

CHANGING ROLES OF BORDERS

Takehisa Nakagawa
Professor of Law, Kobe University
May 20, 2018

1

contents

- Introduction
- Is Extraterritoriality Good or Bad?
- Analytical Framework (proposal)
- International Law Analysis
- Some Examples
- Concluding Remarks

2

Introduction

- Can state laws be applied to a person or conduct beyond its borders?
- This issue has not been discussed as such in **private law** (rather discussed as conflicts of law/ private international law).
- Has been mostly discussed in **criminal law** (since 19th century) using several principles, such as territoriality, nationality, protection, universality.
- Now vigorously discussed in certain regulatory areas, such as **competition law and securities exchange law** (especially these 50 years, triggered by the US), producing “effects doctrine.”
- It seems that international agreements are more frequently, and successfully, used to deal with this topic in **tax law and environmental law**.

3

Introduction

- Now the topic is gradually sneaking into other areas of public law, including **privacy (or data) protection, consumer protection laws, and even business licensing laws**.
- This presentation tries to show how to analyze this issue using (supposedly) domestic law thinking.
- It also tries to show how the international law and domestic law can work together.

4

contents

- Introduction
- **Is Extraterritoriality Good or Bad?**
- Analytical Framework (proposal)
- International Law Analysis
- Some Examples
- Concluding Remarks

5

Is Extraterritoriality Good or Bad? (1) Regulatory environment approach

- Rise of online economy (SNS, e-commerce, sharing economy, fin-tech) makes almost every piece of regulatory legislation arguably be applicable beyond state territories.
- If extraterritoriality is denied, regulatory differences will be caused among online businesses targeting the same consumers/markets. Such **regulatory disparity** is not desirable.
- E.g., should Google be registered under the Telecommunications Business Act of Japan and be subject to the Act's "secrecy of communications" provision? Japanese competitors are severely regulated by the Act.

6

Is Extraterritoriality Good or Bad?

(1) Regulatory environment approach

- If the Act is applied to Google, and it would be banned to analyze Google mail contents at least with regard to Japanese users, in the same way Japanese competitors are banned. That would kill Google's business model while providing for **a level playing field for its competitors**.
- By pursuing extraterritoriality, on the other hand, domestic laws would globally be criticized if they are not persuasive enough. Think of the Google example.
- But **regulatory reform** could eventually follow. Conflict would create a new world.

7

Is Extraterritoriality Good or Bad?

(2) It is (almost) everywhere

- There are **barely unnoticeable examples of extraterritorial application of domestic laws**. It can be said to be omnipresent.
- They are unnoticeable because they would cause no conflicts between states, but theoretically they are still examples of extraterritoriality of statutes.
- E.g., The Administrative Agency Information Disclosure Act ("FOIA") gives "any one" the right to apply for disclosure of government documents. It creates rights both inside and outside the territory of Japan.
- E.g., The Election Act covers voting rights of Japanese nationals outside Japan.

8

Is Extraterritoriality Good or Bad?

(2) It is (almost) everywhere

- Sup. Cot decisions of 2006 & 2007. Atomic Bomb Survivors' Assistance Act provides for AB survivors' **entitlement programs** such as healthcare allowances. Although the Act does not limit its scope to those whose domiciles are in Japan, **the government interpreted the Act not applicable to those recipients who have afterwards moved their domicile to another state**, and said "their right to receive money simply vanishes."
- The plaintiffs, Korean and Brazilian nationals who came back to their home countries after obtaining their entitlements, challenged this interpretation in court.
- The Sup. Ct. flatly denied the government's interpretation, holding that it was against "**the spirit of the act**" to help the difficult situations suffered by the AB survivors. **The Court was not bothered by extraterritoriality at all .**

9

Is Extraterritoriality Good or Bad?

(2) It is (almost) everywhere

- **Private international law** is another example of extraterritoriality, though not regularly described so.
- If a person in State A sues another person in State B in a State B court, and if the court chooses a State B law as applicable, the State B law would reach a person in State A.
- The only difference between **private international law** and **extraterritorial application of criminal/public laws** is that a state court may choose to apply foreign laws in the former (choice-of-law, or "passive" extraterritoriality) while a state court/agency only applies its domestic laws in the latter (no choice-of-law).

10

Is Extraterritoriality Good or Bad?

(3) Nothing unusual

- Laws are **inevitably extraterritorial** simply because people like to cross borders, either physically or by communications (by snail mail or digitally). Laws are created for territorial governance, but the borders turn out to be easy-to-climb walls.
- Cross-border activities are now basis (not part) of our daily life and all business activities, and our thinking about domestic laws **should evolve** accordingly.
- **Domestic Laws need extraterritoriality** to retain their effectiveness, sometimes even to ensure equality. Extraterritorial application of laws should be regarded **as a regular legal process**, nothing unusual nor exceptional. **International conflicts are necessary process** for legal developments, just like the government being sued domestically when they make new laws or issue new rules and regulations.
- Roles of borders differs depending both on **time** and **areas of laws**.

11

contents

- Introduction
- Is Extraterritoriality Good or Bad?
- **Analytical Framework (proposal)**
- International Law Analysis
- Some Examples
- Concluding Remarks

12

Analytical Framework (proposal)

(1) Definition of the issue

- First, Definition of “extraterritorial” “application” of domestic “laws”.
- Two tiers of the question should be distinguished – will discuss only (A)
 - (A) “**Applicability**” of domestically created law (scope/reach/how far the law governs)
 - law making (or interpretation), similar to **the “choice-of-law” rules**
 - deciding whether the target conduct/person falls within the reach of the law
 - (B) “**Application of applicable (substantive) rules to facts**”
 - interpretation of substantive law
 - deciding whether the target conduct/person falls within the requirements of law

Sometimes (A) and (B) converge

13

Analytical Framework (proposal)

(1) Definition of the issue

- Two targets of “extraterritorial” cases – will discuss both
 - (A) “conduct” outside the territory of a state
 - (B) “status of persons/corporations” outside the territory of a state
- Laws – will discuss public law/criminal law/private law
 - *Be aware: Other than private international law (**traditional contracts, torts, and family law** as provided for in Civil Law Code) and criminal law (**traditional crimes** as provided for in Penal Code), there are **public-law-like private/criminal law**. Private enforcement of regulatory laws and criminal enforcement of regulatory laws.*
 - *Thus, we should try to understand **all legal areas under a single approach***

14

Analytical Framework (proposal)

(2) Three interests

- In determining extraterritorial applicability, three interests are relevant and to be considered.

1) Domestic interest: a trigger for extraterritoriality

Would the aim of the domestic law (public policy/ sense of justice/policy goals) be compromised by the target conduct/person outside the territory?

*In other words, **does the case here present domestically important issues rather than totally foreign issues?***

15

Analytical Framework (proposal)

(2) Three interests

2) Target entities' interest:

Would it be reasonable or fair for the target conduct/person to be subject to foreign law?

***Nationals** have constitutional basis to obey domestic laws. **Entering (physically) foreigners** are considered to have consented to obey the law. Similar explanation is necessary for those who are not physically in the territory.*

3) Other states' interest:

*Would interests of other states (places of the target conduct/person) be compromised by the extraterritorial application? Is **Comity** consideration necessary?*

16

Analytical Framework (proposal)

(3) Domestic interest

- Will see how the first factor (domestic interest) is considered in all areas of law:
- Private law (Conflicts of law)

Usually none. Therefore choice-of-law is possible.

However, sometimes domestic interest prevails especially in torts and family law.

*E.g., The choice-of-law rules of Japan require the court of Japan to negate **punitive damages rules of foreign law** in deciding damages. Here **Japanese law on torts is applied to any cases with international elements.***

17

Analytical Framework (proposal)

(3) Domestic interest

- Criminal Law

***The protection principle:** crimes against the state's own interests, such as currency counterfeiting, perpetrated outside the territory or by non-nationals are punishable. If extraterritoriality is denied, the penal law would be significantly compromised.*

***The universal principle:** crimes against human beings are punishable by any state irrespective of place and nationality. Otherwise, the penal law would be powerless against such grave crimes.*

***The nationality principle:** crimes perpetrated by nationals outside the territory are punishable. Nationals would otherwise evade the penal law simply by travelling abroad.*

***The passive nationality principle:** crimes against nationals outside the territory are punishable. Otherwise, the sense of justice of the penal law would be lost.*

18

Analytical Framework (proposal)

(3) Domestic interest

- Public Law

Effects Doctrine: competition law protects market mechanism (therefor consumers' interest of the state). As far as a cartel agreement exerts influence to the market/consumers of another state, its law should be applicable. **Nationalities and territoriality have nothing to do with the aim of the law.**

E.g., "It is obvious that the objectives of competition law would be insufficiently safeguarded if one applied competition law exclusively to conduct by nationals of the enforcing state, or to conduct that takes place on the territory of the state: a cartel is no less harmful just because the cartelists travelled to an exotic location of their meetings; and consumers are hardly interested in the nationality of those who exploit them." by Florian Wagner-von Papp, UCL.

19

Analytical Framework (proposal)

(3) Domestic interest

- Public Law

Source of information: Privacy protection law protects personal information of anybody within the territory. Such information must be protected in the same way even after it crosses the border. Otherwise, simply by sending to and storing the information in no privacy protection state, **the aim of the law can easily be compromised.**

No nationality & territoriality: Some laws, such as AB Survivors Assistance Act, **need to ignore nationality and border** because its purpose is that the government helps all victims with perfect impartiality.

20

Analytical Framework (proposal)

(3) Domestic interest

- Note that, in public law, **coercion is not necessarily required or used** to achieve the aim of the law.

*Companies who need businesses in the market would comply with orders, even with **administrative guidance**.*

*Government can make the order (or even noncompliance of guidance) public, which would damage **business reputation**, not only among consumers, but among business partners. As far as the order or guidance is legally issued, the reputation damage is nothing illegal.*

21

Analytical Framework (proposal)

(4) Target entities' interest

- Will see how the second factor (target entities' interest) is considered in all areas of law:
- Private law (Conflicts of law)

Expectation on which law would apply to their conduct is generally important. That's why "links" are important to choice-of-law.

22

Analytical Framework (proposal)

(4) Target entities' interest

- Criminal Law

***The protection principle:** criminals are targeting a specific state. That makes reasonable to make them subject to that state's law.*

***The universal principle:** universally criticized nature of crimes makes the perpetrator subject to every nation's law.*

***The nationality principle:** nationals can expect to be punished under their home nation's law.*

***The passive nationality principle:** do offenders should expect to be punished under the victims' home nation's law? Generally no, except for in the case of **crimes intended against specific nationals** (typically terrors against US tourists).*

23

Analytical Framework (proposal)

(4) Target entities' interest

- Public Law

***Effects Doctrine:** The cartel agreement has target territory (markets/consumers). That should make them subject to **the law of each market**. But what if online platforms happen to influence unintended states' markets??*

***Source of Information:** business operators who gather personal information (should) know where it comes from. That should make it reasonable that they are to be regulated by **the law of source of information**.*

***No nationality & territoriality:** Under the AB Survivors Assistance Act, recipients under the Act **usually expect** to retain their right for allowances **wherever they live**.*

24

Analytical Framework (proposal)

(5) Other states' interest

- Will see how the third factor (other states' interest) is considered in all areas of law:
- Private law (Conflicts of law)
 - *None at the level of States. That's why "there is no int'l law limitation."*
- Criminal Law
 - *All principles: every state wants the same way, and conflict is unthinkable.*
- Public Law (1) No conflicts would take place
 - *Entitlements programs, such as AB Survivors' Act*

25

Analytical Framework (proposal)

(5) Other states' interest

- Public Law (2) Conflicts are easy to take place, and need to think of settlement
 - Tax: tax on one activity is dividable among relevant nations, thus tax agreements.
 - Regulatory: complicated
 - *Among **the targeted states** (whose markets are targeted)*
each state should apply their own law independently, no conflict here.
 - *Between **the targeted state** and **the conduct state**:*
If the targeted state law requires to do things allowed in the conduct state
if the targeted state law requires to do things that are illegal in the conduct state

26

Analytical Framework (proposal)

(5) Other states' interest

- Note that this third factor could be weighed differently **depending on who sues**.
*If the government sues in the court (criminal law/public law) or make administrative orders (public law), does the court need to be worried about conflict with other states? International conflicts can only be managed by **the executive/agencies**.*
*This would fit the fact that if **the law explicitly provides for extraterritoriality**, the court would not disregard it.*
*On the other had, in the case of **private enforcement suits**, the court might be attracted to “a presumption for non-extraterritoriality.”*

27

contents

- Introduction
- Is Extraterritoriality Good or Bad?
- Analytical Framework (proposal)
- **International Law Analysis**
- Some Examples
- Concluding Remarks

28

International Law Analysis

(1) Several versions of int'l law

- International law has rich history of discussion on the topic, especially in criminal law.
- Several versions of international law seems to exist.
 - US (its **domestic courts**) understanding of int'l law, as expressed in the *Restatement (Third) of Foreign Relations Law of 1987*
 - European, academic understanding of international law as would be voiced by **international tribunals** (ICJ, etc.) + US *Second Restatement of 1965*
- Using the US Third Restatement, I have some questions about “terms” used there.

29

International law analysis

(2) Overview of analysis

- Analysis goes as follows, with criminal law and competition law in mind:
- Out of states' sovereign power (legislative, judicial, executive combined), salient three aspects are picked up, each being called “jurisdiction.”
- **Jurisdiction to prescribe:** a state's power to make its law (domestic law) applicable to people, conduct, property. **Extraterritoriality** is analyzed using “bases”(territory, nationality, protection, universality) and “other considerations.”
- **Jurisdiction to adjudicate:** a state's power to make private entities utilize an adjudicative proceeding, or authoritative decision-making process, of the state court (not necessarily adjudicated under domestic laws)
- **Jurisdiction to enforce:** a state's power to make use of **necessary measures** for the laws (domestic laws) to be realized.

30

International law analysis

(3) Prescriptive jurisdiction

- The three-factor analysis (proposal) is about prescriptive jurisdiction.
- In my understanding, prescriptive jurisdiction should mean power to **enact substantive laws** (creating substantive rights, duties, and statuses). And it necessarily includes the power to decide **their reach** (whose and whereabouts of rights and duties), or the **authority to decide applicability of its laws**.
- Also, it should be noted that **limited areas of substantive laws** are discussed here: laws that restrict right/freedom and/or create duties (criminal law, regulatory law, tax law). Right-giving laws (entitlements programs, right to request information) are excluded because that would not cause int'l conflicts. For the same reasons, private law (contracts/torts/family) are excluded as well.

31

International law analysis

(3) Prescriptive jurisdiction

- Who, within the state, has the jurisdiction to prescribe?
 - Legislature may expressly provide for extraterritoriality. Judiciary (courts) need to interpret the law if there is no explicit provision. The executive (president/ cabinet) may show their interpretation about extraterritoriality, which may be respected by the courts.*
 - Out of the three factors, the last one (conflict with other states) would not be well analyzed by judicial courts. That matter needs to be dealt with by the executive/agency level.*

32

International Law Analysis (4) Adjudicative Jurisdiction

- Jurisdiction to adjudicate

Jurisdiction to adjudicate is relevant only to private law lawsuits. (See international jurisdiction of civil matter courts.) As far as the government (prosecutors/agencies) sues in the court of their state, international law problems would not take place in terms of this jurisdiction.

33

International Law Analysis (5) Enforcement Jurisdiction

- What is clear about jurisdiction to enforce is that **use of physical force by a government outside its territory is prohibited**, unless consented by other states. This is because each state should protect its people and territory from physical invasion by other states.
- Other than that, the meaning of “jurisdiction to enforce” is **unclear**.
- It seems to me that, if a law is extraterritorially applicable in terms of prescriptive jurisdiction, all “enforcement measures” (enforcement jurisdiction) should also be available to the government even outside its territory, only with the exception of **the ban on government’s use of physical force outside its territory**.

34

International Law Analysis (5) Enforcement Jurisdiction

- In criminal law, “enforcement” means **police searches/arrest** and **judgment execution**. **Subpoenas of witnesses** during the court trial may be included, too.
- Because defendants are in the territory for criminal trial, judgment execution would pose no extraterritoriality problem.
- Then, is it OK for **the police to simply ask questions** outside the territory? Embassies regularly gather information in the host state. Why not other government agencies do the same thing (at least through embassies)?
- Is it OK for the trial **court to subpoena witnesses abroad to testify at the court**? There is no way to punish them if ignored, but that does not mean the court has no authority to subpoena. Is it against international law? Why?

35

International Law Analysis (5) Enforcement Jurisdiction

- In **public law**, it is totally unclear what **jurisdiction to enforce**, or **use of public power**, means. In administrative law context, they could mean almost everything in statutes.
- A public law has an “ends—means” structure: a statute is enacted for a specific **policy goal**. It provides for “**programs**” (prohibition, permits, entitlements, tax, subsidies, etc.), “**schemes to make the programs effective**” (sanctions against offenders/ compliance promotion), and “**information gathering**” (investigation).
- Enforcement means at least “effectiveness schemes” and “information gathering.” It sometimes include “programs.”
- To make the statute work, **these three measures are always necessary**. It is hard to imagine how one can cut some parts out of the structure, and categorically deny extraterritoriality

36

International Law Analysis (5) Enforcement Jurisdiction

- Perhaps the least known part of administrative process is **administrative investigation**. It works as follows.
- Agencies typically start with “**secretive investigation**” (informally asking questions to people near the target person/corporation), and only after being certain about their suspicion, they would move to “**formal investigative stage.**”
- Secretive investigation is not illegal. The target will have an opportunity to rebut afterwards, such as before the administrative orders are finalized.

37

International Law Analysis (5) Enforcement Jurisdiction

- Formal investigative stage consists of two categories.
- One category is **administrative “investigatory orders,”** such as report order, subpoena of documents and persons, and site inspection & inquiries. They must be obeyed, legally speaking, but without physical coercion. Disobedience of the investigative orders shall invite criminal punishments or other legal disadvantages.
- Quite different from the above category are administrative “**physical searches and seizures,**” such as raids by enforcement officers based on warrants. Disobedience is impossible here, therefore no punishment follows.

38

International Law Analysis (5) Enforcement Jurisdiction

- **Investigative orders** are legally coercive in the same way as **cease and deist orders and civil penalties** imposed by the court/agency enforcing competition law. It is hard to say that the former categorically be banned while the latter is allowed once extraterritorial applicability is affirmed.
- It is obvious physical searches and seizures are prohibited outside the territory. But I suppose that **secretive investigation** and **investigative orders** should not be categorically denied extraterritoriality.

39

International Law Analysis (6) Difficult questions

- New problems are arising. May the government issue investigative orders to **domestic** parent companies/ subsidiaries for the purpose of obtaining documents held by **the target company that are outside the territory**. E.g., Microsoft Case (Order to MS in the US to bring mails held by its subsidiary in Ireland.)
- It is not unclear, in Japanese law, if the government may order to a parent company to produce something held by its subsidiary. If the answer is yes, it will create **extraterritorial enforcement of law through domestic enforcement of law**.
- Another similar example. Japanese law is said to deny the concept of **attorney-client privileges**. If the government agency seizes documents held by companies in Japan and if they include such communications with US attorneys as are protected by the US law, that would constitute extraterritorial application of Japanese law and would cause conflict. This problem would take place at any time.

40

contents

- Introduction
- Is Extraterritoriality Good or Bad?
- Analytical Framework (proposal)
- International Law Analysis
- **Some Examples**
- Concluding Remarks

41

Some Examples (1) A very broad one

- The first Sup. Ct. decision on extraterritoriality of Anti-monopoly Act (Dec. 12, 2017)
- In 2010, the Japan Fair Trade Commission (JFTC) ordered several CRT (cathode ray tube) manufacturers ("CRT Manufacturers") to pay civil money penalty for their participation in **cartel agreements made outside Japan** that fixed the price of their products (CRTs) **to be sold to several Japanese TV manufactures** ("Japanese TV Manufacturers").
- The CRT Manufacturers (parent/subsidiaries) were each based in Malaysia, Korea, Japan, Indonesia, and Taiwan. (Only the subsidiaries were ordered to pay the penalty.) The cartel agreement ended in 2007.
- The Japanese TV Manufacturers (parent/subsidiaries) were regular buyers of the CRT Manufacturers' products (CRTs).

42

Some Examples

(1) A very broad one

- The fined CRT Manufacturers sued and asserted that the Anti-monopoly Act should not apply to their cartel because (1) the agreements were made **outside of Japan** and (2) **only the foreign subsidiaries** of the Japanese Manufacturers purchased the CRTs.
- Supreme Court upheld the JFTC's position, holding as follows:
 - 1) The Act has no explicit provision on its applicability, or the scope of applicability, to conducts outside the territory of Japan.
 - 2) **Considering the purpose of the Act** (to ensure consumers' interests by promoting fair and free competition), its provisions of cease and desist orders & civil money penalty orders should be interpreted to be applicable **to such cartel** agreed upon outside the territory **as far as it interferes with the economic order of free competition in Japan**.

43

Some Examples

(1) A very broad one

- 3) Thus, for **any conduct that fits the Act's requirements of the cartel** (which includes "competitiveness of a certain market area is substantially restrained"), **the cartelists may be ordered** to cease and desist or pay penalties.
- 4) In this case, **Japanese companies** (TV Manufactures) **were traders (buyers) of the products sold under the price-fixing agreement**. The cartel interferes with the economic order of free competition of Japan.
- The scope of this effects doctrine is vigorously discussed among commentators. Note that the Court **did not mention the quantity of "sales" of those CRT-TV sets in the markets of Japan** (perhaps not much).
- From the three-factor analysis, the Sup. Ct. analyzes the domestic interest and the target entities' interest while there is **no mention to the third factor**.

44

Some Examples

(2) A very narrow one

- Protection of Personal Information Act, as amended in 2015 has a provision on extraterritoriality.
- Section 75 Sections 15,16,18(excluding second paragraph), 19 to 25, 27 to 36, 41, 42 (only the first paragraph), 43, and the following section shall also apply to a “business operator handling personal information“ who has obtained, through its offering of goods and services, **personal information of persons who are in the territory of Japan, even when the operator handle such personal information outside Japan.**
- Section 42 (1) When a business operator handling personal information has violated any of the provisions of Sections , and when the Personal Information Protection Commission finds it necessary to protect the rights and interests of individuals, the Commission **may recommend** the business operator to cease the violation and take other necessary measures to correct the violation

45

Some Examples

(2) A very narrow one

- Section 42 (2) Where a business operator handling personal information having received a recommendation under the provision of the preceding paragraph does not take the recommended measures without justifiable ground, and when the Commission finds that the serious infringement on the rights and interests of individuals is imminent, **it may order** the business operator to take the recommend measures.
- Section 56 A business operator who violates orders issued under paragraph (2) or (3) of Section 42 **shall be sentenced** to imprisonment with work of not more than six months or to a fine of not more than 300,000 yen.
- This limit on extraterritorial applicability seems meaningless. There is no difference between **recommendation** and **order** in the sense that the law applies to conduct outside the territory. Is it **because no extraterritorial principle in crim. law applies here?**

46

contents

- Introduction
- Is Extraterritoriality Good or Bad?
- Analytical Framework (proposal)
- International Law Analysis
- Some Examples
- **Concluding Remarks**

47

Concluding Remarks

Significance of borders differs depending on areas of law
(a very tentative chart):

no borders	expanded fictitious borders	physical borders
entitlement programs		
	competition law (market based, at least cartels)	
		securities exchange law (place of issuance/ sales)
	consumer protection (consumer based)	
	tax(online platforms?)	OR tax (permanent establishments)
	privacy protection (source based)	
		criminal law (traditional crimes)
	private law (contracts)	private law (torts)
environmental law (theoretically)	OR	environmental law + agreement

48

Thank you

For sharing my tentative thought on extraterritoriality, which is itself an “extra-territorial” observation, stepping out of my territory of administrative law.