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Can the World Stop the Bucking Bronco?
The Need to Balance the Expanding Anti-Money Laundering Regimes

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From the introduction of anti-money laundering laws in 1986, the United States government has led international efforts to prevent and prosecute money laundering and terrorist financing, as well as pioneered legal standards in this arena. A constant theme of U.S. AML/CTF laws has been their extraterritorial application and efforts to impose pressure and penalties on foreign governments and persons who failed to meet international standards. The U.S. has always viewed money laundering and terrorist financing laws as ways to deprive criminals of their illegal proceeds and their instrumentalities to commit the underlying crimes. The U.S. has also conducted AML/CFT policies by proposing and dominating international groups, such as the Financial Action Task Force (FATF).

On one hand, the U.S. has proactively used unilateral extraterritorial law enforcement avenues, as well as its superpower status, to prosecute money laundering and terrorist financing violators and forge minilateral alliances. On the other, the U.S.'s unilateralism in the financial enforcement arena has alienated smaller jurisdictions and led to a substantial increase of costs for cross-border transactions. This article examines the trade-offs of the U.S.'s unilateral approach and argues for a rebalancing of the expanding financial enforcement regime.

The Extraterritorial Application of U.S. Money Laundering Statutes

U.S. money laundering laws specifically provide for extraterritorial jurisdiction. In this regard, 18 U.S.C. § 1956(f) provides extraterritorial jurisdiction if

1) The conduct is by a U.S. citizen or, in the case of a non-U.S. citizen, the conduct occurs in part in the U.S.; and
2) The transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

In general, a U.S. court has jurisdiction over extraterritorial conduct when the statute evidences a Congressional intent to achieve extraterritorial effect and the U.S. has the power to reach the extraterritorial conduct under the principles of international law.

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Section 1956(f) applies either when a U.S. citizen engages in the conduct or when a non-citizen engages in the conduct at least in part within the U.S. Clearly governments may regulate the acts of their citizens wherever they occur.

With respect to non-U.S. citizens, under the "territorial" theory of extraterritorial jurisdiction, the U.S. has proactively asserted that it has the right to regulate criminal acts occurring outside the U.S. as long as they produce effects within the United States.

At dawn on December 20, 1989, thousands of U.S. troops invaded Panama, killing, according to an internal U.S. Army memo, an estimated 1,000 Panamanians. Several days later, Panamanian President Manuel Noriega, who had taken refuge in the Vatican nuncio, surrendered to the U.S. The U.S. Attorney in Miami had filed under seal an indictment against Noriega for drug-related money laundering offenses.

Section 1956(f) criminalizes "conduct" occurring in the U.S., which is expansively applied. Electronic conduct, such as a wire transfer into the U.S., even if initiated from abroad, can satisfy presence within the U.S. Section 1956(f) imposes jurisdiction over transactions that occur in whole or in part in the U.S. Hence, "if a defendant, who never enters this country, initiates a transfer of funds from a place within the United States to [a] place outside the U.S., there will be extraterritorial jurisdiction, because a portion of the conduct occurred in the United States." In *United v. Stein*, No. 93-375, 1994 U.S. Dist. LEXIS 8471, at *10, *13-*14, the court rejected the defendant's motion to dismiss the indictment for lack of subject matter jurisdiction and held that the transfer of funds from New Orleans to London represented "conduct" under § 1956(f). The court explained the defendant's physical presence in the U.S. was not a factor.

A criminal statute which Congress intends to have extraterritorial application may reach a defendant who has never even entered the U.S. if s/he participated in a conspiracy in which a co-conspirator's activities occurred within the U.S. For instance, the U.S. indicted Noriega in part under the conspiracy to launder money on the basis of alleged actions by co-conspirators.

The following case demonstrates the use of extraterritorial application of U.S. law in money laundering matters.

Case Study: New York Court Applies Extraterritorial Jurisdiction Even Though None of the Parties or Property Are in the Jurisdiction

On June 4, 2009, the New York Court of Appeals decided a New York Court may issue a judgment ordering the surrender of foreign assets to garnishees even though the property, debtor, and creditor are all outside the jurisdiction. Although the case is a civil case, it has broad ramifications for criminal and enforcement matters, especially due to New York's role as a base for international finance and the amount of international enforcement actions arising out of the alleged frauds during the ongoing global financial crisis.[1]

[1] *Koehler v. Bank of Bermuda Ltd.*, New York, Court of Appeals 2009 NY Slip Op 04297, No. 82, June 4, 2009.

The U.S. Court of Appeals for the Second Circuit asked the New York Court to decide whether a court in New York can order a bank over which it has personal jurisdiction to deliver stock certificates owned by a judgment debtor (or cash equal to their value) to a judgment creditor, pursuant to New York Civil Practice Law and Rules (CPLR) article 52, when those stock certificates are located outside the U.S. The Court answered affirmatively.

On June 4, 2009, Lee N. Koehler, a Pennsylvania citizen, obtained in the U.S. District Court for the District of Maryland a default judgment in the amount of $2,096.43 against his former business partner, A. David Dodwell. At the time of the judgment, Dodwell, a Bermuda resident, owned stock in a Bermuda corporation, of which he and Koehler had been shareholders. Certificates representing Dodwell's shares were in the possession of the Bank of Bermuda Limited (BBL) and were located in Bermuda. Dodwell had pledged the shares to BBL as collateral for a loan. Koehler registered the judgment in the U.S. District Court for the Southern District of New York.

On October 27, 1994, Koehler filed a petition against BBL, in the U.S. District Court for the Southern District of New York, seeking Apayment or delivery of property of judgment debtor.@. Koehler served the petition upon an officer of BBL (New York), which it claimed to be a New York subsidiary and agent of BBL. On October 29, 1994, the District Court ordered BBL to deliver the stock certificates, or monies sufficient to pay the judgment, to Koehler. The surrender order was the subject of the certified question.

In deciding the issue, Justice Pigott, in the majority opinion, found that the key to the reach of the turnover order is personal jurisdiction over a particular defendant. The court reasoned that, when a debtor is neither a domiciliary nor resident of New York, so that the creditor cannot obtain personal jurisdiction of the debtor, but owns assets in New York, courts have exercised jurisdiction over the debtor. Hence, article 52 of the post-judgment enforcement involves a proceeding against a person. The purpose is to demand that a person convert property to money for payment to a credit.

The court applied CPLR article 52, stating that no express territorial limit precluded the entry of a turnover order requiring a garnishee (BBL) to transfer money or property into New York from another state or country. Jurisprudence enabled a New York court with jurisdiction over a judgment debtor in possession of the property to direct a defendant to bring its own property into New York, regardless of whether the defendant is a judgment debtor or a garnishee.

Consequently, the court can issue a judgment ordering the surrender of foreign assets not only to judgment debtors, but also to garnishees. A New York court that has personal jurisdiction over a garnishee bank can order the bank to produce stock certificates located outside New York, pursuant to CPLR 52(b), the post-judgment procedure.

The dissent by Justice Smith observes that the majority's holding opens a forum-shopping opportunity for any judgment creditor trying to reach an asset of any judgment debtor held by a bank (or other garnishee) anywhere in the word. If the bank has a New York branch B either one that is not separately incorporated, or a subsidiary with which the parent's relationship is close enough to subject the parent to New York jurisdiction – the judgment creditor, after registering the judgment in New York, can obtain an order requiring the delivery of the asset.

The dissent observed that the record discloses no New York contact with the parties or the dispute, except the amenability of The Bank of Bermuda, the garnishee, to personal jurisdiction in New York. The dissent said serious doubt exists that enough contact existed under the traditional foreseeability jurisprudence to justify the enforcement of a non-New York judgment by a non-New York creditor against a non-New York debtor, to recover an asset that is located in Bermuda.

Financial institutions that are wary of extraterritorial jurisdiction and proactive court remedies for victims will react adversely to this decision. For instance, the Clearing House Association, L.L.C. intervened as amicus curiae. As a prophylactic step, non-U.S. financial institutions may want to move their subsidiaries or other presence from U.S. jurisdiction.

The case may also prompt proactive courts and legislatures in other countries to assert extraterritorial enforcement authority.

The ability to enforce judgments extraterritorially becomes especially important during efforts to prosecute financial frauds and crimes occurring during the global financial crisis.

The dissent points out that the problem is that competing claims may exist to the asset, by parties who think they have as much right to it as the judgment creditor. If any court with power over the garnishee can order the garnishee to change the asset=s location, significant disruption in the process of deciding whose rights are superior seems inevitable. The business of banking itself, for banks with offices in several states or countries, will also be disrupted, especially when such banks may be at risk of conflicting adjudications.

Efforts to Apply Terrorist Financing Laws Extraterritorially

The area of terrorist financing also has experienced a substantial expansion of extraterritorial jurisdiction, both against financial institutions and sovereign states, even where the acts have occurred outside the U.S.

The Alien Tort Claims Act (also known as the Alien Tort Statute or ATS), 28 U.S.C. § 1350 authorizes foreign terrorism victims to bring a civil cause of action. Under Section 1350, victims suffering injuries arising from a "violation of the law of nations or a treaty of the United States" can bring a suit. In the terrorist financing area, foreign nationals have used the ATS to sue the Arab Bank, a Jordanian bank with a New York branch, for knowingly providing bank and administrative services to HAMAS and other Palestinian terrorist organizations that sponsored

suicide attacks killing innocent civilians. Eventually, the U.S. Supreme Court did not allow the ATS claim.[2]

28 U.S.C. § 1605A authorizes a private cause of action for U.S. nationals, employees of the U.S., or individuals performing a private contract with the U.S. against a foreign state sponsor of terrorism (SST). The law eliminates sovereign immunity for foreign states designated as "state sponsor of terrorism" (SST). States lose their foreign sovereign immunity where plaintiffs are seeking money damages against a foreign state for personal injury or death that was caused by an "act of torture, extrajudicial killing, aircraft sabotage, hostage-taking, or the provision of material support or resources" if the provision of material support was by "an official, employee, or agent of such foreign state while acting within the scope of his … office, employment or agency. Essentially, the statute holds foreign SSTs vicariously liable for the act of their officials, employees, or agents.

One problem of anti-money laundering worldwide is the lack of a cost-benefit analysis. During the George W. Bush Administration, an early initiative was to make AML laws cost-effective, so that regulators, prior to issuing new regulations, would have to consider the cost to the regulators and regulated community. During the morning of September 11, 2001, Under Secretary for Enforcement, U.S. Department of the Treasury Jimmy Gurulé's press conference to explain the new approach was interrupted when the hijacked planes crashed into the Pentagon.

The attacks on 9/11 shocked the Bush Administration, Congress and American people. Congress asked U.S. law enforcement agencies for proposals to strengthen AML and initiate laws to prevent and punish terrorism financing. The U.S. has since abandoned this sensible approach to AML policy.

The Role of FATF

Another trend that contributes to the increasing exclusion of certain jurisdictions from the global financial enforcement regime is the ever-expanding role of informal intergovernmental bodies, such as FATF. FATF is an informal body composed of 35 jurisdictions and 2 regional organizations (the Gulf Cooperation Council and the European Commission). It has only a few full-time employees and is mainly staffed with bureaucrats from financial regulators and law enforcement agencies seconded by its members. The rotating FATF President decides on its priorities. FATF officials determine the various money laundering problems as well as the solutions. Only at the very end does FATF occasionally invite non-members and the private sector to express themselves.

Initially, FATF focused almost entirely on money laundering. After the above-mentioned September 11, 2001 terrorist attacks, the organization's mission was broadened to encompass terrorist financing and thereafter the financing of weapons of mass destruction. At present, the

[2] *Jesner et al v. Arab Bank PLC*, U.S. Supreme Court, (No. 16-499, Apr. 24, 2018) https://www.supremecourt.gov/opinions/17pdf/16-499_1a7d.pdf.

U.S. is the President of the body, and has as one of its priorities improved engagement with the private sector.

The unequal treatment of smaller jurisdictions is an inherent tension within FATF. As a consequence of the body's organizational structure, small countries learn about the new standards many months after its members have proposed changes and sometimes struggle to implement properly the new standards, which require new legislation and regulations, and hiring and training regulatory officials to properly implement the entire body of terrorist financing and WMD sanctions. In turn, small countries periodically find themselves on the FATF black list, which results in further excluding them from the world's financial system through de-risking.

EU AML/CTF Controversy

On February 13, 2019, the European Commission blacklisted 23 jurisdictions for their weak regulation of AML/CTF policy, increasing the level of oversight that European banks would have to overcome in conducting business with said jurisdictions. The list included four U.S. territories – Puerto Rico, Guam, American Samoa, and the Virgin Islands – as well as Saudi Arabia. The U.S. Treasury Department immediately and swiftly condemned the blacklist, noting that it had "significant concerns about the substance of the list and the flawed process by which it was developed." The Treasury further stated that it did not expect U.S. financial firms to pay any heed to the blacklist.[3] King Salman of Saudi Arabia sharply criticized the list as well, stating that it would damage not only economic, but political relations between the EU and Saudi Arabia. Reports indicate that King Salman went so far as to privately threaten EU Member-States to oppose the blacklist, or risk losing potential contracts with the Kingdom.[4] On March 5, the Council of the European Union announced their objection to the Commission's blacklist, as it was not "established in a transparent and resilient process that actively incentivizes affected countries to take decisive action while also respecting the right to be heard."[5] Consequently, the AML/CTF blacklist is stuck in stasis, as the Commission and Council – not to mention the European Parliament – must come to an agreement on how they wish to regulate these matters without frustrating key partners.

Conclusion

The result of over-aggressive application of extraterritorial jurisdiction by the U.S. and the EU for anti-money laundering and prosecution of financial institutions and officials, together with the use of informal organizations, such as FATF, to establish new AML/CFT standards, has led to increasing exclusion of countries (called de-risking) and other depositors, especially in small jurisdictions. It has also led to substantial increase of costs for cross-border transactions, as

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3 Stephanie Bodoni and Alexander Weber, *EU Blacklists Saudi Arabia in Fight Against Money-Laundering and Terror Financing*, BLOOMBERG, (Feb. 13, 2019), https://bloom.bg/2ByPp8S.

4 *EU to reject money laundering black list as official overreach*, THE NATIONAL, (Mar. 6, 2019), https://bit.ly/2VHITEi.

5 Council of the European Union, *Commission Delegated Regulation (EU) of 13.2.2019 supplementing Directive (EU) 2015/849 of the European Parliament and of the Council by identifying high-risk third countries with strategic deficiencies C(2019)1326*, (Mar. 5, 2019), https://bit.ly/2VHSzP7.

financial institutions must increase AML due diligence, including Know Your Customer, Customer Due Diligence, and the requirement to report suspicious transactions, as well as be subject to prosecution and regulatory enforcement actions. National laws and international standards should have a cost-effect requirement, especially as they continually impose new requirements on the private sector and impede normal commerce and privacy.

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