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Extraterritorial Jurisdiction: From Theory to International Practices and the Case of Vietnam Law

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Abstract

Extraterritorial jurisdiction is a concept that has been studied and applied for a long time in the legal practice of a number of states. With the evolution of international law, the jurisdiction of each state is established not only on the basis of territorial factor, but also of other factors that represent certain relationship with the state, such as the nationality, the effect of the act on the nation and national sovereignty. These jurisdictions are extraterritorials. However, the grounds for establishing this extraterritorial jurisdiction arouse a lot of debate. The paper analyzes the relationships that make up extraterritorial jurisdiction in accordance with international law and relates to the practice of Vietnam law to clarify the changes of the legal system of Vietnam at present in establishing its jurisdiction over persons and things.

Keywords: law, provisions, jurisdiction, extraterritorial jurisdiction, Vietnam

1. From Territorial Jurisdiction- Traditional Principle of International Law

In international public law, jurisdiction is defined as the legal right recognized by international law to a country, whereby the country has the right to enact and enforce laws(1). In another words, it is about the power to exercise authority over persons and things within a territory. It constitutes the principle of international law, generally known as territory principle. This principle has two aspects: positive and negative ones. According to the positive aspect, a sovereign state has right to prosecute criminal offences that are committed within its borders. The negative aspect bars state from exercising jurisdiction beyond their borders, except in cases where states have jurisdiction under others principles such as principles of nationality, active and passive principle, protective principle, universality principle.

The term "jurisdiction" in international public law is understood more broadly than its meaning in national law or international private law. Jurisdiction in international public law not only relates to the authority of courts to adjudicate, the power of state to prescribe, but also implies the right of state to enforce laws, according to different state functions.

In *The Third Restatement of Foreign relation law of the United States*, (herein under referred to as the Third Restatement),(2) the American Law Institute introduces the concept of jurisdiction: jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce.(3) Prescriptive jurisdiction can be interpreted as that

[1] O. Thiam, "L'évolution du droit international public et la notion du domaine de compétence nationale de l'État" (The evolution of international public law and the notion of the state's national sphere of competence), Doctoral thesis in 2014, University of Reims Champagne-Ardenne, Republic of France, http://www.theses.fr/2014REIMD004, visited on July 19, 2019; C. Rygaert, "The Concept of Jurisdiction in International law", https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf, visited on July 19, 2019; A. Mills, "Rethinking jurisdiction in International law", *Bristish Yearbook of International law*, vol. 84, issue 1, January 2014, pp. 187-239, https://academic.oup.com/bybil/article/84/1/187/2262836, visited on July 19, 2019; A.J. Colangelo, "What is Extraterritorial Jurisdiction", *Cornell Law Review*, 2014, vol. 99, p. 1303 - 1352, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.fr/&httpsredir=1&article=4640&context=clr, visited on July 19, 2019.

[2] The collection presents the United States law on international relations including the collection of legal precedents from the America Law Institute.

[3] Section 401 of Restatement (Third) states as follows: Under international law, a state is subject to limitations on:

(a) Jurisdiction to prescribe, i.e, to make its law applicable to the activities, relations, or the status of persons, or the interests of persons in

legislative, executive or judicial bodies exercise authority over activities, relationships arising between entities or over their legal status. Adjudicative jurisdiction is the power to subject persons or things to the process of its courts or administrative tribunals. Enforcement jurisdiction is the power to coerce or punish violations.

Jurisdiction is closely associated with the concept of national sovereignty. To be sovereign, that country must meet three criteria: Territory, Residents and True Government. Territory is where the country exercises its power. Territory embraces land areas, territorial waters and airspace. Residents are the people living on the territory. And the true government must fulfill the obligations required by international law from the country on its territory.

When recognized as sovereign, the country hereof has full power to exercise its jurisdiction over people and acts on its territory. The Permanent Court of International Justice has dictated in its celebrity case Lotus that: *"... jurisdiction is certainty territorial; it cannot be exercised by a State outside its territory except by a virtue of a permissive rule derived from international custom or from a convention"*. [(4)] Other countries cannot take any action on the territory of one country without the permission of that country.

In this regard, jurisdiction is closely related to territory. Territory is the limit which international law places upon jurisdiction. The reason is that the title for exercising jurisdiction of a state rests in its sovereignty. It also known as *"rationnae loci"* jurisdiction. As a consequence, other countries have no jurisdiction over matters that fall under a country's jurisdiction. For acts taken abroad, country has no jurisdiction, unless otherwise permitted by international custom or international convention. This is also the traditional point of view of international law on jurisdiction. [(5)]

In short, international law not only allows state to exercise its jurisdiction, but also delineates the exercise of jurisdiction among states based on territorial factors. Territorial jurisdiction is widely recognized and has become the traditional principle of international law.

The delineation of jurisdiction in international public law is of great significance to international private law, to the extent that it helps to determine jurisdiction as understood in international private law. It can be seen that territorial factor are also important factor frequently used to determine the authority of national courts in international private law. The determining of national court authority for acts performed on territory, over property (movables or real estate) on territory, entities residing or headquartering on territory… clearly shows the role of territorial factor in international private law. Regulations in international private law are also considered as background factors for the evolution of international law on jurisdiction [(6)]. Efforts to harmonize international private laws by concluding international treaties on national immunities, on contract law, etc. clearly manifests the close relationship between international public law and international private law in the sphere of jurisdiction.

2. To Extraterritorial Jurisdiction Making the Evolution of International Law

Extraterritorial jurisdiction is a concept that has been referred to for quite a long time in the research world,

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things, whether by legislative, by executive act or order, by administrative rule or regulation, or by determination of a court.

(b) Jurisdiction to adjudicate, i.e., to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings;

(c) Jurisdiction to enforce, i.e., to induce or compel compliance or punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudical action.

[4] See the case on the page: https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf, visited on September 10, 2019. However, researchers consider that, through the case of Lotus, international law does not prohibit a state from the exercise of extraterritorial jurisdiction towards a number of entities, things and acts occurring outside the national territory. See: B. Stern, "Quelques observations sur les règles internationales relatives à l'application extraterritoriale du droit", doc.sited, p. 16.

[5] See more: C. Ryngaert, doc.sited, p. 1-4; A. Mills, doc.sited, p. 190-194; See more on website: https://supreme.justia.com/cases/federal/us/213/347/case.html, visited on February 21, 2019. Territorial principles were also acknowledged for the first time in U.S. legal precedents with the typical case of American Banana Co. v. United Fruit Co. (1909). See the case of American Banana Co. v. United Fruit Co. (1909) on the page web: https://supreme.justia.com/cases/federal/us/213/347/case.html, visited on July 19, 2019. The case happened between two American company doing business together in Panama, by then under the management of Costa Rica government. United Fruit took advantage of the government's sponsorship to hold the monopoly position before American Banana did business there. American Banana brought a suit to the Supreme Court of the United States claiming compensation for damages under Article 7 of the Sherman Act, arguing that United Fruit caused the Costa Rica government to destroy the banana plantation of American Banana in order to maintain its monopoly position thus affecting the importation of banana from Central America into the United States. The court refused to handle the case on the grounds that the incident occurred outside the United States territory, the abuse of United Fruit's monopoly position lied outside the scope of the Sherman Act. Through this case, it can be seen that the United States court has applied territorial principles to determine its jurisdiction.

[6] A. Mills, doc.sited, p. 200-209;.

especially it can be mentioned the researches by Brigitte Stern,[7] C. Ryngaert[8], by lawyer Jean-Pierre Riel, by John H. Shenefield,[9] Anthony J. Colangelo.[10] This issue is also discussed in the fields of law on companies, competition law, etc. The American Law Institute also incorporates the points of view of U.S. judges on extraterritorial jurisdiction in its two collections: The Second and the Third Restatement of Foreign relation law of the United States [11]. Although not considered as the source of U.S. law, these collections are still referred to by U.S. courts when dealing with cases involving this issue. In Vietnam, though no in-depth research on the issue reported, there have also appeared a number of studies with remarkable observations about the principles of extraterritorial jurisdiction in competition law. [12]

In the context of international integration, this issue is increasingly concerned with, especially in regard to the determination of jurisdiction. Because, the enforcement of law by a country will probably influence the exercise of the jurisdiction of other countries, or in other words, arouse a conflict of jurisdiction between countries. For that reason, extraterritorial jurisdiction of a state will only be recognized by other states on the basis of international law.

Reality shows that, each country does not exist separately, but only in a community of countries related to one another in various fields. Therefore, the application of the principle of absolute jurisdiction on territory has some certain shortcomings. These shortcomings are obviously showed in the community of countries where every single person, every country in the world connect each other non-stop. According to the theory of jurisdiction based on community of countries [13]. Especially, in the present context of global integration as well as the electronic technology creates a "flat" world like today, when the boundary between countries is no longer an obstacle in connecting between individuals. The development of the world lead to the evolution of international law, towards the law of cooperation between countries rather than the law of coexistence of countries. This point of view creates a positive way to understand jurisdiction as presented in modern world. In many cases, states are obliged to exercise their jurisdiction over matters relating to the common values respected and protected by the international community. For that reason, there have been many international conventions defining the obligation over international legal cases (particularly war crimes, acts of torture and terrorism). In the sphere of human rights, the obligation to exercise jurisdiction is also included in international conventions to protect human rights for individuals under national jurisdiction, though being outside the national territory. That practice leads to the exercise of extraterritorial jurisdiction of each state.

The factor "extraterritorial" can be construed in many different ways. In a simple way, that means "beyond territorial" -- beyond the national territorial borders. As analyze above, a state has full power to enact, adjudicate and enforce jurisdiction over acts taking place in its territory. If any of such act takes place outside national territory or the entity is located within the territory of another country, the exercise of the jurisdiction over that act or entity will be deemed to be extraterritorial.

For B. Stern, the application of the law is considered as beyond the territory when the process of applying law (from enactment until enforcement) is conducted outside the territory of the enacting country [14]. The territory is

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[7] B. Stern, "Quelques observations sur les règles internationales relatives à l'application extraterritoriale du droit", *doc.sited*; "L'extraterritorialité revisistée: Où il est question des affaires Alvarez- Machain, Pâte de bois et de quelques autres…, AFDI, 1992, p. 239 - 313, https://ael.eui.eu/wp-content/uploads/sites/28/2013/04/12-Vinuales-Background7-Lextra-territorialit%C3%A9-revisite.pdf, visited on July 19, 2019; "Une tentative d'élucidation du concept d'application extraterritoriale", *Revue québecois de droit international*, 1979, 49-78, https://www.sqdi.org/wp-content/uploads/03_-_brigitte_stern.pdf, visited on July 19, 2019.

[8] C. Ryngaert, "Territority in the Law of Jurisdiction : Imagining Alternatives", in M. Kuijer and W. Werner (eds.), Netherlands Yearbook of International law 2016, pp. 49-82

[9]. Jean-Pierre Riel, "L'application extraterritoriale du droit communaitaire de la concurrence et les entreprises canadiens", *Revue générale de droit*, 1989, p. 693 - 718, http://www.rielmtl.ca/pdf/revue_generale_de_droit.pdf, visited on July 19, 2018; John H. Shenefield, "Thoughts on Extraterritorial application of the United States Antitrust laws", *Fordham Law Review*, 1983, Vol. 52, iss. 3, p. 350 - 373, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2569&context=flr, visited on July 19, 2019.

[10] A. J. Colangelo, "What is extraterritorial jurisdiction?", doc.sited, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.fr/&httpsredir=1&article=4640&context=clr, visited on July 19, 2019.

[11]. K. Hixson, "Extraterritorial jurisdiction under the Third Restatement of Foreign Relation law of the United States", doc.sited, p. 129-132.

[12]. Duong Van Hoc, "The principle of extraterritorial jurisdiction in U.S. competition law and the revision of the objects of regulation of Vietnam competition law", *Journal of Legislative Studies,* http://www.nclp.org.vn/kinh_nghiem_quoc_te/nguyen-tac-ngoai-lanh-tho-trong-phap-luat-canh-tranh-hoa-ky-va-viec-xem-xet-lai-111oi-tuong-111ieu-chinh-cua-phap-luat-canh-tranh-viet-nam/#ref18, visited on July 19, 2019.

[13] C. Ryngaert, doc.sited, p. 14-20; A. Mills, doc.sited, p. 209-213; O. Thiam, doc.sited, p. 261-262.

[14] B.Stern, "Quelques observations sur…", doc.sited, p. 9.

construed as the scope of application of law. Extraterritoriality is the situation where the law applies to the circumstances occurring outside the territory of the enacting country.

In some cases, identifying an extraterritorial act or crime is not easy. According to Anthony J. Calangelo [(15)], there are acts or crimes which are thought to be extraterritorial but can be analyzed as being within the territory of a state. Calangelo gives an example of a gunman from country A to country B. The question is where this happens? Whether country A has jurisdiction over this case? The answer will depend on which part of the case we focus on. If relating to the act of the murderer, then the act takes place in country A. If relating to the consequence of the murderer's act, the act takes place in country B.

From the perspective of international private law, the determination of whether the jurisdiction is extraterritorial or not will depend on the determination of the governing law. Specifically, if the conflict of legal norms determines the applicable law based on where the damage is caused, the act is deemed to be performed in country B. At this time, country B will apply its law to the act in the name of this is an act under territorial jurisdiction. In other words, country B will not be deemed to exercise the extraterritorial jurisdiction if it applies its law to the murderer. Inversely, if the rule of conflict of laws is based on where the murderer started the act, then country A has a territorial jurisdiction over the act. Further analysis shows that, since both country A and country B have different rules of conflict of laws, this would lead to the case where both countries have or do not have jurisdiction.

From the perspective of international public law, both country A and country B are considered to have territorial jurisdiction. Since, under international public law, territorial factors are the basis for creating national jurisdiction and forming the principle of territorial jurisdiction in two aspects: objective and subjective. In the subjective aspect, the country will have jurisdiction over the act that is started on its territory. Thus, country A will have jurisdiction over the murderer's act of shooting. In the objective aspect, the country will have jurisdiction over acts that cause impact on its territory, even though the act is performed outside the national territory. In this case, country B will have jurisdiction over the extraterritorial act when this act causes consequences on the national territory (the consequence of shooting a gun at others). This principle was also applied in the Lotus case of the Permanent Court of International Justice. However, the important thing is how to interpret this principle. As reality shows that there will be different ways of interpretation, leading to different broad and narrow interpretations. This principle has also formed the effect theory of extraterritorial jurisdiction.

3. Extraterritorial Jurisdiction in International Practices

3.1 Jurisdiction Based on the Effect of Act

The effect theory was first mentioned in the legal precedents of US courts, especially Alcoa case, US vs. Aluminum Co of America[(16)]. Alcoa is a US company that, together with many other distributors of Canada and those of Europe, established cartels through Aluminum Limited, a subsidiary, to create a monopoly on aluminum market in the world. The US government brought a suit against this company based on the provisions of the Sherman AntiTrust Act – later on referred to as the Sherman Act). Alcoa argued that since most corporation operations are carried out outside the territory of the United States, they do not fall under the US jurisdiction. The United States Court of Appeals concluded that Alcoa had violated the Sherman Act despite its extraterritorial operations, on the grounds that these activities were intended and did impact importation into the United States.[(17)] Nevertheless, this claim was strongly criticized for creating an overly broad understanding of the basis for establishing national jurisdiction.

Then, there was an amendement of effect theory in the US law. In the Second Restatement, the effect theory was approached from the narrower perspective, whereby the country can exercise its prescriptive jurisdiction only if the relation between territory and effect of act meets certain conditions [(18)]. Specifically, this principle requires

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[15] A. J. Colangelo, doc.sited, p. 1322 - 1323.

[16] The effect theory was first proclaimed by judge Learned Hand in Alcoa's sentence in 1945. That was also the first time the principle of extraterritorial jurisdiction was applied in competition law. http://www.invispress.com/law/international/alcoa.html, visited on July 19, 2019. See this precedent on the website: https://supreme.justia.com/cases/federal/us/377/271/, visited on July 19, 2019

[17] Section 1 of the Sherman Anti-trust Act 1890 states: "Every contract, combination in the form of trust or otherwise, or compiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." http://www.stern.nyu.edu/networks/ShermanClaytonFTC_Acts.pdf, visited on July 19, 2019.

[18] Pursuant to clause 18 of the Second Restatement: States have the right to rule outside the territory when the relationship affecting the territory meets the following conditions: The relevant circumstance is also condemned by countries with rationally developed legal system; if the impact is a constituent factor of the governed activity, if it is fundamental and a direct consequence, there is a foreseeability of extraterritorial acts; if the provisions set out are not contrary to the widely accepted principles of justice.

the impact of the act be direct, basic and foreseeable. However, even when this principle is interpreted with limits of applicable conditions, it is still criticized by researchers, particularly scholars from the European Union [(19)].

In the Third Restatement, this principle is once again construed in a broad sense, giving the state the right to apply law to acts performed outside the territory but to create effect basically inside the territory. This approach alleviates the requirement of the Second Restatement, with respect to the effect of the act. The Third Restatement does not require that act be viewed as a crime against the international community as provided in the Second Restatement [(20)]. With this approach, a state will have extraterritorial jurisdiction, due to the effect of the act within the state's territory.

The Third Restatement also provides the rule for delineating jurisdiction. It is the rule of rationality. As it is found that the boundary for delineating jurisdiction and extraterritorial jurisdiction is not clear. Specifically, a state will not exercise the prescriptive jurisdiction over entities or things correlated with other states when the exercise of this jurisdiction is unreasonable. Under this rule, rationality is assessed based on a set of important factors, including those are not listed in the regulations of the Third Statement. Even when the prescriptive jurisdictions of two or more states are determined to be rational; this conflict of jurisdictions will be resolved insofar as each state has its self-assessment based on its own interests and that of others. If another state's interests are assessed to be greater, then that state will have jurisdiction. However, according to the Third Statement, each state has an obligation to self-assess. It is clearly pointed out that each state is not obliged to, but only recommended to grant jurisdiction to other states. This way of delineation is drawn up on the principle of community, in the context where each state does not exist separately but within a community of states related to one another [(21)].

As such, when jurisdiction is determined based on the effect of act, that jurisdiction will be extraterritorial. Extraterritorial jurisdiction can also be determined based on other factors, such as nationality factors, sovereignty factors, … These are the factors that make up the relationship with the country, serving as grounds for establishing jurisdiction. In European Union, the rule of necessary jurisdiction is also recognized, allowing the courts of the member state to solve case even though there is no relationship with that state. This rule has been admitted in at least ten member countries including France, Germany, Austria, Belgium, the Netherlands, Sweden[(22)].

3.2 Jurisdiction Based on Nationality

A country's jurisdiction over its citizens has long been recognized by international law. Nationality is the legal relationship between a certain individual or legal entity with a given state. The basis for exercising jurisdiction over citizens is because of citizen's interests. The relationship between the state and citizens is not restricted by territorial boundaries but can transgress the national territory. By then, the state is entitled to exercise its jurisdiction over its citizens even though they are outside its territory. The relationship with respect to nationality applies to entities, by means of individuals, legal persons, sea transport such as ships, airplanes, etc. The jurisdiction exercised over activities of entities outside national territory is considered as extraterritorial jurisdiction.

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[19] B. Stern, "Quelques observations sur…", doc.sited, p. 31 - 32.

[20] Pursuant to Section 402, the basis of jurisdiction is determined under three approaches. Two of these are to give state the right to prescribe acts that are performed inside the national territory or towards entities or things inside that country. As for the third approach, the basis for establishing jurisdiction is the effect of acts. See more about views on differences in jurisdictional provisions between the two Restatements: K. M.Meessen, *Conflicts of jurisdiction under the new Restatement, Law and Contemporary Problems*, 1988, vol.50, n.3, p. 47 - 69, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3903&context=lcp, visited on July 19, 2019; Kathleen Hixson, doc.sited, p. 134.

[21] See more about U.S. legal precedents regarding extraterritorial jurisdiction: The incident of *Timberlane Lumber Co. v. Bank of America* (1976): In this case, the U.S. court has set the criteria to determine reasonable jurisdiction. U.S. courts should consider the issue of reciprocal diplomatic relations and the separation of national sovereignty as well as consider the interests between countries in real situations when applying the influence theory.

https://law.justia.com/cases/federal/district-courts/FSupp/574/1453/1867331/, visited on July 19, 2019; The case of Mannington Mills, Inc. v. Congoleum Corp (1979): In this case, the U.S. court has added some factors to consider reasonable jurisdiction: The existence of regulatory measures of foreign law (1); influence on diplomatic relations; possibility of applying foreign remedies in the United States (3), https://law.justia.com/cases/federal/appellate-courts/F2/610/1059/77869/, visited on July 19, 2019. Vụ việc F. Hoffmann – La Roche Ltd. v. Empagran S.A (2004) introduces a harmonious approach of the principle of extraterritorial jurisdiction. The harmony approach here expresses respect for national sovereignty of a foreign state with taking into account the context of globalization in trade.

https://supreme.justia.com/cases/federal/us/542/155/, visited on July 19, 2019.

[22] A. Mills, doc.sited, p. 222.

However, the use of this basis with an overly broad way of understanding will not be accepted[23]. That is the case of exercising extraterritorial jurisdiction over individuals or legal persons with a real nationality relationship. It is necessarily to show two typical legal precedents of the International Court of Justice on this issue. They are the cases of Nottebohm and Barcelona Traction[(24)].

In the Nottebohm case, the International Court of Justice upheld the principle of effective nationality in case where the individual has more than one nationality. The determination of and individual's nationality must be made based on the actual situation of the case: the individual's place of residence, center of interests, political activities, family relationship, etc. While for the Barcelona Traction case, the International Court of Justice held that there was a general rule of international law that when an unlawful act was committed against a company, only the state of incorporation of the company could sue, not state of shareholder. The legal ground for exercising state's jurisdiction is determined on the basis of passive sovereignty theory [(25)]. Accordingly, the state is entitled to protect citizens of the crimes committed by foreigners. International practices show that the nationality relationship seems to be understood in the broad sense whereby the state can exercise over cases that occur outside the territory if the victim or beneficiary is the citizen.[(26)] This case can be clearly seen in the stipulation of Article 14 of the French Civil Code: *"Foreigners, even when not residing in France, can be sued in French courts, to perform the obligations that this person committed in France against French citizen; this person can also be sued in French courts for the obligations committed abroad with the French ".*[(27)] Further, the view on extending jurisdiction with respect to nationality is also established based on the theory of control whereby a country has certain jurisdiction over foreign companies that have the majority of the capital owned by their citizens.[(28)] United States law also provides for the right to impose taxes on citizens living and working outside the national territory.[(29)]

3.3 Jurisdiction Based on National Sovereignty

In addition to the jurisdiction determined based on territorial factors, entity factors, jurisdiction is also determined based on national sovereignty. It can be seen that, for cases where there is no direct relationship to territory, the exercise of extraterritorial jurisdiction will probably be hindered by the principle of non-intervention in other state's with respect to its sovereignty, as recognized by international law.[(30)] However, along with the current evolution of international law and practices, these principles have gradually been "softened". Particularly, with the recognition of human rights law, international law allows intervention in

[23] B. Stern, " Quelques obsservations sur…". doc.sited, p. 33-35.

[24] The case of Nottebohm was on November 18, 1953 and April 6, 1955 (*CIJ. Rec. 1953* and *1955*). http://www.icj-cij.org/files/case-related/18/2675.pdf, visited on July 19, 2019. In this case, Liechtenstein filed a lawsuit against Guatemala to the Justice Court to protect its citizen, on the ground that Government of Guatemala has acted against Mr. Nottebohm and his property in contrary to international law. It can be called the Nottebohm principle. The case of Barcelona Traction was on February 5, 1970 (*CIJ. Rec. 1970*), http://www.icj-cij.org/files/case-related/50/5388.pdf, visited on July 19, 2019. In the case of Barcelona Traction, the determination of a state that has legal interest for bringing a claim has been clarified by the International Court of Justice. The question posed in this case is whether a state (in this case is Belgium) has the right to carry out diplomatic protection of shareholders when an unlawful act was committed against a company, established in another state. In this case, a company, named Barcelona Traction, incorporated in Canada, but having shareholders that was Belgian citizen. It is necessarily to point out that the measures taken by the government of Spain are supposed towards the company rather than its shareholders. The International Court of Justice rejected Belgium's claim, stating that it did not have legal status to carry out diplomatic protection of its shareholders. According to the International Court of Justice, authorizing to carry out diplomatic protection of shareholders being nationals of their country would lead to instability in international economic relations.

[25] A.Mills, doc.sited, note 43, p. 198.

[26] See more about B. Stern, "Quelques observations sur …", doc.sited, p. 34.

[27] See French Civil Code on: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721, visited on July 19, 2018.

[28] A.Geslin, "La position de la France en matière d'extraterritorialite du droit economic national", *Revue juridique de l'Ouest*, vol. 10, n.4, 1997, p. 411-467, http://www.persee.fr/doc/juro_0990-1027_1997_num_10_4_2405, visited on July 19, 2018.

[29] *Restatement (Third)* (1987), doc.sited, tiết 411-12.

[30] This principle is known in English as "*non-intervention"* and has been confirmed in resolutions of the General Assembly of the United Nations (Resolutions 2131, 2625, 31/91, 36/103) was the Charter of the United Nations (clause 7, Article 2). See the UN Charter on the website:

http://www.un.org/fr/sections/un-charter/chapter-i/index.html, visited on July 19, 2018. This principle has been widely known through the judgment of the International Court of Justice in the case of Nicaragua's lawsuit against the United States (also known as the Nicaragua case), on June 27, 1986, http://www.icj-cij.org/docket/files/70/6502.pdf, visited on July 19, 2018. See more about studies of this principle: M. Kohen, "The principle of non – intervention 25 years after the Nicaragua Judgment" *Leiden Journal of international law*, vol. 25, 2012, pp. 157-164 on the website http://graduateinstitute.ch/files/live/sites/iheid/files/sites/international_law/shared/international_law/Prof_Kohen_website/Publications%201/82%20-%20_LJL_Kohen_Nicaragua_Non_Intervention.pdf, visited on July 19, 2018.

matters that fall under a country's jurisdiction in a number of cases.(31) The evolution of international law has facilitated the creation a new principle of international law, i.e. the principle of cooperation between countries.(32) Accordingly, states have an obligation to cooperate with each other peacefully and in good faith to resolve the disputes that fall under extraterritorial jurisdiction.(33)

A state may invoke its sovereignty to protect national security and territorial unity by establishing national jurisdiction. In other words, as a sovereign entity, the country has jurisdiction over matters that impact on its existence, national security and national sovereignty. The right to exercise jurisdiction over all acts though performed extraterritorially but infringing upon the basic interests of the nation is recognized by international law. This jurisdiction is also known as extraterritorial jurisdiction, based on the principle of protection. When constituting the values of the international community, the basic interests of each nation will become the foundations that create the global jurisdiction of each state. By then, each state will have jurisdiction over acts that infringe upon the interests the whole international community attach importance to, such as crimes against humanity, pirates, human trafficking, although such crimes are not at all related in respect of nationality as well as territory to that country. This jurisdiction creates extraterritorial jurisdiction, based on the principle of unified community (34). The state may also have jurisdiction based on the performance of its public services abroad or with regard to foreigners participating in these public services.

4. The case of Vietnam Law

Current Vietnam law has provisions on national jurisdiction consistent with international law. With the changes of a series of laws in recent times, Vietnam law has exhibited progress, modernity and integration in a new context.

Specifically, the provisions of the Code of Civil Procedure of Vietnam in 2015 on the determination of jurisdiction of Vietnamese courts over cases involving foreign elements clearly show this change. Article 496 of the Code of Civil Procedure of Vietnam in 2015 extends jurisdiction to Vietnamese courts in settling disputes involving foreign elements over cases involving rights and obligations of Vietnamese organizations, individuals without needing to have a territorial connection (Paragraph 1, sub-paragraph e). Previously, in Vietnam law, the nationality factor is used in combination with territorial factors to determine jurisdiction of Vietnamese court. This approach restricted the jurisdiction of Vietnamese courts over cases occurring abroad and relating persons who are Vietnamese citizens with the mandatory requirement that one of the persons concerned must reside in Vietnam This restriction has constrained the jurisdiction of Vietnamese courts and created gaps of jurisdiction over disputes between Vietnamese individuals, organizations and agencies with foreign entities. The change of Code of Civil Procedure in 2015 creates great significance not only to private actors but also to Vietnam its- self in the international community. In the context extensive international integration, when the interests of entities have gone beyond the borders of territory, the determination of Vietnamese courts' jurisdiction over disputes related to the rights and obligations of actors having Vietnamese citizenship or place of residence, headquarters in Vietnam is necessary, to ensure the right to access justice for private actors and also the fulfillment of the obligations of a state in accordance with international law in the situation of denial justice[35]. These new provisions show that the legal system of Vietnam is gradually integrated into and compatible with the legal system of advanced countries in the world and international law as well.

Likewise, provisions on extraterritorial jurisdiction are also clearly set out in Article 6 of the Penal Code in 2015.

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[31] J. Westmoreland-traoré, "Droit humanitaire et droit d'intervention", https://www.usherbrooke.ca/droit/fileadmin/sites/droit/documents/RDUS/volume_34/34-12-westmoreland.pdf, visited on July 19, 2018; Marcelo Kohen, doc.sited, p. 162. The evolution of the current international law also shows that the judgment of the International Court of Justice in the Nicaragua case still remains valid and lays the foundation for the evolution of international law at present.

[32] H. Ascensio, "Etude: l'extraterritorialité comme instrument", http://www.diplomatie.gouv.fr/IMG/pdf/1_2PESP_2_Etude_lextraterritorialite_comme_instrumentx_cle84485e.pdf, visited on July 19, 2019.

[33] H. Ascensio, doc.sited, p. 2; Alex Mills, doc.sited, trang 209; B. Stern, "Une tentative d'élucidation du concept d'application extraterritoriale", https://www.sqdi.org/wp-content/uploads/03_-_brigitte_stern.pdf?x85994, visited on July 19, 2018.

[34] C. Ryngaert, doc.sited, p. 14; B. Stern, "Quelques observations sur…", doc.sited, p. 25; O. Thiam, doc.sited, p. 305.

[35] See the concept of denial justice in international law: O.J. Lissitzyn, "The meaning of the term Denial of Justice in international law", The American Journal of international law, Vol. 30, No. 4 (Oct., 1936), pp. 632-646, see on https://www.jstor.org/stable/2191125?seq=1, visisted on July 19, 2019 ; R.P. Alford, "Ancialary Discovery to prove Denial of justice", Virginia Journal of International law, Vol. 53, No.1, 1990, pp. 127-156, see on https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1334&context=law_faculty_scholarship, visisted on July 19, 2019; F. Francioni, "Access to Justice, Denial of Justice and International Investment law", see on https://academic.oup.com/ejil/article/20/3/729/402477, European Journal of International law, Vol. 20, iss. 3, 2009, pp. 729-747, visisted on July 19, 2019.

This article affirms the validity of the Penal Code 2015 over criminal acts committed outside the territory of the Socialist Republic of Vietnam. In comparison with the provisions of the Penal Code 1999, validity of the Penal Code 2015 has been extended to foreigners and foreign commercial legal entities committing offenses outside the territory of Vietnam if their acts infringe upon the legal interests of Vietnamese citizens, of state of Vietnam, or under the provisions of the international treaties to which Vietnam is a member. Meanwhile, the previous Penal Code (in 1999) limits its scope of application to the criminal acts committed by foreigners, which are regulated in international treaties that Vietnam has signed or acceded to. Therefore, acts committed outside Vietnamese territory but not listed in international treaties that Vietnam is member, were not sanctioned even though they violated rights and interests of Vietnamese citizens, and the State. The addition in 2015 Penal Code of these criminal acts committed by foreigners and foreigner commercial legal entities outside the territory of Vietnam has been show the extra-territorial jurisdiction of Vietnam. This extension of jurisdiction beyond territory is justified because of the consequences of criminal acts to Vietnamese citizens and the State.

The new Penal Code is also valid for both criminal acts or consequences of criminal acts occurring on aircraft, ships that not carrying Vietnamese nationality outside the territory of Vietnam in the case provided for by the international treaties to which Vietnam is a member. Thus, all criminal acts and consequences of criminal acts committed by foreigners that occurs outside the territory of Vietnam without harming the interests of Vietnamese citizens and the State are regulated by 2015 Penal Code on condition that these cases are covered by international treaties to which Vietnam is a party. It can be seen that these cases do not have any connection with Vietnam. The legal basis for the Vietnamese jurisdiction is found in the provisions of the treaty. The offender may then be punished in accordance with Vietnamese's Penal Code.

The Competition Law of Vietnam in 2018 has also added to the object of application of the Law, compared with the previous law, i.e. the Competition Law 2004, foreign agencies, foreign organizations and individuals related to the performance of competitive acts (Article 2). Previously, the Competition Law 2004 limited the scope of its application to business organizations and individuals operating in the territory of Vietnam. Under the provisions of Competition Law 2018, any act, agreement between manufacturers, distributors, between exporters and Vietnamese importers or an M&A transaction takes place outside of Vietnam, if it is likely to cause significant competition restriction impact on the Vietnamese market, will be governed by the 2018 Competition Law. This change overcomes the limits of the Competition Law 2004 in the lack of a legal basis for controlling acts performed outside the territory of Vietnam but having an impact on or potentially restricting competition of Vietnamese market. Similarly, the Law on Cyber Security 2018 also shows clearly the expansion of grounds for determining Vietnamese jurisdiction. Specifically, the Law on Cyber Security applies to all agencies, organizations, individuals using cyberspace or related to cyberspace, but not limit to users in the territory of Vietnam. This law is intended to protect national security and ensure social order and safety on cyberspace. Therefore, any act of violating network security, whether committed in or outside the territory of Vietnam will fall within the scope of the Law on Cyber Security (Article 1). This is a new law passed by the National Assembly of Vietnam in 2018 by reason of the impact of the development of science and technology together with the potential dangers of cyberspace for sovereignty, national interests and security and social order of Vietnam. The scope of regulation of the Cyber Security Law shows that Vietnam has uniform practice in extending the jurisdiction beyond the territory to cover acts being carried out outside the territory of Vietnam and harming to the values and interests that Vietnam protects.

Thus, it can be seen that the theory of extra-territorial jurisdiction has been developed for a long time and has been applied richly in many countries around the world such as the United States, France, Germany, … However, this theory has only been implemented in Vietnam's legal practice in recent years. The new enactment of a series important laws such as Civil Code, Penal Code, Competition Law, Cyber Security Law, … with the extension of their scope of application shows the change of Vietnamese legal system in the way of determining its jurisdiction beyond the rigid territorial limits prescribed in previous legislation. This change of Vietnam's legal system is necessary and consistent with the general trend in the world, especially in the context of international integration and the development of science technology. This context leads to a mix of interests of countries as well as of the international community in general. Hence, it is necessary to recognize certain extra-territorial jurisdictions for States to protect their own interests and that of international community as a whole. Therefore, it is reasonable for Vietnam to stipulate and exercise its powers beyond the territory.

Nevertheless, in order to effectively create and exercise extraterritorial jurisdiction, it should be taken into account not only issues of national interests but also national capacity of exercising that jurisdiction, especially enforcement jurisdiction. Because, when exercising extraterritorial jurisdiction, the state will have to be confronted with issues that fall under jurisdiction of other states. *For example,* as to disputes occurring to entities

abroad, the process of investigating, collecting information and evidence of the court will face many difficulties because of the principle of non-intervention of matters belonging to the sovereignty of other states protected by international public law. By then, exercising extraterritorial jurisdiction involves co-operation between countries. However, this need for co-operation is not only from one side, but from the whole international community. The evolution of international public law has recognized not only the right to exercise but also the obligation to perform jurisdiction of states when a request for justice is laid out [(36)]. It is necessary to have coordination, co-operation between countries to exercise their jurisdictions. Accordingly, Vietnam needs more international co-operation activities by signing international treaties on mutual legal assistance, participating in international forums to exchange information, advisory consultation, etc. to exercise most effectively extraterritorial jurisdiction.

5. Conclusion

Each country has its jurisdiction over its national territory. It is knowns that the jurisdiction includes the power to prescribe, the power to adjudicate and the power to enforce. According to traditional theory, this jurisdiction is limited in the national border territory. However, with the development of international law, countries are granted extraterritorial jurisdictions, if there are reasonable connections. These reasonable relationships may be shown through the nationality of the person involved in the relationship, or the impact of the act, or the values and interests that the international community recognizes and protect them together. The extraterritorial jurisdictions are stipulated by countries in their domestic legal system or/and in international treaties. It is easier to exercise extraterritorial jurisdiction stipulated in international treaties in case of self-regulation in the national legal system. Indeed, in the self-regulation case, the implementing country requires the coordination of the concerned countries, because this implementation will have certain impacts on their sovereignty. Such coordination can be established by signing international treaties between countries, or on a reciprocal basis. Therefore, one of the important factors for exercising the extraterritorial jurisdiction is that it must be built appropriately, without infringing upon the sovereignty of the concerned countries.

One of the most important changes in Vietnamese legal system in recent years is the addition of extraterritorial jurisdiction in a series of national laws covering civil, criminal, administrative laws, economic relations, etc. This change is in line with international law practice as well as the current context of international integration. The jurisdiction beyond Vietnam's territory is determined on the basis of criteria recognized by the international community such as the Vietnamese nationality of persons involved, the impact of acts on Vietnamese citizens and state; or the values and interests that Vietnam needs to protect in accordance with Vietnam's international commitments. In order to effectively implement these authorities, on the one hand, Vietnam needs to make every effort to improve the law as well as the resources of implementing agencies and organizations, Vietnam also needs to promote foreign relations with countries around the world, especially international cooperation in legal assistance, on the other hand.

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[36] C. Ryngaert, doc.sited, p. 219.

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