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Toward a Theory of Extraterritoriality

Mark Gibney

Response

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I have been asked to provide a brief response to Jeffrey Meyer's *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*. In this Article, Meyer provides a convincing argument of the need for a broader theoretical approach and understanding regarding the ambit of U.S. law. As a means of accomplishing this, Meyer proposes a territorial reading of "geoambiguous" statutes unless there is a prima facie U.S. interest that is involved and the conduct being regulated is also regulated by another state.

Notwithstanding many shared concerns, I am not convinced that Meyer achieves what he sets out to do. In particular, by limiting his analysis solely to geoambiguous statutes, he does not provide the broader theoretical framework that he promises, and which is needed in this realm. I attempt to provide at least some of this, positing that the appropriate place to start is not with U.S. law but with American obligations under international law; and rather than limiting its role to discerning congressional intent, the judiciary is uniquely placed for ensuring that such obligations are met.

I. DEFINING THE PROBLEM AND MEYER'S PROPOSED SOLUTION

Whatever else you might say about it, the geographic scope of U.S. law was certainly much clearer a century ago than it is today. In the 1909 case of *American Banana Co. v. United Fruit Co.*, the U.S. Supreme Court was faced with the issue of whether the Sherman Antitrust Act applied to business operations in Central America, albeit to the monopolistic practices of two

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U.S.-based corporations.[1] In writing for the Court, Justice Oliver Wendell Holmes not only rejected this claim, but he seemed genuinely surprised that this question would even be raised in the first place:

> It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.[2]

Holmes then went on to enunciate what seemed to be an absolute rule of law: "The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[3] Yet, almost immediately thereafter, the Court began to carve out a number of exceptions to this "rule," particularly as it became clearer that practices occurring outside the territorial boundaries of the United States could have a decidedly negative effect on American business interests. In due time, not only was U.S. antitrust law (the very same Sherman Act that was at issue in *American Banana*) given an extraterritorial application,[4] but so were such things as U.S. trademark law[5] and U.S. security law.[6]

1. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 354–55 (1909).

2. *Id.* at 355.

3. *Id.* at 356.

4. Notwithstanding the absolute language in *American Banana*, the Court soon began to erode the territoriality principle, first in cases involving the transportation of goods to and from the United States. In *United States v. Pacific & Arctic Railway & Navigation Co.*, 228 U.S. 87, 104 (1913), the Court applied U.S. antitrust law to a Canadian company's conspiracy to monopolize rail transportation between the United States and Canada. In *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927), the Court applied U.S. antitrust laws to a monopoly in Mexico, holding that the monopolization conspiracy was furthered by agreements made in the United States, and that an export monopoly would have direct effects within the United States.

The transformation was completed in *United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945), where the Second Circuit, sitting as a court of last resort because the Supreme Court could not muster a quorum, held that the Sherman Act applied extraterritorially to a Canadian corporation's participation outside the United States in an international aluminum cartel. Employing what later became known as the "effects test," the court, in an opinion by Judge Learned Hand, permitted the extraterritorial application of U.S. antitrust laws to conduct that had sufficient contact with the United States, even if none of the events comprising the monopoly occurred in this country. *Id.*

5. Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952).

6. The Securities Exchange Act of 1934 perfectly exemplifies the extraordinary confusion that marks this realm. Pub. L. No. 73-291, 48 Stat. 881

Yet while certain aspects of federal law have been given an extraterritorial reading, especially U.S. criminal law and business regulatory practices, other areas of law have been kept stateside. Perhaps the most notable (and notorious) example of this occurred in *Sale v. Haitian Center Council, Inc.*,[7] where, in an 8-1 opinion, the Supreme Court ruled that the prohibition against nonrefoulement under U.S. refugee law did not apply outside the country's territorial boundaries.[8] In that way, the Court upheld the government's policy of returning boatpeople to Haiti, no matter what fate might await them upon their forced return.

No rule of law has replaced *American Banana*. Instead, the Supreme Court has worked under two guiding principles. The first is that Congress has the authority to apply any and all U.S. law beyond the territorial boundaries of the United States, if it so chooses. However, what tempers this proposition is the second principle, which is that all federal law will have a presumption against extraterritoriality.[9]

(1934) (codified as amended at 15 U.S.C. §§ 78a-78kk (1988)). The Act is only applicable when the "means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange" have been employed. 15 U.S.C. § 78j. The Act defines "interstate commerce" as any "trade, commerce, transportation, or communication . . . between any foreign country and any State . . . ." 15 U.S.C. § 78dd-2(h)(5). However, the Act exempts from its coverage "any person insofar as he transacts a business in securities without the jurisdiction of the United States . . . ." 15 U.S.C. § 78dd(b).

Despite all this confusing jurisdictional language, several federal courts have given the Act an extraterritorial reading, although a few courts have readily admitted that it is not clear how and why. *See, e.g.*, Cont'l Grain Pry. v. Pac. Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979) ("We frankly admit that the finding of subject matter jurisdiction in the present case is largely a policy decision."); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975) ("We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions [extraterritorially], we would be unable to respond.").

7. 509 U.S. 155 (1993).

8. *Id.* at 159.

9. As a side note, it should be pointed out that although the Supreme Court will frequently make reference to this presumption, there are also instances when there is no mention of it. In addition, what is needed to overcome this presumption is not always clear, and reasonable people can differ (and, based on the Court's jurisprudence, have differed) on when this presumption has been overcome. John Knox has summed up the Supreme Court's jurisprudence in this entertaining, but illuminating, fashion:

> [I]t has indicated that the presumption against extraterritoriality does, and does not, apply to situations outside the sovereign territory of the United States but within its control. It has sometimes overcome or avoided the presumption when extraterritorial actions cause effects in the United States, but its standard statement of the presumption

The key, then, is congressional intent. Unfortunately, as Jeffrey Meyer shows in his very useful Appendix, in many instances there is simply no clear indication that Congress has even thought about the geographic scope of the legislation before it. Meyer coins a clever but accurate term for this: a geoambiguous statute. He accurately chronicles not only the enormous inconsistencies that now exist in this area of law, but he has also added an important theoretical dimension by placing scholars (and, presumably, judges) into one of three camps. First, there is "judicial unilaterialism," which calls for a liberal extraterritorial extension of U.S. law. In opposition to this approach is "judicial territorialism," which adopts a Holmes-like approach. Finally, there is "judicial interests balancing." This latter group takes its cue from the American Law Institute's Restatement (Third) of Foreign Relations, calling for the extraterritorial application of U.S. law, but only when in the balance of all interests it would be "reasonable" to do so.

Meyer seems to think that these various schools are talking past one another (they are), and what he proposes is a new rule for geoambiguous statutes that would incorporate elements of at least the first two schools. According to this proposal, in cases of geographic uncertainty, a federal statute would be given a territorial reading unless (1) there exists some prima facie U.S. interest, based on one of the traditional jurisdictional grounds under international law (beyond territory)—nationality, effects, protective, or universal jurisdiction; and (2) the conduct being regulated under U.S. law is also regulated in this other state. Meyer terms this the dual-illegality rule, likening it to the comparable provision in extradition law.

One has to praise Meyer for being willing to recognize the crapshoot that the law in this realm has turned into. Moreover, this is a thoughtful and oftentimes useful study that is intent

> makes no exception for such internal effects. Its decisions have treated foreign ships within U.S. territory as subject to a presumption against extraterritoriality, a presumption against interference with their "internal affairs," a presumption against interference with their maritime operations, a balancing test to determine whether U.S. law should apply, and no presumption at all. The Court has said that the presumption may be overcome only by a clear statement of congressional intent, that the statutory structure, legislative history, and agency interpretations are relevant, and that some circumstances may justify extending law extraterritorially without any direct evidence of legislative intent at all. Lower courts have reflected and amplified this incoherence.

John Knox, *A Presumption Against Extraterritoriality*, 104 AM. J. INT'L L. 351, 351–52 (2010).

in bringing to this realm some much needed theoretical discipline. Finally, in terms of the proposal itself, while Meyer never fully explains how and why U.S. law should necessarily supersede foreign law when dual-illegality does exist (and one of the jurisdictional grounds has been met), he is indeed correct that another country would have less reason to complain about U.S. law violating its national sovereignty when that state already regulates a particular area.

Yet, in the name of reining in the imperialism of American law, Meyer's proposal would oftentimes help perpetuate American imperialism more generally. In order to show this, let me use an example that received some press coverage several years ago involving Southern Peru Copper, a U.S.-based multinational corporation. According to a *New York Times* story,[10] Southern Peru Copper had been forced to shut down one of its plants in the United States because it was not able to comply with EPA standards. However, the plant was reassembled in Ilo, Peru, where it went into operation once more—spewing out more than 2000 tons of sulfur dioxide a day, or somewhere in the range of ten to fifteen times what is permissible under federal (U.S.) EPA standards. The basis of the newspaper story had nothing to do with the possible extraterritorial application of U.S. environmental law, but rather, the severe environmental and health effects that the plant's operations had on the residents of Ilo. As the story reports:

> At times, the smoke from the smelter is so thick that it hovers over the city like a heavy fog, forcing motorists to turn on their headlights during the day and sending residents to hospitals and clinics coughing, wheezing and vomiting. On those days, children are told to play indoors.[11]

The accompanying photos gave testament to these claims.

The point is that while the United States has well-developed environmental standards, Peru does not. And because of this, a U.S.-based corporation that could no longer operate in the United States is free to do so in Peru. Meyer's proposal, at least as I read it, would allow this practice to continue. Thus, although U.S. environmental law would seem to qualify

10. Calvin Sims, *In Peru, a Fight for Fresh Air*, N.Y. TIMES, Dec. 12, 1995, at C1, *available at* 1995 WLNR 3863699. For a more detailed analysis of this, see MARK GIBNEY, FIVE UNEASY PIECES: AMERICAN ETHICS IN A GLOBALIZED WORLD 23–26 (2005).

11. Sims, *supra* note 10.

as being "geoambiguous,"[12] and notwithstanding the existence of a jurisdictional link to the United States (the nationality of Southern Peru Copper), the dual illegality requirement would not apply, meaning that American environmental law would not govern the operation of the plant. The sad truth, of course, is that no law is in place to protect the residents of Ilo.

But all this has a certain fictional quality to it because there has never been any serious consideration of applying U.S. environmental law to Ilo, Peru, or anywhere else outside the United States. What does not matter is the nationality of the corporate actor, the amount of environmental harm that U.S.-based corporations might be causing, or the fact that the host state (such as Peru) might not have a single environmental regulation. The ready response—one that Holmes himself might have uttered—is that U.S.-based corporations such as Southern Peru Copper are beyond the regulatory capacity of the U.S. government when they are operating in another country.

While there is a certain intuition to this position—just as there is a certain intuition to the idea that each state's laws have no effect beyond the state's territorial borders—the truth is that U.S.-based corporations operating in other countries are already regulated by a host of domestic (U.S.) law. Without attempting to provide an exhaustive list, this includes: U.S. securities law, U.S. trademark law, U.S. tax law, U.S. bribery law, U.S. age discrimination law (at least with respect to American citizens), and U.S. civil rights law (again, only with respect to American citizens).

In contrast to this, U.S. environmental law has been kept within the territorial boundaries of the United States. Whether this is the intent of Congress remains unclear. However, what is clear is that U.S.-based multinational corporations have been given license under federal law to inflict widespread environmental harm upon people in other countries. Of course, other

12. Most of the litigation in this area has revolved around the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321–79 (1982). Although NEPA is replete with extraterritorial language "recognizing the . . . critical importance of restoring and maintaining environmental quality to the overall welfare and development of man," the statute has generally been given a territorial reading. 42 U.S.C. § 4331(a); *see also* Natural Res. Def. Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345 (D.C. Cir. 1981); Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991); Greenpeace v. Stone, 748 F. Supp. 749 (D. Haw. 1990). *But see* Envtl. Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993).

developed states would be able to prevent this from taking place. This is the reason why Southern Peru Copper would never be able to relocate its plant in a country like France. However, there are a host of other countries that do not have the same environmental regulatory practices as France or the United States. Yet, even in those situations the jurisdiction of U.S. environmental law remains subject to territorial restrictions. And at the end of the day, while it is illegal for agents of a U.S.-based corporation to offer a bribe to a foreign official (even if bribery is perfectly legal in this other state), it is not illegal under U.S. law for this same corporation to wreck all kinds of environmental damage on the citizens of some other country.

I share Meyer's view that this area of law is in desperate need of much more theoretical understanding, but I am not convinced that his proposal does this. Most notably, it dutifully accepts the premise that Congress has the authority to extend any and all U.S. law if it so chooses to do so, so long as the geographic scope of the statute is unambiguous. In addition, Meyer apparently would also allow for the selective application of U.S. law so that it only applies to American nationals, which mirrors current civil rights and antidiscrimination legislation.

II. DEFINING THE SCOPE OF U.S. LAW IN TERMS OF AMERICAN OBLIGATIONS UNDER INTERNATIONAL LAW

My substantive field of interest and expertise is human rights, and the general problem that I see is that nearly all of the attention is given to the enforcement of U.S. law, while almost no attention is given to the protections under the law—either statutory protections or protections under the Constitution itself. Thus, to go back to the Haitian boatpeople example, what the Supreme Court never bothered to question was whether the U.S. Coast Guard had the legal authority to patrol the Atlantic Ocean and halt private boats that it found on the seas. That power was assumed. Rather, the only extraterritorial issue addressed by the Court was whether the protection against sending an individual to a country where his/her life or freedom would be threatened applied to desperate people on the high seas and the Court's answer was that it did not. It is not clear to me whether the 1980 Refugee Law would qualify as a "geoambiguous" statute or not (although in my own view there

is nothing ambiguous about this)[13], but my strong sense is that Meyer's proposal would jibe with the Court's ruling in this case.

Rather than adhering to two principles that have no theoretical basis and which the Court only invokes on occasion, a sounder approach would be to ensure that the extraterritorial application of U.S. law is consonant with international law. In the first instance, U.S. law should only apply where there is a jurisdictional basis for doing so. However, whenever and wherever U.S. law is applied outside the country's territorial borders—regardless of whether there is a jurisdictional basis for doing so—enforcement must be accompanied by protections under the law. The two cannot be kept separate and distinct, as they have been in the past. Furthermore, the extraterritorial application of U.S. law must be done within the framework of American legal obligations under international law more broadly. I will use two examples from the human rights field to illustrate this.

13. The crux of the case concerned the geographic scope of the nonrefoulement provision of the Immigration and Nationality Act (INA). Immigration and Nationality Act (INA) of 1952 § 243(h)(1), 8 U.S.C. § 1253(h)(1) (1988 & Supp. IV 1992) (current version at INA § 241(b)(3), 8 U.S.C. § 1231(b)(3)); *Sale*, 509 U.S. at 158. At the time of the *Sale* litigation, that provision read: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* (quoting INA § 243(h)(1)).

The original 1952 version of this provision included the phase any alien "within the United States." *Id.* at 168 n.16. However, during the passage of the 1980 Refugee Act, this language was removed, while the phrase "or return" was added. *Id.* at 176. What is also noteworthy is that prior to 1980, relief under§ 243 was discretionary. *See id.* at 158 n.2 (comparing then-current version's use of "shall" and prior version's lack of mandatory language).

Notwithstanding these amendments, the Court held that the nonrefoulement provision remained territorial:

> The addition of the phrase "or return" and the deletion of the phrase "within the United States" are the only relevant changes made by the 1980 amendment to § 243(h)(1), and they are fully explained by the intent to apply § 243(h) to exclusion as well as to deportation proceedings. That intent is plainly identified in the legislative history of the amendment. There is no change in the 1980 amendment, however, that could only be explained by an assumption that Congress also intended to provide for the statute's extraterritorial application. It would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect. Not a scintilla of evidence of such an intent can be found in the legislative history.

Id. at 176 (footnote omitted).

The first involves the prohibition against torture.[14] Torture is illegal everywhere and at all times, and what does not matter is whether it is carried out inside a state's borders or outside its territory.[15] This means that it simply does not matter whether domestic legislation implementing a treaty such as the Torture Convention is "geoambiguous"—even if such a law purposely sought to limit the prohibition to the domestic realm. What also would not matter is if the domestic legislation sought to selectively limit the prohibition so that it only applied to citizens of that state. Finally, it would not matter whether other countries also had laws prohibiting torture. The larger point is that there is no reason why the legislative body should be the sole authority on when, where, and in what manner U.S. law is applied extraterritorially. Rather, the judiciary has an important role to play well beyond attempting to divine the geographic intent of Congress. One could even make the claim that the judiciary's role in this context is even more vital than it is in the domestic realm because of the complete absence of democratic representation and accountability inherent in the extraterritorial context.[16]

The second example involves the International Covenant on Economic, Social and Cultural Rights (ICESCR).[17] Although the United States is not a state party, it has signed the cove-

14. Although torture is prohibited in a number of international and regional instruments, as well as under customary international law, the main body of law is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Torture Convention].

15. Although outside the scope of the present work, there is much that U.S. lawmakers and judges can learn from the approach taken by the Human Rights Committee, the United Nations treaty body that interprets and enforces the International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]. The ICCPR is explicitly restricted to "individuals within its territory and subject to its jurisdiction . . . ." *Id.* art. 2(1). Yet, rather than giving the ICCPR a territorial reading, the HRC has clarified that each state party "must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." U.N. Human Rights Comm., General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCRR/C/21/Rev.1/Add.13 (May 26, 2004).

16. For a further analysis of this point see Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 10 B.C. INT'L & COMP. L. REV. 297 (1996).

17. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

nant and thus is obligated to act in good faith to refrain from acts calculated to frustrate the objectives of the treaty.[18] Each state party is obligated to respect, protect, and fulfill all treaty obligations[19]—not just within the domestic realm but outside the country's borders as well.[20] Under the duty to respect, a state is itself prohibited from violating economic, social, and cultural rights (ESCR); under the duty to protect, a state has an obligation to ensure that third parties, including individuals and corporations, do not violate ESCR; and finally, under the duty to fulfill, the state has an obligation to provide goods and materials when individuals are not able to meet their own ESCR themselves.

Under the *Charming Betsy* principle, every effort must be made to interpret U.S. law in conformity with international law.[21] Under the duty to protect, the United States cannot act (or fail to act) so that U.S.-based multinationals are able to violate human rights standards—and this is true not only in the United States, but outside the country's territorial boundaries as well. Thus, any interpretation of U.S. law that would allow this to take place would not be consistent with American obligations under international law. To return to the Southern Peru Copper situation, what this also means is that in this situation, by not applying U.S. environmental laws extraterritorially, the United States has acted in a manner that is not consistent with the ICESCR.[22] In that way, this failure to apply

18. Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S 331.

19. *See, e.g.*, U.N. Comm. on Economic, Social & Cultural Rights, General Comment No. 15, The Right to Water, ¶¶ 20–29, U.N. Doc. E/C. 12/2002/11, (Jan. 20, 2003).

20. Unlike many other international human rights treaties, the ICESCR makes no mention of either "territory" or "jurisdiction." *Compare, e.g.*, ICESCR, *supra* note 17, art. 2(1) ("Each State Party to the present Covenant undertakes to take steps . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."), *with* Torture Convention, *supra* note 14, art. 2(1) ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."), *and* ICCPR, *supra* note 15, art. 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . .").

21. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

22. *See, e.g.*, ICESCR, *supra* note 17, art. 12(1) ("The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.").

the law extraterritorially constitutes a violation of international law.

CONCLUSION

In the past century, U.S. law has started to be applied outside the territorial boundaries of the United States. However, few would deny the haphazard nature of this enterprise. The Supreme Court has settled on two principles to guide its work. However, not only has the application of these principles been problematic, but so are the principles themselves.

Jeffrey Meyer calls for more theoretical analysis and he sets forth a proposal that would give a territorial reading to U.S. law unless (1) Congress expressly calls for an extraterritorial application or (2) there is a jurisdictional link to the United States and what is being regulated under U.S. law is also regulated by the law of another state. While this might provide more certainty in the application of the law than what exists at present, I am not convinced that this advances a proper understanding of the extraterritorial application of U.S. law. Rather than beginning with U.S. law, a much better place to start is with international law—and American obligations thereunder.