

THE EXTRATERRITORIAL EXTENSION OF LAWS: HOW MUCH HAS CHANGED?

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I. INTRODUCTION

Throughout the 20th century, the extraterritorial application of domestic law has given rise to considerable controversy. Decried variously as an affront to the sovereignty of other states, as a violation of international law or even as a manifestation of American exceptionalism, the extraterritorial extension of domestic law has led to a number of notable clashes between otherwise closely allied countries. In the 1950s and 1960s, the United States and Canada clashed over the sale of Canadian-made trucks to communist China and locomotives to Cuba.¹ Canadian trade and investment in Cuba has frequently given rise to legal difficulties for both Canadian corporations and American corporations in Canada and remain subject to various pieces of U.S.-Cuban sanctions legislation.² The United States and several European countries have frequently clashed over the extraterritorial extension of American export control legislation.³ The most notable occasion was doubtless when the United States government sought to restrain European companies from manufacturing pipeline equipment under European Union (EU) license for Poland in retaliation for the crackdown against the Polish dissenting unions in Gdansk.⁴ Japanese companies have also been subject to U.S. sanctions as a result of export control violations.⁵

There has always been tension between the United States and its allies over the extent of export controls over strategic goods and “dual-use” goods.⁶ Other notable sources of conflict have resulted from attempts to enforce discovery orders and orders for the production of documents against foreign banks doing business in the United States.⁷ Some of the most epic battles between friends

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¹ See A. L.C. DE MESTRAL & T. GRUCHALLA-WESIERSKI, *EXTRATERRITORIAL APPLICATION OF EXPORT CONTROL LEGISLATION: CANADA AND THE USA* (1990).

² See SALIM LAMRANI, *THE ECONOMIC WAR AGAINST CUBA* (2013).

³ See DE MESTRAL & GRUCHALLA-WESIERSKI, *supra* note 1.

⁴ *Dresser Indus., Inc. v. Baldrige*, 549 F.Supp. 108, 110 (D.D.C.1982) (order denying temporary restraining order).

⁵ See *EXPORT CONTROLS IN TRANSITION: PERSPECTIVES, PROBLEMS, AND PROSPECTS* (Gary K. Bertsch & Steven Elliott-Gower eds., 1992).

⁶ See DE MESTRAL & GRUCHALLA-WESIERSKI, *supra* note 1; JOHN R. LIEBMAN, ROSZEL C. THOMSEN II & JAMES E. BARTLETT III, *UNITED STATES EXPORT CONTROLS* (2011); JEAN-GABRIEL CASTEL, *EXTRATERRITORIALITY IN INTERNATIONAL TRADE: CANADA AND UNITED STATES OF AMERICA PRACTICES COMPARED* (1988).

⁷ *United States v. Bank of N. S.*, 691 F.2d 1384, 1388 (11th Cir. 1982).

have occurred as a result of the application of American anti-trust legislation against corporations doing business outside of the United States.⁸ In recent years, the EU has also adopted extraterritorial measures enforcing its competition legislation against acts committed abroad by EU and foreign corporations.⁹ Securities regulators on both continents have also sought to give extraterritorial reach to their legislation.¹⁰ For that reason, banking secrecy has been a rich source of conflict between friends.¹¹

In almost all these instances a *modus vivendi* was reached between national authorities, but the underlying tensions flared up from time to time throughout the 20th century. As long as the reach of domestic law was seen as essentially territorial in scope it was inevitable that governments and courts would disagree as to the legality and legitimacy of the extraterritorial application of law. Has this changed in the 21st century? Have we moved from a law based on territorial delimitation to a law based on coordination and cooperation? This paper addresses these questions.

II. HAS ANYTHING CHANGED?

It is possible to argue that much has changed as a result of globalized communications, transportation systems, increased personal mobility, and international commerce. For this reason, governments are under pressure to extend their laws to the activities of their citizens and companies abroad and have to tolerate the correlative extension of other states' laws into their own territory. Some might be tempted to suggest that extraterritoriality is or should be the new norm under these pressures. Certainly, states, and their courts, have to deal with the many pressures created by interdependence. However, as will be argued below, while many things are changing, there has been, as of yet, no fundamental paradigm shift with respect to the extraterritorial application of domestic law. The change that has occurred has been incremental.

⁸ Joel Davidow, *Recent US Antitrust Developments of International Relevance*, 27 WORLD COMPETITION 407, 407 (2004).

⁹ See ALISON JONES & BRENDA SUFRIN, EC COMPETITION LAW (2008); Andrew N. Vollmer & John Byron Sandage, *The Wood Pulp Case*, 23 INT'L L. 721, 721 (1989).

¹⁰ JAMES M. BARTOS, UNITED STATES SECURITIES LAW: A PRACTICAL GUIDE 256-57 (3d ed. 2006); Roger P. Alford, *Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 2 (1992).

¹¹ See, e.g., *Switzerland Signs OECD Tax Convention*, REUTERS (Oct. 15, 2013, 9:35 PM), <http://in.reuters.com/article/2013/10/15/us-oecd-switzerland-idINBRE99E0MV20131015>; *Luxembourg Agrees to End Bank Secrecy with U.S. Authorities*, REUTERS (May 21, 2013, 11:54 AM), <http://www.reuters.com/article/2013/05/21/us-luxembourg-tax-idUSBRE94K0T120130521>; Ellen R. Levin, *The Conflict Between United States Security Laws on Insider Trading and Swiss Bank Secrecy Laws*, 7 NW. J. INT'L L. & BUS. 318 (1985).

A. What is Extraterritoriality?

One aspect of the controversy surrounding extraterritoriality, which continues to this day, is that of the definition. It is by no means clear that governments or their international legal experts agree on what measures actually are extraterritorial. Most would agree that a U.S. law banning a subsidiary of an American company established in Canada from selling its Canadian-made products to Cuba is an extraterritorial measure. Similarly, the penalization of acts by foreign nationals in France for selling American-made goods to third country nationals when this is legal under French law is characterized as extraterritorial.¹² But is the prohibition of the importation into the United States of tuna caught by fishing technology, which is not designed to protect dolphins swimming above the schools of tuna, an extraterritorial measure? A General Agreement on Tariffs and Trade (GATT) panel held that it was,¹³ but a later World Trade Organization (WTO) panel held that it is acceptable for the United States to require a “green” label – i.e., one identifying the tuna as dolphin-friendly – attesting to the same facts as a condition of entry.¹⁴ Does the EU act extraterritorially when it prohibits the importation of wood which is not grown in sustainably managed forests in the country of exportation in order to protect woodlands or when it bans the importation of seal products in order to protect seals from an allegedly cruel death?¹⁵ Is the prohibition on the importation of “unsustainable” fuels an extraterritorial measure or a contribution to limiting greenhouse gas?¹⁶ All these measures give rise to controversies and debate as to their true characterization and none more so than the “product and process methods” (PPMs) imposed as a condition of the right to import, which lie at the heart of many international trade disputes.¹⁷

¹² Dresser Indus., Inc. v. Baldrige, 549 F.Supp. 108, 110 (D.D.C.1982); see also James R. Atwood, *The Export Administration Act and the Dresser Industries Case*, 15 LAW & POL’Y INT’L BUS. 1157 (1983).

¹³ See Panel Report, *United States—Restrictions on Imports of Tuna*, WT/DS21/R (Sept. 3, 1991).

¹⁴ See Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (May 16, 2012).

¹⁵ See Regulation 995/2010, of the European Parliament and of the Council of 20 October 2010 Laying down the Obligations of Operators Who Place Timber and Timber Products on the Market, 2010 O.J. (L 295) 23; Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing and Seal Products*, WT/DS400/R, WT/DS401/R (Nov. 25, 2013).

¹⁶ See Elisa Ruozi, *The EU Directive on Renewable Resources and the WTO: Towards a Solution of the PPMs and Extraterritoriality Issues* (Istituto Universitario di Studi Europei, Working Paper No. 2012-15-ECLI, 2012).

¹⁷ See, e.g., Steve Charnovitz, *The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT’L L. 59 (2002); Robert Howse & Donald Regan, *The Products/Process Distinction: An Illusory Basis for Disciplining “Unilateralism” in Trade Policy*, 11 EUR. J. INT’L L. 249 (2000).

Simply asking these questions demonstrates that the determination of what a true extraterritorial measure can be difficult and serious differences of opinion remain.

B. Why Prescribe, Enforce, and Adjudicate Extraterritorial Measures?

Why do states feel compelled to extend the reach of their domestic laws beyond their borders into the territory of other states? The primary motivation must be that they believe that certain laws will not be effective unless they apply outside their national territory.¹⁸ Related to this is the concern that certain acts committed abroad violate some imperative national policy or have a serious impact within national territory, and therefore, national legislation should be applied.¹⁹ Another factor is the intensity of the link, which some countries deem appropriate to maintain with their nationals or goods leaving their national territory. In some instances, such as treason, states act solely in defense of their national interest and cannot expect assistance from other states. However, in other instances, they act to promote strongly held policies, which could be defended by the universal or regional harmonization of rules among several states.

In the absence of an agreement on the international harmonization of rules and standards, states take the law into their own hands. As long as the rules are not internationally agreed upon, they believe that they must act unilaterally. It is only where there is international consensus, as there was with the condemnation of apartheid, or as exists under various international treaty *régimes* such as that governing the non-proliferation of nuclear weapons or the ban on Chlorofluorocarbon (CFC) chemicals,²⁰ that states can be certain that their extraterritorial measures will not be challenged.

Has this situation changed in the 21st century? Arguably, it has changed in some respects. It appears that a growing number of states view at least some extraterritorial measures as an acceptable means of enforcing certain rules and hence are willing to tolerate such measures taken by others. In areas such as the enforcement of competition law or securities legislation there does appear to be a growing tolerance of the phenomenon.²¹ But the emerging consensus on

¹⁸ Globalization makes this a necessary concern. See Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289 (1993).

¹⁹ See, e.g., Helms-Burton Act, 22 U.S.C. §§ 6021–91 (1996).

²⁰ See Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3.

²¹ See Press Release, European Commission, What Does the Commission Mean by Secure Cloud Computing Services in Europe?, European Commission MEMO/13/898, (Oct. 15, 2013), available at http://europa.eu/rapid/press-release_MEMO-13-898_en.htm?locale=en. The EC's notice of extension to Internet cloud companies will affect companies like Apple. However, it is unlikely that the United States will formally object to it.

extraterritoriality appears to be confined to a limited number of areas of economic regulation, actions against aircraft or protected persons,²² and war crimes,²³ where acts abroad may have immediate and serious effects within the national territory or on nationals abroad. Beyond this, states appear to continue to have widely divergent views on the justification of such extraterritorial measures, and there is no correlative consensus when other economic, national security, or foreign policy justifications are invoked. Furthermore, the existence of any consensus is usually restricted to prescribing measures; there is much less agreement on enforcement and punishment.²⁴

C. What is the International Law Basis for Extraterritorial Action?

The effort to define an international rule for the circumstances justifying extraterritorial action has proven difficult, but it has not been without some success. The International Law Commission has issued a paper suggesting that the time may be ripe for codification and progressive development of the law.²⁵ The Harvard Law School drafts proposed a codification with respect to the bases of extraterritorial jurisdiction over crime.²⁶ The most successful has certainly been the work of the American Law Institute, which has produced no less than three Restatements of the Foreign Relations Law of the United States.²⁷ The Restatement (Third) contains extensive provisions on the extraterritorial extension of domestic law.²⁸ It places the greatest justification for extraterritorial extension of laws on the effects that actions abroad may have within national territory.²⁹ In doing so, it is clearly based on the early decisions interpreting the reach of American anti-trust legislation.³⁰ But, interestingly, it goes to considerable

²² See Montreal Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, 2242 U.N.T.S. 309; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23 1971, 974 U.N.T.S. 177.

²³ Rome Statute of the International Criminal Court art. 8, § (2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

²⁴ Enforcement is only dealt with under a limited set of agreements dealing with extraterritorial issues, primarily in competition and banking law. See, e.g., Agreement Between the Government of Canada and the Government of the United States of America Regarding the Application of their Competition and Deceptive Marketing Practices Laws, U.S.-Can., Aug. 3, 1995, 2028 U.N.T.S. 135.

²⁵ See Rep. of the Int'l Law Comm'n, 58th Sess., May 1–June 9, July 11–Aug. 26, 2006, Annex E, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006).

²⁶ See *Codification of International Law: Part II – Jurisdiction with Respect to Crime*, 29 AM. J. INT. LAW SUPPLEMENT 435 (1935).

²⁷ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (1987).

²⁸ *Id.* §§ 401–03.

²⁹ *Id.* § 402.

³⁰ For a discussion on the provisions of the Restatement dealing with extraterritoriality, see Kathleen Hixson, *Extraterritorial Jurisdiction Under the Third*

lengths to temper the impact of a strict effects test by requiring that national law only be extended to persons and acts abroad when the extension is “reasonable” and where the interests of the extending jurisdiction are clearly preponderant.³¹ Thus, the American Law Institute has sought to find a careful balance between the interests of various states affected.

The Restatement (Third) has gone a considerable way towards defining an acceptable international rule. But this rule goes only so far and many questions remain unanswered and hence subject to debate and controversy. Firstly, the rule is best suited to the prescription of law, and it is much less likely to satisfy critics with respect to the application and enforcement of extraterritorial measures in particular cases.³² Similarly, what may be broadly acceptable today with respect to competition law or laws banning sexual predation may not be at all true with respect to laws governing export controls or the production of sustainable fuels. Secondly, there remains considerable disagreement over the justifications given for extraterritoriality.³³ What may be accepted when there are clear links to territory or nationals may not be accepted internationally when the justification is foreign policy or the “passive personality” principle. The alleged links between a state and the persons, goods, or even legal rights emanating in its territory may not be universally accepted. Thus, attempts to require nationals to violate the domestic law of another state by not selling certain goods, or the obligation to transmit documents to the home state, may not be agreed to. There is a broad consensus to punish or extradite those responsible for the unauthorized seizure of an aircraft, but no comparable universal consensus on the definition or the repression of ‘terrorist’ acts.³⁴ The aircraft hijacker is close to being treated as a pirate, but many other terrorists still benefit from a political offenses defense. In sum, the glass is filling slowly, but it is far from overflowing and unless there is a clear international agreement, such as that evidenced by treaties³⁵ or clear international customs, the extraterritorial extension of domestic law will remain potentially controversial and contestable.

Restatement of Foreign Relations Law of the United States, 12 FORDHAM INT’L L.J. 127 (1988).

³¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

³² Hixson, *supra* note 30, at 145.

³³ See Anne-Marie Slaughter & David T. Zaring, *Extraterritoriality in a Globalized World* 19 (Working Paper No. K33, K39, 1997), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=39380.

³⁴ See Thomas Weignend, *The Universal Terrorist: The International Community Grappling with a Definition*, 4 J. INT’L CRIM. JUST. 912 (2006).

³⁵ See Montreal Convention, *supra* note 22.

III. AREAS OF CONSENSUS AND AREAS OF DISPUTE

The following section reveals that states are becoming more tolerant of extraterritorial measures in selected areas and are even willing to provide limited assistance where they share common policies. However, there remain important areas where states have not yet arrived at a consensus, showing there is still much uncertainty in the law.

- a) There have always been some areas of consensus even on the basis of a highly territorialist vision of law. Most states punish treason or currency violations that occur outside their national territory.³⁶
- b) Food and drug legislation in force in many countries requires, as a condition of importation, that there be evidence that the drugs were produced abroad in accordance with the generally accepted industry standards. This ensures the quality and safety of the products entering national territory.
- c) There exist a number of areas covered by international treaties where extraterritorial controls form part of the internationally agreed upon methods of regulation. Examples include the treaties governing the non-proliferation of nuclear weapons and materials³⁷ and the international treaty banning the sale or importation of CFC chemicals, which threaten the ozone layer of the outer atmosphere.³⁸ In other areas, states have agreed to control the trade of blood diamonds³⁹ or endangered species.⁴⁰ In the case of the fight against apartheid, United Nations Resolutions authorized the extraterritorial measures.⁴¹
- d) There are a number of internationally agreed upon and defined crimes where states are required to prescribe and enforce penalties, either directly or through internationally agreed means. These include piracy, the unauthorized seizure of aircraft and crimes against aircraft, airports or air travelers. States must prohibit such crimes wherever they are committed and punish those who commit them when they have control of

³⁶ See, e.g., Criminal Code, R.S.C. 1985, c. C-46, s. 46 (Can.).

³⁷ See Treaty on the Non-Proliferation of Nuclear Weapons, U.S.-U.K.-U.S.S.R., July 1, 1968, 729 U.N.T.S. 161.

³⁸ Montreal Protocol, *supra* note 20.

³⁹ THE KIMBERLEY PROCESS, <http://www.kimberleyprocess.com/> (last visited Feb. 14, 2014).

⁴⁰ Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 27 U.S.T. 1087.

⁴¹ *South Africa: List of United Nations Resolutions Dealing with Apartheid*, IMMIGRATION & REFUGEE BD. OF CAN. (Oct. 24, 2013), <http://www.refworld.org/docid/3ae6ac6e78.html>.

the person responsible.⁴² Similarly, war crimes and crimes against humanity are to be prohibited and a variety of enforcement measures are required by international treaties.⁴³ Also, many states now prohibit and punish extraterritorial acts of sexual predation and narcotics trading.⁴⁴

- e) There are areas, such as competition law, where there is now a consensus that extraterritorial violations having serious effects in national territory may be subject to extraterritorial measures and that threats of punishment of the perpetrators are also legitimate.⁴⁵ The same may be argued for securities legislation.⁴⁶ Recent years have seen the gradual acceptance of a duty to cooperate in national actions to combat tax fraud through the abuse of bank secrecy.⁴⁷ While the duty to prohibit abuse of bank secrecy is not universally accepted by all jurisdictions, states such as Switzerland have now adhered to the Organization for Economic Co-Operation and Development (OECD) code⁴⁸ and have agreed to participate in the fight against extraterritorial tax avoidance.⁴⁹ The traditional rule providing that states will not assist in enforcing foreign tax laws is now falling by the wayside with an emerging consensus that includes the extraterritorial extension and enforcement of such prohibitions.
- f) States have been attempting to find common ground to ensure cooperation, if not acceptance, in the extraterritorial extension of certain categories of law. Banking secrecy is perhaps the best example, but the agreements currently in force are aimed at giving the taxing state access to information on nationals thought to be evading taxes in other jurisdictions, not at returning or punishing offenders. Attempts have also been made to secure cooperation in making information available with respect to suspected violations of securities legislation.⁵⁰ These

⁴² See, e.g., Criminal Code, c. C-46, ss. 74–75.

⁴³ See The Geneva Conventions of 1949 and their Additional Protocols; Rome Statute, *supra* note 23; see also Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24 (Can.).

⁴⁴ Criminal Code, R.S.C. 1985, c. C-46, s. 7(4.1) (Can.).

⁴⁵ CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW (2008).

⁴⁶ See John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 SW. U.L. REV. 635 (2010).

⁴⁷ *Luxembourg Agrees to End Bank Secrecy with U.S. Authorities*, REUTERS, *supra* note 11.

⁴⁸ *Switzerland Signs OECD Tax Convention*, REUTERS, *supra* note 11.

⁴⁹ *Switzerland Signs OECD Tax Convention*, SWISSINFO.CH (Oct. 15, 2013, 9:36 PM), http://www.swissinfo.ch/eng/politics/Switzerland_signs_OECD_tax_convention.html?cid=37118262.

⁵⁰ See, e.g., *Clock Ticks on Swiss Banking Secrecy*, SWISSINFO.CH (Apr. 23, 2013, 11:00 AM), http://www.swissinfo.ch/eng/business/Clock_ticks_on_Swiss_banking_secrecy_.html?cid=35576788.

arrangements include obtaining information and evidence but do not go beyond that point.

- g) Finally, in the very large areas of legislative, administrative and judicial activity, there is no consensus on the acceptability of extraterritorial measures of other states and no willingness to assist in the enforcement of foreign law. Similarly, in such areas, even stipulations written into contracts at the insistence of the regulating state are likely to be unenforceable and declared a violation of public order. The most common example is attempts made to require buyers in the United States to agree by contract to obey extraterritorial export control requirements.⁵¹ Similarly, attempts to seek enforcement of treble damage orders pursuant to American decisions have not been well received.⁵²

IV. HAVE DOMESTIC COURTS FOLLOWED OR FOSTERED THE TRENDS?

Courts have always been central to the development of the law with respect to extraterritoriality whereas governments have shied away from seeking to make international law in this area. From time to time, governments have made *ad hoc* arrangements concerning the sharing of banking information⁵³ or the determination of cooperative measures to ensure the extraterritorial application of export controls over certain strategic goods;⁵⁴ additionally, as set out above, they have been willing to legislate to broaden the prohibition of certain serious crimes and extend jurisdiction to prohibit and punish them. But states have been reluctant to negotiate rules on extraterritoriality when it involves a more general character and have so far declined the invitation of the International Law Commission to codify the law. International law in this area is thus largely determined by international customs, which are heavily premised on the sovereign control of national territory. In this situation, courts have had to apply customary law as they understand it and as they see fit for the resolution of new problems. As shown above, courts have grown more accustomed to applying certain laws extraterritorially. In the 20th Century, the first steps were taken in the field of competition law; in recent years, they have grown more comfortable with the difficult job of punishing extraterritorial war crimes, crimes against aircrafts, and crimes of sexual predation. In these areas, states are covered by domestic statutes or international agreements, which form the basis for domestic legislation

⁵¹ DE MESTRAL & GRUCHALLA-WESIERSKI, *supra* note 1.

⁵² See John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORDHAM L. REV. 356 (1983).

⁵³ See *supra* note 11 and text accompanying.

⁵⁴ See WASSENAAR ARRANGEMENT ON EXPORT CONTROLS FOR CONVENTIONAL ARMS & DUAL-USE GOODS & TECHNOLOGIES (Jan. 10, 2014), <http://www.wassenaar.org/>.

decisions. In the field of competition law, they have drawn heavily on related concepts of jurisdiction under private international law.⁵⁵

National courts have generally accepted that the law they apply is subject to a presumption of territorial application.⁵⁶ On the other hand, as was the case with anti-trust law, American federal courts have accepted that certain statutes must be applied to acts outside the United States⁵⁷ and have not backed away from this position, even in the face of judicial disapproval in other respected jurisdictions.⁵⁸ American courts, in particular, followed by the European Court of Justice⁵⁹ have done much to expand the law in this area.

Interestingly, despite having taken the initial steps, whenever they have the discretion to do so, American courts are in fact careful to adopt a balanced approach to issues of extraterritoriality.⁶⁰ The initial impulsion in the area of competition law was largely driven by statutory interpretation and not by any doctrinal desire to see American law generally applied to acts outside the United States. The fundamental principle followed by American courts was enunciated long ago in *Murray v. The Schooner Charming Betsy*;⁶¹ there, the United States Supreme Court stated that American law presumptively applies in American territory only. This presumption still stands and it has been reaffirmed rather than weakened in recent cases involving efforts of defense attorneys to extend the constitutional protections of the Bill of Rights beyond American territory.⁶²

Recent decisions of American, Canadian, and European courts reflect the pressures placed on courts to accept extraterritorial extension and their hesitation to do so in the field of human rights. In the United States, the Supreme Court has reaffirmed the presumption of non-extraterritorial extension of the Bill of Rights; however, the Court did apply it to Guantanamo Bay in the *Boumediene v. Bush* case on the grounds that the United States exercises full sovereign control over the

⁵⁵ See generally SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW (2008) (discussing the concept of “center of gravity” under private international law).

⁵⁶ See Stefano Battini, *Globalization and Extraterritorial Regulation: An Unexceptional Exception*, in VALUES IN GLOBAL ADMINISTRATIVE LAW 61 (2011); Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019 (2011); Knox, *supra* note 46; GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (2011); Ryngaert, *supra* note 45; American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Morrison v. Nat’l Austl. Bank, Ltd., 561 U.S. 247 (2010).

⁵⁷ See United States v. ALCOA, 148 F.2d 416 (2d Cir. 1945); see also Davidow, *supra* note 8.

⁵⁸ See Robert Cannon, *Laker Airways and the Courts: A New Method of Blocking the Extraterritorial Application of U.S. Antitrust laws*, 7 J. COMP. BUS. CAPITAL MARKET L. 63 (1985).

⁵⁹ Battini, *supra* note 56, at 64. The ECJ adopted a similar approach in the *Wood Pulp* case. See *Wood Pulp*, 27 O.J. EUR. COMM. (L 85/1), [1982-1985 Transfer Binder] Common Mkt. Rep. (CCH) (1985).

⁶⁰ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (1987).

⁶¹ 6 U.S. 64 (1804).

⁶² See United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

American base there.⁶³ The Supreme Court of Canada, having originally appeared very open to the idea of the extraterritorial extension of the Canadian Charter of Rights and Freedoms,⁶⁴ now appears to have withdrawn from that position. In *R. v. Khadr*, the court concluded that principles of international law and comity of nations, which normally required Canadian officials abroad to comply with local law, did not cover processes displaying “clear violations” of Canada’s binding international human rights obligations.⁶⁵ In *Al-Skeini v. United Kingdom*, the European Court of Human Rights appears to have accepted that the European Convention of Human Rights should apply to the acts of British soldiers in Iraq, which resulted in the death of six civilians.⁶⁶ But at least one influential member of the court, Professor Christian Tomuschat, is reported to have expressed concern as to the implications of the generalized extension of the Convention outside Europe.⁶⁷ One commentator, Professor Sarah Cleveland, has suggested that these cases really reflect a principle of control, whereby courts are willing to contemplate extraterritorial extension of fundamental rights, but only in situations where the states in question exercise close control over the acts of their agents.⁶⁸ Courts should thus be understood to have approached this question with considerable care.

V. SPECIAL PROBLEMS POSED TO TRADE LAW BY PPMs

All the difficulties outlined with respect to extraterritoriality appear to be joined by the questions posed by the attempt of some states to set strict conditions for the PPMs of imported goods. There is considerable debate as to whether they are in fact extraterritorial in nature or are simply conditions of admission.⁶⁹ Many states believe that the only way to approach the subject is through international agreement, rather than by unilateral trade rules. The GATT, and subsequently the WTO, at first condemned them as inherently extraterritorial and did not consider them any different than goods.⁷⁰ However, subsequent leading WTO cases seem to have sidestepped the extraterritoriality issue and sought to justify certain measures as exceptions under Article XX of the GATT.⁷¹ There have been

⁶³ See *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁶⁴ See *R. v. Cook*, [1998] 2 S.C.R. 597 (Can.).

⁶⁵ See *R. v. Khadr*, [2008] 2 S.C.R. 125 (Can.).

⁶⁶ *Al-Skeini v. United Kingdom* (No. 55721/07), 53 Eur. Ct. H.R. 589 (2011).

⁶⁷ See CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* (2003).

⁶⁸ See Sarah H. Cleveland, *Embedded International law and the Constitution Abroad*, 110 COLUM. L. REV. 225 (2010).

⁶⁹ See generally Charnovitz, *supra* note 17.

⁷⁰ See *United States—Restrictions on Imports of Tuna*, *supra* note 13.

⁷¹ See Appellate Body Report, *United States—Prohibition of Certain Shrimps Products*, WT/DS58/AB/R (May 15, 1998).

various studies by WTO committees and many learned trade experts have offered opinions,⁷² however, the law is anything, but clear.

VI. CONCLUSION

While it can be said that extraterritorial legislation is being used more by an increasing number of states, it cannot yet be said that extraterritoriality has become the new norm. Quite the contrary, beyond the subjects of common agreement and tolerance – such as war crimes – there remain many areas where there is no consensus; additionally, while it is easier to envisage extraterritorial prescriptive measures, enforcement and adjudication continue to give rise to a host of potential difficulties which continue to be resolved, if at all, by *ad hoc* diplomacy.



⁷² See, e.g., Charnovitz, *supra* note 17; John H. Jackson, *Comments on Shrimp/Turtle and the Products/Process Distinction*, 11 EUR. J. INT'L L. 303 (2000); Howse & Regan, *supra* note 17.