

Extraterritorial Jurisdiction and the UN Guiding Principles

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Extraterritorial Jurisdiction

- A controversial topic
- Problem of “governance gaps”
- What is the proper role of “home states” of multinationals?
- Competing claims from different stakeholder groups regarding
 - What home states **must** do
 - What home states **could** do
 - What home states **should** do

What ***must*** home states do?

- Guiding Principle 2: No general customary law requirement
- But note interpretative guidance of treaty bodies regarding home state responsibilities

What ***could*** home states do?

- Misunderstandings about what “extraterritoriality” and “extraterritorial jurisdiction” actually means has made proper debate difficult
- 2009-2010 survey of state practice in relation to extraterritorial jurisdiction
- What lessons can we learn from other regulatory areas that might be relevant to the business and human rights sphere?

What *could* home states do?

Key conclusions of extraterritorial jurisdiction study

- The international law rules only deal with a part of the regulatory picture.
- States are becoming more interventionist in a number of areas.
- States manage overlapping jurisdictional claims in various, and sometimes innovative, ways.
- “Domestic measures with extraterritorial implications” are generally less controversial, and are generally less opposed by other states, than assertions of direct extraterritorial jurisdiction.

What *could* home states do?

- States have considerable scope to act, especially as regards “domestic measures with extraterritorial implications”.
- But there is an overarching requirement of “reasonableness”.
- What does “reasonableness” mean in practice?

Factors relevant to “reasonableness”

Green lights, e.g.	Red lights, e.g.
The regulation is authorised or required under a multilateral regime.	The regulation is unilateral. It is not authorised or required under a multilateral regime.
The regime is concerned with an issue about which there is international concern.	The regime is concerned primarily with the national interests of the regulating state.
There is international consensus that the regulated activity is wrongful, undesirable or offensive.	There is a lack of consensus that the regulated activity is wrongful, or that there is a need for regulation.
There is a reasonable degree of international consensus as to the appropriateness and proportionality of any penalties proposed.	There is a lack of consensus among states as to the appropriateness and proportionality of any penalties proposed.
The regulation is flexible, principles-based and outcomes oriented.	The regulation is inflexible, and is based on detailed prescriptive standards.

What *should* home states do?

- Guiding Principle 2: “States should set out clearly the expectation ...”
- Home states need to provide effective and consistent guidance to companies.
- Note that additional steps are called for in relation to companies receiving “substantial state support” (Guiding Principle 4).
- Home states should also encourage, and in some cases require, reporting of global human rights impacts (Guiding Principle 3).
- Note that guidance and support are minimum requirements – other regulatory initiatives are not ruled out.