statute's extraterritorial impact. Second, in the *Empagran* case, the U.S. Supreme Court recognized limits on the application of U.S. antitrust law to conduct outside the United States and emphasized the importance of international comity in today's increasingly global economy. The full, longer-term impact of both decisions will depend, in part, on how lower courts in the United States interpret and apply the Supreme Court's rulings.

Notwithstanding the continued efforts of the business community over the years to mitigate the negative impact of extraterritoriality, the extraterritorial application of national laws has reached new heights and poses renewed threats to international commerce.

Recommendations

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

1. ICC encourages policy-makers, including legislators and regulators, as well as courts, to ***recognize international comity and principles of moderation*** and respect for other states' interests when enacting legislation, enforcing rules, or otherwise exercising jurisdiction. In this regard, ICC urges all states and the EU to put into practice the proposals agreed in 1984 by the governments of the OECD member countries and annexed to the Declaration on International Investment and Multinational Enterprises in 1991, which are expressly aimed at avoiding or minimizing the imposition of conflicting requirements on international commerce. In particular, the OECD member countries agreed that states should endeavor to avoid or minimize such conflicts, by having due regard to relevant principles of international law, by showing moderation and restraint, by respecting and accommodating the interests of other states, and by taking fully into account the sovereignty and legitimate economic, law enforcement, and additional interests of other states.

2. ICC encourages policy-makers, including legislators and regulators, as well as courts, to ***limit the application of national laws and regulations to matters connected to their national territory by a substantial and predictable link***.

3. ICC encourages states to ***foster the convergence and harmonization*** of divergent national laws and policies and to accept the mutual recognition of equivalent standards, although not all areas of law may be suitable for harmonization. Such efforts must not devolve into acceptance of the lowest common denominator.

4. ICC encourages states to ***strengthen bilateral and multilateral consultation and cooperation*** between regulators from various states to prevent and resolve extraterritoriality disputes. In this regard, merger review authorities should, in international matters, consult in order to avoid conflicting decisions. ICC recommends, to that effect, enhancing cooperation within the International Competition Network. ICC also advocates the formation of consulting bodies, allowing, for example, the EU Commission and the U.S. Department of Justice to resolve in a consistent manner competition issues involving both the EU and U.S. markets.

5. ICC encourages policy-makers, including legislators and regulators, as well as courts, to ***avoid conflicting decisions*** by recognizing the decisions rendered in other states on the basis of international comity and internationally recognized criteria of jurisdiction.

6. ICC encourages courts to ***refrain from exercising judicial jurisdiction in matters that lack a substantial and predictable link with their territory***. As a step in this direction, ICC urges governments promptly to explore signature and ratification of the Hague Convention on Choice of Court Agreements, which applies to a wide range of commercial agreements in which the parties have chosen to include exclusive choice of court clauses and sets out rules on the exercise of judicial jurisdiction as well as

enforcement of court decisions in those circumstances. ICC also encourages states to explore further limits on the exercise of judicial jurisdiction in recognition of the principle of international comity.

7. More generally, ICC encourages governments to ***consider greater use of intergovernmental organizations*** (such as the OECD) as vehicles for discussing and resolving disputes related to the extraterritorial application of national laws. In this regard, ICC further encourages governments to explore the feasibility of an international convention on the extraterritorial application of national laws providing for means of resolving extraterritoriality disputes, where appropriate, by way of consultation, cooperation, conciliation, or arbitration.

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About ICC

ICC is the world business organization, the only representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world. ICC promotes an open international trade and investment system and the market economy. Business leaders and experts drawn from ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. ICC was founded in 1919 and today it groups thousands of member companies and associations from over 130 countries.