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State sovereignty, economic interdependence and US extraterritoriality: the demise of Swiss banking secrecy and the re-embedding of international finance

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Abstract This article explores the tactics of an emergent extraterritoriality in international finance by examining how the US was unilaterally able to pierce Swiss banking secrecy regulations before Switzerland was forced to make similar concessions at the multilateral level. Complementing power-based approaches that emphasise control over market access, we show that, for most of the conflict starting in early 2008, the key agents of change were the US law enforcement authorities. By relying on legal action against Swiss banks following a large tax evasion scandal, rather than engaging in a direct confrontation with the Swiss government, the US was able to avoid politicisation of the conflict, which would have raised questions of legitimacy. The US law enforcement authorities' ability to promote institutional change in Switzerland is based on three factors: the structural economic dependence of banks on access to the US market; the corporate liability for legal transgressions of employees; and an adversarial legal system characterised by extensive prosecutorial autonomy. More generally, we show that powerful states have the capacity to re-embed international finance by extending the boundaries of their law enforcement authorities' jurisdiction extraterritorially.
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Introduction

The global financial crisis has powerfully demonstrated the necessity of re-embedding international finance. Among other things, the crisis has redirected attention to the problem of financial secrecy, which is the result of the gulf between state sovereignty and the internationalisation of capital (Palan 2002). If a country facilitates the creation of structures that allow asset holders to avoid taxation, launder money or finance illicit activities, other countries have few means at their disposal to avert the negative consequences. Hence, the literature on offshore finance argues, there is little that can be done against financial secrecy outside of multilateral initiatives that substantially restrict the state's legal sovereignty, but due to collective action problems, such initiatives are unlikely to succeed (Palan 2002; Webb 2004; Eden and Kudrle 2005; Rixen 2008; Sharman 2008; Genschel and Schwarz 2011).

Recently, the US law enforcement authorities managed to coerce the transformation of Swiss banking secrecy regulations against the preferences of Switzerland's government and financial sector. Switzerland is considered 'the old granddaddy of tax havens' with impenetrable banking secrecy facilitating tax evasion and its 'reputation as trustworthy bankers [a] legend among private investors' (Finkelstein 1999: 6, 44). Since Swiss banks are estimated to manage up to one-third of the world's total offshore wealth (Eccleston 2012: 127), Switzerland's agreement to exchange information for tax purposes with the US authorities is of great importance.

This article contributes to our understanding of how the US *unilaterally* pierced Switzerland's allegedly impenetrable veil of secrecy *before* Switzerland was forced to make similar concessions at the multilateral level. This is an important endeavour because Switzerland's concessions to the US clearly set the pace for subsequent multilateral action in the framework of the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes or within the European Union (Palan and Wigan 2014; Emmenegger 2017). With its unilateral action against Switzerland, the US not only demonstrated the need to tackle tax evasion by means of banking secrecy, it also decisively weakened the possibly most influential opponent of international tax cooperation. In addition, the conflict shaped the US approach to combating tax evasion. For instance, the Foreign Account Tax Compliance Act (FATCA) was created with the deliberate goal to close the regulatory gaps that the conflict had disclosed (Harvey 2012).

The existing explanations of the demise of Swiss banking secrecy emphasise US power, which is typically understood to be a function of market size and the ability to control access to it (Eccleston 2012; Steinlin and Trampusch 2012; Palan and Wigan 2014; Emmenegger 2017; Hakelberg 2016). While we agree with these accounts, we consider explanations based on market power alone incomplete, because they cannot explain the timing of events. The US had strongly criticised Swiss banking secrecy several times already before the recent conflict but with little effect (IRS 1981; Vogler 2005). Clearly, the global financial crisis has increased the salience of tax evasion (Eccleston 2012), both in the US and globally, but it did not suddenly empower the US to take on Switzerland.

We complement power-based approaches by identifying and theorising the key agents of change and by tracing the process that led to the sudden demise of Swiss banking secrecy. Our goal is not to explain the US support for multilateral initiatives or international tax cooperation (*cf.* Eccleston 2012; Hakelberg 2016), but rather to explain how the US unilaterally promoted institutional change in Switzerland. We show that, for most of the conflict starting in early 2008, the key agents were the US law enforcement authorities. By relying on legal action against Swiss banks rather than engaging in a direct confrontation with the Swiss government, the US managed to do what it had failed to achieve in the past: pressuring the Swiss government into abandoning banking secrecy. When the two countries finally engaged in bilateral negotiations, such as on the implementation of FATCA in late 2012, Swiss banking secrecy for US persons was already hollowed out.

Treating the conflict as a primarily legal matter allowed the US to avoid the conflict's politicisation, which would have raised questions of legitimacy, because exercises of power left unvarnished are always vulnerable to critique (Eagleton-Pierce 2013). Given its own tax haven status, a direct attack on Switzerland would have raised questions about power abuse, making it look like one tax haven is simply trying to eliminate a competitor. However, a large tax evasion scandal centred around Switzerland's largest bank allowed the US law enforcement authorities to disguise its attack on Swiss banking secrecy as a purely legal matter involving criminal misconduct by Swiss banks. In addition, the scandal in combination with the global financial crisis created a demonstration effect (Mattli and Woods 2009: 22–25), which legitimised the US law enforcement authorities' forceful approach, including the extraterritorial assertion of jurisdiction over actors inside the Swiss territory. As a consequence, the US law enforcement authorities ultimately pressured more than 100 Swiss banks into agreeing to pay significant penalties to avoid prosecution for having US clients with undeclared assets, although these banks often had no representation on US soil, their clients did not invest in the US market and they were not, in principle at least, responsible for their clients' tax compliance.

Our analysis has important implications. In particular, we demonstrate that powerful states have the capacity to re-embed international finance by extending the boundaries of their law enforcement authorities' jurisdiction extraterritorially. Hence, rather than undermining state capacity, as predicted by globalisation scholars (Strange 1996), growing economic interdependence may in fact endow powerful states with new means to exercise pressure on international finance. This is particularly true for the US, which controls access to the world's most important financial system and whose law enforcement authorities have comparatively far-reaching powers. However, in the wake of the US efforts to re-embed international finance, other powerful states such as France, Germany and Great Britain have begun to adopt the US approach of pressuring foreign financial institutions into costly negotiated settlements. The conflict-laden relationship between nation-states and international capital might thus be in the process of being rebalanced.

US power and Swiss banking secrecy

The transformation of the nation-state into a competition-state lies at the heart of globalisation. As states compete for business activities, individuals or companies try to take advantage of regulatory arbitrage. Taxation is a case in point. Due to the possibility of dividing the fiscal subject, individuals can benefit from the public infrastructure of one state while using another state's regulations to avoid paying taxes (Palan 2002). If regulations are such that they allow what is essentially poaching another state's tax base, international disputes over state sovereignty in tax matters are sure to develop.

Switzerland's banking secrecy regulations are a prominent example of structures that allow holders of internationally mobile assets to avoid taxation in a given country.[1] In the case of banking secrecy, the information necessary to collect taxes is available and could, theoretically, be shared with foreign authorities. However, before 2009, no amount of international pressure had been sufficient to induce Switzerland to exchange information for tax purposes (Vogler 2005; Steinlin and Trampusch 2012; Emmenegger 2014). While this lack of success of unilateral and multilateral initiatives is not to imply that state sovereignty is unchallenged (Krasner 1999), it points to the difficulties that states and international organisations face if they want to influence the tax laws of other sovereign states. As a consequence, most of the literature on offshore finance share Palan's (2002: 173) pessimistic conclusion that effective strategies to combat tax havens would 'require a degree of cooperation among the major industrialised countries and a limit on the sovereign rights of states, which effectively would spell the end of the so-called Westphalian system'.

The US has been highly critical of Swiss banking secrecy for several decades. While the US support for multilateral initiatives and international tax cooperation has been unsteady (Hakelberg 2016), the US was consistent in its criticism of Swiss banking secrecy. For instance, the noted Gordon report (IRS 1981) lists numerous complaints and previous attempts to induce Switzerland to change its policies (see also Vogler 2005). But if the US wanted to eliminate Swiss banking secrecy (for US persons), why did it not simply use its power as gatekeeper to the world's most important financial market to inhibit tax evasion by means of Swiss banking secrecy? The literature in international political economy is rife with arguments that emphasise how economic interdependence and the ability to control access to its market awards the US with the ability to cause others to do something that they otherwise would not do (Hirschman 1969; Krasner 1976; Simmons 2001; Drezner 2007).

Indeed, most accounts of the demise of Swiss banking secrecy demonstrate forcefully that US power was decisive in making Switzerland finally change its policies (Eccleston 2012; Steinlin and Trampusch 2012; Palan and Wigan 2014; Emmenegger 2017; Hakelberg 2016). We agree with these accounts, but we argue that US power based on control over market access alone was not sufficient to promote institutional change in Switzerland. To show why this is the case, we need to distinguish between two groups of actors that can be subject to US power: states and banks.

The US can use its control over market access to exercise pressure on other states. However, for three reasons, this strategy is challenging. First, it is economically costly (Simmons 2001). For instance, Switzerland is one of the world's largest financial centres and the sixth largest source of foreign direct investment into the US (Embassy of Switzerland in the US 2014: 7). As we show below, concerns about economic costs were among the reasons why the US had abandoned a previous attempt to eliminate Swiss banking secrecy for US persons. Second, in terms of legitimacy, openly exerting pressure on a respected member of the international community such as Switzerland and infringing its sovereignty would have made the US vulnerable to critique (Eagleton-Pierce 2013). In fact, the powerful norm of state sovereignty is one of the main reasons why previous attempts to combat tax havens had failed (Palan 2002; Sharman 2006).[2] Third, given its own status as an increasingly important tax haven (Hakelberg 2016), the US would have to offer convincing arguments to explain on what grounds Switzerland is singled out. Of course, the US could target all countries, as it did with FATCA. However, without the support of several European powers and international organisations (Grinberg 2012), it is difficult to imagine how the US would have been able to impose FATCA on the world without facing countermeasures.

Most importantly, as we show below, for most of the conflict, the US did not use its control over market access to engage in a direct confrontation with the Swiss government. Instead, the US, and in particular its law enforcement authorities, always focused their attention on Swiss *banks*. While it is certainly true that the US pressured Switzerland to implement FATCA, the bilateral agreement was struck only in late 2012. At that time, the conflict over Swiss banking secrecy had been going on for more than four years and banking secrecy for US persons was largely hollowed out. It is no surprise then that Switzerland was among the first countries to implement FATCA. In fact, while Switzerland repeatedly tried to redefine the conflict as one between two sovereign states (which can be solved by diplomatic means), the US was careful to treat the conflict as a purely legal matter between the US law enforcement authorities and Swiss banks (which has to be dealt with in court).

Next to states, the US can use its control over market access to exercise pressure on banks. For instance, banks that violate certain regulations can be excluded from the US market. However, also in this case, the US faces an important challenge. The reason why the US could not simply use its ability to control access to its financial market to enforce change in Switzerland is that business models based on banking secrecy do not depend on market access. Cross-border economic interdependence becomes a source of power only when the boundaries of regulatory jurisdiction and the scope of markets overlap (Newman and Posner 2011). Swiss banking secrecy is an example of what Newman and Posner call ‘sovereign mismatch’, in which national market size does not determine power. In this situation, the system of state sovereignty protects banks that rely on banking secrecy.

Table 1 uses the boundaries of regulatory jurisdiction (territorial or extraterritorial) and market scope (whether economic activity is constrained by national borders or not) to differentiate between four ideal–typical scenarios of power dynamics based on economic interdependence. Sovereign congruity describes the most familiar case, in which both markets and regulatory authority are national. In this case, national market size increases power because foreign firms must comply with national regulations to sell their products to consumers. The US authorities have considerable power because they control access to the world’s most important market.[3]

Sovereign mismatch denotes a situation in which economic activity is possible outside the boundaries of regulatory jurisdiction. While the US can regulate client–bank interactions on the US territory, its regulatory agencies cannot stop US persons from meeting bank representatives abroad. The US persons who want to evade taxation at home can simply travel abroad for investment advice or to induce securities transactions. If the bank does not communicate with the clients while they are in the US, all economic activity is extraterritorial and thus, in principle, outside the reach of the US authorities. Admittedly, such an arrangement implies

Table 1 Banking secrecy and economic interdependence
Source Adapted from Newman and Posner (2011:597)

		Scope of market	
		Territorial	*Extraterritorial*
Boundaries of regulatory jurisdiction	Territorial	Sovereign congruity *National market size determines power*	Sovereign mismatch *National market size does not determine power*
	Extraterritorial	Transnational mismatch *The sum of national market sizes under a common jurisdiction determines power*	Transnational congruity *Market size determines power*

certain costs, but if these costs are lower than the tax due, tax evasion is still worthwhile. Hence, in the case of offshore wealth management, national market size does *not* determine regulatory power.

The most straightforward response to sovereign mismatch is to obtain information about the US persons' assets by means of information exchange between national tax authorities, but Swiss authorities were reluctant to provide such information due to banking secrecy. The alternative to interjurisdictional cooperation is the extension of the boundaries of regulatory jurisdiction to create transnational congruity. In this situation, economic activity is not constrained by national borders but a regulatory body with extraterritorial jurisdiction oversees these activities, thus reasserting control over economic activity that has previously escaped from national regulatory regimes (Putnam 2009). As we show below, the US law enforcement authorities relied on extraterritoriality to hollow out Swiss banking secrecy. However, if Swiss banking secrecy is an example of sovereign mismatch, how did the US authorities manage to reassert control by extending the boundaries of their jurisdiction extraterritorially?[4].

Extraterritoriality concerns the direct regulation of conduct outside a state's borders and has become an increasingly common mechanism by which powerful states attempt to manage problems associated with transnational activities (Putnam 2009: 459). Unlike other forms of post-war conflict management between sovereign states, though, in particular multilateral cooperation in the framework of international institutions, extraterritoriality has not been the topic of much research (Raustiala 2009: 21). In particular, the political processes that govern the extension of the US extraterritorial jurisdiction are not well understood. Nevertheless, the existing literature provides a series of important insights.

Kahler and Lake (2009: 267) observe that the US uses control over market access to extend its reach into other jurisdictions. Moreover, they note that extraterritoriality is deployed when distributional consequences of the issue are large. In a similar vein, Putnam (2009: 482) argues that while US courts primarily use extraterritoriality to deal with threats to the domestic regulatory order, extraterritorial capacity derives from the ability to exclude non-complying entities from future transactions. Raustiala (2009: 30) notes that extraterritoriality is attractive to the US authorities because, while it does require some market presence by foreign financial institutions, little assent from other governments is needed.

Kaczmarek and Newman (2011) show that extraterritorial interventions by US courts have the capacity to change national regulations in foreign countries. Analysing the regulatory effects of the enforcement of foreign bribery legislation by US courts, which concerns cases of bribery committed by foreign firms outside the US territory, they show that extraterritorial application of the US legislation against foreign firms increases the likelihood of the firms' home countries enforcing their national regulations 20-fold. However, it is worth noting that, in their analysis, it is the foreign companies dependent on market access who commit the illegal acts, while in the case of banking secrecy, tax compliance is primarily the taxpayers' responsibility. Hence, the literature demonstrates the effectiveness of extraterritoriality once jurisdiction has been asserted, but not how that jurisdiction was extended in the first place.

From sovereign mismatch to extraterritoriality

In the following, building on historical institutionalist scholarship (Farrell and Newman 2010; Fioretos 2011), we develop a causal sequential argument to explain how the US law enforcement authorities managed to overcome the sovereign mismatch problem and force Swiss banks into costly settlements. Sequential arguments maintain that events set into motion have an inherent logic, in which event A is causally linked to event B, which is causally linked to event C, and so on (Pierson 2004: 68).[5] Hence, the order in which things happen plays a crucial role because, according to Hay (2011: 68), 'strategic choices made at a particular moment eliminate whole ranges of possibilities from later choices while serving as the very condition of existence of others'.

More concretely, we argue that the demise of Swiss banking secrecy was the result of a sequence of three causally connected key events. First, the US used its power to control market access to force Swiss banks to sign up to a programme that, although compatible with banking secrecy, made Swiss banks for the first time co-responsible for the tax compliance of some of their US clients in specific circumstances. Second, a tax evasion scandal linked to this particular group of US clients involving Switzerland's largest bank allowed the US law enforcement authorities to enforce access to some confidential client data. Third, the resulting inaugural piercing of Switzerland's veil of secrecy enabled the US law enforcement authorities to extend their jurisdiction extraterritorially and to dispose of Swiss banking secrecy for US clients altogether.

The first key event in the causal sequence was the introduction of the little-known Qualified Intermediary Program (QIP), discussed in greater detail in the next section, which allowed the US to create a link between US power and Swiss banking secrecy. Two factors would seem to sever this link. A business model based on banking secrecy is not dependent on market access and banks are not responsible for the tax compliance of their clients. We demonstrate below that the QIP allowed the US law enforcement authorities to negate these two factors and forge just such a link between US power and Swiss banking secrecy.

In the late 1990s, the US took advantage of asymmetrical economic interdependence to require foreign banks to participate in the QIP in return for market access. Given Swiss resistance and the US concerns about economic costs, the QIP was created in a way to be *compatible* with banking secrecy and, therefore, did not solve the sovereign mismatch problem. However, as we show below, it nevertheless provided the US law enforcement authorities with a gateway to attack banking secrecy because the authorities' prosecutorial autonomy allowed them to extend their investigations beyond violations of the QIP to include transgressions normally protected by sovereign mismatch. Hence, when in 2008 the US law enforcement authorities, based on a whistle-blower's testimony, accused the Swiss bank UBS of violations of the QIP, the conditions necessary for an attack on Swiss banking secrecy were at last ripe at the same time (the second key event). The US had the legal right, the power, but also the legitimacy to pounce on Switzerland.

First, in terms of legal rights, the US law enforcement authorities have exceptionally wide discretion and 'the adversarial system in the United States creates an unusually prosecution-friendly dynamic' (Garrett 2014: 224). Among other characteristics, companies are required to submit all requested documentation to the authorities, while the authorities can extend their investigations to include transgressions that are only loosely connected to the initial ones. As a result, in the case of Swiss banking secrecy, the US law enforcement authorities could, based on the whistle-blower's testimony, for the first time legally request access to the files of *all* US clients of Swiss banks, despite Swiss law explicitly forbidding providing such information and the QIP not anticipating such an exchange of information.

In addition, corporate liability makes companies relatively easy targets for prosecution. Compared to most other countries, the US law enforcement authorities are relatively quick to hold companies responsible for transgressions committed by employees even if the management did not know or benefit from them. What is more, once investigations have started, companies are expected to fully cooperate with the authorities (Holder 1999). Hence, companies cannot prevent investigations by simply pointing to the inappropriate behaviour of some rogue employee.

Second, with regard to power, the US law enforcement authorities can exercise considerable pressure on companies. For instance, they can restrict banks' access to the US market in punishment for lack of cooperation. At the most extreme, they can use 'the corporate death penalty' (Garrett 2014: 14). Given the history of criminal indictments of banks, the US law enforcement authorities know that banks do not economically survive criminal indictments (Holder 1999).[6] In the case of Swiss banking secrecy, facing the US demands to provide access to client files while being legally bound to keep them secret, Swiss banks had little choice but to hope for some agreement between the two involved jurisdictions.

However, the US law enforcement authorities were in a great bargaining position because they could anticipate that Switzerland is structurally dependent on its largest bank's survival. At the beginning of the conflict in 2008, the Swiss bank at the centre of the tax evasion scandal, UBS, held assets worth approximately three times Switzerland's GDP (by comparison, all US banks together held assets worth approximately the US GDP). The economic risks of a criminal indictment were aggravated further by the consequences of the global financial crisis, during which

UBS was forced to request state help. As a result, a credible threat to indict UBS was likely to trigger a response by the Swiss government that would satisfy the US demands.[7]

Finally, in terms of legitimacy, openly exerting pressure on a respected member of the international community such as Switzerland and infringing its sovereignty by requesting institutional change would have made the US vulnerable to critique (Eagleton-Pierce 2013). In the UBS case, that critique was not forthcoming because the tax evasion scandal allowed the US to treat the conflict as a purely legal matter. Thereby, the US could avoid politicisation of the conflict, which would have raised questions of legitimacy. Hence, what was, from a Swiss point of view, a bilateral conflict and thus in the realm of international law, the US considered to be a purely legal matter that just happened to involve, at the end, more than one hundred Swiss banks. As such, the US did not infringe Swiss sovereignty directly but still forced Switzerland's hand because Switzerland had no choice but to come to its banks' aid.

Of course, the issue of legitimacy is also important for the US law enforcement authorities because their greater autonomy and ability to exercise pressure on companies could raise questions about abuse of power. While the legitimacy of European law enforcement authorities is primarily based on their commitment to a clear set of rules (procedural legitimacy), the US authorities are more willing to resort to an assertive approach if the ends justify the means (outcome legitimacy). Hence, the US approach to pressure companies into expensive settlements without proper court trials is acceptable to the public only because it seems legitimate (Holder 1999). Crucially, the whistle-blower's detailed account of illegal practices in combination with a shifting public mood following the global financial crisis legitimised the US authorities' assertive approach by demonstrating the economic and social cost of the regulatory *status quo* (Mattli and Woods 2009: 22–25).

Importantly, the first encounter between the US law enforcement authorities and Switzerland was primarily concerned with UBS' violations of the QIP. In addition, while the resulting Swiss concessions gave the US authorities access to some client files, these concessions were still a far cry from the automatic exchange of information that ultimately resulted. To truly put an end to Swiss banking secrecy, the US authorities had to continue to exert pressure on Swiss banks and induce the Swiss government to make further concessions. In the absence of new violations of the QIP, what could the banks be accused of?

The answer, as we show below, was a new *interpretation* of the QIP. In the absence of any regulatory change, the US law enforcement authorities used their prosecutorial autonomy in late 2010 to make Swiss banks responsible for having *any* US clients with undeclared bank accounts on their books (the third key event). Legitimised by the successful investigation against UBS that revealed widespread abuse and based on client data obtained from multiple offshore voluntary disclosure programmes, the US law enforcement authorities now issued new threats to criminally indict banks unless they provided full access to their client files. Worried about its banks' survival and struggling to undermine the US investigations' legitimacy despite their questionable legal basis, the Swiss government ultimately agreed to dismantle banking secrecy for the US clients of Swiss banks.

In what follows, we use process tracing to analyse, based on primary sources, specialised secondary literature and twelve interviews, how the US law enforcement authorities took advantage of asymmetrical economic interdependence and their prosecutorial autonomy to extend their jurisdiction extraterritorially. We are primarily interested in understanding why Switzerland was not able to block these developments.[8] We have therefore talked to senior officials of Swiss banks and their interest associations as well as senior officials from the responsible regulatory agencies. However, we have also talked to senior officials of the US regulatory agencies. For both legal and practical reasons, it is difficult to obtain interviews with the actors involved in these developments. We have therefore pledged to protect the interviewees' anonymity. The list of interviews is provided at the end. In the analysis below, we cite additional primary sources wherever possible.

Conditions for market access: the qualified intermediary program

The US extraterritorial power is based on its central position in the dollar-based financial system. For most activities in finance (offshore wealth management being a notable exception), there is virtually no possibility for banks to be globally active without repeatedly trading with US-based institutions or in US dollars. However, the Federal Reserve controls the clearing of transactions in US dollars, the Internal Revenue Service (IRS) taxes all income from a source inside the country and several agencies regulate banking activities within the US territory. The US can use this structural dependence on access to the dollar-based financial system to impose conditions for market access.

A prominent example is the QIP, which required foreign banks to report information directly to the US tax authorities in case of investments in US securities. The QIP strove to identify the US persons who held beneficial interests in US securities, but also to ensure the appropriate withholding of the US tax from payments of the US source income to non-US persons. Foreign banks could eliminate some of these reporting requirements by applying for the status of 'qualified intermediaries'. As such, foreign banks themselves were responsible for information collection by determining which of their customers were US persons subject to information sharing and which were non-US persons entitled to reduced rates of withholding tax under a treaty or statute, thereby keeping client names confidential (Hanrehan and Shapiro 1998).

Foreign banks had a strong interest in participating in the QIP. If banks did not participate, their payments were subject to withholding at a rate of approximately 30%. For Swiss banks specifically, there were, however, two issues that complicated participation. First, the QIP conflicted with Swiss banking secrecy if banks were engaged in offshore wealth management for US clients. As originally conceived, the QIP had left Swiss banks with two possibilities: either stay out of the QIP and pay the punitive withholding tax, or participate in the QIP and do away with secrecy in the case of US clients. Second, the US had a strong interest in maximising foreign direct investment. If the Swiss government barred its banks from participating in the QIP (through an act of law), the programme might have resulted in negative economic consequences for the US because the large withholding tax would have made the US financial market unattractive for Swiss investors.

In negotiations, this dilemma was quickly solved.[9] The QIP allowed foreign banks to keep the names of non-US clients confidential. Instead, the implementation of the QIP by foreign banks was subject to two external audits within a six-year period (Sec. 10.03 QIP). In practice, this meant that, where bilateral double taxation treaties (DTT) were in place, the US financial market remained a lucrative destination for foreign investors with undeclared assets. Additionally, the QIP did not require foreign banks to share information with the IRS on their US clients if they refrained from investing in US securities on behalf of their US clients (Sec. 6.04 QIP). This exemption from reporting requirements—a concession to Switzerland—was the reason the Swiss government did not consider the QIP to be in violation of banking secrecy regulations. The QIP left the individual US clients of Swiss banks the choice between giving up banking secrecy or forgoing the right to invest in US securities (Bundesrat 2012).

These US concessions were certainly a success for the defenders of banking secrecy. However, the QIP, even in this revised form, created problems for Swiss banks. The fact that some US clients did not want their identity reported could have been interpreted as a sign that they had something to hide. Banks were thus obliged to investigate these clients' tax status for reasons of due diligence. Also, some clients with undeclared assets might still insist on investing in US securities, given the US financial market's relative attractiveness. In this situation, banks would have had to resort to highly problematic obfuscatory techniques to avoid attracting the attention of the US authorities.

Most importantly of all, the QIP made foreign banks responsible for collecting information if there was income from a US source, by determining which of their clients were US persons subject to information sharing and which were non-US persons but entitled to reduced rates of withholding tax under a DTT. While this responsibility was the cost for the right to keep client names confidential, it had one crucial consequence. It suddenly made foreign banks to some extent liable for the tax compliance of their US clients if there was any US source income (Grinberg 2012). In this way, the QIP created a link between US power and Swiss banking secrecy, although the involved actors were not able to recognise this at the time.

Piercing Switzerland's veil of secrecy: the UBS tax evasion scandal

The QIP did not make a business model based on banking secrecy impossible, but it did circumscribe it. Those US clients of Swiss banks who wanted to participate in the highly attractive US securities market, particularly in the years before the subprime mortgage crisis, found what at first sight seemed a loophole in the QIP. Consistent with US law, the QIP defined the beneficial owner of an account to include (foreign) corporations (Morse 2012: 533). This allowed banks to continue to serve the US clients that were interested in trading US securities while respecting both the QIP as well as the confidentiality requirements of Swiss banking secrecy. In this scenario, the US clients of Swiss banks appeared as foreign corporations and were thus not subject to information sharing. Importantly, using such intermediary structures was perfectly legal, according to the US law, as long as their *sole* purpose was not tax evasion (GAO 2007: 14).[10]

Such possibilities of circumventing the QIP did not escape Swiss banks' attention. In the years around 2000, delegations of the Swiss Federal Tax Administration and the Swiss Banking Association met repeatedly with the IRS to discuss the two nations' different interpretations of an account's beneficial owners.[11] According to the tougher Swiss regulations, banks are obliged to identify the persons who control intermediary structures and these structures' bank accounts. The IRS, however, insisted on its understanding of beneficial owners (Müller 2008; FINMA 2009). An analysis by the law firm (Baker and McKenzie 2000: 3, emphasis in the original) confirmed this interpretation: 'The fact that a non-US company is "passive" and wholly or partially owned by a US person should *not* prevent the non-US company from being treated as a non-US person for US withholding tax and information reporting purposes.'[12]

Not everybody was willing to trust this interpretation. Some client managers specialising in the US market left big, internationally active banks to become independent asset managers, create new private banks or join the existing small banks such as Wegelin & Co., bringing along their US clients. These client managers were relying on another strategy to circumvent reporting requirements. By creating or joining small banks with no representation in the US, they were assuming the small size of their new employers would not attract any US attention and the system of state sovereignty would continue to protect their business activities.[13]

At first, it seemed as if these more risk-averse voices were right, as the QIP's interpretation began to change at some point in the mid-2000s. In 2006, the US Senate's Permanent Subcommittee on Investigations released a report that highlighted tax haven abuses, including the use of foreign corporations owned by US persons, although without explicitly discussing the QIP's loopholes (Coleman and Levin 2006). In contrast, the loopholes were the topic of a hearing before the US Senate's Committee on Finance and a report of the Government Accountability Office in 2007 (Committee on Finance 2007; GAO 2007). Hence, at last, towards the end of 2007, the writing was on the wall that the US would no longer accept the circumventing of the QIP reporting requirements by means of intermediary structures.

In parallel, another string of events was unfolding that turned a reinterpretation of the existing regulations into a serious bilateral conflict. In May 2005, the US police searched the house of a US-domiciled UBS client. In response, the UBS client manager transferred all the client's assets to a Liechtenstein-based bank (in June 2005) because he believed that 'Liechtenstein had better bank secrecy laws than Switzerland' and ended his employment at UBS in spring 2006 (Court of Southern District of Florida 2008: 12). Before he left, the client manager alerted UBS' management of possible transgressions, such as using intermediary structures to obfuscate the identity of beneficial owners, becoming an internal whistle-blower at UBS. As the situation escalated, the client manager decided to talk to the US authorities. In June 2007, he met representatives of the Department of Justice (DoJ) for the first time. What he did not know, however, was that by then, his US-domiciled client had already admitted to tax evasion. As a result, in June 2008, the whistle-blower was sentenced to 40 months in prison for his role in assisting tax evasion.

The US attention now turned to his former employer, UBS, which is the world's largest bank measured by assets under management and also has a sizeable presence in the US market since its merger with Paine Webber in 2000 (Scorpio 2013). Based on the whistle-blower's information, the US law enforcement authorities arrested the head of UBS wealth management in the US at a Miami airport in April 2008. UBS was also the topic of a public hearing and a report of the US Senate's Permanent Subcommittee on Investigations in July 2008, which highlighted the violations of the reporting requirements under the QIP (Levin and Coleman 2008). In the hearing, UBS representatives admitted wrongdoing. However, they insisted that the use of intermediary structures to obfuscate beneficiary ownership was legal according to US law, that the problem was primarily a case of compliance failure and that the main fault lay with rogue client managers, not the bank itself (Branson 2008).

Following the hearing, the US law enforcement authorities requested information on Swiss banks' US clients, but given Swiss banking secrecy regulations, such information would only have been accessible by means of a process called international administrative assistance. The Swiss Financial Market Supervisory Authority (FINMA) advised the US representatives on how to file such requests in a meeting in June 2008.[14] In this meeting, Swiss representatives were also informed that the IRS would issue a John Doe summons, requesting 19,000 client files, in July 2008, but would not request its enforcement. Its main purpose was instead to interrupt the statute of limitations that sets the maximum time after an event that legal proceedings based on this event could be initiated (Bundesrat 2009: 45). Nevertheless, if enforced, the John Doe summons would create a major problem, as it would force UBS to disclose information on unknown taxpayers, which banking secrecy prohibits.

International administrative assistance is a cumbersome process. By February 2009, Switzerland had completed preparations for the transfer of information in only 26 cases (Schaub 2011: 214–15). For the US law enforcement authorities, this process was too slow. In late 2008, the DoJ offered UBS a deferred prosecution agreement (DPA) in exchange for admitting to having helped US clients evade taxation, paying a fine of USD 780 million and disclosing the names of approximately 250 US clients to the IRS (Bondi 2010: 9). To increase pressure on UBS, the DoJ also indicted the head of the bank's wealth management division in November 2008. The Swiss government now signalled its willingness to support the DPA but it still had the problem of how to allow UBS to send client files without violating banking secrecy laws.

The conflict finally escalated in February 2009. In a letter to UBS dated 17 February, the DoJ openly threatened to indict the bank: 'If UBS fails to enter into this deferred prosecution agreement with the Department of Justice by February 18, 2009, the trial team will immediately seek authorisation to obtain a criminal indictment against the bank' (cited in GPK 2010: 3361). Unwilling to risk an indictment, FINMA immediately complied and authorised the transfer of 255 UBS client files to the DoJ on 18 February, 2009. In a creative move, FINMA redefined the use of intermediary structures to circumvent the QIP as a case of tax fraud rather than tax evasion. In cases of tax fraud, Swiss banking secrecy does not bar authorities from engaging in international administrative assistance. Pointing to the real danger of an indictment and using this creative strategy, FINMA could send the UBS client files without violating banking secrecy.[15]

The decisive questions are of course whether or not an indictment would have jeopardised UBS' survival and, if yes, whether or not the US law enforcement authorities would have taken this risk, given the fragile state of its own financial market in spring 2009. Be that as it may, it is clear that Swiss authorities were convinced that UBS would not survive an indictment.[16] In July 2011, the Swiss Federal Court also decided that transferring the client files was legal because FINMA had sufficient reason to assume that an indictment would have led to the bankruptcy of the bank, which in turn would have caused serious and virtually uncontrollable economic repercussions for Switzerland (Bundesgericht 2011).

The UBS DPA addressed the criminal investigations against UBS. It did not, however, address the request for information about US clients issued by the IRS. In a surprise move, the day after UBS had entered the DPA with the DoJ, the IRS requested the relevant district court to enforce the John Doe summons and now demanded 52,000 client files (Bondi 2010: 2). The Swiss government immediately made clear that UBS would not be allowed to send further client files. Moreover, on 30 April, it sent an Amicus brief to the court, presenting its view of the legal conflict. Emphasising its interest in preserving the integrity of Swiss law and sovereignty and pointing to the obligation to respect international treaties with Switzerland, it observed that 'if the Court were to order UBS to produce evidence from Switzerland, and backed that order with coercive powers, the Court would be substituting its own authority for that of the competent Swiss authorities, and therefore would violate Swiss sovereignty and international law' (Bundesrat 2009: 13). In July 2009, the Swiss government noted that it would, if necessary, seize the requested files from UBS, so UBS could not transfer them to the US authorities.

On 19 August, 2009, the two sides finally reached a settlement. Switzerland agreed to give the IRS access to 4450 client files as well as to provide administrative assistance in case of tax evasion in the future (in the form of a revised DTT). The settlement allowed Swiss authorities to screen and select the client files to ensure that only files of clients who had committed tax fraud as per Swiss law were sent to the IRS. Notably, the Swiss Federal Administrative Court rejected that agreement in 2010 for violating banking secrecy regulations. This court decision, however, was subsequently overruled by a parliamentary decision in June 2010 that turned the settlement into a state treaty.

In sum, after having obtained the legal right and the legitimacy to do so, the US law enforcement authorities used the power that is theirs based on others' economic dependence to bring UBS, and by extension the Swiss government, to their knees. The US law enforcement authorities continuously increased pressure on UBS until they finally threatened to impose 'the corporate death penalty'. At this point, because it could not risk the collapse of its biggest bank, Switzerland finally complied with the US demands. For the first time ever, Switzerland's veil of secrecy was decisively pierced.

Shifting boundaries: prosecutorial autonomy and extraterritoriality

In November 2010, all charges against UBS were dropped. However, the settlement did not put an end to the bilateral conflict. Rather, the US law enforcement authorities announced that they would now start investigations against other Swiss banks for conspiracy to aid US taxpayers in filing false income tax returns. These new investigations were no longer about violations of the QIP. In the framework of the QIP, foreign banks were not responsible for the tax compliance of their US clients, as long as these US clients' assets were not invested in US securities. In contrast, these new investigations, made possible by the prosecutors' wide discretion and *contra* the QIP, now suddenly extended the banks' responsibilities to include all US clients with undisclosed assets.[17]

The UBS tax evasion scandal proved crucial in this process. In its wake, the US clients were looking for ways to get their assets out of reach of the US authorities. Some decided to transfer their assets to other offshore financial centres, while others transferred their assets to small banks that had no representation outside

Switzerland. These banks still welcomed US clients and, in accordance with Swiss regulations, did not monitor the tax status of their new clients' assets because they believed, incorrectly, that the UBS case did not affect them.[18] For instance, court documents reveal that the small Swiss private bank Wegelin & Co. was accepting US clients without proper documentation at least until late 2009 (Court of Southern District of New York 2012: 7–8; Court of Southern District of New York 2013: 2). As late as March 2010, the bank rejected the notion that it was running an operational risk due to the ongoing conflict and its US clients. Rather, Wegelin & Co. believed that, by keeping a low profile and banking on Swiss state sovereignty, it would draw no attention from the US law enforcement authorities (Hummler 2010; Bruderer 2012).

Those who believed only the giant bank UBS was a US target were soon to be proved wrong. Thanks to the UBS client files that the US authorities had received, two special offshore voluntary disclosure programmes and their own investigations, the US authorities now had considerable information on tax non-compliance by the US clients of Swiss banks. This information provided for the first time hard evidence that several Swiss banks had systematically used banking secrecy to facilitate tax evasion by US persons. In addition, this information clearly demonstrated that some Swiss banks, despite the UBS case, still relied on business models based on banking secrecy. Hence, this new information in combination with a shifting public mood following the financial crisis legitimised the US authorities' assertive approach that allowed it to extend their jurisdiction extraterritorially.

In October 2010, US law enforcement authorities arrested a senior Wegelin & Co. client manager at a Miami airport, who was on his way to a conference in the Bahamas. In the past, this banker had worked with a US-based lawyer who had been arrested by the US authorities in autumn 2009. The Wegelin & Co. client manager subsequently cooperated with the US authorities, thereby giving them sufficient material to indict the bank. In January 2012, the Southern District Court of New York (2012) indicted three further Wegelin employees and ultimately, in February 2012, the bank itself. The bank immediately withdrew from business, as did two other small banks whose senior managers had been indicted by the US authorities around the same time.

Why did the conflict escalate so suddenly? Following the UBS agreement and in light of the new information, the US law enforcement authorities kept requesting client files, but the Swiss government insisted on the system of international administrative assistance, including the new DTT. As already noted, this system is slow and cumbersome. In addition, the US government struggled to get the new DTT through the Congress. As a result, the US law enforcement authorities resorted to indicting the small but well-known bank Wegelin & Co. (Emmenegger 2015: 485–87), which was clearly an attempt to increase pressure on the Swiss government.[19]

The Swiss government immediately reacted to the new situation. Based on a new interpretation of the still-active 1996 DTT, the Swiss government now allowed group requests in cases of international administrative assistance. In addition, it allowed Swiss banks to send files to the US law enforcement authorities that did not blacken out their employees' names. Finally, in a joint statement in June 2012, the US and Switzerland informed that they would start negotiating the implementation of FATCA. An agreement on FATCA implementation was reached in December 2012, which Switzerland subsequently ratified in September 2013.

These concessions still did not satisfy the US law enforcement authorities. While they created automatic exchange of information for the future and simplified the procedure for accessing information through the international administrative assistance system with a view to identifying past transgressions, the US authorities still insisted on access to client files outside the regular administrative procedures, in contravention of Swiss banking secrecy laws. Across the table, as the Swiss negotiators argued, violating regular procedures was the line in the sand that the Swiss government was not willing to cross again.[20] Both sides seemed stuck.

Faced with the threat of indicting even more banks, including Switzerland's second-largest bank Credit Suisse, from spring 2011 onwards the Swiss government tried to negotiate a new state treaty that would put an end to the conflict once and for all. Yet, the US had little interest in resolving the conflict by diplomatic means.[21] The result was therefore not a state treaty but a unilateral 'amnesty' programme for Swiss banks created by the US law enforcement authorities, which the Swiss government agreed to support (Joint Statement 2013). The (still ongoing) programme allows banks that are not already under investigation to obtain non-prosecution agreements (NPA) or non-target letters from the DoJ. Banks requesting non-target letters must prove that all of their US clients paid their taxes. If they fail to do so, they are excluded from the programme and may be subject to criminal investigations.

If banks worry about having US clients with undeclared assets, they can request a NPA.[22] In order to obtain a NPA, they must provide detailed information on internal procedures, including employee names and client accounts. That information would, in turn, allow the US authorities to get access to client files through the system of international administrative assistance. In addition, these banks must agree to pay as a penalty an amount equal to 20% of the maximum aggregate dollar value of the US-related accounts that existed on 1 August, 2008, an amount equal to 30% of the maximum aggregate dollar value of all such accounts that were opened between 1 August, 2008, and 28 February, 2009, and an amount equal to 50% of the maximum aggregate value of all such accounts that were opened after 28 February, 2009 (Joint Statement 2013: 7–8). Banks may benefit from rebates if the bank can prove that the assets of US persons were properly declared or if it successfully encouraged its US clients to participate in the voluntary offshore disclosure programmes.

Crucially, this amnesty programme criminalises banks for activities that were, in the framework of the QIP, legal at the time they were committed (i.e., unless banks actively supported their US clients in evading taxation). The odd choice of the dates of the programme reflects that banks were supposed to follow the changing interpretation of tax laws by the US authorities (rather than regulatory reforms). Although there is no official justification for the choice of these dates, the 1 August, 2008 date is likely to refer to the 17 July, 2008 Senate hearing on UBS, while the 28 February, 2009 date is likely to refer to the UBS DPA from 18 February, 2009. Put differently, higher penalties are linked to developments in the UBS case and not to regulatory changes.

The fifteen banks already under investigation cannot participate in this programme and have to find bilateral solutions to their tax conflict with the US authorities. In May 2014, Credit Suisse agreed to a penalty of USD 2.6 billion and a guilty plea to avoid a court trial.

From a Swiss point of view, the amnesty programme has the advantage of giving banks the opportunity to resolve the conflict with the US law enforcement authorities. However, the compromise also has disadvantages. Clearly, it is very expensive. In addition, because the US amnesty programme shifts the burden of proof onto the banks, it imposes significant administrative costs on banks that have never played a relevant role in international wealth management because these banks—in order to obtain a non-target letter like any other Swiss bank—need to document to the IRS that they did not violate the US laws.

In sum, the US law enforcement authorities deliberately took advantage of their prosecutorial autonomy as well as economic interdependence to put pressure on Swiss banks,[23] while the banks—worried about the consequences of criminal indictments—basically accepted any agreement offered by the US law enforcement authorities.[24] In a similar vein, the Swiss government agreed to scrap banking secrecy regulations for US persons in order to reduce the pressure on Swiss banks. Whether or not the accusations of the US law enforcement authorities had any legal basis is a completely different matter. So far, not a single bank has dared to challenge the agreement in court.[25]

Conclusion

Referring to the bilateral conflict between Switzerland and the US over banking secrecy, the then-President of Switzerland argued that ‘no state has more value than another. No state should rule over another one. […] All states are sovereign and have equal rights. Their relationships are based on law and not power’ (Maurer 2013). His view reflects the prevalent understanding of sovereignty in *international* law. However, in practical terms, as this case study has demonstrated, he is wrong. *National* law can force another state’s hand.

In today’s world, powerful states’ law enforcement authorities can extend their jurisdiction extraterritorially to infringe on other states’ sovereignty. Extraterritoriality does not require assent from other governments. All that is needed is economic dependence on market access. Given the US' financial pre-eminence, virtually all financial institutions are in some way dependent on access to its financial system, which gives the US law enforcement authorities the power to regulate their behaviour and to prosecute them in case of violations—even if the acts are legal in the country where they were committed.

More specifically, we argue that the US law enforcement authorities managed to coerce the transformation of Swiss financial regulations by relying on their unparalleled ability to extend their jurisdiction extraterritorially. For this to happen, a sequence of three causally connected key events was needed. First, economic interdependence allowed the US to introduce the QIP, which created the necessary link between US power and Swiss banking secrecy. Second, a whistle-blower's testimony and the financial crisis provided the US law enforcement authorities with both the legal right as well as the legitimacy to prosecute Swiss banks and by extension attack banking secrecy. Third, the resulting first piercing of Switzerland's veil of secrecy, combined with the wide discretion of prosecutors in the US legal system, finally allowed the US law enforcement authorities to extend their jurisdiction extraterritorially and to dispose of Swiss banking secrecy for US persons altogether.

Our analysis therefore shows that, even in times of globalisation, powerful states play central roles in global economic governance. Rather than undermining their state capacity, growing economic interdependence may even endow the most powerful states, and in particular their law enforcement authorities, with additional means to exercise pressure on other states as well as on multinational companies. From this point of view, globalisation scholars may be right in highlighting how globalisation leads to a decline in state autonomy but their prediction is not true for all states. As long as economic actors are dependent on market access, great powers have the potential to regulate their activities. This conclusion is particularly true for the US, which controls access to the most important financial system in the world and whose legal system carries global credibility.

However, in the wake of the US efforts to re-embed international finance, other powerful states such as France, Germany and Great Britain have begun to adopt the US approach of pressuring large multinational companies into costly negotiated settlements. Legitimised by the global financial crisis, they impose significant penalties on foreign financial institutions without proper court trials, although the penalties reflect the smaller size of the markets they control. As a result, the most important regulatory change brought about by the global financial crisis might thus not be the creation of new multilateral rules or bodies but rather the increasing reliance on the extraterritorial application of national law (Palan and Wigan 2014) and the acceptance of the resulting infringements of state sovereignty in cases such as tax evasion, money laundering, violation of sanctions or financing of illicit activities.

Extraterritoriality, like any exercise of power, can be used for good. As economic activities, in particular in finance, increasingly cross borders, the world is confronted with a situation in which a borderless economic system faces a still-bordered legal system. The resulting tensions create opportunities for regulatory arbitrage and increase the risk of a regulatory race to the bottom. If the global financial crisis has taught the world anything, it is that a re-embedding of international finance is imperative. A critical test case of this necessity to re-embed international finance is the struggle against tax havens. Extraterritoriality is a promising strategy powerful states can use to deal with these challenges.

However, there is also a darker side to extraterritoriality. The power to extend its jurisdiction extraterritorially allows powerful states to obtain competitive advantages and to force rules upon others, while at the same time avoiding following those rules themselves (Raustiala 2009). It should therefore come as no surprise that the US has so far played a contradictory role in the fight against tax evasion. In some ways, the US has been leading the way, not least with its attack on Swiss banking secrecy and the unilateral imposition of FATCA. In other ways, the US is considerably less dependent on multilateral cooperation to enforce tax compliance because it has sufficient means to exercise pressure on other states. In addition, by relying on extraterritoriality, rather than on multilateral cooperation, the US retains considerably more autonomy. We therefore conclude that, while FATCA is likely here to stay, the continued US support for the OECD's Global Forum is not set in stone.

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Notes

1 Swiss banking secrecy is based on two pillars (Emmenegger 2014). First, banking secrecy is a legal requirement that prohibits banks from disclosing any information about client accounts without the owner's consent, at risk of criminal penalty. This requirement of confidentiality also includes bank interactions with foreign authorities. Second, banking secrecy is a set of rules regulating the access of domestic public authorities to financial data and the latitude to share this information with foreign authorities in accordance with international conventions and treaties. According to Swiss law, banks must collect information on all of their clients and, under certain circumstances, transfer this information to Swiss authorities. However, Switzerland is comparatively reluctant to share this information with foreign authorities.

2 Norms can change and subsequent multilateral action indeed redefined the boundaries of legitimate state practice (Webb 2004; Eccleston 2012). However, as we show below, most of the conflict between the US and Switzerland preceded these international developments.
3 For instance, the Securities Exchange Act regulates the interaction between clients and foreign banks on the US territory. Foreign banks' client managers need to register with the Securities and Exchange Commission in order to be entitled to solicit clients, provide investment advice or induce securities transactions (including communication with clients in the US through overseas e-mails and phone calls).
4 Another example of extraterritoriality is FATCA, which requires foreign financial institutions to report directly to the US Internal Revenue Service (IRS) about accounts held by US clients (Harvey 2012). Crucially, it does not matter whether these clients of foreign financial institutions live in the US or invest in US securities.
5 This inherent logic does not rule out the possibility that earlier events have unanticipated consequences.
6 An indictment indicates that a competent body has come to the conclusion that there is sufficient *probability* that the accused company has committed the crime. After an indictment has been served, the public prosecutor can continue to collect evidence against the accused company before the case is possibly subject to trial in court. Nevertheless, criminal indictments typically bankrupt banks because of the reputational damage and the resulting bank runs, the possible revocation of banking licenses or the exclusion of indicted banks from over-the-counter transactions between banks (Garrett 2014). It is often argued that very large financial institutions are 'too big to fail' and thus off-limits for *criminal* prosecution because criminal convictions might lead to the institutions' collapse, which in turn could endanger the viability of the global financial system. However, while their ability to enforce criminal convictions of very large financial institutions is indeed limited, the US authorities still have an unparalleled ability to coerce large financial institutions to accept huge penalties in the framework of negotiated settlements (for a detailed discussion of the argument, see Emmenegger 2015).
7 It is not known whether the US authorities would have really taken this risk, given the fragile state of the US financial market. It is, however, clear that UBS' collapse would have been extremely harmful for Switzerland.
8 See Eccleston (2012) and Hakelberg (2016) for an analysis of the US preferences and strategic considerations in the recent attempts to combat tax evasion, and Eggenberger and Emmenegger (2015) for a discussion of Swiss domestic politics during the conflict.
9 Interview 8; Interview 9.
10 This inconvenient fact was ignored in the conflict over Swiss banking secrecy. For instance, while quoting from the GAO report, Levin and Coleman (2008: 25) simply omitted the word 'legal'.
11 Interview 8; Interview 9.
12 During the first years of the QIP, this interpretation was not challenged. In the QIP, a term lasts six years, during which two external audits are required (Sec. 10.03 QIP). None of the external audits in the cases of UBS, Credit Suisse or Wegelin & Co. revealed any relevant violations of the QIP.
13 Interview 1; Interview 3; Interview 10; Interview 12.
14 Interview 4; Interview 6.
15 Interview 2; Interview 11.
16 Interview 4; Interview 5; Interview 6.
17 Interview 4. In March 2010, the US Congress passed FATCA, which was to replace the QIP. Unlike the QIP, FATCA makes foreign banks responsible for the tax compliance of *all* their US clients. In late 2010, however, Switzerland had not yet agreed to implement FATCA.
18 Interview 1; Interview 3; Interview 12.
19 Interview 5.
20 Interview 11.
21 Interview 11.

22 Given the vague definition of US persons (*cf.* IRS 2014), many banks often do not know whether or not their clients are in fact US persons and thus subject to information sharing. Hence, many banks have opted to request a NPA (and pay a penalty) even though they are not engaged in offshore wealth management.

23 Interview 12.

24 Interview 4; Interview 5; Interview 7.

25 In addition, in November 2014, the head of the UBS wealth management division was found *not* guilty of conspiring to defraud the US government.

References

Baker and McKenzie (2000) Memorandum: documentation guidelines for qualified intermediaries—accounts holders other than individuals, Zurich: Baker & McKenzie.

Bondi, Bradley J. (2010) 'Don't tread on me: has the United States government's quest for customer records from UBS sounded the death knell for Swiss bank secrecy laws?', *Northwestern Journal of International Law & Business* 30(1): 1–21.

Branson, Mark (2008) Opening statement of Mark Branson before the permanent subcommittee on investigations, Washington: United States Senate.

Bruderer, Otto (2012) Exhibit A to the plea agreement dated December 3, 2012, United States *v.* Wegelin & Co., Allocution.

Bundesgericht (2011) Übergabe von Kundendaten der UBS durch die Finanzmarktaufsicht (FINMA) an das US-Justizdepartement war rechtmässig [Transfer of UBS's Customer Data by the Financial Market Authority (FINMA) to the US Department of Justice was lawful], Lausanne: Bundesgericht.

Bundesrat (2009) Amicus Brief of Government of Switzerland, Bern: Bundesrat.

Bundesrat (2012) Die Behörden unter dem Druck der Finanzkrise und der Herausgabe von UBS-Kundendaten an die USA (The Authorities under the Pressure of the Financial Crisis and the Issuance of UBS Customer Data to the USA), Bern: Bundesrat.

Coleman, Norm and Carl Levin (2006) Tax Haven Abuses: the enablers, the tools and secrecy, staff report of permanent subcommittee on investigations, Washington: United States Senate.

Committee on finance (2007) Offshore tax evasion: stashing cash overseas (Hearing), Washington: US Government Printing Office.

Court of Southern District of New York (2012) United States of America *v.* Wegelin & Co., Michael Berlinka, Urs Frei, and Roger Keller, Defendants, Indictment.

Court of Southern District of New York (2013) United States of America *v.* Wegelin & Co., Sentencing Memorandum.

Court of Southern District of Florida (2008) United States of America *v.* Bradley Birkenfeld and Mario Staggl, Defendants, Indictment.

Drezner, Daniel W. (2007) *All Politics is Global: Explaining International Regulatory Regimes*, Princeton: Princeton University Press.

Eagleton-Pierce, Matthew (2013) *Symbolic Power in the World Trade Organization*, Oxford: Oxford University Press.

Eccleston, Richard (2012) *The Dynamics of Global Economic Governance: The Financial Crisis, the OECD and the Politics of International Tax Cooperation*, Cheltenham: Edward Elgar.

Eden, Lorraine and Robert T. Kudrle (2005) 'Tax Havens: Renegade States in the International Tax Regime?', *Law & Policy* 27(1): 101–27.

Embassy of Switzerland in the US (2014) Creating jobs and supporting the US economy: Swiss direct investment in the United States, Washington: Embassy of Switzerland.

Eggenberger, Katrin and Patrick Emmenegger (2015) 'Economic vulnerability and political responses to international pressure: Liechtenstein, Switzerland and the struggle for banking secrecy', *Swiss Political Science Review* 21(4): 491–507.

Emmenegger, Patrick (2014) 'The politics of financial intransparency: the case of swiss banking secrecy', *Swiss Political Science Review* 20(1): 146–64.

Emmenegger, Patrick (2015) 'The long arm of justice: US structural power and international banking', *Business and Politics* 17(3): 473–93.

Emmenegger, Patrick (2017) 'Swiss banking secrecy and the problem of international cooperation in tax matters: a nut too hard to crack?', *Regulation & Governance* 11(1): 24–40.

Farrell, Henry and Abraham L. Newman (2010) 'Making global markets: historical institutionalism in international political economy', *Review of International Political Economy* 17(4): 609–38.

Finkelstein, Ken H. (1999) *The Tax Haven Guide Book*, Olympia: Big Island Media Corp.

FINMA (2009) Untersuchung der EBK des grenzüberschreitenden Geschäfts der UBS AG mit Privatkunden in den USA [Investigation of the SFBC of the Cross-border Business of UBS AG with Private Customers in the USA], Bern: FINMA.

Fioretos, Orfeo (2011) 'Historical institutionalism in international relations', *International Organization* 65(2): 367–99.

GAO (2007) Tax Compliance: Qualified Intermediary Program Provides Some Assurance That Taxes on Foreign Investors Are Withheld and Reported, but Can Be Improved, United States Government Accountability Office.

Garrett, Brandon L. (2014) *Too Big To Jail: How Prosecutors Compromise with Corporations*, Cambridge: Harvard University Press.

Genschel, Philipp and Peter Schwarz (2011) 'Tax competition: a literature review', *Socio-Economic Review* 9(2): 339–70.

GPK (2010) Die Behörden unter dem Druck der Finanzkrise und der Herausgabe von UBS-Kundendaten an die USA [The Authorities under the Pressure of the Financial Crisis and the Issuance of UBS Customer Data to the USA], Bern: Eidgenössisches Parlament.

Grinberg, Itai (2012) 'The battle over taxing offshore accounts', *UCLA Law Review* 304: 305–83.

Hakelberg, Lukas (2016) 'Coercion in international tax cooperation: identifying the prerequisites for sanction threats by a great power', *Review of International Political Economy* 23(3): 511-541.

Hanrehan, Barbara and Alan Shapiro (1998) 'Compete as a qualifying intermediary', *International Tax Review* 9: 48–50.

Harvey, J. Richard (2012) 'Offshore accounts: insider's summary of FATCA and its potential future', *Villanova Law Review* 57: 471–98.

Hay, Colin (2011) 'Ideas and the construction of interests', in Daniel Béland and Robert Henry Cox, eds, *Ideas and Politics in Social Science Research*, 65–82, Oxford: Oxford University Press.

Hirschman, Albert O. (1969) *National Power and the Structure Of Foreign Trade*, Berkeley: University of California Press.

Holder, Eric H. (1999) Memorandum on the Federal Prosecution of Corporations, Office of the Deputy Attorney General.

Hummler, Konrad (2010) 'Raaflaubs Worte sind absolut verheerend' [Raaflaubs words are absolutely devastating], *Sonntags Zeitung*, 7 March.

IRS (1981) Tax Havens and Their Use by US Taxpayers (Gordon Report), Washington: IRS.

IRS (2014) Classification of Taxpayers for US Tax Purposes, available from http://www.irs.gov/Individuals/International-Taxpayers/Classification-of-Taxpayers-for-US-Tax-Purposes (accessed 8 April, 2014).

Joint Statement (2013) Joint Statement between the US Department of Justice and the Swiss Federal Department of Finance.

Kaczmarek, Sarah C. and Abraham L. Newman (2011) 'The long arm of the law: extraterritoriality and the national implementation of foreign bribery legislation', *International Organization* 65(4): 745–70.

Kahler, Miles and David A. Lake (2009) 'Economic integration and global governance: why so little supranationalism?', in Walter Mattli and Ngaire Woods, eds, *The Politics of Global Regulation*, 242–76, Princeton: Princeton University Press.

Krasner, Stephen D. (1976) 'State power and the structure of international trade', *World Politics* 28(3): 317–47.

Krasner, Stephen D. (1999) *Sovereignty: Organized Hypocrisy*, Princeton: Princeton University Press.

Levin, Carl and Norm Coleman (2008) Tax Haven Banks and US Tax Compliance, Staff report of permanent subcommittee on investigations, Washington: United States Senate.

Mattli, Walter and Ngaire Woods (2009) 'In whose benefit? explaining regulatory change in global politics', in Walter Mattli and Ngaire Woods, eds, *The Politics of Global Regulation*, 1–43, Princeton: Princeton University Press.

Maurer, Ueli (2013) Souveränität, Recht und Macht [Sovereignty, Law and Power], Speech to the Swiss Diplomatic Corps, 9 January.

Morse, Susan C. (2012) 'Ask for help, Uncle Sam: the future of global tax reporting', *Villanova Law Review* 57: 529–50.

Müller, Fritz (2008) Das qualified intermediary system, Zurich: Credit Suisse.

Newman, Abraham L. and Elliot Posner (2011) 'International interdependence and regulatory power: authority, mobility, and markets', *European Journal of International Relations* 17(4): 589–610.

Palan, Ronen (2002) 'Tax havens and the commercialization of state sovereignty,' *International Organization* 56(1): 151–76.

Palan, Ronen and Duncan Wigan (2014) 'Herding cats and taming tax havens: The US Strategy of "not in my backyard"', *Global Policy* 5(3): 334–43.

Pierson, Paul (2004) *Politics in Time: History, Institutions, and Social Analysis*, Princeton: Princeton University Press.

Putnam, Tonya L. (2009) 'Courts without borders: domestic sources of US extraterritoriality in the regulatory sphere', *International Organization* 63(3): 459–90.

Raustiala, Kal (2009) *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law*, Oxford: Oxford University Press.

Rixen, Thomas (2008) *The Political Economy of International Tax Governance*, Houndmills: Palgrave Macmillan.

Schaub, Martin (2011) 'Konflikt um Kundendaten: Die Situation der UBS vor dem Abkommen 09' [Conflict over Customer Data: The Situation of UBS before Agreement 09], *Zeitschrift für Schweizerisches Recht* 130: 209–38.

Scorpio (2013) The Scorpio Partnership Private Banking Benchmark 2013, London: Scorpio.

Sharman, Jason C. (2006) *Havens in a Storm: The Struggle for Global Tax Regulation*, Ithaca: Cornell University Press.

Sharman, Jason C. (2008) 'Regional deals and the global imperative: the external dimension of the European union savings tax directive', *Journal of Common Market Studies* 46(5): 1049–69.

Simmons, Beth B. A. (2001) 'The international politics of harmonization: the case of capital market regulation', *International Organization* 55(3): 589–620.

Steinlin, Simon and Christine Trampusch (2012) 'Institutional Shrinkage: the deviant case of Swiss Banking Secrecy', *Regulation & Governance* 6(2): 242–59.

Strange, Susan (1996) *The retreat of the state: the diffusion of power in the world economy*, Cambridge: Cambridge University Press.

Vogler, Robert U. (2005) *Swiss Banking Secrecy: Origins, Significance, Myth*, Zurich: Association for Financial History.

Webb, Michael C. (2004) 'Defining the boundaries of legitimate state practice: norms, transnational actors and the OECD's project on harmful tax competition', *Review of International Political Economy* 11(4): 787–827.

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Interview 1: Senior Swiss bank official, Zurich, 7 March, 2014.
Interview 2: Swiss investigative journalist, Zurich, 10 March, 2014.
Interview 3: Senior Swiss bank official, Zurich, 24 March, 2014.
Interview 4: Senior official of Swiss regulatory agency, Zurich, 7 April, 2014.
Interview 5: Senior official of Swiss banking association, Zurich, 10 April, 2014.
Interview 6: Senior official of Swiss regulatory agency, St. Gallen, 6 April, 2014.
Interview 7: Senior Swiss bank official, Zurich, 30 April, 2014.
Interview 8: Senior Swiss bank official (phone), 13 May, 2014.
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Interview 10: Senior US bank official, New York, 7 February, 2015.
Interview 11: Senior official of Swiss regulatory agency, Zurich, 7 December, 2015.
Interview 12: Senior official of US regulatory agency, New York, 18 December, 2015.

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