

The Sedona Conference
Framework for Analysis on Trade Secret Issues Across International
Borders: Extraterritorial Reach
(March 2021 public comment version)

The *Framework for Analysis on Trade Secret Issues Across International Borders: Extraterritorial Reach* addresses the extraterritorial reach of United States federal and state trade secret law. Trade secret misappropriation is increasingly a cross-border problem, with conduct that is difficult to reach in the United States. In some instances, foreign parties are accused of misappropriating U.S. trade secrets but never enter the United States physically and have little or no presence in the United States. Other cases involve parties and incidents that span multiple countries, including the United States. It often is equally difficult to address overseas and extraterritorial misappropriation through foreign legal proceedings due to shortcomings in national laws and enforcement in many countries. Moreover, it may be the case that no one country's courts are able to offer a complete remedy.

Finding a remedy for such cross-border claims in U.S. courts poses several challenges, particularly territoriality, which limits the ability of a country's courts to apply its laws to conduct outside its borders. Under U.S. law, territoriality gives rise to a presumption against extraterritorial application of law. Nevertheless, the presumption against extraterritoriality is just that—a presumption. There are exceptions to the rule. For instance, the presumption against extraterritorial application of domestic law does not entirely preclude the use of domestic laws and forums to seek relief for extraterritorial acts.

This *Framework* thus identifies key means by which U.S. trade secret law reaches conduct abroad. For each of these means, it identifies primary areas of agreement, disagreement, and ambiguity. It catalogs some successful approaches, offers guidance as to how they can be used, and identifies potential limitations of existing approaches.

The discussion here is framed as a resource to parties and lawyers seeking to remedy a misappropriation of trade secrets where some or all of the conduct, parties, or evidence are outside of the United States. Nevertheless, this *Framework* should serve equally as a resource to a party defending a claim for misappropriation of trade secrets with extraterritorial aspects—the framing will serve to ensure comprehensive coverage.

The first part of the *Framework* identifies six key means of reaching conduct abroad:

- claims pursuant to the Defend Trade Secrets Act
- claims pursuant to state trade secret laws
- the International Trade Commission
- criminal prosecution



- extrajudicial regulatory remedies against foreign wrongdoers
- litigation abroad

The second part of the *Framework* then addresses significant challenges when parties attempt to use these means to reach conduct abroad:

- sovereign immunities
- choice of law issues
- jurisdiction and venue
- where and how to get evidence
- enforceability of trade secret judgments against foreign entities

The full text of *The Sedona Conference Framework for Analysis on Trade Secret Issues Across International Borders: Extraterritorial Reach*, March 2021 public comment version, is available free for individual download from

The Sedona Conference website at:

https://thesedonaconference.org/publication/Trade_Secret_Issues_Across_International_Borders_Extraterritorial_Reach

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