Rolf H. Weber | Walter A. Stoffel |
Jean-Luc Chenaux | Rolf Sethe (Hrsg.)

Aktuelle Herausforderungen des Gesellschafts- und Finanzmarktrechts

Festschrift für Hans Caspar von der Crone
zum 60. Geburtstag

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Vorwort

Professor HANS CASPAR VON DER CRONE, Ordinarius für Privat- und Wirtschaftsrecht an der Universität Zürich, feiert am 18. Januar 2017 seinen 60. Geburtstag. Seine Freunde, Fachkollegen und Weggefährten freuen sich, ihm zu diesem besonderen Tag die vorliegende Festschrift überreichen zu können.

HANS CASPAR VON DER CRONE hat in Zürich die Volksschule und das Gymnasium (mit Abschluss Matura Typus B im Jahre 1976) besucht. Sein Studium der Rechtswissenschaft an der Universität Zürich schloss er sechs Jahre später mit dem Lizentiat ab. Während seiner Zeit als Assistent bei Professor MEIER-HAYOZ verfasste er seine Dissertation sowie das – heute noch als Standardwerk geltende – Lehrbuch «Wertpapierrecht» (in Co-Autorschaft mit ARTHUR MEIER-HAYOZ); im Jahre 1988 hat er dann den Doktor der Rechtswissenschaft an der Universität Zürich und ebenso das Zürcher Anwaltspatent erworben. Kurz nach Beginn der Anwaltstätigkeit in Zürich ist HANS CASPAR VON DER CRONE indessen an die Yale Law School, New Haven CT, gegangen, um erfolgreich einen Master of Laws (LL.M.) zu absolvieren. Nach der Rückkehr in die Schweiz hat er seine Anwaltskarriere fortgesetzt und gleichzeitig eine Habilitationsschrift zum Thema «Rahmenverträge» verfasst, aus welcher sein Interesse am Zusammenspiel von Ökonomie und Recht deutlich hervorgeht. Auf deren Abnahme an der Universität Zürich folgte die Ernennung zum Privatdozenten für Zivil-, Handels- und Kapitalmarktrecht im Jahre 1992.

Im Jahre 1995 berief die Universität Zürich HANS CASPAR VON DER CRONE zum Extraordinarius, hernach 1997 zum Ordinarius für Privat- und Wirtschaftsrecht. Seit gut 20 Jahren liegen seine hauptsächlichen Lehr- und Forschungsinteressen im Bereich des Gesellschafts- und Kapitalmarktrechts, doch hat er auch das Vertragsrecht regelmässig weiter betreut; didaktisch gute Lehre ist ihm immer ein grosses Anliegen gewesen. Kennzeichnend für ihn ist weiter die grosse Affinität zu den neuen Medien: Seine Internet-Kolloquien – jährlich angeboten sowohl im Obligationenrecht Allgemeiner Teil wie im Handels- und Wirtschaftsrecht – gehören zu den beliebtesten Veranstaltungen der Rechtswissenschaftlichen Fakultät; das von ihm ins Leben gerufene virtuelle Projekt «RechtEck» (www.rechteck.uzh.ch) ermöglicht sodann auch die von ihm stets gepflegte Zusammenarbeit mit der Romandie.

HANS CASPAR VON DER CRONE hat ebenso aktiv an der universitären Selbstverwaltung mitgewirkt: Als Mitglied der Universitätsleitung war er von 2002-2006 Prorektor Planung, von 2007-2008 Prorektor Rechts- und Wirtschaftswissenschaften. Sein Interesse an der Mitwirkung in rechtsgestaltenden Gremien zeigt sich auch darin, dass HANS CASPAR VON DER CRONE von 1999-2005 Präsident der Schweizerischen Übernahmekommission sowie 2009-2010 Mitglied der Expertenkommission des Schweizerischen Bundesrates zur Limitierung von volkswirtschaftlichen Risiken durch Grossunternehmen (Expertenkommission «too big to fail» bzw. «Systemically Important Financial Institutions») gewesen ist. Am erfolgreichen Aufbau des Universitären Forschungsschwerpunkts (UFSP) «Finanzmarktregulierung» (ab 2013) hat er massgeblich mitgewirkt; weiterhin ist er als Mitglied des Leitungsgremiums im UFSP engagiert.

Bereits seit 1993 trägt HANS CASPAR VON DER CRONE als Mitglied des Herausgeberkollegiums der Schweizerischen Zeitschrift für Wirtschafts- und Finanzmarktrecht (SZW) eine Mitverantwortung für die hohe wissenschaftliche Qualität dieser Zeitschrift; seit 2015 ist er nun Vorsitzender dieses Kollegiums. Grosse Bedeutung haben in diesem Kontext die seit 2002 sechsmal im Jahr erscheinenden Besprechungen wichtiger (Bundesgerichts-)Entscheide erlangt. Daneben ist HANS CASPAR VON DER CRONE weiterhin forensisch in der von ihm vor 20 Jahren gegründeten Anwaltskanzlei von der Crone Rechtsanwälte AG in Zürich aktiv und amtet darüber hinaus regelmässig als Schiedsrichter in nationalen und internationalen Verfahren.

Das wissenschaftliche Oeuvre von HANS CASPAR VON DER CRONE ist beeindruckend: Seine bevorzugten Tätigkeitsgebiete sind das Gesellschafts- und Firmenrecht, das Banken- und Kapitalmarktrecht, sowie das Vertragsrecht. Seine Schriften zeichnen sich durch wissenschaftliche Strenge, Offenheit gegenüber Neuem, dem Suchen nach überzeugenden Lösungen sowie grosse Praxisrelevanz aus.

Die Festschrift widerspiegelt diese breite wissenschaftliche Arbeiten des Jubilars: Schwerpunkte bilden das Gesellschaftsrecht und das Kapitalmarktrecht, doch fehlen auch die weiteren Rechtsgebiete nicht. Innerhalb der beiden Hauptteile ist die Festschrift nach Themen (z.B. Corporate Governance, Konzern, Verantwortlichkeit, Gesetzgebungsvorhaben) und von allgemeinen Überlegungen zu spezifischen Themenstellungen geordnet.

Über seine vielfältigen beruflichen Tätigkeiten hinaus zeigt sich der breite Horizont, über den HANS CASPAR VON DER CRONE verfügt, auch in seinen weiteren Interessen, neben der Freude am Reisen ins Ausland insbesondere in der Nähe zu kulturellen Ereignissen; die Stichworte Fotografie, Film und Theater sind ein Zeichen für seine diesbezüglichen Affinitäten.

Die Herausgeber hätten ohne mannigfaltige Unterstützung diese Festschrift nicht rechtzeitig erstellen können. OLIVIER BAUM hat das Projekt von Beginn weg bis zur Drucklegung umsichtig und mit grossem Einsatz betreut; bei der Organisation wurde er von FELIX BUFF, beim Lektorieren der Texte von LUCA ANGSTMANN und LINUS CATHOMAS unterstützt. Weiter hat BRIGITTE VON DER CRONE im Hintergrund wesentlich zur Realisierung des Projektes beigetragen. Zu Dank verpflichtet sind die Herausgeber auch dem Schulthess Verlag für die zuvorkommende und effiziente Zusammenarbeit.

Die Herausgeber und alle Mitwirkenden an der Festschrift wünschen HANS CASPAR VON DER CRONE von Herzen alles Gute für die kommenden Jahre. Die Freude an der weiteren Zusammenarbeit verbindet sich mit dem Wunsch, dass auch inskünftig weiterhin die privaten Interessen im Leben einen ausreichenden Platz einnehmen können.

ROLF H. WEBER

WALTER STOFFEL

JEAN-LUC CHENAUX

ROLF SETHE

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Extraterritoriality in Financial Regulation

SUSAN EMMENEGGER*

I. Introduction: American Imperialism and the Brussels Effect

Extraterritoriality has a bad reputation. It is generally associated with imperialism, arrogance, undeserved moral supremacy, and hypocrisy – and with a country named U.S.A. As has been famously said, the U.S. has had three major export products: rock music, blue jeans and U.S. law.[1] The third item is easily the most hated U.S. export

* This piece is part of the research I conducted as a Hauser Global Fellow at NYU law school in 2015/2016. I wish to thank GEOFFREY MILLER, KEVIN DAVIS, UN KYUNG PARK, JENNIFER HILL, FABIO MOROSINI, YOON JIN SHIN, JING TAO, SHREYA ATREY, FREDERICK WILMOT-SMITH, ASEM KHALIL, MACHIE MURATA and the other participants of the Global Fellows Forum for their comments and observations. I also thank GEOFFREY MILLER, JENNIFER ARLEN and SERINA VASH for welcoming me at the Center of Financial Institutions and the Program on Corporate Compliance and Enforcement. Finally, I thank LEONIE LUTERBACHER and EVA STOKAR VON NEUFORN for their valuable assistance in finalizing this paper.

1 V. ROCK GRUNDMAN, The New Imperialism: The Extraterritorial Application of United States Law, The International Lawyer 1980, 257. This quote was also referred to by Supreme Court Justice BRENNAN in his dissenting opinion in *United States v. Verdugo-Uriquiez,* 494 US 259, 280 *et seq.* (1990): «Particularly in the past decade, our Government has sought, successfully, to hold foreign nationals criminally liable under federal laws for conduct committed entirely beyond the territorial limits of the United States that nevertheless has effects in this country. Foreign nation-

item of all times.[2] The resentment is being kept alive by recurring cycles of highly publicized U.S. enforcement actions against foreign targets. U.S. prosecutorial methods and the level of pecuniary sanctions evoke the image of ruthless U.S. attorneys dedicated to fill their government's pocket at the expense of unlucky foreign companies who happen to pop up on their computer screens. In the field of law making and particularly with regard to financial regulation, the argument is that extraterritoriality of U.S. provenience subverts traditional multilateral processes,[3] and that to turn away from multilateralism is particularly damaging at a time where the governmental responses to the financial crisis have been remarkably consensus-oriented, giving rise to a large body of international standards with a harmonizing effect on the global scale.[4]

Some tell a different tale. They argue that even though critics of U.S. policy portray U.S. financial regulators as «uniquely and arrogantly applying our law extraterritorially, the EU has actually done much the same over the same period.»[5] They also note that the EU has engaged in a new type of extraterritoriality, using market access rules to unilaterally force upon the world new regulatory standards.[6] EU regulations dictate what cereal Americans eat for breakfast, what makeup they apply and what software they use on their computer.[7] This extraterritorial regulatory design is labeled the «Brussels Effect».[8] How much more imperialistic can things get if – due to EU regulations –

als must now take care not to violate our drug laws, our antitrust laws, our securities laws, and a host of other federal criminal sanctions. The enormous expansion of federal criminal justice outside our Nation's boundaries has led one commentator to suggest that the country's three largest exports now are 'rock music, blue jeans, and United States law'». For an overview of areas of U.S. extraterritorial regulation *see* AUSTEN L. PARRISH, Reclaiming International Law from Extraterritoriality, Minnesota Law Review 2009, 846 *et seqq.* (mentioning antitrust, copyright, securities, trademark, corporate law, bankruptcy, tax, criminal, environmental, civil rights and labor law).

2 MARKUS STÄDELI, Lukratives Geschäft mit dem Export der eigenen Gesetze, NZZ am Sonntag, 6. Juli 2014, 27.

3 ARTHUR J. COCKFIELD, The Limits of International Tax Regime as a Commitment Projector, Vanderbilt Tax Review 2013, 102 f.; ALLISION CHRISTIANS, Putting the Rign Bank in Sovereign, Pepperdine Law Review 2013, 1408.

4 JAMES COCK, Extraterritorial Reach of U.S. Financial Laws, in: Hopt/Wymeersch/Ferrarini (eds.), Financial Regulation and Supervision: A Post-Crisis Analysis, Oxford 2012, 469.

5 JOHN C. COFFEE JR., Extraterritorial Financial Regulation: Why E.T. can't come home, Cornell Law Review 2014, 1263, Fn. 9.

6 ANU BRADFORD, The Brussels Effect, Northwestern University Law Review 2012, 1; JOAN SCOTT, Extraterritoriality and Territorial Extension in EU Law, American Journal of Comparative Law 2014, 87.

7 BRADFORD (Fn. 6), 2.

8 The «Brussels Effect» has been coined by BRADFORD (Fn. 6). As with all good labels, it has spread quickly. *See e.g.* SCOTT (Fn. 6), 88; ORLA LYNSKEY, The Foundations of EU Data Protection Law, Oxford 2015, 42; PAUL M. SCHWARZ, The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures, Harvard Law Review 2012/2013, 1967.

American kids no longer find soft plastic toys in their McDonald's Happy Meal?![9] Lastly, a positive note is added to U.S. unilateralism by pointing out that extraterritoriality of U.S. provenience has sparked worldwide multilateral agreements on important issues such as financial transparency: If today 101 jurisdictions have committed to the OECD sponsored automatic exchange of financial account information, it is because the U.S. went ahead and enacted FATCA.[10]

I propose a different tale still. My argument is that in the field of financial regulation, extraterritoriality has always been a core element of the main regulatory framework, and that this framework is consensus-driven. Before I present the evidence in support of this argument, I need to explain what I mean by extraterritoriality and extraterritorial jurisdiction.

II. Extraterritoriality: A Term of Many Meanings

Not only is extraterritoriality tainted with a negative connotation. There is also no consensus on what extraterritoriality actually means.[11] Some scholars suggest that one should simply avoid the term, noting that «[t]he search for a satisfactory definition of extraterritorial jurisdiction [...] is doomed to failure: 'extraterritorial jurisdiction', like 'bureaucratic', is a term that could never be rescued from its unattractive reputation»[12]. However, the issues related to extraterritoriality are unlikely to disappear by some linguistic turn. The conditions under which a state may regulate persons, things or conduct outside of its territorial borders needs to be answered regardless of definitional challenges.

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9 This example is mentioned in BRADOFORD (Fn. 6), 3.

10 JOSHUA D. BLANK/RUTH MASON, Exporting FATCA, NYU Law & Economics Research Paper Series, Working Paper No. 14-15 (February 2014), 1247 *et seq*. On a more critical note, one should add that the U.S. has not committed to the OECD standard and that its FATCA-based intergovernmental agreements are a one-sided affair: The U.S. gets all the information and the partner jurisdictions get very little. See SUSAN EMMENEGGER, Why America Is The New Switzerland – And how Panama Is About To Change This, NYU Program on Corporate Compliance and Enforcement Blog May 25, 2016, html-document available at: <https://wp.nyu.edu/compliance_enforcement/>.

11 *See e.g.* ANTHONY J. COLANGELO, What Is Extraterritorial Jurisdiction?, Cornell Law Review 2014, 1303 *et seqq.*

12 ANDREAS LOWENFELD, International Litigation and the Quest for Reasonableness, Oxford 1996, 16; CÉDRIC RYNGAERT, Jurisdiction in International Law, 2nd ed., Oxford 2015, 8: «[T]he term [extraterritorial] might best be avoided because it is tainted by the pejorative connotation it has acquired over the years.»

1. Approaches to Extraterritoriality

The narrowest approach defines extraterritoriality as jurisdiction that lacks a territorial nexus. Whenever a territorial nexus – however weak this nexus may be – exists, then jurisdiction is territorial. This is an approach which is sometimes discussed, but one that lacks doctrinal support.[13] The two main approaches to extraterritoriality are broader in the sense that a territorial nexus alone does not suffice to exclude extraterritorial jurisdiction. To facilitate the discussion, I will label the first *substantial nexus approach* and the second *foreign element approach.*

Under the substantial nexus approach, jurisdiction is extraterritorial if it lacks a substantial territorial nexus.[14] Reversely, if a substantial territorial nexus is established, jurisdiction becomes territorial. Under the foreign element approach, jurisdiction is extraterritorial if it involves persons, things or conduct outside the domestic territory.[15] Its starting point is that jurisdiction – in the form of legislation, adjudication or enforcement – can be over persons, things, or conduct. Whenever one jurisdictional element is located outside the domestic territory, jurisdiction is extraterritorial. This approach is very similar to the one taken in the field of international private law. There too, the first question is whether a case includes a foreign element. If this holds true, the analysis continues on the basis of the conflict of law rules.

As extraterritoriality is strongly associated with the U.S. legal system, it is worth mentioning that the U.S. Supreme Court is said to have endorsed a «troubling new approach»[16] to extraterritoriality in *Morrison v. National Australia Bank.*[17] This decision

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[13] *See* LOUIS D'AVOUT, L'extraterritorialité du droit dans les relations d'affaires, La Semaine Juridique 2015, 1876: «Au sens étroit (extra: 'en dehors'), l'extraterritorialité est caractérisée si les éléments essentiels du commandement juridique sont tous localisés hors le territoire de son auteur. L'intention spécifique [...] est d'appréhender des personnes, des biens, des relations non localisées sur le territoire.» The author calls this notion the extraterritoriality «stricto sensu». He favors a broader approach. *See also* RYNGAERT (Fn. 12), 7, who does not endorse this approach.

[14] *See* SCOTT (Fn. 6), 89 *et seq.*: «[A] measure will be regarded as extraterritorial when it imposes obligations on persons who do not enjoy a relevant territorial connection with the regulating state».

[15] MATTHIAS HERDEGEN, Principles of International Economic Law, Oxford 2013, 78: «This extraterritorial reach of national law refers to its application to activities partly or entirely carried out abroad or to the status of persons or things domiciled or located in foreign territory.»; LEA BRILMAYER/CHARLES NORCHI, Federal Extraterritoriality and Fifth Amendment Due Process, Harvard Law Review 1991/92, 1218, Fn. 3: «[A] case involves extraterritoriality when at least one relevant event occurs in another nation». AUSTEN L. PARRISH, Evading Legislative Jurisdiction, Notre Dame Law Review 2013, 1678: «Both courts and commentators refer to extraterritorial legislation the same way: domestic law that regulates conduct abroad».

[16] PARRISH (Fn. 15), 1673.

is mostly hailed for the court's renewed and unequivocal affirmation that there is a presumption against the extraterritorial application of U.S. law[18] and its forceful rejection of the argument that some domestic contact is sufficient to overcome said presumption.[19] The «troubling approach» regards another aspect of the case. It has been argued that the Supreme Court in Morrison might inadvertedly have redefined extraterritoriality itself by suggesting that if legislation has a domestic «focus» it is not extraterritorial, even if it concerns foreign parties or foreign conduct.[20] I do not find clear evidence for this suggestion in Morrison. However, if indeed the domestic «focus» of a statute would determine its territorial nature, this would be a new and very singular understanding of territoriality, and, by consequence, extraterritoriality. This understanding would also be troublesome for another reason: The presumption against extraterritoriality could easily be circumvented by finding a domestic «focus» in a statute, in which case jurisdiction would be territorial and therefore uncontroversial.[21]

2. Why Definitions Matter

As becomes clear from the different approaches, the controversy turns on the demarcation line between territorial and extraterritorial jurisdiction – more precisely: on the ground covered by the territoriality principle. This is because territoriality is the prima-

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17 *Morrison v. Nat'l Australia Bank Ltd*., 130 S. Ct. 2869, 2884 (2010). The case was about a claim by Australian Investors who had bought stock in Australia's largest bank. The stock value of the bank dropped substantially after it was discovered that one of the bank's subsidiaries in Florida had fraudulently miscalculated interest rates on mortgages it was servicing. The court dismissed the claim. It held that the anti-fraud provision of the Securities and Exchange Act applies only when a purchase or sale is made in the U.S., or involves a security listed on a domestic exchange. For a discussion of Morrison *see* LEA BRILMAYER, The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption against Extraterritorial Application of American Law, Southwestern Law Review 2011, 655; WILLIAM S. DODGE, Morrison's Effects Test, Southwestern Law Review 2011, 687; JOHN H. KNOX, The Unpredictable Presumption Against Extraterritoriality, Southwestern Law Review, 635.

18 *Morrison v. Nat'l Australia Bank Ltd.,* 130 S. Ct. 2869, 2877 (2010): «Thus, 'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions'» (referring to EEOC v. Arabian American Oil Co. [Aramco], 111 S. Ct. 1227 [1991]).

19 *Morrison v. Nat'l Australia Bank Ltd.,* 130 S. Ct. 2869, 2884 (2010): «But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.»

20 PARRISH (Fn. 15), 1698 *et seq.,* referring to *Morrison v. Nat'l Australia Bank Ltd.,* 130 S. Ct. 2869, 2884 (2010).

21 *See* BRILMAYER (Fn. 17) 663 *et seq.:* «The possibility that the presumption against extraterritorial application of a statute can be circumvented simply by declaring the presumption inapplicable creates a major loophole.» *See* also PARRISH (Fn. 15), 1691 *et seqq.* for examples in case law in the aftermath of Morrison.

ry and most uncontested jurisdictional basis in international law.[22] The principle of equality between sovereign nations warrants that each nation possesses an exclusive jurisdiction within its territory. Accordingly, whenever a jurisdictional claim is deemed territorial, then such jurisdiction is legal under international law standards.

Reversely, when a jurisdictional claim is deemed extraterritorial, it is *a priori* a violation of the principle of non-intervention in the internal affairs of another sovereign nation.[23] Thus, whenever a jurisdictional claim is deemed extraterritorial, it needs specific justification. Generally speaking, a state can base its jurisdictional claim on treaty law or on the permissive customary law principles for jurisdiction, i.e. the territoriality principle (including subjective and objective territoriality), the personality principle, the protective principle, and the universality principle.[24] Although there is controversy to the exact content of these principles, the overall conclusion is that they offer a broad range of justifications for extraterritoriality.[25] Yet the important difference to territorial jurisdiction remains, as extraterritorial jurisdiction does need a specific legitimizing link, whereas this link is assumed in the presence of territorial jurisdiction.

Returning to the two main approaches to extraterritoriality, it is easy to see that the substantial nexus approach leaves room for a broad interpretation of what constitutes a sufficiently strong territorial link. This allows an expansive reading of territoriality and favors the finding of regulatory authority under the auspices of territorial jurisdiction.

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22 Swiss scholarship has left a footprint in this area of the law through an opinion written by famous statesman and scholar MAX HUBER in the *Island of Palmas* arbitral case. HUBER held that «Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the function of a State. This development [...] of international law [has] established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.» *Island of Palmas* (US v. Netherlands), 2 RIAA 829 (1928). For more recent judicial authority *see e.g. Laker Airways Limited v. Sabena, Belgian World Airlines,* 731 F. 2d 909, 921 (DC Cir 1984): «[T]he territoriality base of jurisdiction is universally recognized. It is the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power.»

23 *See* HERDEGEN (Fn. 15), 86; JAMES CRAWFORD, Brownlie's Principles of Public International Law, Oxford 2012, 456 (holding that extraterritorial jurisdiction is an exception to the rules of customary international law).

24 RYNGAERT (Fn. 12), 29. There are differences in scholarship when it comes to the naming of the categories, as the personality principle is sometimes divided into the nationality principle (uncontested) and the passive personality principle (contested). *See* CURTIS BRADLEY, Universal Jurisdiction and U.S. Law, University of Chicago Legal Forum 2001, 323: «Unless a nation's extraterritorial law falls within one of five categories – territoriality, nationality, protective principle, passive personality, or universality – it is said, the nation violates international law rules governing 'prescriptive jurisdiction'». But see also HERDEGEN (Fn. 15), 86 *et seqq.,* describing the following legitimizing links for jurisdiction: territoriality, personality, control, protective, and universality.

25 RYNGAERT (Fn. 12), 29 *et. seq.*

The foreign element approach operates with the formal jurisdictional categories (persons, things, conduct). It is therefore more likely to qualify jurisdiction as extraterritorial. For reasons I have explained elsewhere, I favor the foreign element approach to extraterritoriality.[26]

III. Extraterritoriality as a Core Element in Financial Regulation

Not only does extraterritoriality carry the taint of questionable legality because it constitutes an encroachment of another state's sovereignty. It is also said to be of doubtful democratic legitimacy because it applies laws to individuals and groups that had no formal voice in the political process of making them.[27] But in financial regulation, another story deserves attention. Much of the national law governing core issues of regulation is an implementation of regulatory principles developed by international standard setters. If one looks at the international regulatory framework, extraterritorial jurisdiction emerges a core regulatory instrument. Extraterritorial financial regulation may be exercised by a national authority based on national law, but it is generally based on international standards, which, in turn, are the result of a broad multilateral consensus. In short: extraterritoriality emerges as the key regulatory instrument when sovereign nations discuss issues of financial regulation.

1. Consolidated Supervision

The first example of multilateral extraterritorial jurisdiction in financial regulation regards the principle of consolidated supervision. This principle has been developed by the Basel Committee on Banking Supervision (BCBS) and it lies at the core of cross-border banking regulation. As the BCBS explained in its Concordat of 1983, «the principle of consolidated supervision is that parent banks and parent supervisory authorities monitor risk exposure [...] of the banks or banking groups for which they are responsible, as well as the adequacy of their capital, *on the basis of the totality of their business wherever conducted.*»[28]

Since 1983, the principle of consolidated supervision has seen further developments. In 1992, the Concordat principles were reformulated as minimum standards and the prin-

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[26] *See* SUSAN EMMENEGGER, Extraterritorial Economic Sanctions And Their Foundation in International Law, Arizona International and Comparative Law Journal 2016, II. (to be published in November 2016).

[27] PARRISH (Fn. 15), 1701.

[28] BCBS, Principles of the Supervision of Bank's Foreign Establishments (May 1983), 4. A note to the reader: All documents cited in this section can be found via search machines. I will therefore only indicated url-information where I am referring to a document that is not available in a pdf-format.

ciple of consolidated supervision was extended to «all prudential matters pertaining to international banks», including the bank's conduct in terms of criminal activity or violations of banking law.[29] The BCBS also introduced the instrument of on-site examinations by the home supervisor in all jurisdictions where the bank is active.[30] A joint report of the BCBS and the Offshore Group of Banking Supervisors published in 1996 set out the standard procedures for the on-site inspections.[31] The report was discussed at the Ninth International Conference of Banking Supervisors and the supervisors of one hundred and forty countries endorsed its principles.[32]

If a home country supervisor can order the bank's foreign branches and subsidiaries to transmit information about their local operations, if he is in a position to prohibit such operations and if he can go as far as conducting on-site inspections, then his supervisory power is extraterritorial. Indeed, consolidated supervision as the core concept of effective cross-border banking supervision is based on the assumption of extraterritoriality. As shown above, the extraterritoriality in the context of consolidated supervision is not restricted to purely prudential matters, but extends to the conduct of banks with regard to criminal law and banking law. Moreover, these minimum standards are either implemented or at least endorsed by a very large number of countries, meaning that there is a widespread consensus on the appropriateness of extraterritoriality as an instrument to regulate banks with cross-border activities.

2. Bank Resolution

As has been famously said, «banks are global in life, but national in death.»[33]. The financial crisis of 2008 provided ample evidence for this, as national supervisors blocked assets of failing banks to ensure that local creditors would recover as much of their assets as possible.[34] However, it was also evident that a coordinated recovery and

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29 BCBS, Minimum Standards for the Supervision of International Banking Groups and their Cross-Border Establishments (July 1992), 2. The text refers to the supervisors' active commitment to cooperate in said areas. But effectively, this means that consolidated supervision will include areas of law that are beyond the scope of traditional prudential supervision and regulation.

30 BCBS, Minimum Standards for the Supervision of International Banking Groups and their Cross-Border Establishments (July 1992), 5.

31 BCBS and Offshore Group of Banking Supervisors, The Supervision of Cross-Border Banking (October 1996), Annex A, 21.

32 BCBS and Offshore Group of Banking Supervisors (Fn. 31), Preface.

33 The dictum is attributed to MERVYN KING, Governor of the Bank of England from 2003-2013. *See* EVA HÜPKES, Too Big, Too Interconnected and Too International to Resolve? How to Deal with Global Financial Institutions in Crisis, in: Delimatsis/Herger (eds), Financial Regulation at the Crossroads, Implications for Supervision, Institutional Design and Trade, Alphen aan den Rijn 2008, 93 Fn. 64.

34 This is the story of Lehman Brothers, *see* DIRK SCHOEMAKER, Governance of International Banking, Oxford 2013, 72 *et seqq*.

resolution planning would have, overall, left more funds in the hands of the creditors. Not surprisingly, the G20 called for action.[35]

In 2011, the Financial Stability Board (FSB) published and adopted the Key Attributes of Effective Resolution Regimes for Financial Institutions.[36] The G20 Heads of State endorsed the key attributes at the Cannes summit meeting as «new international standards for resolution regimes.»[37] In designing the key attributes, the FSB was mindful of the fact that territorial borders will be watched more closely for banks in death than for banks in life. Accordingly, the key attributes' primary aim is to make one national death look as much alike as the other. Yet even in this essentially territorial context, extraterritorial elements abound, especially with regard to global systemically important financial institutions (G-SIFIs).

In 2013, the FSB published a Guidance on Developing Effective Resolution Strategies for SIFIs, complementing the Key Attributes and mapping possible resolution strategies by the Crisis Management Groups.[38] The ensuing BCBS Principles for Effective Supervisory Colleges contains the note that joint on-site inspections or even on-site inspections of the home supervisor alone are an essential element of a statement of mutual cooperation.[39] Needless to say: On-site inspections by a home supervisor in foreign territory are quintessentially extraterritorial in nature. More importantly, the FSB guidance includes the proposal of the single point of entry resolution strategy (SPE). Conceptually, the SPE replicates the concept of consolidated supervision in the area of bank recovery and resolution: The home supervisor has the authority to manage the recovery and the resolution of the bank's worldwide operation.[40]

The SPE has not yet been tested. Whether it will ever be successfully implemented remains an open question.[41] From an extraterritoriality perspective, however, what emerges from consensus-oriented international standard-setters such as the FSB is that not only in life, but also in the death of banks the supervisory process hinges on the extra-

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35 G20 Summit: Pittsburgh (24-25 September 2009), Leaders' Statement, 9; G20 Summit: Seoul (11-12 November 2010) Leaders' Declaration, Para. 30-33.

36 FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions (October 2011), revised version published in October 2014 (no changes to the 12 key attributes).

37 G20 Summit: Cannes (3-4 November 2011), Communiqué, 3.

38 FSB, Recovery and Resolution Planning for Systemically Important Financial Institutions: Guidance on Developing Effective Resolution Strategies (16 July 2013).

39 BCBS, Principles of Effective Supervisory Colleges (June 2014), 12, 24 *et seq*.

40 According to the FSB, the single resolution authority will probably be «in the jurisdiction responsible for the global consolidated supervision of a group.» *See* FSB (Fn. 38), 12.

41 The U.S. as one of the advocates of the SPE requires large foreign banks to place their U.S. subsidiaries under a U.S. intermediate holding company. This allows the U.S. to implement a SPE resolution under its own control. Needless to say that this undermines the very idea of an SPE resolution.

territorial application of one authority's resolution framework to the worldwide subsidiaries and branches of the failing bank.

3. OTC Derivatives Regulation

A third example of extraterritoriality in financial regulation regards market transactions. At the summit meeting in Pittsburgh in September of 2009, the G-20 leaders called for tougher regulation of over-the-counter (OTC) derivatives, concluding that these types of financial instruments had contributed to the financial crisis of 2008.[42] The FSB was charged with the assessment of the implementation of the G20 regulatory agenda.

As OTC derivatives markets are essentially cross-border markets, effective regulation and supervision presumes extraterritoriality.[43] Indeed, when the G-20 Leaders affirm that national regulators and supervisors must have access to «all relevant information», this information is bound to come from sources outside of the national territory. More to the point, OTC regulations have direct extraterritorial effects on third country counterparties.[44] The most prominent example of extraterritorial regulation[45] regards the clearing obligations of OTC derivatives counterparties. For instance, the EU regulation (EMIR) provides that clearing obligations will apply to certain third country counter-

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42 G20 Summit: Pittsburgh (Sept. 24-25, 2009), Leader's Statement, 9. The statement includes four central regulatory responses: First, all standardized OTC derivative contracts should, where appropriate, be traded on exchanges and electronic platforms. Second, these contracts should be cleared through central counterparties by end-2012 at the latest. Third, OTC derivative contracts should be reported to trade repositories. Forth, Non-centrally cleared contracts should be subject to higher capital requirements. At the Toronto summit in June 2010, the G-20 leaders committed to «accelerate the implementation of over-the-counter (OTC) derivatives regulation and supervision and to increase transparency and standardization.» *See* G20 Summit: Toronto (June 26-27, 2010), 19.

43 *See also* EDWARD F. GREENE/ILONA POTHIA, Issues in the extraterritorial application of Dodd-Frank's derivatives and clearing rules, the impact on global markets and the inevitability of cross-border and US domestic coordination, CAPITAL MARKETS LAW JOURNAL 2013, 359 (referring to the speech by the then acting director of the Division and Trading of the SEC, JOHN RAMSEY, delivered to the ABA on May 2013, where RAMSEY noted that the implementation of the G20 commitments make extraterritoriality inevitable).

44 OTC derivatives regulations also have indirect extraterritorial effects. An example is Art. 11 of Reg. 648/2012 on OTC derivatives, central clearing counterparties and trade repositories (EMIR). This provision states that the risk mitigation requirements apply whenever *at least* one counterparty is established in the EU. As a result, EU counterparties will have to make sure that their non-EU counterparties comply with EMIR's requirements, creating not a legal, but a de facto obligation of non-EU counterparties to comply with EMIR.

45 For another example *see* Art. 93 Para. 5 of the Financial Market Infrastructure Act (FMIA): This provision imposes reporting duties on foreign subsidiaries of a Swiss counterparty if the subsidiaries are not subject to equivalent foreign regulation.

parties even if *both* are located outside the EU.[46] This extraterritorial scope is mirrored by the U.S. Dodd-Frank Act.[47] Finally, the G20 Leaders' call for the mutual recognition of the regulatory regimes with similar outcomes at the summit meeting in St. Petersburg in 2013 effectively refers to the instrument of «functional equivalence» (in the U.S. terminology: «substituted compliance»).[48] Functional equivalence has been the main mechanism in the current transnational efforts to coordinate OTC derivatives regulations.[49] But let it be clear: Functional equivalence is a mechanism to avoid conflicting outcomes resulting from extraterritorial regulatory claims. In the case of OTC derivatives regulation, the claims as such are not called into question.

The assumption and indeed the consensus on the extraterritorial reach of OTC derivatives regulation and the fact that the regulatory regimes are similar has not prevented controversies among the major regulatory powers regarding the implementation of the OTC derivatives markets regulation. Notably, there has been substantial friction between the U.S. and the EU, since – as shown above – both have implemented regulation with an express extraterritorial reach.[50] Thus, to assume extraterritoriality as an underlying concept does not make the design of the actual regulatory framework any less challenging. But this should not distract from the finding that in the systemically relevant field of OTC derivatives rules, the regulatory responses proposed by the main international institutions operate under the assumption of extraterritoriality. It is also clear that, whatever the outcomes of the present cooperation and harmonization efforts will be, they will include extraterritoriality as a central regulatory and supervisory tool.

4. Money Laundering

In the late 1980s the problem of drug trafficking had reached alarming proportions and had become a concern in the US and in Europe. This lead to the establishment of the

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46 *See* Art. 4(1)(a)(v) Reg. 648/2012 on OTC derivatives, central clearing counterparties and trade repositories (EMIR). This provision states that there is a clearing obligation for transactions between «two entities established in one *or more* third countries if they would be subject to a clearing obligation if they were established in the Union, provided that the contract has a direct, substantial and forseeable effect within the Union or where such an obligation is necessary or appropriate to prevent the evasion of any provisions of this Regulation [...]» (emphasis added). *See also* Art. 4(1)(a)(iv) Reg. 648/2012 on OTC derivatives, central clearing counterparties and trade repositories (EMIR) and Art. 102 CH-FMIA for a lesser degree extraterritorial scope.

47 Sec. 722(d) U.S. Dodd-Frank Wall Street Reform and Consumer Protection, Pub. L. 11-203, July 21, 2010.

48 G20 Summit: St. Petersburg (September 2013), Leaders' Declaration, 17.

49 *See, e.g.,* GREENE/POTHIA (Fn. 43), 386. For a critical view on substituted compliance *see* COFFEE (Fn. 5), 1265 («the concept has not received the scrutiny it needs. Sometimes, its costs may outweigh its benefits.»); ALEXY ARTAMONOV, Cross-border application of OTC derivatives rules: revisiting the substituted compliance approach, Journal of Financial Regulation 2015, 3 *et seqq*.

50 For a discussion *see* COFFEE (Fn. 5), 1274 et *seqq*.; ARTAMONOV (Fn. 49), 3 *et seqq*.

Financial Action Task Force (FATF) at the summit meeting of the G7 hosted by French President FRANÇOIS MITTERRAND in the new arch of Paris la Défense (sommet de l'arche) in 1989.[51] In 1990, the FATF published a report which contained forty recommendations to improve the national legal systems against money laundering.[52] Since then, the FATF has extended its mandate to the combat of terrorist financing (2002),[53] to the financing of proliferation of weapons of mass destruction (2008),[54] and to the general combat of financial crime, including tax crimes (2012).[55]

The current version of the FATF recommendations of 2012 figure in the Compendium of Standards published by the Financial Stability Board. The compendium lists the standards which are «internationally accepted as important for sound, stable and well functioning financial systems»[56]. The FATF recommendations include the following interpretive note to recommendation 3 on the money laundering offence: «Predicate offenses for money laundering should *extend to conduct that occurred in another country*, which constitutes an offence in that country, and which would have constituted a predicate offence had it occurred domestically. Countries may provide that the only prerequisite is that the conduct would have constituted a predicate offence, had it occurred domestically»[57].

The short version of the interpretive note is: extraterritoriality. Predicate offenses to money laundering are explicitly extended to conduct in another country. This makes perfect sense. If the proceeds of a crime could legally be invested in any country other than the one where the crime was committed, the fight against money laundering

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51 *See* FATF, History of the FATF, html-document, available at: <http://www.fatf-gafi.org> About > History of the FATF. Originally, its members comprised the G7 (United States, Japan, Germany, France, United Kingdom, Italy, Canada), the EU Commission and eight other countries (Sweden, Netherlands, Belgium, Luxemburg, Switzerland, Austria). As of 2016, the FATF counts 37 members.

52 FATF, First FATF Report on the extent and nature of the money laundering process and FATF recommendations to combat money laundering, Report 1990. The recommendations were an integral part of the report which also addressed the money laundering process (containing estimates of the financial flows resulting from drug trafficking) as well as the status of international treaty law and national legislation with regard to money laundering. The 1990 report addressed money laundering exclusively under the aspect of drug trafficking.

53 *See* FATF, Annual Report 2001-2002 (June 2002), 1 *et seqq.,* as well as Annex A for eight (later nine) special recommendations on terrorist financing.

54 *See* FATF, Proliferation Financing Report (18 June 2008).

55 FATF, International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation. The FATF Recommendations (February 2012), at 113 (designated categories of offenses now include tax crimes).

56 *See* FSB, The Compendium of Standards, available at: <http://www.financialstabilityboard.org/what-we-do/about-the-compendium-of-standards/>.

57 *Id.*

would be a sham. National provisions on money laundering consistently include this extraterritorial scope, and they differ only with regard to the condition of double criminality.

In addition, the FATF guidance of 2015 for a risked-based approach – which is also included in the FSB Compendium of Standards – includes the recommendation of on-site inspections of foreign establishments by the competent anti-money laundering authority.[58] As has been said before, on-site inspections by a foreign regulator are the quintessence of extraterritorial enforcement jurisdiction.

IV. Conclusion

My aim in writing this article was not to put extraterritoriality on a pedestal and present it as a bright and shiny problem solver that we should happily endorse. There is no question that extraterritorial jurisdiction raises issues with regard to sovereignty and with regard to the rightful expectation of people that – absent extraordinary circumstances – they are shielded from the application of foreign laws. There is also very little question that we are seeing quite a bit of extraterritorial overreach – and yes, notably by the United States of America.[59]

My aim was much more modest. I simply wanted to point out that there are areas of law where extraterritoriality and international convergence are complementary rather than contradictory. Financial regulation is such an area. Here, the standards developed by consensus-oriented international institutions have been the main driver for regulation. Within that framework, extraterritoriality emerges as a core principle, extending from prudential regulation to markets and transaction regulation and to conduct regulation. There is a point to be made: When sovereign nations discuss issues of financial regulation, extraterritoriality emerges as the key instrument to attain regulatory goals.

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[58] FATF, Effective Supervision and Enforcement by AML/CFT Supervisors of the Financial Sector and Law Enforcement, Guidance for a Risk Based Approach (October 2015), 16. *See also* Directive (EU) 2015/849 of the European Parliament and of the Council of May 20, 2015 on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing, Para 52 (stating that the responsibility of the home Member State can involve on-site visits in establishments based in another Member State).

[59] Two areas of law are the primary targets for criticism: U.S. anti-bribery legislation (FCPA) and U.S. unilateral economic sanctions. With regard to the FCPA, *see* NATASHA N. WILSON, Pushing the Limits of Jurisdiction Over Foreign Actors Under the Foreign Corrupt Practices Act, Washington University Law Review 2014, 1077 *et seqq*. With regard to economic sanction *see* THILO RENSMANN, Völkerrechtliche Grenzen extraterritorialer Wirtschaftssanktionen, in: Ehlers/Wolffgang (eds.), Recht der Exportkontrolle, Bestandesaufnahme und Perspektiven, Frankfurt a.M. 2015, 97; SUSAN EMMENEGGER (Fn. 26), IV.; HARVARD LAW REVIEW 2011 – Developments in the Law: Extraterritoriality, 1251.

Thus, as the international consensus on financial regulation progresses, we are bound to see more extraterritoriality rather than less.

