

## **Your Criminalisation, Our Business Opportunity - on Nation States' Reluctance to Globalised Law**

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In this paper, some business opportunities presented through foreign states' criminalisation thereof will be shortly discussed, as well as the reasons behind the nation states' reluctance to adopt foreign legislation imposed upon them and the sanctions they risk by failing to comply with the vested interests of foreign states' law enforcement. Finally, it is briefly discussed how efficacious it is to impose a state's legislation on other states.

### **The setting**

Obviously, states protect their interests by national legislation. In combination with well controlled state borders, where customs and police control every movement of human beings or goods passing across the border, national legislation is adequate per se. However, when people, goods and services move en masse across the borders, the states' vested interests extend over their frontiers. Transnational economic liberalisation has markedly increased these global flows. Interdiction at the state borders is no longer a feasible control strategy. Intellectual property rights cannot be locked up and must be constantly defended. When income of every nature and wherever it may be earned in the world is to be taxed, authorities will strive for international agreements on exchange of information. Increasingly states try to protect their interests by imposing legislation on other states. The U.S.A. is strongly pursuing this policy unilaterally, but also within the framework of the OECD. The EU has a lower profile, but its long term impact should not be underestimated.

Certainly, the phenomenon of imposing legislation on other states is not new but globalisation suggests it is expanding. Today the demands made on other states legislation have less to do with historical relations between states and more to do with trade and cash flows. Geographical distances partly loose their relevance on the Internet. The business world, the legal as well as the illegal, is all about selling goods and services. Down to the fact that a growing number of states have good legal infrastructures, global trade has contributed to increased wealth world wide, although the recent increase in food prices has challenged that proposition. Following the rules, business is associated with hardship and risks. Hence, personal wealth is most easily obtained by breaking the rules without being prosecuted.

When there is no victim in the nation state in which a crime was perpetrated, the authorities tend not to prioritise solving that crime. It seems to be less risky to sell goods and services forbidden by legislation imposed on a nation state by other states. Typically, it is not so risky to grow narcotics where this is done for export or to infringe the intellectual property laws when the copyright holders are overseas. However, what is prosperous for the perpetrator breaking such laws is risky for the nation state not enforcing these laws. The latter attracts first the interest and at the bitter end the wrath of the state in which the victims of these crimes are found.

Nevertheless, the concept of seeing a business opportunity in other states' criminalisation will always attract entrepreneurs, who regardless of the principles take advantage of the circumstances. These allegedly criminal entrepreneurs are found everywhere; in the drug producing states of Central and South America, in the corrupt bureaucracies of China and Russia disregarding intellectual property law, in the tax havens assisting tax evasion and money laundering, and in Sweden hiding criminal activity behind a veil of anti-Americanism just to give a few examples. More intriguing than the alleged criminals' common acquisitiveness is the silent protection they receive from the nation states' reluctance to globalised law. This reluctance has

various reasons, which sometimes coincide. As will be exemplified below, states may choose not to enforce such law due to anti-Americanism, consideration for the local custom and practice, consideration for the national economy, consideration for the people or electorate, corruption, nationalism, objective impossibility to succeed with enforcement, personal involvement in the forbidden trade or sympathy for the forbidden trade. Obviously, this shortlist is not exclusive.

### **Murky business opportunities**

The first illustration of these questionable business opportunities made by other states' criminalisation relations relates to Afghanistan, albeit neither its notorious narcotic business nor its fatal affiliation with Al Qaeda. Back in 1977 Datasaab Contracting AB, the computer division of the Swedish aircraft and automotive manufacturer SAAB, violated the US imposed export restrictions and sold state-of-the-art radar surveillance equipment to the Soviet Union, which allegedly used this air traffic control system for the invasion of Afghanistan. Seven years later an American judge found Datasaab guilty of treacherous conduct and fined the company the largest criminal penalty ever for violating U.S. export controls, \$3.1 million, for illegally exporting strategic American material to the Soviet Union, as the built in radar circuit boards were of American origin. However, the main setback was that Sweden was unable to purchase air to air robots for their SAAB JA-37 Viggen fighter planes, jet motors for its successor JAS Gripen and other American military technology necessary for Sweden's defence. This cold war incident is now forgotten in Sweden and in the U.S.A. (Noble 1984; Rezun 1996, p. 38).

Yet more than thirty years later the relations between the U.S.A. and Sweden are strained again, albeit by the illicit trade of less depressing goods and services - the Hollywood productions. *U.S. Embassy officials have described Sweden as home to the "worst Internet piracy in the world"* (Patrick & McBride 2008). From the Sweden based Internet site impudently named *Pirate Bay*, millions of movie fans could load down films for free using alleged illegal file-sharing. *Pirate Bay's* web site is estimated to generate \$60,000 a month in advertising revenue. Organised crime is part of the Internet piracy. Often the films shared on the Internet are provided by a so called supplier, an insider with access to new films who illegally sell their copies. Several well known Swedish IT-businessmen are opposing control of the infringements of the intellectual property (copyright) law in their broad band nets. Of course, they make money on their customers' need of high speed broad band access, thus indirectly benefiting from Internet piracy. However, there are detailed suspicions that a number of rather high placed IT-managers belong to the so called scene, the criminal network providing the films to the Internet pirates. (Ponten 2008.) In addition the legislator is signalling its unease with enforcement with the obvious result that the authorities do not prioritise such crime and the perpetrators feel safe.

Tax evasion is a criminal offence in most jurisdictions, the victim of which is the state or its inhabitants. Money laundering has been criminalised by an increasing number of states in order to fight organised crime. Although anti-money laundering legislation in recent years has been rather successfully implemented around the world, it can be argued that little is achieved by forcing criminals to re-invest in criminal activity - accepting dirty money - in stead of investing the dirty money into legal activities. An opposite view of mine is well articulated by Peter Lilley (2003, pp. x-xiii, 1-10). Offshore legislation offers tax havens for foreign subjects not doing business in the tax haven of registration, while domestic business pay normal taxes. Thus, they attracted foreign capital without losing tax revenues. Normally the tax havens have fees for offshore businesses, thus giving the state small yearly revenue also from offshore business, not counting the relatively high numbers of lawyers and bankers taking care of the offshore business and paying normal income taxes. For a nation state looking for business opportunities, dirty money from tax evasion and other crimes does not necessarily smell, i.e. the criminal seeking a safe haven for his money might choose not to destroy this safe haven by bringing his criminal habits to the state where the money is placed. Thus, it is tempting for nation states to offer bank accounts to be opened under code names, anonymous safe deposit boxes in banks, bank accounts with no-name ATM cards, anonymous credit cards, anonymous international business corporations (companies) and N.B., cheap banks for the customer with greater needs. Offering clients a new citizenship under a new identity, such as Guatemala and some African states do, might of course be more risky, i.e. giving the suspected criminal the right to live in their country.

### Reasons for reluctance

The Datasaab scandal shows the complexity of enforcing the rule of law, when the rules are not understood by the ruled ones. In the seventies the official Swedish discourse was that of neutrality and balance between the two superpowers, the U.S.A. and the Soviet Union, albeit the popular support for the latter was very limited. I cannot say if anti-Americanism played any part in the export deal of the air control, but the neutrality discourse mixed with nationalism might have given the Swedes involved in the deal a sense of superiority, thus forgetting the dangers and the rather obvious choice of loyalty. Assisting a communist dictatorship in invading a neighbouring state certainly is hard to explain.

In contrast, the Pirate Bay controversy is easy to grasp. Swedish intellectual property law has always been very tolerant when it comes to private use of other people's rights. When almost all sorts of copying for personal use was legal, it was hard to get acceptance for that file-sharing on the Internet might be a crime. Lawyers were divided upon and discussing the subject, so no clear signal was sent to the public on what could not be accepted. Internet users did not feel that they hurt someone by not paying, many considered that the American film industry had more money than it needed. The teenage children of the legislators (and some of the legislators too) were copying or downloading from the Internet - taking sides against piracy to many legislators meant taking side against their families. With one and a half million Swedes visiting Pirate Bay it seemed as an impossibility to succeed with enforcement, should copying (downloading) be criminalised. Many of the local IT-businessmen were regarded as heroes in Sweden and when they argued against criminalisation, people listened and did not side with the film industry's hardliners. In fact, the representatives of the media industry were met with organised resistance driving them on the defensive. At the end of the day even a political party was founded, the Pirate Party (2008) - *The Pirate Party wants to fundamentally reform copyright law, get rid of the patent system, and ensure that citizens' rights to privacy are respected. With this agenda, and only this, we are making a bid for representation in the European and Swedish parliaments.*

The reluctance of tax havens to the demands of foreign states trying to force them out of part of their business, i.e. assisting tax evasion and money laundering, is sometimes principal, as was the case with the Austrian bank secrecy, but when it comes to smaller tax havens, typically situated in locations where other types of industry cannot be attracted, it is purely economical. Breakaway regions often see offshore legislation as a quick way of attracting capital and office infrastructure. Montenegro adopted offshore legislation in 1996 followed a couple of years later by Ingushetia - obviously in contradiction with federal law as often is the case in breakaway regions. (Lilley 2003, pp. 11-12, 103-104.) The traditional tax havens that have not yet given in to the international pressure of the OECD groups Financial Action Task Force (FATF) are Andorra, Lichtenstein and Monaco. These are small states with very solid economies, centrally situated in Europe and can rely on both ordinary tourists and banking tourists. In February 2008 Lichtenstein's relation to Germany got very tense, since the German authorities paid an ex-employee of Lichtenstein LGT Group bank some six million USD for a CD containing all the account holder information of foreigners having foundation accounts in that bank. Americans, French, Finns, Germans and Swedes among other nationalities found on that disk now face prosecution for tax evasion. This offensive, not to say criminal act, by the German Intelligence Service, may if not coerce resisting tax havens so at least have some negative impact on the more prominent foreigners' willingness to hide their money in tax havens. Panama, a tax haven in which more than a quarter of its workforce is related to the banking sector, has made clear that it can retaliate if a nation would attempt to them what Germany did to Lichtenstein: *Panama could block their ships/goods from crossing the Panama Canal* (Panamalaw 2008).

### Sanctions

Obviously, there are many nation states out of different reasons not succeeding in enforcing legislation imposed upon them by foreign states and consequently, these latter states will protect their interests by taking the appropriate actions, ranging from soft power to armed intervention. Lobbying will be the first action to take in most cases, using senior diplomats when this seems appropriate. Armed intervention will be the last action to take, though it was more or less adopted in the American presidents' war on drugs during the eighties in South and Central America. Unfortunately, such intervention tends to unite different interests against the intervening forces, so that in the long run little or nothing is achieved. (Grayson 2003) After the nine eleven

events in 2001, few states opposed the demands of the U.S.A. proposed as measures hindering the financing of terrorists. Using the Office of Foreign Assets Control (OFAC), the U.S.A. may enforce economic and trade sanctions against targeted foreign states. So they did against offshore Liberia in 2001, when its government allegedly participated in the selling of conflict diamonds, which financed the rebels in Sierra-Leone.

The efforts by FATF against offshore jurisdictions during the past ten years have been described as a success, especially after 2001. Most of these jurisdictions have now adopted legislation against money laundering and in other ways altered their legislation and made bilateral agreements on exchange of information according to FATF recommendations, i.e. entered into different tax treaties, tax information sharing agreements and mutual legal assistance treaties. In addition to this they have weakened their bank and corporate secrecy laws. Doing so, they have avoided a blacklisting, which would have hindered many of their customers from continuing business in their jurisdictions.

## **Discussion**

How efficacious is it to impose legislation on other states? Some states try to withstand, but the price to be paid for not complying is high for small states. However, sometimes even small states manage to avoid coercion. The coercing state is not always unanimous - a fifth column within the administration may have another agenda as in the case of tax havens being used by high officials and influential business men. The rule of law is often insufficient to enforce the legislation adopted. Eradication policies are often adopted by central governments wishing to show cooperativeness, but in practice not being pursued vigorously. Additionally, criminalisation forces the perpetrators to go underground which make them even harder to notice and target. Corruption may in many states hinder the implementation of the legislation. Custom and tradition may explain why it is so hard to eradicate drugs in states where drugs are part of traditional life or making Swedes used to lax intellectual property laws adhere to copyright law.

Impracticability of new legislation, i.e. too many offenders, may explain its failure. The sheer size of a state, like Russia and China, can make it both uncontrollable and impregnable to foreign states. Comparing USA's action on the Datasab scandal and their action on the Russian missile technology transfer to Iran from 1997, the former action primarily targeted the Swedish state, the latter targeted the companies and institutes involved, one might conclude the obvious, i.e. that the possible means are chosen and that sanctions are not so efficient against states of certain size and impact.

Last but not least, there will always be individuals, organisations, breakaway regions and states seeing a business opportunity in smuggling, counterfeiting, or in the market of offshore services and hence offering such. Should there no longer be tax havens and independent states with bank secrecy, the demand for such would still exist and systems of trustees, bankers, front companies and money laundering companies in the original sense of the word would quickly fill the gap.

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