

## ARTICLES

### THE LONG ARM OF THE SEC IN THE REGULATION OF DIGITAL CURRENCIES

FRANK EMMERT\*

#### I. INTRODUCTION

Among the most fundamental principles governing international law and international relations are the sovereign equality of states,<sup>1</sup> and the principle of

---

\* John S. Grimes Professor of Law and Director of the Center for International and Comparative Law at Indiana University Robert H. McKinney School of Law with law degrees from Germany, the Netherlands, and the U.S. I have been advising companies in the blockchain space since 2017 and I am teaching Blockchain and Digital Currency Law at the Indiana University Maurer School of Law. I am a co-founder of the Blockchain Law Alliance and regularly speaking at conferences and events about blockchain and digital currency regulation. Most of my publications and presentations, including several on blockchain and digital currency law, are freely accessible at <https://www.researchgate.net/profile/Frank-Emmert>.

I would like to thank my assistants Adam Kashin, Rick Tapia, and Can Okandan for background research going into the present Article. Any remaining errors or omissions are mine alone. For comments or questions please e-mail [femmert@iupui.edu](mailto:femmert@iupui.edu).

1. The principle was enshrined as Article 2(1) in the Chapter on Purposes and Principles of the Charter of the United Nations (UN). U.N. Charter art. 2, ¶1. As Kelsen has pointed out, the principle had already been enunciated in the so-called Four Power Declaration adopted at the Moscow conference of October 1943 by the Governments of the United States of America, the United Kingdom, the Soviet Union, and China, who recognized “the necessity of establishing . . . a general international organization, based on the principle of sovereign equality of all peace-loving States . . . .” See Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 207-20 (1944). Since then, the principle has been enshrined in numerous international declarations and documents, such as the 1947 UN Draft Declaration on Rights and Duties of States (Arts. 1, 5 and 14), the 1970 UN Friendly Relations Declaration, and the 1974 UN Charter of Economic Rights and Duties of States (Art. 2(1)). The principle has also been endorsed in numerous decisions of the International Court of Justice. See, e.g., Bardo Fassbender & Albert Bleckmann, *Article 2(1)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 68 ¶¶ 35-44 (Bruno Simma et al. eds, 2d ed. 2002). As a consequence, it is widely accepted as universally binding; See, e.g., Hannah Woolaver, *Sovereign Equality as a Peremptory Norm of General International Law*, in PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS) 713-739 (Dire Tladi ed., 2021). For further analysis, see

non-intervention in the domestic affairs of other states.<sup>2</sup> These principles have, at times, been more or less restrictively interpreted,<sup>3</sup> but they make it clear that the authorities of one state need to pass a very high bar before they can act in ways that interfere with the sovereignty of another state. First, a state needs to have jurisdiction to act. Second, if more than one state should claim jurisdiction over the same matter, certain conflict rules need to be respected. Third, there are specific bars that are hard to overcome—for example the prohibition of the use of force against another state<sup>4</sup>—and specific rules that may have to be respected, for example the principle of proportionality in response to an unlawful act.<sup>5</sup>

---

ROBERT A. KLEIN, *SOVEREIGN EQUALITY AMONG STATES: THE HISTORY OF AN IDEA* (1974).

2. As Nolte points out, the non-intervention principle enshrined in Article 2(7) of the Charter of the United Nations “protects only against acts of the United Nations and not against acts of other States.” It is, however, “*lex specialis*” to a more “general principle of non-intervention ... derived from Arts. 2(1) and (4) of the Charter and from customary international law.” See Georg Nolte, *Article 2(7)*, in 1 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 1, ¶ 7; See U.N. Charter art. 2, §7. Although Niki Aloupi has persuasively argued that the right to non-intervention or non-interference cannot be broadly qualified as an absolute right at the level of *jus cogens*, and that only an illegal threat or use of force against another state violates *jus cogens*, Niki Aloupi, *The Right to Non-Intervention and Non-Interference*, 4 *CAMBRIDGE INT'L L.J.* 566-587 (2015), it is equally clear that each and every state is under an obligation to respect the sovereignty and territorial integrity of other states by refraining from interventions in other states' domestic affairs unless there are compelling reasons, in particular those necessitating a humanitarian intervention. See ELLERY C. STOWELL, *INTERVENTION IN INTERNATIONAL LAW* (1921). For more contemporary examples, see Nancy D. Arnison, *International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?*, 17 *FLETCHER F. WORLD AFFS.* 199-211 (1993); Chris O'Meara, *Should International Law Recognize a Right of Humanitarian Intervention?*, 66 *INT'L & COMP. L.Q.* 441-466 (2017).

3. For a less restrictive approach, see, e.g., Anthony D'Amato, *There Is No Norm of Intervention or Non-Intervention in International Law*, 7 *INT'L LEGAL THEORY* 33 (2011). Even D'Amato acknowledges, however, that sovereignty and sovereign equality of states prevent interventions in other states in the absence of compelling reasons, in particular for the prevention or termination of massive human rights violations. *Id.*

4. See, e.g., Jean d'Aspremont, *Mapping the Concepts Behind the Contemporary Liberalization of the Use of Force in International Law*, 31 *UNIV. PA. J. INT'L L.* 1089-1148 (2010); RUSSELL BUCHAN & NICHOLAS TSAGOURIAS, *REGULATING THE USE OF FORCE IN INTERNATIONAL LAW: STABILITY AND CHANGE* (2022); Olivier Corten & Vaios Koutroulis, *The Jus Cogens Status of the Prohibition of the Use of Force - What Is Its Scope and Why Does It Matter?*, in *PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS)*, *supra* note 1, at 629-67.

5. See MICHAEL NEWTON & LARRY MAY, *The Uniqueness of Jus in Bello Proportionality*, in *PROPORTIONALITY IN INTERNATIONAL LAW* 155 (2014); see also JUDITH GARDAM, *NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES* (2004); *NECESSITY AND PROPORTIONALITY IN INTERNATIONAL PEACE AND SECURITY LAW* (Claus Kreß & Robert Lawless eds., 2020); ALEC STONE SWEET & JUD MATHEWS, *PROPORTIONALITY BALANCING & CONSTITUTIONAL GOVERNANCE: A COMPARATIVE & GLOBAL APPROACH* (2019). For a discussion of proportionality as “an instrumental part of the rule of law and an essential check on government power,” see E.

Part II, provides a detailed analysis of these rules of international law and the rules applied in the U.S. with regard to extraterritorial application of domestic laws. Part III will showcase how a number of decisions of the U.S. Securities and Exchange Commission (SEC)<sup>6</sup> and the U.S. Commodity Futures Trading Commission (CFTC)<sup>7</sup> in matters of blockchain technology and digital currencies stack up against these rules and principles of national and international law. While the SEC and the CFTC have been the main authors of the decisions to be investigated, a few remarks about the activities of the Department of Justice (DoJ)<sup>8</sup> will also be included. Part IV discusses stated and unstated justifications for the use of extraterritorial or long-arm jurisdiction by the SEC and CFTC and why they fall short in justifying at least some of these cases. To an extent, I will speculate about the motives of the regulators as they generously stretch the limits of their jurisdiction.<sup>9</sup> Finally, Part V offers some conclusions and suggestions for the way forward.

## II. THE RULES APPLICABLE TO THE EXERCISE OF EXTRATERRITORIAL OR LONG-ARM JURISDICTION

### 1. *Jurisdiction*

According to the Restatement (Fourth) of Foreign Relations Law (subsequently referred to as “the Restatement”), “[j]urisdiction refers to the authority of a state to make, apply, and enforce law.”<sup>10</sup>

---

THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS (2008).

6. See SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov/> [<https://perma.cc/C8KP-F427>].

7. See COMMODITY FUTURES TRADING COMMISSION, <https://www.cftc.gov/> [<https://perma.cc/V8FP-2836>].

8. On 6 September 2022, the DoJ published a report pursuant to Sec. 5(b)(iii) of President Biden’s Executive Order 14067 *Ensuring Responsible Development of Digital Assets* of 9 March 2022. See U.S. DEP’T OF JUST., OFF. OF THE ATT’Y GEN, THE ROLE OF LAW ENFORCEMENT IN DETECTING, INVESTIGATING, AND PROSECUTING CRIMINAL ACTIVITY RELATED TO DIGITAL ASSETS (2022), <https://www.justice.gov/ag/page/file/1535236/download> [<https://perma.cc/STE2-EN5D>]. The report complements an earlier Report of the Attorney General. See U.S. DEP’T OF JUST., OFF. OF THE ATT’Y GEN, HOW TO STRENGTHEN INTERNATIONAL LAW ENFORCEMENT COOPERATION FOR DETECTING, INVESTIGATING, AND PROSECUTING CRIMINAL ACTIVITY RELATED TO DIGITAL ASSETS (2022), <https://www.justice.gov/ag/page/file/1510931/download> [<https://perma.cc/JE7G-KERJ>].

9. Kevin Roose recently suggested that “[r]ight now, the biggest threat to crypto – in the United States, at least – is that the people who are in charge of regulating the industry seem to want to ban it.” Kevin Roose, *Can ‘The Merge’ Save Crypto?*, N.Y. TIMES (Sept. 15, 2022) <https://www.nytimes.com/2022/09/15/technology/merge-ether-eum-crypto.html> [<https://perma.cc/9DTG-46TL>].

10. RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. pt. IV, intro. note (AM. L. INST. 2019).

The Restatement elaborates as follows: “The foreign relations law of the United States

*Jurisdiction to prescribe* is the authority of a state *to make* law applicable to persons, property, or conduct. Legislative bodies exercise prescriptive jurisdiction when they enact statutes, but so does the executive branch when it adopts generally applicable orders or regulations, and so do courts when they make generally applicable common law.

*Jurisdiction to adjudicate* is the authority of a state *to apply* law to persons or things, in particular through the processes of its courts or administrative tribunals. [...]

*Jurisdiction to enforce* is the authority of a state to exercise its power *to compel* compliance with law.<sup>11</sup>

On the basis of these principles, *international law* recognizes the power of states to exercise prescriptive or regulatory jurisdiction only in the following cases:

Pursuant to the *territoriality principle*, a country can regulate all activities that take place within its borders, which include embassies in foreign countries, as well as ships and aircraft flying the flag of the respective country.<sup>[12]</sup> Hence, anybody driving on U.S. roads has to observe the posted speed limits, regardless of their nationality. Along the same lines, anybody [...] selling goods inside the U.S. has to observe U.S. federal and/or state standards for health and safety and the protection of the environment, regardless of where the goods were made. Finally, U.S. federal law can prohibit smoking on commercial aircraft registered in the U.S., regardless of where they may be at any given time around the globe.

---

divides jurisdiction into three categories:

- (a) jurisdiction to prescribe, i.e., the authority of a state to make law applicable to persons, property, or conduct;
- (b) jurisdiction to adjudicate, i.e., the authority of a state to apply law to persons or things, in particular through the processes of its courts or administrative tribunals; and
- (c) jurisdiction to enforce, i.e., the authority of a state to exercise its power to compel compliance with law.”

*See id.* § 401 Categories of Jurisdiction.

11. *Id.* (emphasis added).

12. Although the territoriality principle, at least when it comes to the proper territory of a state, is the strongest of the jurisdictional bases for the use of regulatory and enforcement powers, it is not unlimited. Already in the 1930s, it was recognized that a state must not use or allow the use of its territory in ways that cause preventable harm to other states, for example via transboundary pollution. *See* U.N. OFF. OF LEGAL AFFAIRS, CODIFICATION DIV., 3 REPORTS OF INTERNATIONAL ARBITRAL AWARDS, at 1905-82, U.N. Sales No. 1949.V.2.; John Wirth, *The Trail Smelter Dispute: Canadians and Americans Confront Transboundary Pollution, 1927-41*, 1 ENV'T HIST. 34-51 (1996).

On the basis of the *active personality principle*, countries can also regulate activities of their citizens/nationals wherever they take place. For example, the U.S., in principle, applies its tax laws to U.S. citizens wherever the taxable revenue is made and regardless of the place of residence of the taxpayer.<sup>[13]</sup> By contrast, many other countries only tax the worldwide income of individuals or corporations that have their place

---

13. This can lead to double taxation if a U.S. citizen is living abroad. In general, the worldwide income of an individual will be taxed by the country of residence. Countries other than the country of residence usually only tax whatever income a non-resident may have acquired in their territory. Some countries, like the U.S., however, also tax the worldwide income on the basis of citizenship. For Americans living abroad, unless there is a so-called Double Taxation Agreement (DTA) in place between the U.S. and the country of residence, the income will actually be taxed twice. For example, if an American is living in Germany and has gross worldwide income of about \$100,000, Germany will charge income tax at a rate of about 42% on the worldwide income. As an American citizen, however, she will also have to file a tax declaration in the U.S. and pay income tax at a rate of about 24% on the entire worldwide income. In the absence of a DTA, the total tax burden would amount to a whopping 66%. However, with the current DTA in place, Germany, as the place of residence and employment would be first to levy its income tax and the U.S., as “merely” the place of citizenship, would only top up the taxation if the tax already paid in the first country is lower. In this example, the U.S. would not add more taxes and the total tax burden would be 42%. By contrast, if the American was living in Dubai and paying only 10% tax on an income of \$100,000, the U.S. would add 14% to bring the total tax burden to the U.S. rate of 24%.

Even if a country does not levy income tax “merely” on the basis of citizenship, double taxation can occur if the country of residence taxes the worldwide income, as is generally accepted, and other countries levy their taxes on the portion of the worldwide income that is earned in their respective territories. For example, if a German resident also has income from a rental property in Costa Rica, the Germans will tax the worldwide income, including the income in Costa Rica, and Costa Rica will tax the local income from the rental property. Once again, without a DTA, double taxation would happen. With a DTA, Costa Rica would collect on the rental income and Germany would give a credit for the taxes already paid in Costa Rica and only tax the rental income if the tax rate in Costa Rica was lower than the tax rate that would be applied in Germany. In this way, DTAs avoid double taxation but always result in a total tax burden equivalent to the higher of the two country rates.

Yet another layer of complexity is potentially added for a U.S. citizen living abroad. If our German resident with the Costa Rica rental property is an American citizen, she would potentially pay three times for the rental income. However, if DTAs are in place between Germany and the U.S., and for the U.S. and Costa Rica, the latter would first tax the rental income, then Germany would tax the worldwide income while giving credit for tax already paid in Costa Rica, and then the U.S. would tax if the total rate of income tax should still be lower than the U.S. rate of income tax on the worldwide income. We could say that the sequencing is determined by the closeness of the connection. Costa Rica is most closely connected to the rental property for that part of the income, and Germany is still closer connected than the U.S. for the worldwide income because of the physical residence in Germany. For further discussion, see BRET WELLS, *INTERNATIONAL TAXATION* (5th ed. 2022).

of residence or incorporation within their territory, as well as any income that is earned within their borders. Hence, Germans living abroad do not pay taxes to the German authorities, unless they have some income source in Germany. However, Germany does make use of the active personality principle in criminal law by subjecting criminal activities of German citizens to its penal code, regardless of where they are committed.

Next is the so-called *passive personality principle*, which allows countries to apply their laws in cases where something is done to one of their citizens, even if the act is committed abroad. To illustrate the application of these first three principles of jurisdiction – and the potential conflicts – we could imagine a German and a British citizen getting into a fight in a bar in Australia. If the German causes injury to the Briton, Australia can apply its criminal law based on the territoriality principle. However, Germany can also prosecute the offender based on the active personality principle. Finally, the United Kingdom could exercise jurisdiction on the basis of the passive personality principle.<sup>14</sup>

Outside of these categories, states are not supposed to exercise their prescriptive or regulatory powers unless one of just a few narrow exceptions applies. The most important of those exceptions are triggered if a subject matter falls *outside of any territorial jurisdiction*, for example the protection of marine life on the high seas,<sup>15</sup> or in case of the *inability or unwillingness* of a territorial sovereign to prevent or terminate massive human rights violations.<sup>16</sup> The bar for

---

14. FRANK EMMERT, INTERNATIONAL BUSINESS TRANSACTIONS- TEXT, CASES, AND MATERIALS 28-29 (2nd ed. 2021).

15. Spanish tax laws provide another example. Spain, like most countries, will levy income tax on residents, defined as individuals spending at least 183 days a year in the country. Begoña Pérez-Bernabeu, *The New Tax Regime for Expatriates in Spain*, 34 Intertax 263 (2006). This standard is universally accepted since nobody can spend more than half of the year in more than one country, making it perfectly reasonable for the country of the main of several possible residences to lay claim to taxation of the worldwide income on the basis of residence. However, as the Colombian pop star Shakira is currently finding out, Spain will also tax her worldwide income on the basis of the location of her spouse and children in Spain in spite of the fact that Shakira was out of the country and on tour for more than 186 days in 2012, 2013, and 2014. Normally this could be a case of conflict with the real country of residence. However, in those years Shakira traveled so much that she did not spend at least 186 days anywhere and—presumably—also did not declare her worldwide income for taxation anywhere. Spain simply applies a presumption that individuals with close family in Spain who cannot show tax residency anywhere else, have their de facto center of economic interests in Spain. See Remy Tumin & Jose Bautista, *Shakira is Accused of Tax Evasion in Spain. Here's What We Know.*, N.Y. TIMES (Sept. 29, 2022) <https://www.nytimes.com/2022/09/29/world/europe/shakira-tax-fraud-explained.html> [<https://perma.cc/WVK2-SGJ3>].

16. See, e.g., CHARLES DOYLE, CONG. RSCH. SERV., RS22497, EXTRATERRITORIAL

the exercise of this *universal jurisdiction* is even higher when it comes to the exercise of judicial or enforcement powers, rather than mere regulatory powers.<sup>17</sup>

Whenever the authorities of one state go beyond these limits and exercise so-called *extraterritorial jurisdiction*, they invariably bump up against the sovereign rights of other states, whether it is the home state of the crew or flag state of the fishing vessel polluting the high seas, or the state tolerating or even encouraging massive human rights violations against a minority like the Rohingya in Myanmar. As the examples illustrate, an exercise of extraterritorial jurisdiction is not always illegal, but it must always be justified.

From the time it gained its independence, the U.S. “has been subject to ‘the law of nations.’”<sup>18</sup> As Nafziger et al remind us, “[a] famous dictum in the case of *The Paquete Habana*, 175 U.S. 677 (1900), confirmed earlier authority that, although Article VI(2) of the U.S. Constitution established only one of the sources of international law, treaties, as the supreme law of the land, *all* international law applies in the mixed monist-dualist system of the United States. This dictum begins as follows:

‘International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages [of states] . . . .’<sup>19</sup>

Consistent with this dictum, the Restatement comments on domestic rules in U.S. law dealing with the exercise of jurisdiction in international cases: “The United States exercises prescriptive jurisdiction on the bases recognized by customary international law, subject to the limits of the Constitution and the principles of statutory interpretation that determine the geographic scope of ambiguous statutes.”<sup>20</sup> The limits of the Constitution were interpreted by the U.S.

---

APPLICATION OF AMERICAN CRIMINAL LAW: AN ABBREVIATED SKETCH (2012); AISLING O’SULLIVAN, UNIVERSAL JURISDICTION IN INTERNATIONAL CRIMINAL LAW- THE DEBATE AND THE BATTLE FOR HEGEMONY (2017); NIENKE VANDER HAVE, THE PREVENTION OF GROSS HUMAN RIGHTS VIOLATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAWS (2018).

17. For more information, see, in particular, The Princeton Project on Universal Jurisdiction, a collaboration between Princeton University’s Program in Law and Public Affairs (LAPA), the Woodrow Wilson School of Public and International Affairs, the International Commission of Jurists, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the Netherlands Institute of Human Rights. The project published the Princeton Principles on Universal Jurisdiction. See The Princeton Project, *Princeton Principles on Universal Jurisdiction*, in INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 185-202 (Charlotte Ku & Paul F. Diehl (eds.), 2009)

18. JAMES NAFZIGER, ANASTASIA TELESETSKY & VED NANDA, PRIVATE INTERNATIONAL LAW: AVOIDING AND RESOLVING CONFLICT OF LAWS 32 (2022).

19. *Id.* at 33.

20. See RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. RESTATEMENT § 401

Supreme Court as early as 1804 in *The Charming Betsy Case*: "... an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."<sup>21</sup>

Extraterritorial application of domestic law has always been problematic because of the potential conflict with the sovereign equality of states and the principle of non-intervention in the domestic affairs of other states. An oft cited expression of this approach is the decision of the U.S. Supreme Court regarding the application of the Sherman Antitrust Act of 1890<sup>22</sup> in *American Banana*: "[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country *where the act is done*."<sup>23</sup> The narrow and territorial interpretation of the Sherman Act was cast aside by Judge Learned Hand in the 1945 *Alcoa* judgment.<sup>24</sup> Among other questions, Judge Learned Hand had to examine whether "Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it."<sup>25</sup> The Judge concluded, on somewhat spurious evidence that "it is settled law [...] that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that *has consequences [or effects]* within its borders which the state reprehends."<sup>26</sup>

The *effects doctrine* established in *Alcoa* initially triggered domestic and international resistance. As Gavil, Kovacic and Baker explain, foreign authorities were specifically concerned about criminal prosecution of their nationals under the Sherman Act, the application of far reaching American discovery rules, the availability of treble damages and class actions, and the application of the American Rule regarding recovery of attorney fees.<sup>27</sup>

Nevertheless, the effects doctrine was subsequently endorsed by other U.S. courts and also imported by a growing number of foreign courts and authorities, at least *in the area of antitrust or competition law*.<sup>28</sup> Two important questions

---

cmt. b (AM. L. INST. 2019).

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

22. *See* 15 U.S.C. §§ 1-7 (1890).

23. *See* *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (emphasis added).

24. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

25. *Id.* at 443.

26. *Id.* (emphasis added).

27. *See* Andrew Gavil, William Kovacic & Jonathan Baker, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS, AND PROBLEMS IN COMPETITION POLICY* 1031 (2nd ed. 2008) These are all legal concepts unknown to most foreign jurisdictions. In most countries, antitrust procedures are administrative in nature and do not entail criminal sanctions. Class actions and treble damages are uncommon, and discovery is much restricted. Moreover, under the English Rule applicable in most countries, the prevailing party can recover attorney fees from the non-prevailing party, which is not the case under the American Rule.

28. For discussion, see Karl M. Meessen, *Antitrust Jurisdiction and Customary International Law*, 78 AM. J. INT'L L. 783-810 (1984); James Friedberg, *The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine*, 52 U. PITT. L. REV. 289-26 (1990-91); Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: the United*



remain, however. First, whether *any* effect within U.S. borders is sufficient or whether the effects have to reach a more substantial level. Second, whether state practice is *sufficiently widespread, consistent, and broad*, to create new customary international law beyond the regulation of anticompetitive behavior. At least with regard to the general recognition of the effects doctrine, the Restatement seems to have no doubt. The Comment added to § 401 Categories of Jurisdiction elaborates as follows:

Both domestic and international law govern jurisdiction. No broad-based multilateral treaty governing jurisdiction currently exists. Instead, jurisdiction under international law is primarily regulated by customary international law, which results from a general and consistent practice of states followed out of a sense of international legal right or obligation. [...]”Customary international law permits exercises of prescriptive jurisdiction where there is a genuine connection between the subject of the regulation and the state seeking to regulate. [...] The most commonly recognized bases of jurisdiction that reflect such a genuine connection are territory, *effects*, active personality, passive personality, protection, and universality.<sup>29</sup>

As long as the legal foundations for reliance on the effects doctrine *beyond the area of antitrust law* are less than universally accepted, however,<sup>30</sup> any

---

*States and European Community Approaches*, 33 VA. J. INT’L L. 1-50 (1992); Jason Coppel, *A Hard Look at the Effects Doctrine of Jurisdiction in Public International Law*, 6 L.J. INT’L L. 73-90 (1993); J.P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159-99 (1999). Sufficiently wide acceptance around the globe—at least in the area of antitrust law—is argued by Anindita Jaiswal. See Anindita Jaiswal, *Effects Doctrine in India Versus the US: Developing & Developed Country Perspectives*, 12 MANCHESTER J. INT’L ECON. L. 344-65 (2015). For the contemporary state of the art, see Florian Wagner-von Papp, *Competition Law and Extraterritoriality*, in RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW 21-59 (Ariel Ezrachi ed., 2012); Brandan Sweeney, *International Governance of Competition and the Problem of Extraterritorial Jurisdiction*, in COMPARATIVE COMPETITION LAW 345-84 (John Duns, Arlen Duke & Brendan Sweeney eds., 2015); Eleanor Fox, *Extraterritorial Jurisdiction, Antitrust, and the EU Intel Case: Implementation, Qualified Effects, and the Third Kind*, 42 FORDHAM INT’L L.J. 981-98; Peter Behrens, *Unilateral Application of Competition Laws to Transnational Business Transactions: The Development of the “Effects” Doctrine in the US and the EU*, in EXTRATERRITORIALITY OF EU ECONOMIC LAW: THE APPLICATION OF EU ECONOMIC LAW OUTSIDE THE TERRITORY OF THE EU 9-27 (Nuno Cunho Rodrigues ed., 2021).

29. RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. RESTATEMENT § 401 cmt. a, § 403 (AM. L. INST. 2019), (emphasis added).

30. According to the Restatement, “[the] United States has long applied the effects doctrine to economic regulation. [...] Some foreign states have objected to U.S. exercises of prescriptive jurisdiction based on effects and have responded by enacting statutes blocking foreign regulation. [...] Some foreign states have also issued diplomatic protests and filed amicus briefs objecting to U.S. exercises of effects-based jurisdiction.” *Id.* §409 Reporter’s Note 2 to Jurisdiction Based on Effects.

exercise of jurisdiction on this basis has to be conservative. After all, “[if] a state exercises jurisdiction beyond the limits of *international* law, the resulting violation of international law will entail international responsibility.”<sup>31</sup>

## 2. Conflict Rules

As long as a country is exercising its jurisdiction on a solid basis, primarily the territoriality and personality principles but including the effects doctrine, it need not concern itself with the fact that another country may *also* have jurisdiction over the act or actor. If both countries should regulate the matter, however, a conflict may arise if the regulations should be mutually incompatible.

A good example is provided by the case against Marc Rich.<sup>32</sup> Rich was an American commodity trader operating under the trade name Marc Rich & Co., A.G. out of Zug, Switzerland. In 1982, a federal grand jury was investigating the company for alleged tax evasion and a grand jury subpoena duces tecum was served on a New York affiliate of the Swiss company for production of business records relating to crude oil transactions in 1980 and 1981.<sup>33</sup> Mr. Rich objected to the subpoena on the grounds that the Swiss entity was not subject to *in personam* jurisdiction of the U.S. court and that Swiss law prohibited the production of the materials demanded.<sup>34</sup> The district court rejected both arguments and imposed a coercive fine of US\$ 50,000 per day on Rich. The U.S. Court of Appeals Second Circuit affirmed the decision and the U.S. Supreme Court denied certiorari regardless of the fact that a Swiss court had prohibited compliance with the subpoena in June 1983. After Rich tried to comply with the subpoena in contravention of the Swiss court order, Swiss officials seized various documents responsive to the subpoena and ordered Rich on several occasions not to comply with the U.S. order.<sup>35</sup> When Rich moved to vacate the contempt judgment, the Government of Switzerland even appeared as *amicus curiae* on behalf of Rich, taking the position “that there is a clear conflict between the public laws of Switzerland and those of the United States, and that efforts to force compliance with the subpoena despite Swiss law violate Swiss sovereignty and international comity.”<sup>36</sup>

---

31. *See id.* § 401 cmt. a (emphasis added); *see also* Rep. of the Int’l L. Comm’n on Its Fifty-Third Session, U.N. Doc. A/56/10, at 26-20 (2001).

32. *In re* Marc Rich & Co., 707 F.2d 663 (1983).

33. *Id.* at 665.

34. *Id.*

35. *In re* Marc Rich & Co., 736 F.2d 864, 866 (1984).

36. *Id.* The U.S. Court of Appeals explained that “[c]ivil contempt is a coercive sanction, and thus a person held in civil contempt must be able to comply with the court order at issue. [...] Individuals unable to comply, because of their own bad faith actions or otherwise, may be subject to criminal sanctions, but may not be held in civil contempt. The burden of proving ‘plainly and unmistakably’ that compliance is impossible rests with the contemnor. [...] We face two different issues in deciding whether Rich should continue to be held in civil contempt: (1) Has Rich proved that it is no longer in possession or control of documents responsive to the subpoena and thus no

International comity is indeed the relevant conflict rule for the resolution of competing jurisdictional claims in international law and relations. William Dodge begins his seminal article on comity in American law with the following words:

International comity is one of the principal foundations of U.S. foreign relations law. The doctrines of American law that mediate the relationship between the U.S. legal system and those of other nations are nearly all manifestations of international comity—from the conflict of laws to the presumption against extraterritoriality; from the recognition of foreign judgments to the doctrines limiting adjudicative jurisdiction in international cases; and from a foreign government’s privilege of bringing suit in the U.S. courts to the doctrines of foreign sovereign immunity.<sup>37</sup>

International comity is not international law, since there is no treaty and no sufficiently uniform custom defining it. Consequently, Dodge defines it as follows: “International comity is deference to foreign government actors that is not required by international law but is incorporated in domestic law.”<sup>38</sup> Furthermore, Dodge usefully distinguishes different aspects of comity as follows: “Deference to foreign lawmakers constitutes “prescriptive comity,” deference to foreign tribunals is termed *adjudicative comity*, and deference to foreign governments as litigants is *sovereign party comity*.”<sup>39</sup> The latter is not at issue here. For both of the former, the Supreme Court has quite recently reaffirmed *the principle of restraint* comity imposes on American authorities.

The first example, *Empagran*, was about the application of the Sherman and Clayton Acts to the vitamin cartel.<sup>40</sup> Vitamin manufacturers in the U.S. and abroad had engaged in price fixing with the result that prices for vitamins had gone up everywhere. Although the price cartel clearly had effects in U.S. markets, the District Court held that the Sherman Act was not applicable to foreign effects on foreign customers, i.e. that it was only protecting domestic customers. The U.S. Court of Appeals for the District of Columbia Circuit reversed and held:

[W]here the anticompetitive conduct has the requisite harm on United States commerce, FTAIA<sup>[41]</sup> permits suits by foreign plaintiffs who are

---

longer able to comply? (2) If Rich still possesses or controls such documents, are Swiss laws or orders sufficient to excuse noncompliance and thus to serve as the basis for vacating the judgment of contempt?” *Id.*

Since Rich could have complied before the documents were seized by the Swiss authorities, his motions were denied. *Id.* at 867. In the end, Rich was caught between a rock and a hard place and ended up being not quite so rich.

37. William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2071-41 (2015).

38. *Id.* at 2078.

39. *Id.* (footnotes omitted).

40. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

41. Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a.

injured solely by that conduct's effect on foreign commerce. The anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court.<sup>42</sup>

In effect, this would have allowed a number of foreign companies domiciled in Ecuador, Panama, Australia, Mexico, Belgium, the UK, Indonesia, and Ukraine to sue an equally foreign company based in Switzerland for damages in the U.S. The obvious purpose of the action was to make use of the potential availability of treble damages under U.S. law. The U.S. Supreme Court wisely vacated and remanded.<sup>43</sup> It elaborated as follows:

No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.<sup>44</sup>

But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim*? Like the former case, application of those laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs. But, unlike the former case, the justification for that interference seems insubstantial. [...] Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?<sup>45</sup>

Respondents reply that many nations have adopted antitrust laws similar to our own, to the point where the practical likelihood of interference with the relevant interests of other nations is minimal. Leaving price fixing to the side, however, this Court has found to the contrary. [...] Even where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies.<sup>46</sup>

---

42. *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 315 F.3d 338, 341 (2003).

43. *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. at 175.

44. *Id.* at 165.

45. *Id.*

46. *Id.* at 167.

We conclude that principles of prescriptive comity counsel against the Court of Appeals' interpretation of the FTAIA. Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.<sup>47</sup>

This 2004 decision made it clear that a general effect in U.S. markets is not enough for the application of U.S. antitrust laws. Rather, a specific injury to U.S. parties or interests would be required.<sup>48</sup> Anything else could easily cross the line into legal imperialism.

In the second example, a similar result was achieved outside the area of antitrust when Argentinian individuals sought to bring suit against a German corporation under the Alien Tort Statute and the Torture Victim Protection Act of 1991.<sup>49</sup> Plaintiffs alleged that Mercedes-Benz Argentina, a subsidiary of the German Daimler AG, "collaborated with state security forces during Argentina's 1976–1983 'Dirty War' to kidnap, detain, torture, and kill certain MB Argentina workers".<sup>50</sup> The Supreme Court, in the interest of "international comity", affirmed its decisions in *Kiobel* (presumption against extraterritorial application of the Alien Tort Statute)<sup>51</sup> and *Mohamad v. Palestinian Authority* (only natural persons are subject to liability under the Torture Victim Protection Act)<sup>52</sup> and denied jurisdiction.

---

47. *Id.* at 169.

48. Potential gaps in enforcement should be dealt with via international cooperation. See ORG FOR ECON. COOP. AND DEV. [OECD], *Recommendation Concerning International Co-operation on Competition Investigations and Proceedings*, OECD/LEGAL/0408 (Sept. 15, 2014), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0408> [<https://perma.cc/Y8UK-KLSA>]; Antonio Capobianco & Aranka Nagy, *Developments in Inter-national Enforcement Co-operation in the Competition Field*, 7 J. EUR. COMPETITION ON TRADE AND DEV. 566-83 ; U.N. Conference on Trade and Development, *The United Nations Set of Principles and Rules on Competition: The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Doc. TD/RBP/CONF/10/Rev.2 (2000); Rajan Dhanjee, *International Co-operation on Competition Law Enforcement: A Breakthrough?*, 44 WORLD COMPETITION L. AND ECON. REV. 455-86 (2021).

49. *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

50. *Id.*

51. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013).

52. *Mohamad v. Palestinian Authority*, 566 U.S. 449, 456 (2012).

### 3. *Relevant General Principles of Law*

As we have seen, the U.S. Supreme Court has consistently held that extraterritorial application of U.S. law is not a casual matter and requires a clear expression of Congressional intent when based on statutory law. Alternatively, extraterritorial application of U.S. law may be reasonable when it addresses foreign conduct that has significant effects within the U.S.

Any more expansive extraterritorial application of U.S. law would not only violate U.S. rules of jurisdiction and international comity but also constitute an abuse of rights, defined as

“a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State.”<sup>53</sup>

The abuse of rights doctrine “is widely considered to be a part of international law, whether as a general principle of law or as part of customary international law . . . [and] retains an important role with respect to various international legal issues. These issues include the resolution of certain types of normative conflicts, the protection of ‘common spaces’ and ‘matters of common concern’.”<sup>54</sup> As Taylor has outlined, “sovereignty dictates that a State may do what it will.”<sup>55</sup> Yet, at the same time, “a State cannot act in a way which prevents another State from doing what it wills.”<sup>56</sup> Of course, some exceptions will be required but they cannot be unreasonable or abusive. Sir Robert Jennings, the Whewell Professor of International Law at Cambridge University and former President of the International Court of Justice writes in this respect,

[M]any great monopolies and cartels do not operate merely within the territory of one State. They involve agreements between both United States and foreign firms, the network of understandings and controls operating in several different countries. Thus they may be too far flung for a strictly territorial antitrust law to control effectively. In attempting to cope with this problem the United States courts have not hesitated to reach out after such trust arrangements, so that [...] antitrust law has been given in many respects an extraterritorial application of a most radical and even novel kind.<sup>57</sup>

---

53. Alexandre Kiss, *Abuse of Rights*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (2006).

54. Michael Byers, *Abuse of Rights: An Old Principle, a New Age*, 47 *MCGILL L.J.* 389, 389 (2001-02); see also DANIELLE IRELAND-PIPER, *ACCOUNTABILITY IN EXTRATERRITORIALITY: A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE* 39 (2017).

55. G.D.S. Taylor, *The Content of the Rule Against Abuse of Rights in International Law*, 46 *BRIT. Y.B. INT'L L.* 323 (1972-1973).

56. *Id.* at 323.

57. Robert Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 *BRIT. Y.B. INT'L L.* 146, 146-47 (1957).

[T]herefore [...] international law will permit a State to exercise extraterritorial jurisdiction provided that State's legitimate interests (legitimate that is to say by tests accepted in the common practice of States) are involved; but against this must be set also the legitimate and reasonable interests of the State whose territory is primarily concerned, for the extraterritorial exercise of jurisdiction must not be permitted to extend to the point where the local law is supplanted: where in fact it becomes an interference by one State in the affairs of another. The position can be expressed in terms of the doctrine of *abuse of rights*. A State has a right to extraterritorial jurisdiction where its *legitimate interests* are concerned, but the right may be abused, and it is abused when it becomes essentially an interference with the exercise of the local territorial jurisdiction.<sup>58</sup>

In conclusion, a State may always regulate and adjudicate actions and actors within its proper territory and enforce its law in these cases. It may also regulate actions by its own nationals, wherever they may occur, although in adjudicating and enforcing its laws, it may already have to take into account international comity to avoid cases like the Marc Rich affair. Regulatory, adjudicative and enforcement jurisdiction have to be exercised even more restrictively when merely based on passive personality or effects within the territory. Finally, State powers are at their minimum and most likely to interfere with the sovereignty of other states when they are based on the protection or passive personality principle. U.S. law is generally consistent with these principles since it applies a presumption against extraterritoriality<sup>59</sup> and requires reasonableness in interpretation of domestic laws that might have extraterritorial application<sup>60</sup> and, in any case, an interpretation that is consistent with international law.<sup>61</sup>

We will now examine whether the SEC and the CFTC practice in the area of blockchain and digital currency law is compliant with these rules.

## II. EXAMPLES OF SEC AND CFTC DECISIONS AGAINST NON-U.S. ENTITIES AND NATIONALS

Blockchain technology and cryptocurrencies are affected by a number of federal laws, even if those were not designed for and do not specifically mention DLT technology or digital money. Furthermore, there are regulatory agencies like the SEC and the CFTC issuing rules, opinions and adjudicatory orders within their respective areas of responsibility, and launching enforcement actions in court to enforce those rules and opinions.<sup>62</sup> In addition, there may be registration

---

58. *Id.* at 153.

59. RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 404 (AM. L. INST. 2019).

60. *Id.* § 405.

61. *Id.* § 406.

62. For detailed analysis, see Frank Emmert, *The Regulation of Cryptocurrencies in the United States of America*, EUR. J. L. REFORM (forthcoming summer 2023), <https://www.>

or licensing requirements at the State level.<sup>63</sup>

The Securities Act of 1933 requires that corporations must provide “adequate, thorough and accurate financial information about securities being offered for sale to the public.”<sup>64</sup> Corporations have to go through a registration process and publish a prospectus before they can offer *securities* for sale to the public.<sup>65</sup>

---

researchgate.net/publication/358906189\_The\_Regulation\_of\_Cryptocurrencies\_in\_the\_United\_States\_of\_America [https://perma.cc/K9VX-S59Z] [hereinafter *Regulation of Cryptocurrencies*].

At the Federal level, a multitude of agencies and authorities are currently involved in oversight of cryptocurrency businesses:

- the Securities and Exchange Commission (SEC) has oversight of securities issuers and traders;
- the Commodities Futures Trading Commission (CFTC) has oversight of traders and trading places (exchanges) dealing with commodities futures;
- the Department of Justice is charged with fraud prevention, for example in the form of Ponzi schemes;
- the Federal Reserve, i.e. the central bank of the U.S., has oversight of banks and financial institutions to ensure their safety and soundness;
- the Financial Crimes Enforcement Network (FinCEN) at the Treasury Department is charged with combating money laundering, terrorist financing, and other large scale financial crimes; cryptocurrency business may have to obtain licenses as “money services businesses;”
- the Office of Foreign Assets Control (OFAC) at the Treasury Department administers and enforces trade sanctions against particular countries, individuals, and companies;
- the Consumer Financial Protection Bureau (CFPB) protects consumers against unfair treatment by banks, lenders, and other financial companies;
- the Internal Revenue Service (IRS) at the Treasury Department is responsible for assessment and collection of taxes on income and assets;
- the Federal Trade Commission and the Commerce Department, together with the Department of Justice, are charged with the enforcement of antitrust legislation;
- the Environmental Protection Agency (EPA) may yet get involved if the current expansion of Bitcoin and other energy intensive mining operations in Texas and other places continues;
- several Self-Regulatory Organizations (SROs) like the Financial Industry Regulatory Authority (FINRA) or the National Futures Association (NFA) set industry standards and regulations;

Federal courts oversee the rulemaking by and activities of the Federal agencies. *Id.* (manuscript at 15-16).

63. An important example is the New York virtual currency regulation, commonly known as “the BitLicense.” For the full text of the regulation, see N.Y. COMP. CODES R. & REGS., tit. 23, ch. I, pt. 200 (2023). For analysis, see *Regulation of Cryptocurrencies*, *supra* note 62, at 53-58.

64. JAMES MARMERCHANT, *SARBANES OXLEY-ACT COMPLETED GUIDE: RISK MANAGEMENT PERSONNEL, AUDITORS AND SENIOR MANAGERS* 4 (2021).

65. *The Laws that Govern the Securities Industry*, INVESTOR.GOV, <https://www.investor.gov/>



Securities *exchanges* can seek registration with the SEC pursuant to Section 6 to obtain exemption from certain requirements of the Securities Exchange Act.<sup>66</sup> While such registration is not mandatory, “[i]t shall be unlawful for any person to effect transactions in security futures products that are not listed on a national securities exchange or a national securities association registered pursuant to section 78o–3(a) of [the Securities Exchange Act].”<sup>67</sup>

The mission of the CFTC is “to promote the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation.”<sup>68</sup> Pursuant to the *Commodity Exchange Act of 1936*, the CFTC

. . . [S]hall have exclusive jurisdiction . . . with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an “option”, “privilege”, “indemnity”, “bid”, “offer”, “put”, “call”, “advance guaranty”, or “decline guaranty”), and transactions involving swaps or contracts of sale of a commodity for future delivery (including significant price discovery contracts), traded or executed on a contract market [...] or a swap execution facility [...] or

---

introduction-investing/investing-basics/role-sec/laws-govern-securities-industry [https://perma.cc/EPZ3-TA49]. [S]ecurities sold in the U.S. must be registered. The registration forms companies file provide essential facts while minimizing the burden and expense of complying with the law. In general, registration forms call for:

- a description of the company’s properties and business;
- a description of the security to be offered for sale;
- information about the management of the company; and
- financial statements certified by independent accountants.

Registration statements and prospectuses become public shortly after filing with the SEC. [...] Registration statements are subject to examination for compliance with disclosure requirements. [It is unlawful to sell securities to the public before the SEC has declared a registration statement ‘effective’.]

Not all offerings of securities must be registered with the Commission. Some exemptions from the registration requirement include:

- private offerings to a limited number of persons or institutions;
- offerings of limited size;
- intrastate offerings; and
- securities of municipal, state, and federal governments.

*Id.* For a shorter overview, see generally THOMAS LEE HAZEN, *ADVANCED INTRODUCTION TO U.S. FEDERAL SECURITIES LAW 1-94* (2022). For more detailed analysis, see, e.g. THOMAS LEE HAZEN, *PRINCIPLES OF SECURITIES REGULATION* (5th ed. 2017).

66. For a list of registered National Securities Exchanges in the U.S., see *National Securities Exchange*, INVESTOR.GOV, <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml>.html [https://perma.cc/V8PF-XT35].

67. 15 U.S.C. § 78f(h)(1).

68. *About the Commission*, COMMODITY FUTURES TRADING COMM’N, <https://www.cftc.gov/About/AboutTheCommission>.

any other board of trade, exchange, or market, and transactions subject to regulation by the Commission . . . .<sup>69</sup>

With few exceptions, the Commodities Exchange Act makes it unlawful to enter into or execute a transaction “for the purchase or sale of a commodity for future delivery,” unless the transaction is conducted on a registered exchange and “evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery.”<sup>70</sup> The supervisory powers of the CFTC extend even to foreign boards of trade if they provide access to traders located in the U.S.

Pursuant to the SEC, most digital currencies qualify as “securities”, regardless of the characterization as coins, tokens, NFTs, etc. given by the issuers.<sup>71</sup> At the same time, many of the digital currencies are treated as “commodities” by the CFTC.<sup>72</sup> Contracts for the delivery of a commodity at a set price at some point in time in the future – which is typical of many smart contracts – fall within the regulatory authority of the CFTC.

As a consequence, issuers, traders, exchanges, and other participants in the blockchain space may have a variety of registration and compliance requirements under U.S. law and companies trading in securities futures—as defined by the SEC and CFTC—have to comply with *both* the Securities Exchange Act and the

---

69. 7 U.S.C. § 2(a)(1)(A).

70. *Id.* § 6(a); 7 U.S.C. § 6d. For all implementing regulations adopted by the CFTC, see Commodity Futures Trading Commission, <https://www.cftc.gov/LawRegulation/CommodityExchangeAct/index.htm>.

71. The former SEC Chairman actually testified before the U.S. Senate that “I believe every ICO I’ve seen is a security.” *Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 115th Cong. 5 (2018) (statement of Jay Clayton, Chairman, SEC), <https://www.banking.senate.gov/hearings/virtual-currencies-the-oversight-role-of-the-us-securities-and-exchange-commission-and-the-us-commodity-futures-trading-commission> [<https://perma.cc/59E3-CKGN>].

72. In order to assert its authority to regulate cryptocurrencies, the CFTC announced that “virtual currencies, such as Bitcoin, have been determined to be commodities under the Commodity Exchange Act.” *Bitcoin Basics*, COMMODITY FUTURES TRADING COMM’N, [https://www.cftc.gov/sites/default/files/2019-12/oceo\\_bitcoinbasics0218.pdf](https://www.cftc.gov/sites/default/files/2019-12/oceo_bitcoinbasics0218.pdf) [<https://perma.cc/28ZG-SZDG>]. Commodities are normally “defined broadly to include not only ‘physical commodities,’ such as cotton or gold, but also currencies or interest rates. The definition also includes ‘all services, rights, and interests ... in which contracts for future delivery are presently or in the future dealt in.’” 7 U.S.C. § 1a(9). As a general matter, the CFTC has oversight over futures, options, and derivatives contracts. [It] also has jurisdiction where there is fraud or manipulation involving commodities trade in interstate commerce.” DANIEL STABILE, KIMBERLY PRIOR & ANDREW HINKES, *DIGITAL ASSETS AND BLOCKCHAIN TECHNOLOGY: US LAW AND REGULATION* 68 (2020). For a discussion of smart contracts as derivatives, see PRIMAVERA DE FILIPPI & AARON WRIGHT, *BLOCKCHAIN AND THE LAW: THE RULE OF CODE* 89-104 (2018).

Commodity Exchange Act and be registered with *both* the SEC and the CFTC.<sup>73</sup> Unfortunately, the required filings and registrations are complicated and expensive and often hard to achieve for technology startups that want to focus limited resources on the development of a viable product rather than the engagement of expensive securities lawyers.<sup>74</sup>

---

73. In December 2020, the American Bar Association (ABA) published a White Paper on jurisdictional issues concerning digital assets. AMERICAN BAR ASSOCIATION, DIGITAL AND DIGITIZED ASSETS: FEDERAL AND STATE JURISDICTIONAL ISSUES (2020), [https://www.americanbar.org/content/dam/aba/administrative/business\\_law/idpps\\_whitepaper.pdf](https://www.americanbar.org/content/dam/aba/administrative/business_law/idpps_whitepaper.pdf). See *id.* at 47-275 for an outline of the regulatory conflict between the CFTC and the SEC. Section 5 is specifically dedicated to “The Need for a Better CFTC and SEC Regulatory Scheme for Digital Assets.” See *id.* at 243-75.

74. Prospective issuers of securities generally have to register with the SEC pursuant to Sections 6 to 8 of the Securities Act, using form S-1, unless they fall under one of the exemptions. See Securities Act of 1933, 15 U.S.C. §§ 77f-77h. Form S-1 has to be accompanied by a prospectus that meets the requirements outlined in Sec. 10 of the Act and the Form itself. Extensive annexes with exhibits pursuant to 17 CFR § 229.601 and financial statements pursuant to 17 CFR Part 210 are also required, which makes the registration so complex and costly. 17 C.F.R. § 229.601; 17 C.F.R. § § 210.1-01-210.12-02. Once Form S-1 is filed, the SEC engages in a complex review procedure, typically involving a back-and-forth of questions and clarifications with the applicant. Pursuant to Sec. 5, securities can only be issued after the SEC has declared the registration “effective.” 15 U.S.C. § 77e. Once an IPO or ICO is completed, there are various disclosure and regular filing requirements for as long as the company remains in business. Somewhat different procedures apply to broker-dealers and exchanges. The threshold for national securities exchanges pursuant to Section 6 of the Securities Exchange Act of 1934 is particularly high and to date, no crypto exchange has successfully registered. See 15 U.S.C. § 78f.

U.S.-based cryptocurrency exchanges and trading places, as well as issuers or commodities futures, i.e. smartcontracts that do not execute immediately, have to register with the CFTC as a Designated Contract Market (DCM), Swap Execution Facility (SEF), Futures Commission Merchant (FCM), Commodity Pool Operator (CPO), or Commodity Trading Advisor (CTA) pursuant to the Commodities Exchange Act. A DCM is “[a] board of trade or exchange designated by the CFTC to trade futures, swaps, and/or options under the [Commodities Exchange Act]. A contract market can allow both institutional and retail participants and can list for trading contracts on any commodity.” *Futures Glossary*, COMMODITY FUTURES TRADING COMM’N, <https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/CFTCGlossary/index.htm#D> [<https://perma.cc/HN9G-PJ3Q>].

A Swap Execution Facility (SEF) is a trading system or platform [defined] by the Dodd-Frank Act in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce. The Dodd-Frank Act imposed different statutory provisions on SEFs than on designated contract markets. Futures Commission Merchants (FCMs) are individuals, associations, partnerships, corporations, and trusts that solicit or accept orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any exchange and that accept payment from or extend credit to those whose orders are accepted. A Commodity Pool Operator (CPO)

Highly restrictive and costly procedures may well be worthwhile if they actually accomplish significant benefits for investors and markets. Recent collapses of cryptocurrencies like Do Kwon's Terra network and Luna coin or the implosion of the FTX trading platform make it hard to argue with the idea that blockchain technology and cryptocurrencies need oversight. However, whether the "oversight" provided by the SEC and the CFTC is making cryptocurrencies safer is at least questionable. Registration with the SEC secures a high level of transparency and a certain level of standardization of information provided to the public. It does not provide any kind of quality seal of approval for the proposed business model because the SEC does not evaluate a prospectus on the merits, whether it seems viable and delivers services of value or not.<sup>75</sup> As a consequence, issuers with deep pockets can register almost any business for an IPO or ICO. By contrast, startups with viable use cases for cryptocurrencies but limited funding are largely excluded from the capital markets and/or pushed into offshore jurisdictions.<sup>76</sup>

---

is a person engaged in a business similar to an investment trust or a syndicate and who solicits or accepts funds, securities, or property for the purpose of trading commodity futures contracts or commodity options. The CPO either makes trading decisions on behalf of the pool or engages a Commodity Trading Advisor (CTA) to do so. Managers at hedge funds or their advisors are often registered with the CFTC as CPOs or CTAs.

Abe Cherin, Nicole Moran & Simona Mola, *The CFTC's Approach to Virtual Currencies*, 7 NAT'L L. REV. 1, 16 (2020) at note 24.

75. See STABLE, PRIOR & HINKES, *supra* note 72, at 191. SEC Commissioner Peirce used the very apt term "disclosure regulator" for the SEC. See Hester Peirce, Sec. and Exch. Comm'n, Remarks at the British Blockchain Association's Conference "Success Through Synergy: Next generation Leadership for Extraordinary Times" (Mar. 15, 2021) (transcript available at <https://www.sec.gov/news/speech/peirce-paper-plastic-peer-to-peer-031521> [<https://perma.cc/EG9L-MSB9>]).

76. Under SEC Regulation S, offshore offers and sales of securities do not have to be registered under the Securities Act. 17 C.F.R. §§ 230.901-905. To benefit from this exemption, many Blockchain businesses exclude customers domiciled in the U.S. from purchasing their cryptocurrencies. The exclusion has to be comprehensive, however, and include indirect distributions and resales into the United States. See SEC Release No. 33-7505; 34-39668; File No. S7-8-97 International Series Release No. 1118; RIN 3235-AG34 Offshore Offers and Sales. Concrete examples of crypto exchanges and other Blockchain businesses trying to avoid the U.S. regulatory mess can be found via links on the Ethereum website. ETHEREUM <https://ethereum.org/en/dapps/> [<https://perma.cc/7EWU-SAMJ>]. For example, dYdX excludes any and all customers from the United States; *Terms of Use*, DYDX <https://dydx.exchange/terms> [<https://perma.cc/2QBD-696S>]. Loopring DEX does not serve residents of New York State, while residents of other States of the U.S. seem to be okay. *Terms and Conditions of Loopring*, IUBENDA <https://www.iubenda.com/terms-and-conditions/74969935> [<https://perma.cc/N8KR-XZ84>]. Yet others include terms with complicated disclaimers that the average customer will not be able to assess appropriately to ensure compliance. Uniswap, although based in New York City, discloses that

We are not registered with the U.S. Securities and Exchange Commission as a national securities exchange or in any other capacity. You understand and acknowledge that we

In certain ways, full compliance with the SEC and CFTC may actually be counterproductive. On the one hand, startup entrepreneurs have to divert scarce resources to the registration process. This may impede their ability to develop a viable product. On the other hand, registered securities may create the false impression among potential investors that the business model has actually been vetted by the U.S. authorities.

Moreover, registrations with the SEC and CFTC do not provide any protection against fraud or diversion of funds by overzealous CEOs like Sam Bankman-Fried of FTX or Do Kwon of Terra. FTX, in particular, was fully registered with the SEC and CFTC and all other regulatory authorities,<sup>77</sup> yet managed to crash from a valuation around US\$ 32 billion into bankruptcy in a matter of days in November 2022.<sup>78</sup> The DOJ and its powers to pursue criminal activities and punish perpetrators with prison time should work as a deterrent. Alas, a long list of corporate scandals, from Enron to FTX, demonstrate all too

---

do not broker trading orders on your behalf nor do we collect or earn fees from your trades on the Protocol. We also do not facilitate the execution or settlement of your trades, which occur entirely on the public distributed Ethereum blockchain.

*Uniswap Labs Terms of Service*, UNISWAP <https://uniswap.org/terms-of-service> [<https://perma.cc/3F5E-MBJ2>].

Whether this will insulate the exchange or its users from SEC interventions remains to be seen. However, the fact that an exchange like Uniswap, with an average daily trading volume of more than US\$ 200 million and a current market valuation of billions of dollars, does not get an SEC registration and prefers to operate with a considerable measure of legal uncertainty should be ample evidence that full compliance is too hard and expensive. *Uniswap Protocol*, UNISWAP <https://uniswap.org/> [<https://perma.cc/YDS7-R4H9>].

77. FTX US was registered by FinCEN as a Money Services Business. It had successfully received a US GAAP financial audit. It continuously relied on the services of a specialized law firm, Fenwick & West, for its various documentation and compliance assessment and reports. Its derivatives unit was a Federally regulated and licensed commodity derivatives exchange and clearinghouse and held three licenses with the CFTC. It was audited annually by Grant Thornton LLP, and used various outside vendors to conduct annual or even more frequent cyber security tests and simulations. Internal decision-making and supervisory procedures were audited by Friedman LLP (SOC I Type II Audits, and a SANS CSC Top 20 audit). System safeguards, market surveillance and/or financial controls were examined annually by the CFTC. Although this was already a lot, FTX US also sought and obtained Money Transmitter licenses at the State level from Alabama, Alaska, Arizona, Arkansas, the District of Columbia, Florida, Georgia, Illinois, Iowa, Maine, Maryland, Michigan, Mississippi, Missouri, New Hampshire, New Mexico, Oregon, Pennsylvania, Puerto Rico, South Dakota, Washington, and West Virginia. Source no longer available due to bankruptcy filing of the exchange (former web address <https://help.ftx.us/hc/en-us/articles/360046877253-Regulation-and-Licensure-Information>).

78. See *Rise and Fall of Crypto Exchange FTX*, REUTERS (Nov. 16, 2022, 9:51 PM EST), <https://www.reuters.com/markets/currencies/rise-fall-crypto-exchange-ftx-2022-11-10/> [<https://perma.cc/24HS-M8BB>]. See also Nathan Reiff, *The Collapse of FTX: What Went Wrong with Crypto Exchange?*, INVESTOPEDIA <https://www.investopedia.com/what-went-wrong-with-ftx-6828447> [<https://perma.cc/V5HW-YHGF>] (Feb. 27, 2023).

well that any industry where large amounts of money are at stake, crypto or not, will attract its share of reckless risk takers and crooks.

As we will see, the SEC in particular has launched many administrative investigations against issuers of digital currency, as well as sellers, traders, exchanges, and various other financial service providers in the blockchain space, because they did not comply with its securities registration and other requirements. The SEC and the CFTC frequently resort to the courts to obtain cease-and-desist orders, injunctions, as well as civil penalties against parties found in violation of the laws. Indeed, the SEC increasingly sees itself as “the primary cryptocurrency cop”<sup>79</sup> for the entire digital currency market and, effectively, the entire world of cryptobusiness, regardless of national frontiers and jurisdictions. It is one thing if the U.S. wants to have procedural rather than substantive oversight of these markets. However, it is quite another if the U.S. imposes this procedural oversight on the rest of the world by way of legal imperialism.

The SEC maintains a comprehensive database of “Crypto Assets and Cyber Enforcement Actions” on its website.<sup>80</sup> The CFTC does not single out cryptocurrency-related cases, but these cases can be easily identified among the “enforcement actions” on its website.<sup>81</sup> The Department of Justice (DoJ) provides “sample cases” online for its “crypto enforcement” activity “prosecuting fraud and market manipulation involving cryptocurrency.”<sup>82</sup>

The types of cryptocurrency-related enforcement actions can be categorized as follows:

- unregistered offering and sale of crypto assets

---

79. Mark Bini & Joanna Howe, *Here's Why the SEC Will Likely Be the Primary Cryptocurrency Cop*, BLOOMBERG L. (Oct. 17, 2022, 4:00 AM), [https://www.bloomberglaw.com/bloomberglawnews/exp/eyJjdHh0IjoiQlVVOVYlslmlkIjoiMDAwMDAxODMtZDZiMS1kMGM yLWEzOWItZmVmZDZmMjgwMDAxIiwic2lnIjoiUUZpc09vZE5idHl4bng2dVZMalpwMUV zZUtFPSlslRpbWUuOiIxNjY2MDA5OTQzIiwidXVpZCI6InJHdmE2bHZaYXNxaGtMSW5t L012OGc9PTICVHVjOFFUNVNxT2hvMXZXSklV2MEE9PSlslInYiOiIxIn0=?bwid=00000183-d6b1-d0c2-a39b-fefd6f280001&cti=LSCH&emc=bbunw\\_nl%3A34&et=NEWSLETTER&isAlert=false&item=headline&qid=7368701&region=digest&source=newsletter&uc=1320043742&udv Type=Alert&usertype=External](https://www.bloomberglaw.com/bloomberglawnews/exp/eyJjdHh0IjoiQlVVOVYlslmlkIjoiMDAwMDAxODMtZDZiMS1kMGM yLWEzOWItZmVmZDZmMjgwMDAxIiwic2lnIjoiUUZpc09vZE5idHl4bng2dVZMalpwMUV zZUtFPSlslRpbWUuOiIxNjY2MDA5OTQzIiwidXVpZCI6InJHdmE2bHZaYXNxaGtMSW5t L012OGc9PTICVHVjOFFUNVNxT2hvMXZXSklV2MEE9PSlslInYiOiIxIn0=?bwid=00000183-d6b1-d0c2-a39b-fefd6f280001&cti=LSCH&emc=bbunw_nl%3A34&et=NEWSLETTER&isAlert=false&item=headline&qid=7368701&region=digest&source=newsletter&uc=1320043742&udv Type=Alert&usertype=External) [https://perma.cc/EQ88-PZJD]. In this context, it is also of interest that there is currently a bipartisan bill pending in the U.S. Senate seeking to turn the CFTC into the primary cryptocurrency regulator. See Nikhilesh De, *CFTC Would Become Primary Crypto Regulator Under New Senate Committee Plan*, COINDESK <https://www.coindesk.com/policy/2022/08/03/cftc-would-become-primary-crypto-regulator-under-new-senate-committee-plan/> [https://perma.cc/6CRA-NMH5] (Aug. 17, 2022, 12:46 PM EDT).

80. *Crypto Assets and Cyber Enforcement Actions*, SEC, <https://www.sec.gov/spotlight/cybersecurity-enforcement-actions> [https://perma.cc/VX7Z-XM9U].

81. *Enforcement Actions*, CFTC, <https://www.cftc.gov/LawRegulation/EnforcementActions/index.htm> [https://perma.cc/W7YY-T38Z].

82. *Crypto Enforcement*, U.S. DEP'T OF JUST., <https://www.justice.gov/criminal-fraud/crypto-enforcement> [https://perma.cc/9WA7-TFVA].

- unlicensed trading and exchange activities
- false or misleading statements in registration or other disclosure statements
- pump and dump schemes related to crypto assets
- insider trading related to crypto listings
- other types of violations of securities laws

A significant portion of the SEC, CFTC and DoJ enforcement actions are directed at foreign nationals and/or companies with their place of incorporation outside of the U.S. In a majority of these international cases, there is a sufficient link to the U.S. to justify an exercise of U.S. jurisdiction, however, not in all of them. This will be illustrated with a number of examples.

*1. SEC v. Rivetz Corp, Rivetz International SEZC, and Steven Sprague*

Pursuant to the civil complaint filed on 8 September 2021 in the U.S. District Court, District of Massachusetts,<sup>83</sup> defendants offered and sold digital tokens called “RvT” to more than 7,000 investors from around the world between June and September 2017 and took in some \$18 million. About 30% of the investors were located in the U.S. The tokens were marketed as an investment opportunity and supposed to appreciate rapidly in value. However, neither the defendants, nor the tokens, were registered with the SEC and the investors were not provided with the disclosures required by U.S. federal securities laws.<sup>84</sup> Moreover, “Rivetz did not have an operational product and the RvT token had no use.”<sup>85</sup>

For the SEC, a case like this is a classic offering or sale of an unregistered security. Ever since the famous Supreme Court decision in *Howey*,<sup>86</sup> “a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party”<sup>87</sup> qualifies as an investment contract, and therefore a security. Under this definition, any issue or sale of digital money that is expected to increase in value is an issue of securities.

The problem in *Rivetz* was the fact that the RvT tokens were issued by a Cayman Island corporation, Rivetz Int’l.<sup>88</sup> The SEC, however, claimed jurisdiction over the case because the owner of Rivetz and Rivetz Int’l, Steven Sprague, was a resident of Richmond, Massachusetts, and—according to the SEC complaint—“Rivetz’s principal place of business was Sprague’s home.”<sup>89</sup> The

---

83. Complaint, SEC v. Rivetz Corp., No. 3:21-CV-30092 (D. Mass. Sept. 8, 2021), <https://www.sec.gov/litigation/complaints/2021/comp25198.pdf> [<https://perma.cc/B25Q-CNH6>] [hereinafter SEC Complaint].

84. *Id.* ¶ 1.

85. *Id.* ¶ 3.

86. SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

87. *Id.* at 298-299.

88. SEC Complaint, *supra* note 83, ¶ 2.

89. *Id.* ¶ 14.

reader might ask why the owner of a foreign limited liability company would be responsible for the actions of the corporate entity. However, both the Securities Act of 1933 and the Securities Exchange Act of 1934 provide for controlling person liability.<sup>90</sup> Insofar, the SEC action stands on solid ground.

## 2. CFTC v. Adam Todd and Digitex Futures *and Similar Cases*

The complaint recently brought by the CFTC in the U.S. District Court for the Southern District of Florida has already less of a connection to the United States.<sup>91</sup> The CFTC alleges that defendants violated the Commodity Exchange Act (CEA)<sup>92</sup> and several CFTC Regulations<sup>93</sup> promulgated pursuant to the CEA. Digitex was active from May 2020 to May 2022. The owner, Adam Todd, a citizen of the United Kingdom,<sup>94</sup> incorporated a number of entities, including Digitex Ltd in the Republic of the Seychelles, Digitex Software Ltd in Ireland, and Blockster Holdings Ltd in Gibraltar. Todd and Blockster Holdings then applied to form Digitex LLC in St. Vincent & the Grenadines. Operating under the trade name Digitex Futures, defendants built and operated a digital asset derivatives trading platform. According to the CFTC complaint,

2. The Exchange operated from no later than July 31, 2020, the date of its ‘launch,’ through at least May 2022 [and] accepted customer funds as margin and matched customer orders for digital asset derivatives such as bitcoin futures contracts and ether futures contracts. In connection with its offering of digital asset futures contracts, Digitex Futures allowed users, including customers located in the United States, to trade with leverage of up to 100 to 1.

3. Through the operation of the Exchange, Digitex Futures became subject to the requirements under Section 4 of the Act, 7 U.S.C. § 6, to register with the Commission as a designated contract market (“DCM”) or foreign board of trade (“FBOT”), as well as the requirement under Section 4d of the Act, 7 U.S.C. § 6d, to register as a futures commission merchant (“FCM”). Digitex Futures and Todd have never been registered with the Commission in any capacity and therefore violated 7 U.S.C. §§ 6 and 6d.

---

90. Securities Act of 1933, 15 U.S.C. §77o; Securities Exchange Act of 1934, 15 U.S.C. §78t.

91. Complaint, *CFTC v. Todd*, No. 1:22-CV-23174 (S.D. Fla. Sept. 30, 2022) [hereinafter Complaint].

92. *Id.* 7 U.S.C. §§ 1-26.

93. 17 C.F.R. §§ 1.1-190.19 (2021).

94. Although the citizenship information is not included in the complaint filed by the CFTC, it was obtained from the Companies Registration Office. COMPANIES REGISTRATION OFFICE, *Digitex Software Limited: B10 Change in DIRS/SEC (12605555)* (Mar. 20, 2018), <https://www.cro.ie/en-ie/> [<https://perma.cc/TX3Y-KN8Z>] (general website located here; this specific source is located behind a paywall).



4. Because Digitex Futures also met the statutory definition of an FCM, Regulation 42.2, 17 C.F.R. § 42.2 (2021), required it to comply with applicable provisions of the Bank Secrecy Act (“BSA”), including requirements to implement effective know-your-customer (“KYC”) procedures and a customer information program (“CIP”). However, Digitex Futures did not have effective KYC procedures at any time nor did it implement an effective CIP, thus violating 17 C.F.R. § 42.2.<sup>95</sup>

Todd also created a proprietary digital currency, the DGTX token, which was sold to investors and traded on secondary exchanges. Pursuant to the CFTC, Todd then engaged in a series of transactions “expected to lose money rather than make money [...] with the intent to artificially inflate (or ‘pump’) the price of DGTX. [...] This attempted manipulation of DGTX violated Section 6(c)(1), 6(c)(3), and 9(a)(2) of the Act, 7 U.S.C. §§ 9(1), 9(3), and 13(a)(2), and Regulations 180.1(a)(1) and 180.2, 17 C.F.R. §§ 180.1(a)(1), 180.2 (2021).”<sup>96</sup>

Digitex was owned by a British subject, was incorporated outside of the U.S., and claimed that it was blocking U.S. IP addresses and “asking users to confirm ... that they are not based in the U.S.”<sup>97</sup> Nevertheless, at least some activity was operated out of an office in Miami, Florida, where Todd also maintained a residence. Because of the Florida connection, once again, the CFTC action stood on solid legal ground.

Similar cases where foreign nationals were using foreign registered companies for transactions that were not registered with U.S. authorities but had some links to the U.S. include *SEC v. Okhotnikov et al.*<sup>98</sup> Vladimir Okhotnikov

---

95. See Complaint, *supra* note 91, ¶¶ 2-4; see also ADAM TODD, DIGITEX: A COMMISSION-FREE, TRUSTLESS FUTURES EXCHANGE FOR TRADING DIGITAL CURRENCY PRICES 18 (2017), <https://whitepaper.io/document/425/digitex-futures-whitepaper> [<https://perma.cc/E8KL-FVZ7>].

96. *Id.* ¶ 7.

97. See Helen Partz, *Crypto Exchange Digitex Removes KYC to Protect User Data*, COINTELEGRAPH (Mar. 4, 2020), <https://cointelegraph.com/news/crypto-exchange-digitex-removes-kyc-to-protect-user-data> [<https://perma.cc/T6BJ-YF84>].

Todd argued at the time that “[f]orcing all of our customers throughout the world to prove they’re not American is unreasonable”. He said that “[w]e all know the real reason for KYC. The real reason for KYC is that Big Brother wants to know what everybody’s doing all the time. He wants to know how much you’ve got and what you’re doing with it. I don’t believe they have the right to do that to everybody in the world.” According to Todd,

There’s two trillion dollars worth of fiat currency laundered every year which is 10x the entire market cap of every crypto currency combined. Any money laundering that is going on with crypto is a tiny fraction of a percent of what is going on in fiat. Therefore by the same logic any business that takes cash without fully identifying their customer is also funding terrorism.

*Id.*

98. Press Release, SEC, SEC Charges Eleven Individuals in \$300 Million Crypto Pyramid Scheme (Aug. 1, 2022), *Securities and Exchange Commission*, <https://www.sec.gov/news/press-release/2022-134> [hereinafter Press Release].

and his partners created Forsage.io, “a website that allowed millions of retail investors in the United States and elsewhere to enter into transactions via smart contracts created by the Founders that operated on the Ethereum, Tron, and Binance blockchains.”<sup>99</sup> Although Forsage collected more than US\$ 300 million from its users, the SEC alleges that it never delivered any service and, instead, used the money from early investors to recruit more investors in a classic pyramid or Ponzi scheme. Although none of the owners or creators were U.S. citizens or residents,<sup>100</sup> and Forsage was neither incorporated nor operated any offices or installations in the U.S., the SEC’s exercise of jurisdiction was lawful, both under U.S. and international law. First, the effects of the fraudulent and unregistered offer and sale of securities in U.S. markets was substantial. Second, Forsage recruited a number of “promoters” and “crypto crusaders” in the U.S. and rewarded them with commissions for bringing in new investors and helping with sales of unregistered securities in the U.S.<sup>101</sup>

The criminal indictment brought by the DoJ against Satish Kurjibhai Kumbhani (“Vindee”) for conspiracy to commit wire fraud, operation of an unlicensed money transmitting business, and conspiracy to commit money laundering, among others, is based on similar premises.<sup>102</sup> The organization created by Vindee, *BitConnect*, was unincorporated and the owner himself was based in India. Nevertheless, the DoJ enforcement action was compatible with U.S. and international law. First, BitConnect sold unregistered securities in the form of BitConnect Coin or BCC for the equivalent of some US\$ 2.4 billion to investors around the world, including many in the U.S.<sup>103</sup> Thus, it had substantial effects on U.S. markets. Second, Kumbhani had entered into a promotional arrangement with residents in the U.S.<sup>104</sup>

Another example is the cryptocurrency pump-and-dump scheme operated by *Arbitrade* and *Cryptobontix*. Although the companies were incorporated in Bermuda and Canada, respectively, and the owner/operator was Canadian, substantial sales of the Dignity or DIG coin were made to U.S. investors, and a number of U.S. residents participated in the promotion of the scheme.<sup>105</sup>

---

99. Complaint, *SEC v. Okhotnikov*, No. 1:22-CV-03978 (N.D. Ill. Aug. 1, 2022), at 1-2 [hereinafter *Okhotnikov Complaint*].

100. Okhotnikov himself was a resident of Tbilisi, Georgia. Other partners were based in Bali, Indonesia, as well as Moscow, Russia. See Press Release, *supra* note 98.

101. Okhotnikov Complaint, *supra* note 102, ¶¶ 1-2.

102. Grand Jury Indictment, *United States v. Kumbhani*, No. 3:22-CR-00395 (S.D. Cal. Feb. 25, 2022) [hereinafter *Indictment*].

103. At its peak, BitConnect reached a market capitalization of US\$ 4.3 billion. *Id.* According to the SEC, Kumbhani and his co-conspirators ultimately defrauded investors out of some US\$ 2.4 billion. *Id.* ¶¶ 19, 26, 60.

104. *Id.* ¶¶ 5-7.

105. See Complaint, *SEC v. Arbitrade Ltd.*, No. 1:22-CV-23171 (S.D. Fla. Sept. 30, 2022). For another similar case brought by the DoJ, see Complaint, *United States v. Le Ahn Tuan*, No. 2:22-CR-00273 (C.D. Cal. Sept. 30, 2022) (regarding the *Baller Ape Club* NFT investment program rug pull). For discussion, see Ian McGinley, *Wire Fraud: The Most Powerful Law in Crypto Right*

If the SEC, CFTC and other U.S. authorities had stuck to these kinds of cases, with genuine links to U.S. markets and territorial jurisdiction, this Article would never have been written. But they didn't.

### 3. Barron v. Helbiz

Several buyers of HelbizCoin attempted to bring a class action in the United States District Court, S.D. New York, against foreign and American parties after the value of the coin collapsed. District Judge Stanton wisely dismissed the case. The Judge found that the coin was created under the laws of Singapore and that “any purchases in the United States or by U.S. residents” during the ICO were specifically prohibited.<sup>106</sup> Nevertheless, plaintiffs argued that “[d]efendants sent out deceptive communications from New York-based addresses and social media accounts, held marketing events in New York to (fraudulently) promote their coin, executed transactions that required New York-based Ethernodes to function, and perpetrated other aspects of their conspiracy from within New York . . . [creating a] sufficient nexus to New York.”<sup>107</sup> The Judge refuted these arguments by sticking with the U.S. Supreme Court precedent *Morrison v. National Australia Bank, Ltd.*<sup>108</sup> In the interpretation of Judge Stanton, *Morrison* held that “the proper test was ‘transactional’: not where the deceptive action took place, but whether the purchases were made in the United States or on a domestic exchange”.<sup>109</sup> Since the coin had not been listed on a U.S. exchange, had no facility for purchase within the U.S., and had no domestic off-exchange purchases, the case did not meet the *Morrison* test.<sup>110</sup>

Plaintiffs further argued that jurisdiction of U.S. courts could be established by the fact that the U.S. is home to the largest number of Ethernodes, i.e. the servers on which the Ethereum blockchain runs, more than twice as many as any other country.<sup>111</sup> Pursuant to this logic, the U.S. could indeed arrogate to itself the imperial power of regulating anything and everything that ever happens on what is arguably the most important blockchain in the world. Once again, Judge Stanton wisely chose judicial restraint. The Judge held that

[although] plaintiffs say, ‘the sale of that virtual currency was executed on a network of digital nodes that have more nexus to the U.S. than to any other country’ [...] all that machinery for generating, administering, and delivering the [digital coin] could be located in Kansas, Germany or Brazil without affecting the location of the offer and acceptance of the

---

Now, REUTERS (Aug. 23, 2022, 11:38 AM EDT), <https://www.reuters.com/legal/legalindustry/wire-fraud-most-powerful-law-crypto-right-now-2022-08-23/> [<https://perma.cc/2FLD-QGSY>].

106. Barron v. Helbiz, Inc., No. 1:20-CV-04703, 2021 WL 229609 (S.D.N.Y. Oct. 4, 2021).

107. *Id.* at \*4.

108. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *see also infra* note 132.

109. *Barron*, 2021 WL 229609, at \*4.

110. *Id.* at \*5.

111. *Id.* at \*5-6.

purchase. Morrison dealt with the location of the change in the legal relationship between persons, not the electronic operations of creation, transport and delivery of the product. Mr. Khanchandani did not purchase his bitcoins in Kansas. He purchased them in the United Arab Emirates, where he accepted the offer and agreed to the contract of purchase. Mr. Szklarek purchased his in Great Britain, not Kansas.<sup>112</sup>

Accordingly, the Judge dismissed the claims and denied the plaintiffs access to U.S. courts where the latter should not exercise jurisdiction. However, the plaintiffs appealed, and the U.S. Court of Appeals for the Second Circuit was far less interested in judicial restraint.<sup>113</sup> Since plaintiffs had meanwhile produced “factual allegations regarding the citizenship of plaintiff Ryan Barron (a purported U.S. citizen who purchased HelbizCoin domestically), to clarify the domesticity of the ICO and purchases of HelbizCoin, and to make a separate federal securities claim under Section 10(b) [of the Securities Exchange Act]”,<sup>114</sup> the Second Circuit vacated Judge Stanton’s judgment and remanded “for further proceedings consistent with this order.”<sup>115</sup>

The reader should appreciate how far the Second Circuit is straying beyond the requirement of a direct, substantial, and reasonably foreseeable effect in U.S. markets. By now, *a single U.S. resident who manages to buy cryptocurrency in circumvention of the rules set by the issuer is enough to justify extraterritorial application of U.S. law!* If you listen carefully, you can actually hear Justice Scalia, the author of *Morrison*, spinning in his grave. More on that below.

#### 4. SEC v. Telegram

Telegram is an instant messaging service offering free end-to-end encrypted chats and video calling. The company was created in 2013 and is based in Dubai. As of November 2022, Telegram had 700 million active users. To fund its operations and further growth, Telegram announced in 2018 that it would create digital assets called “Grams” and run on a proprietary blockchain, the “Telegram Open Network” (TON). In February and March 2018, Telegram filed two Form D submissions with the SEC declaring that it was raising US\$ 1.7 billion from accredited investors. While Telegram accepted that Grams would be securities, it “claimed that their sale was exempt from the registration requirement of Section 5 of the Securities Act [...], 15 U.S.C. § 77e, pursuant to Rule 506(c) of Regulation D issued under the Act. See 17 C.F.R. § 230.506(c).”<sup>116</sup> Before Telegram was able to deliver the Grams to its investors, the SEC filed a court action on 11 October 2019 and sought an emergency order seeking expedited U.S.-style discovery for a “complete and updated list of all individuals and

---

112. *Id.* at 6.

113. *Barron v. Helbiz, Inc.*, 2021 WL 4519887 (2nd Cir. Oct. 4, 2021).

114. *Id.* at 3.

115. *Id.*

116. *SEC v. Telegram Grp.*, No. 19 Civ. 9439, 2020 WL 61528, at \*2 (S.D.N.Y. Jan. 3, 2020).

entities that purchased Grams’ and ‘financial records reflecting the current amount of the funds, and the use to which any funds were put.’”<sup>117</sup> Telegram objected to the scope of the information demanded and provided only partial bank records with deposits but not expenditures.

The SEC claimed and the court agreed that Telegram has the burden of proof to establish that it is entitled to an exemption under Regulation D.<sup>118</sup> The SEC claimed and the court agreed that “[w]ithout fully un-redacted bank records [...], the SEC (and the Court) cannot fully understand (1) who made payments under which purchase agreement, (2) whether some of those payments were from entities who were acting as statutory underwriters, and (3) whether Telegram made any payments to such underwriters.”<sup>119</sup> Although Telegram had already conceded that Grams are securities, the SEC argued that it “must establish that such instruments are ‘investment contracts’ under [*Howey*]” and that “[h]ow much money Telegram has spent to date, and in what manner, to develop the TON Blockchain and related applications, and to integrate them into Telegram Messenger, is highly relevant evidence to whether the investors had a reasonable expectation of profits through the ‘efforts of others.’”<sup>120</sup> The District Court granted the SEC’s request for a preliminary injunction on 1 March 2020. The SEC then asked the District Court to enjoin Telegram from distributing the Grams previously purchased by “175 sophisticated entities and high net-worth individuals in exchange for a promise to deliver 2.9 billion Grams.”<sup>121</sup> While Telegram argued that its distribution of Grams to the investors would fall under the exemption of Regulation D, the SEC saw the initial purchasers as underwriters, many of whom would proceed to sell the Grams “in the public market, whose participants would have been deprived of the information that a registration statement would reveal.”<sup>122</sup> The District Court agreed with the SEC that it was likely that the investors would resell the Grams and, therefore, the entire transaction would be “an offering of securities under the *Howey* test to which no exemption applies.”<sup>123</sup> Therefore, the District Court, on 24 March 2020, granted a preliminary injunction “prohibiting the delivery of Grams to the Initial Purchasers.”<sup>124</sup>

In response, Telegram requested clarifications and argued that the injunction was overbroad and should be limited to purchase agreements with U.S.-based investors. Telegram argued that it is a non-U.S. entity, and the majority of its purchasers are non-U.S. parties who entered into agreements with Telegram

---

117. *Id.*

118. *Id.* at 3. “Registration exemptions are construed strictly to promote full disclosure of information for the protection of the investing public.” *Id.* (citing *SEC v. Cavanaugh*, 455 F.3d 105, 115 (2d Cir. 2006)).

119. *Telegram Grp.*, 2020 WL 61528, at \*4.

120. *Id.*

121. *SEC v. Telegram Grp. Inc.*, 448 F. Supp. 3d 352, 358 (S.D.N.Y. 2020).

122. *Id.*

123. *Id.* at 359.

124. *Id.* at 382.

outside of the U.S. and containing foreign choice-of-law provisions. The request was denied.<sup>125</sup>

In the end, Telegram was unable to deliver Grams to any purchasers, had to return more than US\$ 1.2 billion to investors, and pay a fine of US\$ 18.5 million to the SEC.<sup>126</sup> The SEC celebrated its victory declaring “[o]ur emergency action protected retail investors from Telegram’s attempt to flood the markets with securities sold in an unregistered offering without providing full disclosures concerning their project”.<sup>127</sup>

Of course, the outcome could be interpreted quite differently, namely that the SEC prevented a foreign company from doing business in foreign markets according to foreign rules with willing and sophisticated foreign parties to prevent that at least some of the digital assets would eventually end up with less sophisticated but still willing U.S. parties.

### III. JUSTIFICATION OF SEC LONG-ARM JURISDICTION

The SEC, and to some extent the CFTC, are by now regularly exercising extraterritorial or long-arm jurisdiction in the application of U.S. securities laws. In light of the questionable scope of the effects doctrine and its focus on antitrust law, the practice of the SEC and CFTC requires further examination and justification.

In the context of securities law, the U.S. Court of Appeals Second Circuit took a significant step in 1968 in *Schoenbaum v. Firstbrook* when it held that the Securities Exchange Act of 1934 has extraterritorial application.<sup>128</sup> However, the facts were highly specific. The Court held that:

Section 30(a) [of the Securities Exchange Act] empowers the SEC to regulate all brokers and dealers who use the mails or interstate commerce, for the purpose of effecting *a transaction in American securities* on exchanges outside the United States... It was intended to prevent evasion of the Act through transactions on foreign exchanges.<sup>129</sup>

Moreover, *Schoenbaum* was overruled by the U.S. Supreme Court in 2010.<sup>130</sup> A large Australian bank was accused of securities fraud in relation to the acquisition of a Florida mortgage servicing business. International shareholders brought suit in the U.S. Justice Scalia wrote on behalf of the majority:

---

125. SEC v. Telegram Grp. Inc., No. 19-CV-9439, 2020 WL 1547383 (S.D.N.Y. Apr. 1, 2020).

126. See Press Release, SEC, Telegram to Return \$1.2 Billion to Investors and Pay \$18.5 Million Penalty to Settle SEC Charges (June 26, 2020), <https://www.sec.gov/news/press-release/2020-146> [https://perma.cc/9DF6-SLGD].

127. *Id.*

128. *Schoenbaum v. Firstbrook*, 405 F.2d 200, 207 (1968).

129. *Id.* (emphasis added).

130. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

It is a “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” . . . This principle represents a canon of construction, or a presumption about a statute’s meaning, rather than a limit upon Congress’s power to legislate . . . . It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters. . . . 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.’ . . . The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law . . . . When a statute gives no clear indication of an extraterritorial application, it has none.

Despite this principle of interpretation, long and often recited in our opinions, the Second Circuit believed that, because the Exchange Act is silent as to the extraterritorial application of § 10(b), it was left to the court to ‘discern’ whether Congress would have wanted the statute to apply. . . . This disregard of the presumption against extraterritoriality did not originate with the Court of Appeals panel in this case. It has been repeated over many decades by various courts of appeals in determining the application of the Exchange Act, and § 10(b) in particular, to fraudulent schemes that involve conduct and effects abroad. That has produced a collection of tests for divining what Congress would have wanted, complex in formulation and unpredictable in application . . . .

[T]he Second Circuit . . . excised the presumption against extraterritoriality from the jurisprudence of § 10(b) and replaced it with the inquiry whether it would be reasonable (and hence what Congress would have wanted) to apply the statute to a given situation. As long as there was prescriptive jurisdiction to regulate, the Second Circuit explained, whether to apply § 10(b) even to ‘predominantly foreign’ transactions became a matter of whether a court thought Congress ‘wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries.’

The Second Circuit had thus established that application of § 10(b) could be premised upon either some *effect* on American securities markets or investors (Schoenbaum) or *significant conduct* in the United States (Leasco). It later formalized these two applications into (1) an ‘effects test,’ ‘whether the wrongful conduct had a substantial effect in the United States or upon United States citizens,’ and (2) a ‘conduct test,’ ‘whether the wrongful conduct occurred in the United States.’ [...]

Commentators have criticized the unpredictable and inconsistent

application of § 10(b) to transnational cases.<sup>131</sup>

Justice Scalia continues to discuss arguments presented in favor of at least some extraterritorial application of the Securities Exchange Act and concludes:

The general reference to foreign commerce in the definition of ‘interstate commerce’ [in § 10(b)] does not defeat the presumption against extraterritoriality. . . . The fleeting reference [in Congress’ description of the purposes of the Securities Exchange Act] to the dissemination and quotation abroad of the prices of securities traded in domestic exchanges and markets cannot overcome the presumption against extraterritoriality. . . . [P]ossible interpretations of statutory language [such as § 30(b) of the Act] do not override the presumption against extraterritoriality.<sup>132</sup>

With these statements, Justice Scalia, on behalf of the U.S. Supreme Court, was making a forceful statement against the extraterritorial application of the Securities Exchange Act and, in fact, any U.S. statutes. He continues, “[T]he 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.”<sup>133</sup>

Before and after *Morrison*, many other courts in the U.S. have taken a similarly conservative approach to the effects doctrine.<sup>134</sup> Even in the area of antitrust law, the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) restricted the application of U.S. antitrust laws to cases where a “direct, substantial, and reasonably foreseeable effect” of the foreign actions on U.S. commerce could be demonstrated.<sup>135</sup> The presumption against extraterritoriality

---

131. *Id.* at 255-60 (emphasis added) (citing Choi & Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 467-68; Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORD. J. CORP. & FIN. L. 89, 106-08, 115-16 (2004); Langevoort, *Schoenbaum Revisited: Limiting the Scope of Antifraud Protection in an Internationalized Securities Marketplace*, 55 LAW & CONTEMP. PROBS. 241, 244-48 (1992); Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677 (1990); Note, *Let There Be Fraud (Abroad): A Proposal for A New U.S. Jurisprudence with Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts*, 28 LAW & POL'Y INT'L BUS. 477, 492-93 (1997)).

132. *Morrison*, 561 U.S. at 263-64.

133. *Id.* at 266.

134. See Jonathon Turley, “*When in Rome*”: *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 608-34 (1990) (discussing older cases).

135. 15 U.S.C. § 6a. Gavil, Kovacic and Baker summarize that

the jurisdictional threshold for domestic antitrust violations is relatively minimal – all that need be alleged is that the challenged conduct *affected* interstate commerce. Although cases like *Alcoa* were perceived as expanding U.S. antitrust jurisdiction through the effects doctrine, they imposed a more elevated jurisdictional standard on



was reaffirmed as recently as 2016 in *RJR Nabisco*.<sup>136</sup>

For the area of securities law, the SEC claims that the adoption of the Dodd-Frank Act<sup>137</sup> overruled the case law-based presumption against extraterritoriality and provides a jurisdictional basis for the application of the Securities Act of 1933<sup>138</sup> and the Securities Exchange Act of 1934<sup>139</sup> to foreign parties selling securities to U.S. persons.<sup>140</sup> Presumably, this is also the stance of the CFTC with regard to the Commodity Exchange Act of 1936<sup>141</sup> and trade in commodities futures involving U.S. persons.<sup>142</sup>

Dodd-Frank amended the Securities Act to state:

(c) Extraterritorial Jurisdiction

The district courts of the United States [...] shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 77q(a) of this title involving –

(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.<sup>143</sup>

Congress inserted a parallel provision into the Securities Exchange Act,<sup>144</sup> and the

foreign conduct than did the domestic cases like *McLain* [*McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980)]. As *Hartford Fire* [*Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993)] formulated the standard, in order to assert U.S. antitrust jurisdiction over foreign conduct, that conduct must ‘produce some substantial effect in the United States.

ANDREW GAVIL, WILLIAM KOVACIC & JONATHAN BAKER, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 1038 (2nd ed. 2008).

136. *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325 (2016).

137. Pub. L. No. 111-203 (2010).

138. 15 U.S.C. § 77a.

139. 15 U.S.C. § 78a.

140. See SEC. AND EXCH. COMM’N, *STUDY ON THE CROSS-BORDER SCOPE OF THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934* (2012) <https://www.sec.gov/files/929y-study-cross-border-private-rights.pdf> [<https://perma.cc/B4CT-EFJN>].

141. 7 U.S.C. § 1.

142. See, e.g., *The Long Arm of the CFTC: What Stakeholders in the MENA Region Should Know*, JONES DAY INSIGHTS (July 2021) <https://www.jonesday.com/en/insights/2021/07/the-long-arm-of-the-cftc> [<https://perma.cc/ZP8E-TYDL>].

143. 15 U.S.C. § 77v(c).

144. 15 U.S.C. § 78aa(b).

Investment Advisers Act of 1940.<sup>145</sup>

Unfortunately, the SEC and certain other U.S. authorities seem to enjoy the header of the added provisions so much that they don't read beyond it. True, the amendment overcomes the presumption against extraterritoriality and overrules *Morrison*, which was decided before the entry into force of Dodd-Frank. However, the added extraterritorial language is by no means unlimited. In fact, there still is a "conduct-and-effects test" that has to be met before extraterritorial jurisdiction shall be exercised. As the statute clearly requires, the SEC and other U.S. authorities have to demonstrate that there was either "conduct within the United States" or "a foreseeable *substantial* effect within the United States."<sup>146</sup> The statute does not say that *any effect* would suffice or that largely speculative effects would be enough to create U.S. jurisdiction over a case, nor does it say that American authorities have extraterritorial jurisdiction over the blockchain and cryptocurrency markets everywhere. Even if Congress did provide a clarification and some extraterritorial powers via Dodd-Frank, one simply cannot argue that Congress, in so doing, intended to overrule and discard the entire body of international and national law urging restraint in the extraterritorial application of U.S. law.

#### IV. CONCLUSIONS

Jurisdiction of the SEC and CFTC is not a problem if natural or legal persons in the blockchain and cryptocurrency space have a physical presence in the United States. They may be incorporated elsewhere, but if they have offices in the U.S. or if their companies are owned by American citizens, the U.S. government has regulatory and enforcement jurisdiction under the territoriality and/or the active personality principle.

In the case of companies that do not have an incorporation or physical office in the U.S. and are not owned or operated by U.S. citizens, the SEC and CFTC could argue that their interventions against these companies are justified under the passive personality principle if they are issuing digital currencies without prior registration in the U.S. and without making sure that potential U.S.-based buyers are excluded from purchasing them. As we have seen in the introduction, the passive personality principle permits states to take action if their nationals are injured by foreign parties.

However, there is a hierarchy in the jurisdictional bases. The first, and strongest, base is the territoriality principle, which gives priority for the regulation of companies and securities to the jurisdiction or country where they are domiciled and issued. The second base is the active personality principle, which gives authority to the home country of a natural or legal person to regulate the conduct of that person wherever it occurs in the world, provided this does not conflict with the territorial sovereignty of another country.<sup>147</sup> In terms of the third

---

145. 15 U.S.C. § 80b-14(b).

146. 15 U.S.C. § 77v(c)(2) (emphasis added).

147. As early as 1927, the Permanent Court of International Justice (PCIJ) declared that

base, the passive personality principle only gives authority to enforce domestic laws in international cases if there is no conflict with either the territorial sovereignty or the active personality jurisdiction of other countries. Finally, regarding the fourth base, the universality principle only kicks in after a matter remains unregulated by any and all of the countries with higher priority jurisdictional claims.

The hierarchy can be illustrated quite easily. Even though German law allows consumption of alcohol from age sixteen and up, this does not mean that German nationals under the age of twenty-one can lawfully consume alcohol in the United States. Nor does it mean that German authorities have any obligation to assist American authorities in trying to determine whether American nationals under the age of twenty-one were consuming alcohol during a visit to Germany. It is a general principle of international criminal law that countries asked for their legal assistance in the determination of crimes and misdemeanors will only lend a hand if the conduct in question is illegal also in their jurisdiction.<sup>148</sup> These principles apply equally for administrative regulations and enforcement actions.

Transferred to this case, this casts a problematic light on SEC interventions in cases like Telegram.

The SEC had jurisdiction in Rivetz because the owner Steven Sprague was a U.S. national and operated at least part of the enterprise on U.S. territory.

The CFTC also had jurisdiction in Digitex although Adam Todd was a British citizen and all of his companies were incorporated outside of the U.S. Todd made the fundamental mistake of establishing a residence in Miami and running part of his operations from there.

Even in criminal cases like Bitconnect<sup>149</sup> or Terraform and Do Kwon,<sup>150</sup> the SEC has a persuasive claim to jurisdiction on the basis of the passive personality principle because American citizens were defrauded. However, once Do Kwon is apprehended and any remaining assets of Terraform are being distributed, U.S. claims to enforce U.S. laws will be secondary to Korean claims.<sup>151</sup> Korea may

---

the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

The Case of the S.S. ‘Lotus’ (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 15-16 (Sept. 7).

148. See, e.g., Sharon A. Williams, *The Double Criminality Rule and Extradition: A Comparative Analysis*, 15 NOVA L. REV. 581-623 (1991).

149. See Indictment, *supra*, note 102 and accompanying text.

150. SEC v. Terraform Labs Pte Ltd., No. 22-368, 2022 WL 2066414 (2nd Cir. June 8, 2022), Court of Appeals Affirms Order Against Terraform and Kwon in SEC Subpoena Enforcement Action, Release No. 25415 (June 9, 2022).

151. As Doyle wrote to the U.S. Congress in 2016, “[a]lthough the crimes over which the United States has extraterritorial jurisdiction may be many, so are the obstacles to their enforcement. For both practical and diplomatic reasons, criminal investigations within another

choose to extradite Mr. Kwon to the U.S. should a request be made, but it is under no obligation to do so. Furthermore, if Mr. Kwon should be criminally charged and convicted in Korea, he could no longer be prosecuted a second time in the U.S. after having served time in Korea. The prohibition of double jeopardy<sup>152</sup> would stand in the way of any attempts to factually undermine the priority of Korean jurisdiction over the actions of Terraform and the person Do Kwon.

However, in the absence of territorial and active personality links, and outside of the realm of international criminal law, the U.S. and its regulatory authorities, including even the SEC, simply do not have the power to be the global regulator of digital money. The argument by the SEC that protection of American investors is part of their core mandate and that this gives it the power to control any issue of digital money anywhere in the world unless any access by Americans is physically prevented,<sup>153</sup> simply does not hold up under international law.

Most importantly, such a claim does not hold up under U.S. law either. There is no way the District Court in *Barron v. Helbiz* can credibly claim a *substantial effect* within the United States after *one single person in Texas* managed to buy a crypto coin in spite of a prohibition by the issuer.

Furthermore, even in Telegram, the SEC did not show a *foreseeable substantial effect* within the United States. It could have made the argument, but it did not even bother to do so because it seems to think that Dodd-Frank has given it virtually unlimited extraterritorial jurisdiction. However, an unsubstantiated claim to regulatory and enforcement jurisdiction by the SEC in a case like Telegram is simply unacceptable and falls under the abuse of rights doctrine. As the case presented itself, Telegram offered to exclude American investors from the distribution of Grams. Sure, it is possible and even probable that at least some of the third country investors would have eventually resold Grams to U.S. investors, including U.S. retail investors. However, that effect was still somewhat remote and hard to substantiate. Even if we accept that sooner or later, American investors would have ended up with Grams, they freely choose to purchase digital coins or tokens from a foreign issuer, they do so at their free will and largely conscious of the risks involved. The American buyers may be business-minded investors interested in the commercial applications under

---

country require the acquiescence, consent, or preferably the assistance, of the authorities of the host country. The United States has mutual legal assistance treaties with several countries designed to formalize such cooperative law enforcement assistance.” CHARLES DOYLE, CONG. RSCH. SERV., RS22497, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW: AN ABBREVIATED SKETCH 3 (2016), <https://crsreports.congress.gov/product/pdf/RS/RS22497> [<https://perma.cc/CJW7-ZMU7>].

152. As outlined above, in international cases, this is commonly referred to as the dual criminality or double criminality requirement. As Doyle wrote to Congress in 2016, “[t]he nation’s recently negotiated extradition treaties address some of the features of earlier agreements which complicate extradition for extraterritorial offenses, that is, dual criminality requirements; reluctance to recognize extraterritorial jurisdiction; and exemptions on the basis of nationality or political offenses.” *Id.*

153. See Bini & Howe, *supra* note 79.

development by the foreign issuer. Alternatively, and this is usually true of the majority of those buyers, the American buyers may be unsophisticated retail investors speculating that the particular coins or tokens will experience a rapid increase in value. The actions of the SEC would not only prevent both types of American investors from accessing these markets, but as the Telegram case shows, they actually prevent the development of the business in its entirety, unless the cumbersome and expensive American filings have been made. And even if those filings did get done, we may safely assume that not one of the retail investors the SEC is so worried about would read, let alone understand the disclosures required by the SEC—a classic case of form over function.

In conclusion, we don't prevent Americans from gambling in foreign casinos while in Monte Carlo or Macao. We don't even prevent Americans from buying traditional securities from foreign issuers that have not filed with the SEC. The SEC does not even attempt to stop a U.S. citizen domiciled in the U.S. from using the internet to instruct a broker in Hong Kong or London or Dubai to purchase common stock of foreign companies on their respective exchanges on behalf of the U.S. client. As long as a foreign issuer does not seek to list their traditional shares or securities on U.S. exchanges, the U.S. does not arrogate to itself the authority to be the global regulator of stock exchanges and securities trading places. However, this is precisely what the SEC is doing for digital currencies, and the only jurisdictional basis it can claim for this overreach is the principle of "yes, we can."