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U.S. Economic Sanctions and the Corporate Compliance of Foreign Banks

DAVID RESTREPO AMARILES* AND MATTEO M. WINKLER**

Introduction

This article links the economic sanctions enacted by the United States and the internal compliance functions of non-American banks.¹ Whereas scholars have recently investigated either aspect,² only a few have drawn a connection between them.³ At the moment of writing, and to our knowledge, no scholar has proposed a comprehensive view of the corporate compliance of banks operating outside the territory of the United States, and in Europe especially, regarding the U.S. economic sanctions arsenal as a whole, including the extraterritoriality problem.⁴

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1. For a general overview of the compliance-related aspects of U.S. economic sanctions, see Paul L. Lee, *Compliance Lessons from OFAC Case Studies—Part I*, 131 *BANKING L. J.* 657, 657 (2014), and Paul L. Lee, *Compliance Lessons from OFAC Case Studies—Part II*, 131 *BANKING L. J.* 717, 717 (2014).

2. See in this respect Georges Affaki, *L'Extraterritorialité en Droit Bancaire [Extraterritoriality in Banking Law]*, *REVUE DE DROIT BANCAIRE ET FINANCIER* 90, 90 (2015), according to which, “[t]he extraterritoriality of banking law raises complex questions of conflict of laws and jurisdictions, public policy, mandatory rules and international management of banking transactions.” *Id.* at 90. He does not mention the related implications for corporate compliance. See *id.*

3. Actually, “[m]any financial institutions, mindful that U.S. federal and state banking regulations mandate AML [anti-money laundering] compliance programs, focus nearly all of their compliance attention in fighting money laundering, while leaving scant attention or resources for other areas, such as sanctions, anti-boycott [and] export controls. . . .” Gregory Husisian, *U.S. Regulation of International Financial Institutions: It’s Time for an Integrated Approach to Compliance*, 127 *BANKING L. J.* 195, 197 (2010). French jurists Garapon and Servant-Schreiber have recently edited an excellent monograph on the hegemony of American law in international business viewed from a French perspective. See ANTOINE GARAPON & PIERRE SERVANT-SCHREIBER, *DEALS DE JUSTICE: LE MARCHÉ AMÉRICAIN DE L’OBEISSANCE MONDIALISÉE* (2013).

4. An isolated exception to this statement might be identified with the work of the Parisian independent and Harvard-educated attorney Laurent Cohen-Tanugi, who however does not address the problem, dealt with in Part III of this article, of the reform of the compliance

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

498 THE INTERNATIONAL LAWYER

[VOL. 51, NO. 3

In the first place, a tension exists between the extraterritorial application and enforcement of U.S. economic sanctions on the one hand, and corporate compliance on the other. In fact, “[w]ith the penalties for non-compliance [with such sanctions] high, and the potential sanctions severe, banks need to exercise an abundance of caution in their dealings both at home and abroad.”⁵ This might not be an obvious task for non-U.S. compliance officers, who usually operate in a predominantly domestic environment and are typically not familiar with U.S. laws.⁶ While most of them have studied in the United States and preside over transactions with the United States on a daily basis, they remain skeptic about the real reach of U.S. sanctions.⁷ Also, because the economic sanctions of the kind enacted by the United States and the powerful enforcement tools that support them find no correspondence in Europe or elsewhere, such compliance officers remain convinced that they commit no wrong in breaching such sanctions, creating a loophole in their own firm’s compliance culture.⁸ Disregarding them,

functions of non-U.S. banks. See LAURENT COHEN-TANUGI, *THE EXTRATERRITORIAL APPLICATION OF AMERICAN LAW: MYTHS AND REALITIES* 5 (2015), <http://dx.doi.org/10.2139/ssrn.2576678> (describing the links between the French bank BNP Paribas and the U.S. legal system).

5. Steven A. Meyerowitz, *Compliance is Key*, 131 *BANKING L. J.* 655, 655 (2014).

6. Such corporate officers are of two kinds. On the one hand, there are “in-house lawyers acting as corporate counsel [and] carry[ing] out a wide range of duties within and on behalf of the firm.” Robert C. Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 *AM. BUS. L. J.* 203, 203 (2016). In particular, “it is the in-house counsel who must organize regular meetings to evaluate the company’s level of compliance, write up the regular reports documenting the level of compliance, conduct interviews on a regular basis with those responsible for the various corporate functions, and so it goes on.” U. DRAETTA, *ON THE SIDE OF IN-HOUSE COUNSEL* 30 (2012). These lawyers are “responsible to the CEO for the company’s compliance with the laws governing its various business activities as well as identifying and evaluating the legal risks facing the company as a whole.” *Id.* at 46. On the other hand, there are compliance professionals [who] “design and implement compliance processes, investigate misconduct, and serve as a neutral fact finder[s] whose duties transcend the practice of law.” Bird & Park, *supra*, at 205.

For the purpose of this article, the distinction between the legal and the compliance functions is left aside, based upon the consideration that, even if they remain separated in many firms’ structure, “[a] long history of collaboration between Legal and Compliance . . . [can] cultivate[] and strengthen[] compliance risk management within the organization.” Thomas C. Baxter, Jr. & Won B. Chai, *Enterprise Risk Management: Where is Legal and Compliance?*, 133 *BANKING L. J.* 3, 13 (2016). Moreover, “[e]very organization is unique, and so is the role played in each by the General Counsel and Chief Compliance Officer . . . [who] have already integrated themselves into the organization’s risk management, whether or not a formal risk management framework is in place.” *Id.* at 15.

7. See Jaclyn Jaeger, *BNP Paribas Debacle Offers Lessons in Compliance*, *COMPLIANCE WEEK* (July 22, 2014), <https://www.complianceweek.com/news/news-article/bnp-paribas-debacle-offers-lessons-in-compliance#.WxbEhdMvyu4> (arguing that non-American compliance officers “have their own cultural tendencies or skepticism about the reach of U.S. laws or the purpose of U.S. sanctions.”).

8. See Thomas C. Baxter, Jr., Executive Vice President and General Counsel of the Federal Reserve Bank of New York, Reflections on the new compliance landscape (July 23, 2014), <http://www.bis.org/review/r140731d.htm>, “[s]ome European [firms] almost naturally adopted the

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however, may cost European banks hundreds of millions of dollars—perhaps even billions—in fines and loss of reputation. As we will see, examples of this sort abound in practice. Scholars have dubbed these violations “spectacular failures” in compliance.⁹

Remarkably, the banks that were accused of such “spectacular failures” decided to settle with U.S. authorities, in some instances pleading guilty, and committed to reform their compliance functions according to the standards suggested by the U.S. government.¹⁰ In fact, because compliance officers proved crucial in triggering the investigations of the U.S. authorities, either for being unable to change their practices or for complying with the violators, they inevitably became part of the tools used to remedy the wrongs committed.¹¹ On the other hand, the reform efforts put forward by foreign banks can be seen as the sign of a broader need to rethink the compliance functions with respect to the extraterritoriality of U.S. economic sanctions, even in industries other than banking.¹² As a scholar argued in this regard, “[g]iven the extensive nature of some of the economic sanctions programs administered by the [U.S. government], the precise effect on those [banking] interests may manifest itself in unexpected ways, thus constituting a dangerous trap for the unwary.”¹³ Compliance officers should not find themselves unprepared.

This article addresses these problems in three parts. Part I describes the legal background of the U.S. economic sanctions arsenal, with a focus on its history and more recent enforcement by the U.S. government.¹⁴ Part II illustrates the failures in the compliance offices of the banks investigated by U.S. authorities for violation of U.S. economic sanctions.¹⁵ Finally, Part III concludes with a “macro-compliance” analysis,¹⁶ examining the reforms that

view that there was no value system underlying the technical American legal rule. They looked at economic sanctions as technical ‘American’ rules that were not seen as consistent with the organization’s and the home country’s larger value system In Europe, they found no similar sanctions, and there it was perfectly legal at the time to do business with these sanctioned jurisdictions.” *Id.* “This failure to correlate the rule with the value is root of real mischief. It erodes what some commentators call the ‘culture of compliance’, and it tends to foster an employee population that will be inclined to look for loopholes, to place toes on the edge of the permissible, or even to turn a blind eye to a black letter compliance rule.” *Id.*

9. John L. Douglas, *New Wine into Old Bottles: Fintech Meets the Bank Regulatory World*, 20 N.C. BANKING INST. 17, 53 (2016).

10. Karen Freifeld, Aruna Viswanatha, & Steve Slater, *BNP said to move compliance operations to U.S. as settlement nears*, REUTERS: BUS. NEWS (June 24, 2014), <https://www.reuters.com/article/us-bnp-paribas-compliance/exclusive-bnp-said-to-move-compliance-operations-to-u-s-as-settlement-nears-idUSKBN0EZ2S820140624>.

11. *See id.*

12. *See* Michael P. Malloy, U.S. International Banking and Treasury’s Foreign Assets Controls: Springing Traps for the Unwary, 8 ANN. REV. BANKING L. 181, 183 (1989).

13. *Id.* at 183.

14. *See* discussion *infra* Part I.

15. *See* discussion *infra* Part II.

16. While “micro-compliance” relates to “those technical, unambiguous regulatory requirements and prohibitions that most people would instantly recognise as compliance issues

the targeted banks have put into place as a result of these investigations. We will focus mostly on European banks, which are those who have been investigated most vigorously by U.S. authorities. As this final part will show, such reforms changed the structure and philosophy underlying compliance offices of European banks to the point that it is possible to argue that an Americanization of compliance is currently underway.

I. The Legal Arsenal of U.S. Economic Sanctions

Part I addresses the general legal arsenal of U.S. economic sanctions, with attention to their extraterritorial enforcement. Through a short description of the various components of this arsenal at constitutional, statutory and regulatory levels, this Part recounts the history of economic sanctions enacted by the United States, including the various amendments enacted over time (section A). More specifically, even though the U.S. government has made particularly intense efforts regarding economic sanctions enforcement as part of its foreign policy towards several countries, it is regarding the sanction regime against Sudan, Iran and Cuba that such efforts have been strengthened in the last decade in respect of the activity of foreign corporations in the bank industry (section B). The enforcement thereof usually takes the form of either a criminal prosecution, with the U.S. Department of Justice (DOJ) in charge of the investigation, or civil penalty proceedings under the control of the Treasury Department's Office of Foreign Assets Control (OFAC), or even both (section C). Once it is targeted by the DOJ and/or the OFAC, the foreign corporations can actually negotiate the amount of the final sanction by adopting a cooperative attitude that helps both them and the U.S. government to mitigate the costs and the consequences of a potential criminal trial (section D).

A. HISTORY AND PHILOSOPHY OF U.S. ECONOMIC SANCTIONS

Even though scholars traditionally identify the first statutory source of economic sanctions in the *Trade with the Enemy Act* (TWEA), a law enacted in 1917 at the verge of the United States' entry into World War I, the use of economic sanctions is deeply rooted in American history since its very beginning.¹⁷

([e.g.], the requirement to perform client identification procedures under anti-money laundering . . . legislation) . . . 'macro-compliance' [relates to] those governance-like rules or regulatory expectations, often expressed in principles-based language, that deal with broad concepts such as supervision, oversight, the management of reputational or operational risk and ethics." Mark D. Pratt, *'Macro-Compliance' Obligations in International Financial Institutions*, 9 BUS. L. INT'L 181, 181 – 82 (2008).

17. See Trading with the Enemy Act, Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified at 12 U.S.C. § 95a – 95b and 50 U.S.C. App. § 1 – 44); see also Timothy Zick, *Territoriality and the First Amendment: Free Speech – and Beyond – Our Borders*, 85 NOTRE DAME L. REV. 1543, 1563 (2010) (noticing that "[m]uch of the modern legal and regulatory architecture for the regulation

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 501

At the time of the American Revolution and its immediate aftermath, a well-established norm of the law of nations was already commonly recognized as entitling belligerents to restrict trade with the countries they were at war with.¹⁸ According to this norm, “[e]nemies are enemies in every respect, including trade”¹⁹ The United States made frequent use of its rights in such respect, especially in its turbulent relations with Great Britain.²⁰ In particular, as Justice Joseph Story stated referring to the War of 1812,²¹ “[w]hen [t]he whole nation [is] embarked in one common bottom . . . [e]very individual of the one nation must acknowledge every individual of the other nation as his own enemy because [the other is] the enemy of his country. It is not necessary to quote the authorities on this subject,” Story concluded, “[a]s they are numerous, explicit, respectable, and have been ably commented upon the argument.”²² Simultaneously, the same international law norm was explicitly acknowledged by the U.S. Supreme Court, which affirmed that “in war all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government”²³ Blockade and export restrictions were subsequently

of information flow at the national borders was construed during and as a direct response to World War I.”).

18. See *The International Law of Embargo and Reprisal*, 24 LAW MAG. QUART. REV. JURIS. 73, 73 – 79 (1840).

19. R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 89 (1985).

20. While the American Revolution itself was the result of a boycott over English goods as a retaliation against the Stamp Act 1765, “[b]etween 1794 and 1809, Congress enacted various statutes that vested discretion with the president to impose embargoes on all ships and vessels in US ports and to suspend or restrict trade on commercial relations with other countries.” KERN ALEXANDER, ECONOMIC SANCTIONS: LAW AND PUBLIC POLICY 13 (2009).

21. Such a war against England itself was caused by the rupture of economic relations between the two countries due to Britain’s involvement in the Napoleonic Wars. See SYLVIA ELLIS, HISTORICAL DICTIONARY OF ANGLO-AMERICAN RELATIONS 5 (2009). In 1807 President Thomas Jefferson persuaded Congress to enact the Embargo Act, thereby prohibiting trade with Britain. See *id.* at 5 – 6. Jefferson had a profound knowledge of international law as he studied and often used to quote the works of prominent international lawyers of past and contemporary Europe, including Hugo Grotius, Puffendorf and Vattel. See Louis Martin Sears, *Jefferson and the Law of Nations*, 13 AM. POL. SCI. REV. 379, 384 (1919). He also “pronounced in favor of commercial retaliation as an efficient substitute for war.” *Id.* at 394. Jefferson himself declared that “[w]ar is not the best engine for us to resort to, nature has given us one in our commerce, which if properly managed will be a better instrument for obliging the interested nations of Europe to treat us with justice.” Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT’L L. & POL. 1, 54 (1999). Moreover, “the embargo during Jefferson’s administration proved a tremendously powerful weapon” Charles Wiltse, *Thomas Jefferson on the Law of Nations*, 29 AM. J. INT’L L. 66, 80 (1935). “Recent researches in the French and British archives of the period reveal that it was far more effective than either its friends or its enemies realized at the time.” *Id.*

22. *The Rapid*, 12 U.S. 155, 161 (1814).

23. *The Julia*, 12 U.S. 181, 193 (1814).

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THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

502 THE INTERNATIONAL LAWYER

[VOL. 51, NO. 3

applied during the Civil War (1861-1865) and the Spanish-American War (1898).²⁴

As part of this development, the TWEA of 1917 does represent the first example of modern U.S. economic sanctions legislation.²⁵ Legal historians connect the American TWEA with the homonymic British war regulations of 1915-1916, which introduced a comprehensive system of sanctions against Germany, including blacklisting persons and entities of third countries suspected of acting in the interest of Germany.²⁶ But, the hurdles of war and the necessities of economic warfare soon required an expansion of both the blacklist and the listing criteria.²⁷

The TWEA's key provision resides in section 5(b), which confers on the President the prerogative to "investigate, regulate or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions"²⁸ While such a broad power was naturally granted for the entire duration of the war, the TWEA was not formally abolished with the peace treaty and the presidential powers established therein remained

24. Indeed, "[e]mbargoes have been imposed during every war fought by the United States, with the exception of the Mexican." *Constitutionality of Export Controls*, 76 YALE L. J. 200, 202 n.7 (1966).

25. When the TWEA was enacted, the common law already prohibited trading with the enemy. See Thomas Ewing, *The "Trading with the Enemy" Act*, 6 GEO. L. J. 4, 4 (1917 - 1918) (noting that "[a]t Common Law trade with an enemy is forbidden. The purpose of the 'Trading with the Enemy' Act is to give statutory definitions to 'trading,' 'enemy,' and 'ally of enemy;' to fix appropriate penalties for violation of law; to provide for the administration of the law, and to confer upon the Executive the authority in proper case to permit any prohibited act.").

26. See Alexander, *supra* note 20, at 15. The law in question was the Trading with the Enemy (Extension of Powers) Act of Dec. 3, 1915 (5 & 6 Geo. V, c. 98, briefly commented on in 60 SOLIC. J. & WKLY. REP. 167 (1916)), which was preceded by the Trading with the Enemy Act of Sept. 18, 1914 (4 & 5 Geo. V, c. 87, published in 58 SOLIC. J. & WKLY. REP. 842 (1914)), which declared "enemies" all persons and firms residing in enemy territory regardless of their nationality. See Karl Zemanek, *Economic Warfare*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, USE OF FORCE, WAR AND NEUTRALITY PEACE TREATIES 157, 160 (Rudolph Bernhardt ed., 2014). In addition to that, "in order to cope with the interweaving of neutral and enemy businesses, [the Act of 1915] made enemy connection the relevant criterion and empowered the Crown to penalize all transactions between British subjects and 'statutory alien enemies,' of whatever nationality and wherever resident, who were named in 'black lists.'" *Id.*; see also John McDermott, *Trading with the Enemy: British Business and the Law During the First World War*, 32 CAN. J. HIST. 201 (1997); R.F. Roxburgh, *The Alien Enemy in English Law*, 2 J. COMP. LEGIS. & INT'L L. 269, 275 (1920). Two Trading with the Enemy (Statutory List) Proclamations dated February 29, 1916, and April 26, 1916, carried into force the Act of 1915, and inaugurated the blacklisting system which was used until the end of the hostilities. See J.E.G. De Montmorency, *The Black List*, 3 PROBS. OF THE WAR 29, 32 (1917).

27. See *Trading with the Enemy*, 3 MOD. L. REV. 219, 220 (1940) (noting, regarding the English regulations of 1914 and 1915, that "[s]tep by step the scope of the . . . statutes of the last war had to be enlarged so as to include an increasing number of persons and 'bodies of persons' in order to give effect to the legal requirements of economic warfare.").

28. See Trading with the Enemy Act, Pub. Law No. 65-91, § 5(b), 40 Stat. 411 (1917) (codified at 12 U.S.C. § 95a - 95b and 50 U.S.C. App. § 1 - 44).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 503

“only sleeping”²⁹ during peace periods, ready to be re-employed either as a foreign policy instrument or to face domestic emergencies.³⁰ A good example of the latter resides in the use made of the TWEA by President Franklin D. Roosevelt in 1933 in ordering a bank holiday or by President Richard Nixon in 1970 in reacting to a postal strike.³¹

In the immediate aftermath of the Watergate scandal in 1977, with the intent of confining presidential powers, Congress enacted the *International Emergency Economic Powers Act* (IEEPA), limiting the scope of the TWEA to an “unusual and extraordinary threat” if the President declares that threat a national emergency.³² Nevertheless, since its adoption, the IEEPA has constituted the legal basis for the enactment of a wide range of economic sanctions, often put into place with the TWEA.³³

These developments show that U.S. economic sanctions have from time to time been conceived, throughout their history, as naturally extraterritorial in their scope. In fact, traditionally:

29. Joseph W. Bishop, Jr., *Judicial Construction of the Trading with the Enemy Act*, 62 HARV. L. REV. 721, 725 (1949), argued that “the question of the extent of the survival of the old Act has not proved embarrassing [, as i]t seems to have been assumed from the first . . . that the World War I provisions (except such of them as in terms were applicable only to that war) had not been dead but only sleeping, and that they automatically became effective upon the outbreak of World War II.”

30. “While most of the war-related statutes were terminated at the end of World War I, the TWEA was retained, primarily because property was still held by the Alien Property Custodian under authority of the Act. Although commentators have remarked that the TWEA was always considered legislation available in the event of another war, the Act was next relied upon by [subsequent] President[s] . . . [to address] a domestic, peacetime emergency.” Mary M. Coughlin Bowman, *Presidential Emergency Powers Related to International Economic Transactions: Congressional Recognition of Customary Authority*, 11 VAND. J. TRANSNAT’L L. 515, 518 (1978).

31. See HAROLD J. KRENT, *PRESIDENTIAL POWERS* 156 – 57 (2005).

32. Cf. International Emergency Economic Powers Act, Pub. L. 95-223, Title II, § 202, 91 Stat. 1626 (1977) (codified in 50 U.S.C. § 1701(a)) (establishing that “[a]ny authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.”). Bowman, *supra* note 30, at 521, pointed out in this regard that “[i]t was not until Congress became concerned over the unilateral actions of the executive branch that there was any demonstrable interest in what it recognized as a shift of power from Congress to the President, primarily in foreign policy and the budget.” See also *The International Emergency Economic Powers Act: A Congressional Attempt to Control Emergency Presidential Power*, 96 HARV. L. REV. 1102, 1105 (1983). In this regard, Detlev F. Vagts, *Trends in International Business Law: Towards a New Ethnocentricity*, 1 NW. J. INT’L L. & BUS. 11, 17 (1979), noticed that the provisions of the TWEA “were gradually undermined by the desire of American business to retain business relationships, the public’s eagerness for a restoration of diplomatic relations, an administrative concern for the disapproval expressed by U.S. allies, and a congressional urge to confine the executive’s powers.”

33. “Congress first in the TWEA and then in IEEPA, therefore, delegated a host of powers that presidents can pursue in an emergency, and it can limit those authorities further if it should so choose.” Krent, *supra* note 31, at 157.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

504 THE INTERNATIONAL LAWYER

[VOL. 51, NO. 3

An embargo applies only within the territory of the state and does not interfere directly with transactions in other states or with acts done in the territory, even, of the state against which it is directed . . . Its immediate effect is domestic, and it applies to persons and goods within territory over which the jurisdiction of the state is undoubted.³⁴

But embargo measures may also be used as extraterritorial sanctions, as they produce effects beyond the borders of the United States.³⁵ The expectation is that these measures will be sufficient to produce a change of attitude from the government towards which they are directed.³⁶ As courts have affirmed in relation to the TWEA and the various regulations derived therefrom, “[their] goal is to prevent . . . [targeted countries and subjects] from deriving any economic benefit from transactions with persons subject to the jurisdiction of the United States . . . [as] money is an important weapon in any international struggle”³⁷

B. THE ENFORCEMENT OF ECONOMIC SANCTIONS

A series of criminal and administrative provisions ensure the enforcement of U.S. economic sanctions at all times.

To begin with the criminal provisions, IEEPA’s section 206 declares it “unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under this [Act].”³⁸ As for any other federal crime, it is for the DOJ to prosecute such violations. Moreover, the Office of Foreign Assets Control (OFAC), a division of the Treasury Department constituted in 1950 and potentiated in the following decades,³⁹ takes care of the enforce-

34. Joseph Chamberlain, *Embargo as a Sanction of International Law*, 27 AM. SOC’Y INT’L L. PROC. 66, 67 (1933).

35. *See id.*

36. *See id.* at 67-68.

37. *Veterans and Reservists for Peace in Vietnam v. Reg’l Comm’r of Customs, Region II and the Sec’y of Treas. of the United States*, 459 F.2d 676, 680 (3d Cir. 1972).

38. 50 U.S.C. § 1705(a) (2016).

39. OFAC’s predecessor, the Division of Foreign Assets, was established in the Office of International Finance under President Harry Truman in 1950, during the Korean War, to address the blockade of Chinese and North Korean assets. *See* Treas. Dept. Order of Dec. 5, 1950, 15 Fed. Reg. 9040 (Dec. 5, 1950); *see also* Tracy J. Chin, *An Unfree Trade in Ideas: How OFAC’s Regulations Restrain First Amendment Rights*, 6 N.Y.U. L. REV. 1883, 1887 (2008) (describing OFAC’s history). The origin of the Division dates back to 1940, when after Germany’s occupation of Denmark and Norway, the U.S. government decided to create the Office of Foreign Funds Control to administer the frozen German assets, including those related to countries that would have been subsequently occupied by the Third Reich. *See id.*; *see also* MARTIN LORENZ-MEYER, *SAFEHAVEN: THE ALLIED PURSUIT OF NAZI ASSETS ABROAD* 20-21 (2007). In 1962, a few months after President John F. Kennedy proclaimed an embargo against Cuba, *see* Proclamation 3447, 27 Fed. Reg. 1085 (Feb. 7, 1962), the Secretary of the Treasury delegated all its powers under section 5(b) of the TWEA, which had been delegated to him during the World War II, *see* Exec. Order No. 9193, 7 Fed. Reg. 5205 (July 6, 1942), to the Division, which became the OFAC. *See* Treas. Dept. Order No. 128 (Rev. 1, Oct. 15, 1962)

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 505

ment of the administrative provisions supporting U.S. economic sanctions.⁴⁰

In particular, the OFAC promulgates sanctions regulations and applies sanctions as it administers the lists of Specially Designated Nationals (SDNs), ensuring the tradition of blacklisting one's enemies in regard to trade.⁴¹ These SDN lists include natural and legal persons depending on the targets (terrorists, drug traffickers, etc.).⁴² When a person's name appears as an SDN in one of these lists, any transfer to such person, no matter where located, is prohibited without the OFAC's authorization.⁴³

As mentioned, the OFAC operates both as a regulator and as an enforcement agency.⁴⁴ As a regulator, it determines the special legal regime applicable to the different targeted countries and grants the exemptions to such a regime.⁴⁵ For example, special regimes are in place against Sudan, Iran, and Cuba.⁴⁶ In case of violation, OFAC carries out the necessary civil investigations, possibly in coordination with other authorities at the federal or state level, and often interacts with foreign regulators and enforcement agencies.⁴⁷

(amended by Office of Foreign Assets Control: Authority and Functions, 32 Fed. Reg. 3472 (March 2, 1967)). Currently, "OFAC administers section 5 of the [TWEA]," M. Cherif Bassiouni & Eliot A. Landau, *Presidential Discretion in Foreign Trade and Its Effects on East-West Trade*, 14 WAYNE L. REV. 494, 517 (1968), and "is delegated the administration of blocking controls as well as other restrictions over property imposed under Section 5 (b) of the [TWEA] . . ." Arthur John Armstrong, *A Federal Marshalling of Assets Statute: Equitable Compensation for International Claimants*, 12 VA. J. INT'L L. 211, 232 (1972).

40. Actually, "[f]or the past fifty years, OFAC has been the agency through which the U.S. government has implemented its sanctions regime." Court E. Golumbic & Robert S. Ruff III, *Leveraging the Three Core Competencies: How OFAC Licensing Optimizes Holistic Sanctions*, 38 N.C. J. INT'L L. & COM. REG. 729, 733 (2013) (emphasis added). More than that, "OFAC is the office responsible for issuing, interpreting, and applying the regulations that implement the various trade embargoes imposed by the United States." MATIAS F. TRAVIESO-DIAZ, *THE LAWS AND LEGAL SYSTEM OF A FREE-MARKET CUBA: A PROSPECTUS FOR BUSINESS* 18 (1997).

41. See Golumbic & Ruff, *supra* note 40, at 771 – 72.

42. See Judith Lee & James Slear, *Beware of OFAC: A Little-Known Agency Poses Challenges to International Finance*, 25 INT'L FIN. L. REV. 58, 58 (2006). The list is currently composed of about 20,000 entities. See OFFICE OF FOREIGN ASSET CONTROL, U.S. DEPARTMENT OF TREASURY, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSON LIST (2018), <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> (follow "Complete Specially Designated Nationals List (in PDF format)" hyperlink).

43. See Lee & Slear, *supra* note 42, at 58.

44. See Travieso-Diaz, *supra* note 40, at 18.

45. See Chin, *supra* note 39, at 1888. In fact, "[t]he primary mission of OFAC is to administer and enforce economic sanctions against targeted foreign countries and regimes, terrorists and terrorist organizations, weapons of mass destruction proliferators, narcotic traffickers, and others, in furtherance of U.S. national security, foreign policy, and economic objectives." Dep't of Treas., Office of Foreign Assets Control, Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57593, 57594 (Nov. 9, 2009) (to be codified at 31 C.F.R. pt. 501).

46. See Chin, *supra* note 39, at 1884.

47. See Dep't of Treas., Office of Foreign Assets Control, Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57594.

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THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

506 THE INTERNATIONAL LAWYER

[VOL. 51, NO. 3

Despite its limited size—it currently employs no more than 150 employees—and its “relative obscurity,”⁴⁸ the OFAC has demonstrated extremely broad powers both in theory and in practice.⁴⁹ Undoubtedly, it can blacklist entities not directly related to U.S. security concerns,⁵⁰ and it can freeze any subject’s assets with no need for substantiated evidence.⁵¹

C. EXTRATERRITORIAL EFFECTS OF ECONOMIC SANCTIONS

Since their first enactment, the U.S. economic sanctions have always impacted the world of international business transactions. But in the last decade they have received new, extraordinarily strong enforcement by the U.S. government, including vis-à-vis foreign corporations.

Heightened enforcement began around 2001 with the Enron and the Arthur Andersen scandal, when the American corporate community found itself in the eye of a political and legal storm.⁵² On the wave of reform that ensued in 2003, the DOJ amended its corporate prosecution guidelines by focusing on corporate culture and compliance rather than punishment.⁵³ This new approach also demonstrated a greater ambition in terms of its extraterritorial effects by targeting predominantly foreign corporations with links to the U.S. Assistant Attorney General and head of the DOJ’s Criminal Division Alice S. Fisher effectively delineated this change of paradigm when, a few years later, she announced the new DOJ policy: “to root out global corruption and preserve the integrity of world’s market.”⁵⁴ She said: “I want

48. Lee & Slear, *supra* note 42, at 58.

49. *See id.*

50. *See* Louisa C. Slocum, *OFAC, the Department of State, and the Terrorist Designation Process: A Comparative Analysis of Agency Discretion*, 65 ADMIN. L. REV. 387, 390 (2013) (stating that OFAC “can designate entities that do not directly threaten the country’s security.”).

51. *See* Vanessa Ortblad, *Criminal Prosecution in Sheep’s Clothing: The Punitive Effects of OFAC Freezing Sanctions*, 98 J. CRIM. L. & CRIMINOLOGY 1439, 1442 (2008) (noting that “[w]hat is most troubling about OFAC’s power is that it may freeze an entity’s assets with extremely little evidence.”).

52. *See, e.g., Timeline: A chronology of Enron Corp.*, N.Y. TIMES: INT’L BUS. (Jan. 18, 2006), <https://www.nytimes.com/2006/01/18/business/worldbusiness/timeline-a-chronology-of-enron-corp.html>.

53. *See* Memorandum from Deputy Attorney Gen. Larry Thompson to Heads of Dep’t Components and U.S. Attorneys (Jan. 20, 2003), https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf (amending and implementing the Memorandum from Deputy Attorney Gen. Eric H. Holder, Jr. to Heads of Dep’t Components and U.S. Attorneys (June 16, 1999), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> (where the Holder Memorandum listed eight factors to lead prosecutors to indict or settle with corporate actors: the nature of the offense; the pervasiveness of the wrongdoing within the corporation; the defendant’s history; the corporation’s timely and voluntary disclosure; the existence of adequate corporate compliance program; the remedies and actions taken by the corporation; the prosecution’s collateral consequences; the adequacy of non-criminal remedies).

54. *See, e.g.,* George K. Foster, *Combating Bribery of Indigenous Leaders in International Business*, 54 COLUM. J. TRANSNAT’L L. 59, 113 n.263 (2015).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 507

to send a clear message today that if a foreign company trades on U.S. exchanges and benefits from U.S. capital markets, it is subject to our laws.”⁵⁵

Statistics show that the “DOJ’s voracious appetite for . . . violators,” as scholars defined it,⁵⁶ significantly targeted non-American businesses. For instance, in his seminal book *Too Big to Jail*, Professor Brandon L. Garrett explains that “[t]hirteen percent of the 2,262 corporate prosecutions between 2001 and 2012 . . . were foreign corporations.”⁵⁷ He also found that:

[F]oreign firms received an average fine of \$35 million and made an average total payment of almost \$66 million. The comparison with domestic firms is stark, as they received an average fine of \$4.7 million and made an average total payment of \$12 million.⁵⁸

According to these findings—which however do not include the \$8.9 billion forfeited by BNP Paribas in 2014⁵⁹—foreign firms are fined seven times more than domestic firms and pay nine times the amounts paid by the latter.⁶⁰ As a result, non-American firms find themselves in an odd position compared to American firms.

Academics associate this American exceptionalism in corporate prosecution to the extremely broad discretion that American prosecutors enjoy in deciding whether to prosecute or not, as well as to the prosecution-friendly character of the American criminal system.⁶¹ While an analysis of these elements would exceed the scope of this article, it is important to remark here that potential defendants, instead of preparing their defenses based on certain allegations, deliberately choose to cooperate with the prosecutors in order to avoid the burden of a trial.⁶² As Professor Garrett’s points out in this respect, in such a context “cooperating with U.S. prosecutors is imperative.”⁶³ This new cooperative model has played a central role in the heightened enforcement of economic sanctions against foreign corporations.

55. See David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 697 (2009).

56. Rebekah J. Poston & Ritchie T. Thomas, *Investigating Fraud in Emerging and Developed Markets*, 3 J. PAYMENT SYS. L. 72, 74 (2007).

57. BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 219 (2014).

58. *Id.* at 220.

59. See *infra* discussion Part II.A.

60. Garrett, *supra* note 57, at 220.

61. See *id.* at 224 (noting “U.S. prosecutors are simply more powerful than most prosecutors elsewhere in the world. They possess extraordinarily wide discretion, and the adversarial system in the United States creates an unusually prosecution-friendly dynamic by placing great discretion in the hands of prosecutors—which also gives corporations more to gain by cooperating.”).

62. See *id.* (noting “[w]hen foreign companies have tried to push back [against prosecutors], the consequences have not been good for them.”).

63. *Id.*

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

508 THE INTERNATIONAL LAWYER

[VOL. 51, NO. 3

D. THE COOPERATIVE MODEL

Cooperation became the first pillar of the DOJ's sanctions policy. As a start, the above-mentioned 2003 amendments to the corporate prosecution guidelines extended the prosecutors' power to reach an agreement with potential or actual defendants in exchange for cooperation.⁶⁴ Such an agreement may consist of three different forms: (i) the traditional plea agreement; (ii) the deferred prosecution agreement (DPA), and (iii) the non-prosecution agreement (NPA).⁶⁵ All three have recently arisen as ordinary prosecutorial tools in the field of corporate crimes.⁶⁶

These three forms of agreement bear a commonality—they result in a settlement that allows the corporation to avoid the trial and the related costs.⁶⁷ But they also show certain differences. Pursuant to a DPA, the prosecutors simply agree to postpone the criminal charges to a subsequent moment, committing to waive them all if the defendant abides by certain terms.⁶⁸ If the latter breaches these terms, the deferral is automatically

64. See Memorandum from Deputy Attorney Gen. Larry Thompson to Heads of Dep't Components and U.S. Attorneys (Jan. 20, 2003), https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf (stating that “[i]n some circumstances . . . granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government’s investigation. In such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally.”).

65. See *infra* note 66 and accompanying text.

66. See Michel Yangming Xiao, *Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime*, 23 CORNELL J. L. & PUB. POL’Y 233, 234 (2013) (explaining that “[a]lthough DPAs and NPAs were initially created as alternative forms of punishment for juvenile and drug offenders, they are being used increasingly in corporate crime proceedings.”). The key to understanding the history and the recent evolution of DPAs is probation. In the field of juvenile offenders, “[i]nstead of placing young, non-violent offenders on the track of traditional criminal conviction—and thus inflicting on them the stigma of a criminal conviction—prosecutors would file charges with a court, but then agree to suspend the prosecution. Essentially, the defendant would be placed on a term of probation. If the offender successfully completed this term, then the prosecutor would dismiss the charges.” Gordon Bourjaily, *DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-Prosecution Agreements in Corporate Criminal Prosecutions*, 52 HARV. J. ON LEGIS. 543, 544 (2015). The same reasoning is followed in corporate crime cases, as “[c]orporate deferral scenarios typically involve a prosecutor filing a criminal charge against a company, but agreeing not to prosecute the claim contingent upon the corporation complying with the terms of the deferral agreement for a period of time.” Irina Kotchach Bleustein, Lauren J. Kelleher, & Danielle Zeitz-Winston, *Corporate Criminal Liability*, 52 AM. CRIM. L. REV. 851, 865 (2015); see also Astrid Mignon-Colombet, *La Self-Defense des Entreprises*, in ANTOINE GARAPON & PIERRE SERVAN-SCHREIBER, *DEALS DE JUSTICE: LE MARCHÉ AMÉRICAIN DE L’OBEISSANCE MONDIALISÉE* 79, 86 – 94 (2013) (describing the three forms of criminal settlement agreements).

67. See Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 544 (2015) (noting that “[l]ike the traditional plea agreement, NPAs and DPAs are pre-trial settlement through which the government and the corporation together avoid the costs of trial.”).

68. See *id.* at 545.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 509

terminated.⁶⁹ The NPA follows a similar logic, allowing the prosecutor to agree upon certain conditions not to prosecute the defendant at all.⁷⁰ Finally, another striking difference between these three models resides in the involvement of federal courts. While both DPAs and plea agreements are subject to judicial scrutiny, NPAs are not.⁷¹ Because of such an absence, the parties, i.e. the prosecutors and the defendants-to-be, remain in full control of the process, free to interpret the law as they please and to reach the solution that better fits their respective interests. “In such a justice system,” a French author noted, “the finding of the wrongdoing is left to the prosecutor’s office and to negotiations with the firm.”⁷²

This cooperative model has led to changes in the way corporations approach economic sanctions, adopting a predominantly strategic approach rather than a limited legal one. Indeed, a firm’s decision to comply with them or to cooperate in a related criminal investigation has become an integral part of its business strategy, pertaining essentially to the function of risk-assessment.⁷³ As French scholar and corporate lawyer Hubert de Vauplane notices in this regard:

Once a firm resolves to make [the U.S.] regulations its own, it has to put into place certain procedures that allow it to ensure preemptively its respect. . . . To decide not to align with [those regulations] risks

69. See Court E. Golumbic & Albert D. Lichy, *The “Too Big to Jail” Effect and the Impact on the Justice Department’s Corporate Charging Policy*, 65 HASTINGS L. J. 1293, 1299–1300 (2014) (“[i]n exchange for the prosecutor’s stipulation to ‘defer’ criminal charges, the defendant agrees to waive indictment and be charged criminally, and to fulfill certain requirements over a specified period of time. If the defendant discharges her obligations, the charges against her are dismissed and she is treated as if the government declined to prosecute at the outset If the defendant fails to abide by the terms of the deferred prosecution, however, she faces the specter of criminal prosecution just the same as if the government had never granted a deferral.”).

70. Actually, “[t]he difference between DPAs and NPAs is whether charges were ever filed.” Xiao, *supra* note 66, at 234 n.6; see also Bleustein, Kelleher, & Zeitz-Winston, *supra* note 66, at 866 (concluding that “NPAs work in much the same way [as DPAs], except there are no publicly-filed charges and no court supervision of compliance with an agreement.”). Obviously, in the case of NPAs, charges might be filed later in the event that the defendant has breached the obligations she had entered into in the NPA. See *id.*

71. See Alexander & Cohen, *supra* note 67, at 545 (pointing out that “there is indeed no direct role for the federal courts to play in the approval or enforcement of an NPA, although there is an open question as to whether a court could consider the breach of an NPA once the DOJ brings actual charges.”).

72. Astrid Mignon-Colombet, *La Self-Defense des Entreprises*, in ANTOINE GARAPON & PIERRE SERVAN-SCHREIBER, *DEALS DE JUSTICE: LE MARCHÉ AMÉRICAIN DE L’OBEISSANCE MONDIALISÉE* 79, 86–94 (2013).

73. Gregory Husisian, *U.S. Regulation of International Financial Institutions: It’s Time for an Integrated Approach to Compliance*, 127 BANKING L. J. 195, 200 (2010) (noting that “[t]he risks for [all] financial institutions flow both from their increased regulatory responsibilities and from the inherent riskiness of these activities.”). Peter Kurer notes that the rise of compliance officers in global banks stems partly from the need to ensure compliance with U.S. regulations from the perspective of risk management. PETER KURER, *LEGAL AND COMPLIANCE RISK: A STRATEGIC RESPONSE TO A RISING THREAT FOR GLOBAL BUSINESS* 74–77, 187–88 (2015).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

510 THE INTERNATIONAL LAWYER

[VOL. 51, NO. 3

generating a gap with competitors and creating also difficulties with the investors and with American clients which could eventually claim such a respect. But the most important risk consists in being required, ‘one day’, to explain to the authorities of the United States the reasons that led the firm to disregard such regulations, while the firm entertains more or less tight connections with the American market. . . . On the opposite side, aligning with those regulations fills the gap and engages the firm with obligations that require the mobilization of significant resources that might often be over-proportionate compared to the activities developed on the American soil. That is why this decision is an eminently strategic one.⁷⁴

In this context, foreign corporations may obtain several benefits by cooperating with the U.S. government in a criminal investigation. First, these corporations would likely wish to avoid the risk of being dragged into long-lasting—and sometimes combined⁷⁵—criminal, civil, and fiscal proceedings in the United States.⁷⁶ Also, any negotiations with the U.S. government, even at a preliminary stage, must necessarily be kept secret, doomed to be disclosed only at their final output with the signature of the final settlement.⁷⁷ Otherwise, a reputational harm may increasingly supplement the entire phase of negotiations up to draining off the company’s entire shareholder value.⁷⁸ Obviously, cooperation and confidentiality go along, and as far as the defendant-to-be is willing to cooperate, the criminal investigation remains secret.⁷⁹

On the other hand, uncooperative corporations might be subject to retaliation by the U.S. government in the form of revocation or suspension

74. Hubert de Vauplane, *Une Nouvelle Géopolitique de la Norme*, in ANTOINE GARAPON & PIERRE SERVAN-SCHREIBER, *DEALS DE JUSTICE: LE MARCHÉ AMÉRICAIN DE L’OBEISSANCE MONDIALISÉE* 23, 33 – 34 (2013).

75. Actually, pre-trial negotiations with the DOJ may involve various governmental agencies—including, of course, OFAC—with which the DOJ may be expected to work “in conjunction” and simultaneously. See Memorandum from Deputy Attorney Gen. Larry Thompson to Heads of Dep’t Components and U.S. Attorneys (Jan. 20, 2003), https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_priv_waiv_dojthomp.authcheckdam.pdf (under which “the [DOJ], in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities. Some agencies . . . have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions.”).

76. Lack of cooperation with U.S. authorities exposes firms “to the triple risk of a criminal proceeding, a civil action and a tax adjustment.” OLIVIER BASSO, *POLITIQUE DE LA TRÈS GRANDE ENTREPRISE. LEADERSHIP ET DÉMOCRATIE PLANÉTAIRE* 243 (2015).

77. See Olivier Boulon, *Une Justice Négociée*, in Antoine Garapon & Pierre Servan-Schreiber, *Deals de Justice: Le Marché Américain de l’Obeissance Mondialisée* 41, 69 (2013).

78. See *id.* at 69 (noting that “[c]ooperating with U.S. authorities in the framework of an informal procedure allows firms to economize on the negative publicity that would result from a public disclosure concerning the opening of a judicial procedure against the firm.”).

79. See *id.*

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 511

of their license to do business in the United States and a ban to do business with U.S. public entities.⁸⁰ All these risks, if concretized, may be deeply harmful, especially for foreign banks and financial institutions. Therefore, while according to some scholars “it is merely unconceivable for an international bank not to access the American market,”⁸¹ thus implying that such a bank has no choice but to cooperate, the cooperative model remains strategic in the sense that the amount paid by foreign corporations to the U.S. government represents “the price to retain the access to the American market open,”⁸² making the decision to cooperate simply more efficient than pursuing the matter in a court of law.

A last key feature is voluntary self-disclosure.⁸³ From the corporation’s perspective, voluntary self-disclosure is a potential ground for clemency. But from the government’s standpoint it becomes a proper obligation. In this regard, OFAC regulations and DOJ guidelines adopt the same policy, both putting the degree of contribution to the violation on stage.⁸⁴

Under OFAC regulations, voluntary self-disclosure is a factor that determines the egregiousness of a violation and, as a consequence, the penalty to be applied in a concrete instance.⁸⁵ Specifically, if the violation comes to OFAC’s attention by means other than voluntary self-disclosure, the starting penalty is the maximum for that violation.⁸⁶ Moreover, the

80. Firms decide to cooperate because “if they refuse, they expose themselves to the sovereign decision of the U.S. authorities to withdraw their licence [sic] of exploitation on American territory.” Basso, *supra* note 76, at 243. U.S. laws which apply to foreign entities generally provide for the possibility of the government to revoke their license, nullify their charter or halt their activities if they go against the law. For instance, OFAC regulations establish that foreign financial institutions who engage in a prohibited activity may face restrictions regarding “the opening or maintaining of a correspondent account or a payable-through account in the United States. . . .” CISADA-Based Sanctions on Certain Foreign Financial Institutions, 31 C.F.R. § 561.201 (2016).

81. Boulon, *supra* note 77, at 70.

82. De Vauplane, *supra* note 74, at 33-34 (transl. from French).

83. See generally Richard L. Matheny, *So Many Feathers on the Scale: Whether and How Voluntary Disclose Violations of U.S. Exports Controls and Economic Sanctions Laws*, 6 GLOBAL TRADE & CUST. J. 389 (2011).

84. Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 890 (2012) (noting that both the DOJ and OFAC “place culpability at the center of the penalty process”). See also Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1130 (2006) (noting that OFAC’s amended regulations “focus on factors similar to those in the Thompson Memo”).

85. According to the OFAC regulations, voluntary self-disclosure means “self-initiated notification to OFAC of an apparent violation by a [subject] that has committed, or otherwise participated in, an apparent violation of a statute, Executive order, or regulation administered or enforced by OFAC, prior to or at the same time that OFAC, or any other federal, state, or local government agency or official, discovers the apparent violation or another substantially similar apparent violation.” 31 C.F.R. Pt. 501, App. A, § I(I) (2012).

86. In particular, “if the apparent violation comes to OFAC’s attention by means other than a voluntary self-disclosure, the base amount of the proposed civil penalty in the Pre-Penalty Notice shall be the applicable statutory maximum penalty amount applicable to the violation.” 31 C.F.R. Pt. 501, App. A § V(B)(2)(a)(iv) (2012).

aforementioned 2003 amendments to the corporate prosecution guidelines mandate federal prosecutors to consider a number of factors. These include: the existence of a formal and reliable compliance program, timely and voluntary disclosure, and the management's involvement in said compliance program.⁸⁷ The completeness of the disclosure (including internal investigations) is also considered in this respect.⁸⁸

All these factors pertain to the way U.S. law enforcement agencies bring an investigation against foreign corporations for the violation of economic sanctions, and to the way the latter react. These developments are shaping the mechanisms through which the U.S. authorities now attempt to prevent these violations from even happening. The key lies in the compliance function of foreign corporations. While the practice of U.S. corporate prosecutions shows that all the foreign banks targeted in the last decade had a compliance office (some of whom even boasted about its efficiency, preparation and capacity of reaction), those offices were ill-equipped to respond to the allegations presented by the U.S. government. To this "dark side of compliance" of foreign banks we dedicate the following Part.

II. The Dark Side of Compliance

The purpose of this Part is to illustrate how the compliance offices of non-U.S. banks failed to abide by the legal arsenal described in Part I and to what extent they were affected by its enforcement. As of today, at least nine major global non-U.S. banks have paid substantial amounts to the U.S. government as a result of violating economic sanctions arsenal (in descending order based on the amount paid, in U.S. dollars, with the mention of the home country): (i) BNP Paribas S.A. (8.9 billion; France);⁸⁹

87. In this respect, the Thompson Memorandum requires prosecutors to consider, as a ground for leniency and "[e]ven in the absence of a formal program, [. . .] a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program." See Memorandum from Deputy Attorney Gen. Larry Thompson to Heads of Dep't Components and U.S. Attorneys (Jan. 20, 2003), https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf.

88. *Id.* ("[o]ne factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances. The Department does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation").

89. *Cf. infra* the text corresponding to notes 112-135.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 513

(ii) HSBC Bank N.V. (1.921 billion; the Netherlands);⁹⁰ (iii) ING Bank, N.V. (619 million; the Netherlands);⁹¹ (iv) Standard Chartered (667 million; U.K.);⁹² (v) Tokyo-Mitsubishi UFJ (565 million; Japan);⁹³ (vii) ABN AMRO

90. *Cf. infra* the text corresponding to notes 147-166.

91. *Cf. infra* the text corresponding to note 146.

92. Accusations against Standard Chartered Bank (SCB) were based on the allegation that “[f]or almost ten years, SCB schemed with the Government of Iran and hid from regulators roughly 60,000 secret transactions, involving at least \$250 billion, and reaping SCB hundreds of millions of dollars in fees . . . [, leaving] the U.S. financial system vulnerable to terrorists, weapons dealers, drug kingpins and corrupt regimes, and deprived law enforcement investigators of crucial information used to track all manner of criminal activity.” Standard Chartered Bank, New York Branch, 2012 WL 3594813 at *1 (N.Y. Dep’t of Fin. Servs., Aug. 6, 2012) (Order pursuant to Banking Law § 39). Subsequently, the bank entered into a consent order with the NYSDFS and two deferred prosecution agreements with the DOJ and the District Attorney of the County of New York, and finally settled with the OFAC, but was pushed to make another settlement in 2014 after the monitor appointed pursuant to the previous DPA brought to the attention of the NYSDFS some deficiencies in SCB’s anti-money laundering system. *See, respectively*, Standard Chartered Bank, New York Branch, 2012 WL 5194361 at *1 – 2 (N.Y. Dep’t of Fin. Servs., Sep. 21, 2012) (Consent Order under New York Banking Law § 44); *United States v. Standard Chartered Bank*, No. 1:12-CR-00262, 2012 WL 6097335 (D.D.C., Dec. 7, 2012) (SCB DPA); Press Release, Dep’t of Just., Standard Chartered Bank Agrees to Forfeit \$227 Million for Illegal Transactions with Iran, Sudan, Libya, and Burma (Dec. 10, 2012) (noting that Standard Chartered entered into “ a deferred prosecution agreement with the New York County District Attorney’s Office for violating New York state laws by illegally moving millions of dollars through the U.S. financial system.”), *available at* <https://www.justice.gov/opa/pr/standard-chartered-bank-agrees-forfeit-227-million-illegal-transactions-iran-sudan-libya-and>; Standard Chartered Bank, MUL-607200 (Dep’t of the Treas., Off. of Foreign Assets Control) (SCB Settlement Agreement) (Dec. 10, 2012), *available at* https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121210_SCB_Settlement.pdf; more recently, Standard Chartered Bank, New York Branch, 2014 WL 4699596 (N.Y. Dep’t of Fin. Servs., Aug. 19, 2014) (Consent Order under New York Banking Law §§ 39 and 44).

93. The Bank of Tokyo-Mitsubishi UFJ, Ltd., was reported to have paid two major sums to the New York State Department of Financial Services (NYDFS), respectively of 250 million and 315 million dollars, both relating to dollar-clearing transactions performed mainly through its New York branch and other New York-based financial institutions on behalf of Iran, Sudan and Myanmar entities. In particular, in 2013 the bank entered into a 250 million dollar consent order with the NYDFS concerning “approximately 28,000 U.S. dollar payments through New York worth close to \$110 billion involving Iran, and additional payments involving Sudan and Myanmar, and certain entities on the Specially Designated Nationals list issued by the U.S. Treasury Department’s Office of Foreign Asset Control.” Bank of Tokyo Mitsubishi-UFJ, Ltd., New York Branch, at 2 (N.Y. St. Dep’t Fin. Servs., June 19, 2013) (Consent Order under New York Banking Law § 44). Later on, however, the investigators discovered that the bank had instructed the consulting firm PriceWaterhouseCoopers (PwC) “to remove excerpts from drafts [. . .] that would have cast doubt upon the thoroughness, objectivity and reliability of the finding contained in the [r]eport submitted to Regulators on behalf of the Bank.” Bank of Tokyo Mitsubishi-UFJ, Ltd., New York Branch, 2014 WL 6611758 at *2 (N.Y. St. Dep’t Fin. Servs., Nov. 18, 2014) (Consent Order under New York Banking Law § 39 and 44). This obliged the bank to sign, in 2014, a second settlement agreement with the NYDFS for the amount of 315 million dollars. *Id.*, at *5. *See* Richard L. Cassin, *Run-Amok Compliance Officers Cost Bank of Tokyo Mitsubishi \$ 315 Million for Sanctions Report Whitewash*, THE FCPA BLOG (Nov. 18, 2014),

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

514 THE INTERNATIONAL LAWYER

[VOL. 51, NO. 3

Bank N.V. (580 million; the Netherlands);⁹⁴ (vii) *Crédit Suisse AG* (536 million; Switzerland);⁹⁵ (viii) *Lloyds TSB Bank PLC* (350 million; U.K.);⁹⁶ and (ix) *Barclays Bank PLC* (298 million; U.K.).⁹⁷ The only cases that will be analyzed are those that are interesting both in terms of amount paid and relevance of the measures taken according to the agreements entered into with the U.S. government—mainly the first three (*BNP Paribas*, *Lloyds*, *HSBC*, and *ING*).

This Part starts with a short summary of the ways compliance offices work generally in global firms and an account of how banks that were subsequently caught in non-compliance by the U.S. government used to praise the large reaction capabilities of their own legal and compliance offices (section A). Following negotiations with the U.S. government, the very same banks had to publicly disclose their failures. Specific sections focus on the case of the group led by the French bank *BNP Paribas S.A.* (section B) and other banks like *HSBC* and *ING* (section C).

A. HOW COMPLIANCE WORKS (AND FAILS)

Every respected global firm has a compliance office, which functions to monitor the firm's activities and report suspected wrongdoing to the board of directors.⁹⁸ To perform these tasks fully and punctually, the compliance office should be independent and provided with sufficient funds and resources.

The law determines to a certain degree the extent of the severance of the compliance function from the main decisional bodies of a company. Generally speaking, one can say that global firms “establish an official

<http://www.fcpablog.com/blog/2014/11/18/run-amok-compliance-officers-cost-bank-of-tokyo-mitsubishi-3.html?printerFriendly=true>.

94. *Cf. infra* the text corresponding to notes 138-140.

95. The sanctions paid by *Credit Suisse AG* in 2009 related to multiple and systematic violations of economic sanctions in force against Iran, Libya, Burma, Sudan, and Cuba as well as OFAC's Specially Designated Nationals. Jason A. Burner, *The Tour de Fraud: What Foreign Banks Can Learn from the BNP Paribas Settlement*, 19 N.C. BANKING INST. 196 – 198 (2015). *See United States v. Credit Suisse AG*, No. CR-09-352, 2009 WL 4894467 (D.D.C., Dec. 16, 2009).

96. *Lloyds TSB Bank PLC* signed two deferred prosecution agreements with the DOJ and the District Attorney of the County of New York at the beginning of 2009 to avoid prosecution for violations of economic sanctions against Iran. *See United States v. Lloyds TSB Bank PLC*, No. CR-09-007 (D.D.C., Jan. 9, 2009) [hereinafter *Lloyds DPA*]; *Lloyds TSB Bank PLC*, MUL-4745344 (Dep't of the Treas., Off. of Foreign Assets Control) (*Lloyds Settlement Agreement*) (Dec. 22, 2009), available at https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/lloyds_agreement.pdf. *See also* Lee, Part I, *supra* note 1, at 669 – 674.

97. *See* Lee, Part I, *supra* note 1, at 681-684.

98. “The compliance function aims at identifying, evaluating, and controlling the risk of non-compliance of the company, in particular of the risk of judicial (specifically criminal), administrative or disciplinary sanction, financial loss, or infringement of the reputation, which arises out of non-compliance with specific provisions regulating the banking or financial activities, being them of legislative or regulatory nature, or professional or deontological norms, or enacted by the Executive.” EMMANUEL DAUD & JULIE FERRARI, GÉRER LE RISQUE PÉNAL EN ENTREPRISE 121 (2011) (transl. from French).

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THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 515

‘compliance program’ [. . .] and/or designate a specific individual, such as the chief compliance officer (CCO), with overall responsibility for compliance, who reports to the board of directors.”⁹⁹ But specific regulations may dictate more specific requirements. For instance, certain OFAC regulations oblige banks to implement internal procedures in order to identify suspicious accounts and transactions.¹⁰⁰ This control also involves the designation of a compliance officer who is responsible for the OFAC compliance program.¹⁰¹

No global firm would publicly deny or belittle the importance of an effective and efficient compliance office. And yet, statements made to that end—no matter how pompous—cannot contradict the fact that, more often than one may think, compliance offices are understaffed and their complaints to the board remain most times unheard. The French Bank BNP Paribas S.A. (BNPP) exemplified this fact before it was so publicly brought under rebuke in 2014.

In fact, in its Report on Environmental and Social Responsibility for 2007, BNPP praised its compliance office as a “key element” of its internal control system.¹⁰² According to BNPP, its compliance policy “meets the criteria of exhaustiveness and universality and the same highest standards are applied [. . .] in France and abroad [pursuant to] the most stringent of the regulations laid down by the laws of the various countries in which the [BNPP] Group has operations [. . .].”¹⁰³

From the operational standpoint, a set of local teams representing ninety-five percent of the function’s staff had to coordinate with a centralized office headed by a member of the executive committee under the direct supervision of the CEO.¹⁰⁴ Under this scheme, all employees, and especially those facing clients directly, acted as gatekeepers in detecting potential violations.¹⁰⁵ An escalation alerting procedure was in place consisting of both a permanent control system and periodic inspections.¹⁰⁶ While the operational staff was accountable for the risks generated by their own activities, “independent control functions—risk and compliance—[had the] primary responsibility [] to oversee the way in which risks are taken and managed by operational staff, particularly by taking a second look at certain

99. Agnes Bundy Scanlan & Catherine Purdon, *Compliance Program Management for Financial Services Institutions in Today’s Environment*, 62 BUS. LAW. 735, 735 (2006).

100. David Zaring, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1406 (2007), referring to 31 C.F.R. § 103.140 (2006).

101. *Id.*

102. BNP PARIBAS, REPORT ON ENVIRONMENTAL AND SOCIAL RESPONSIBILITY 82 (2007), stating that the “[c]ompliance function is one of the key elements of its internal control mechanism.”

103. *Id.*

104. *Id.*

105. *See id.*

106. The escalation procedure is triggered by an employee informing his/her superiors of a transaction that he/she thinks to be non-compliant. Then, through appropriate compliance teams and officers, the information climbs the company’s hierarchical structure to the top officers and the board of directors.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

516 THE INTERNATIONAL LAWYER

[VOL. 51, NO. 3

decisions [. . .].”¹⁰⁷ Adequate employee training was essential as well. According to the above-mentioned 2007 Report, BNPP provided compliance training to 82,000 employees, with an increase of thirty percent compared to 2006,¹⁰⁸ which it intensified throughout the decade.¹⁰⁹

Additionally, BNPP compliance policy expressly mandated financial security teams to take control over transactions affected by embargo measures in general. BNPP ensures that this control as well had been strengthened over time through appropriate instructions and “imperative guidelines.”¹¹⁰

Despite this seemingly reassuring scheme, “[t]he American guillotine has fallen” on BNPP.¹¹¹ A lengthy investigation brought by the DOJ and other U.S. governmental agencies led to the discovery of a massive number of violations of the economic sanctions enacted against Sudan, Iran, and Cuba.¹¹² Together with its Swiss subsidiary in Geneva, [BNPP].

conspired with banks and other entities located in or controlled by countries subject to U.S. sanctions, including Sudan, Iran and Cuba (“Sanctioned Entities”), other financial institutions located in countries not subject to U.S. sanctions, and others known and unknown, to

107. Jaeger, *supra* note 7, at 22.

108. Report on Environmental and Social Responsibility 2007, *supra* note 102, at 84.

109. BNP PARIBAS, 2012 CORPORATE SOCIAL RESPONSIBILITY REPORT (2012), at 37 (noting that “[b]etween September 2011 and August 2012, [BNPP’s] employees attended more than 138,000 training events on [, among other things,] financial embargoes . . .”).

110. Report on Environmental and Social Responsibility 2007, *supra* note 102, at 84 (stating that “[i]nstructions relating to the application of these embargoes lay down imperative guidelines for detecting and dealing with transactions by clients targeted by these measures, in accordance with the legislation in force. In light of the particularly sensitive political and regulatory climate in 2007, the mechanism for ensuring compliance with financial embargoes has been strengthened.”).

111. *Capital Punishment: France’s Largest Bank Gets Fined for Evading American Sanctions*, THE ECONOMIST, July 5, 2014.

112. *United States v. BNP Paribas S.A.*, No. 14 Cr. 460, 2015 WL 1962882 (S.D.N.Y., May 6, 2015). See Press Release, Dep’t of Just., BNP Paribas Sentenced for Conspiring to Violate the International Emergency Economic Powers Act and the Trading with the Enemy Act (May 1, 2015), available at <https://www.justice.gov/opa/pr/bnp-paribas-sentenced-conspiring-violate-international-emergency-economic-powers-act-and>. The text of the plea agreement between BNP Paribas S.A. (BNPP) and the DOJ is reported under the Government’s Memorandum in Support of the Court’s Acceptance of the Plea Agreement, *United States v. BNP Paribas S.A.*, No. 14 Cr. 460, 2014 WL 8815128 (S.D.N.Y., July 17, 2014). The plea agreement itself presents the Statement of Facts as Exhibit B (Statement of Facts). See *United States v. BNP Paribas S.A.*, Dep’t of Just., U.S. Att’y, S.D.N.Y (June 27, 2014) (Plea Agreement). All documents regarding the case, in particular the Information, the Plea Agreement, the Notice of Intent, the Statement of Facts and the Consent Preliminary Order of Forfeiture are available at the website <http://www.justice.gov/usao-sdny/pr/supporting-documents-us-v-bnp-paribas> (retrieved July 12, 2017). For a commentary of the case see Lee, Part II, *supra* note 1, at 748 – 762; Louis d’Avout, *Droit du commerce international*, 34 RECUEIL DALLOZ, 1967, 1967 – 1969 (Oct. 9, 2014); Burner, *The Tour de Fraud*, *supra* note 95, at 191; Kristina Daugirdas & Julian Davis Mortenson, *French Bank Pleads Guilty in Criminal Violations of U.S. Sanctions Law*, 108 AM. J. INT’L L. 826 (2014).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 517

knowingly, intentionally and willfully move at least \$8,833,600,000 through the U.S. financial system on behalf of Sanctioned Entities in violation of U.S. sanctions laws¹¹³

According to the DOJ, not only had BNPP deliberately disregarded the law by providing targeted countries with access to the U.S. financial system,¹¹⁴ but it had also tried to conceal these violations, attempting to evade the detection of its acts by the U.S. government.¹¹⁵ But how was this possible, with such an apparently well-structured and well-informed compliance office?

B. A FAILURE IN COMPLIANCE: THE EXAMPLE OF BNP PARIBAS

Cases such as BNPP bring forth key issues about the participation of the Chief Compliance Officer (CCO) and Chief Legal Officer (CLO) of foreign corporations in spotting and addressing OFAC compliance issues. In some cases, both figures were aware of the bank's illegal practices, but possessed no tools to effectuate a real change in the corporate conduct.¹¹⁶ In others, they sided with the business managers, who, in at least one instance, encouraged the legal office to continue the illegal practice.¹¹⁷ The former cases delineate issues of effectiveness and credibility of the compliance office internally; the latter question the actual independence of the office from the firm's managers. BNPP lacked both.

To begin with, one should underline that thousands of international business transactions with entities targeted with economic sanctions were deliberately performed, notwithstanding the knowledge of their illegality under U.S. laws and regulations and despite repeated government's

113. *United States v. BNP Paribas S.A.*, Statement of Facts, *supra* note 112, ¶ 14.

114. According to Assistant Attorney General Leslie R. Caldwell, by committing these violations "BNPP deliberately disregarded the law and provided rogue nations, and Sudan in particular, with vital access to the global financial system" Press Release, BNP Paribas Sentenced for Conspiring, *supra* note 112.

115. *Id.* ("BNPP provided access to billions of dollars to these sanctioned countries, and did so deliberately and secretly, in a way designed to evade detection by the U.S. authorities.")

116. In fact, "these personnel identified and warned about practices, but were not able on their own to effect changes in the practices." Lee, *Part I, supra* note 1, at 686, adding that "[t]his scenario presents a dilemma for a banking institution. The dilemma, indeed paradox, is that a strong compliance program can be self-defeating if it effectively monitors behavior and identifies problems, but its findings and warnings are then disregarded by the business units. Such a fact pattern supplies the prosecutors with indelible evidence that the institution in continuing the practices or activities was acting with the requisite knowledge and intent to support criminal prosecution. This dilemma can be addressed (though never wholly solved) by creating a culture and governance structure that empowers the compliance function itself to address the practices or requires the compliance function to escalate the issues to a more senior level for prompt resolution."

117. "[T]he business managers engaged in illegal conduct with the knowledge of the compliance and legal staff and, in the case of at least one institution, with their encouragement." *Id.* (concluding that "[t]hese constitute stark judgments about the compliance culture of the institutions involved.")

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

warnings. Thus, these transactions did not simply escape in-house control, but have been carefully executed with the knowledge of their illegality.

In BNPP, for example, the company not only covered the involvement of SDNs, but also removed the related information from payment messages and embroiled transactions with no other apparent business purpose than concealing the entities' names and nationality.¹¹⁸ Concealment endured for the entire period investigated by the DOJ, i.e. from 2004 to 2012, during which BNPP used all its efforts to deceive the filters installed to identify and block suspect transactions involving SDNs.¹¹⁹ When these filters identified potentially suspect transactions, BNPP agreed with its clients in sanctioned countries to avoid indicating the latter's names in the transactions processed in the U.S.¹²⁰ Another method consisted of exploiting unaffiliated banks, which were internally referred to as "satellite banks," to disguise the true origins of the transactions.¹²¹ These satellite banks operated for no other business purpose than assisting BNPP in evading U.S. economic sanctions.¹²²

On multiple occasions, various U.S. governmental agencies warned BNPP of the existence of these violations, but nevertheless the bank omitted to promptly react and desist. For example, as a result of a first warning issued in 2004, BNPP requested and obtained from its outside counsel in New York a memorandum suggesting a shift in clearance operations from a non-U.S.

118. The means and methods of the BNPP's conspiracy in violating U.S. laws are described in BNPP's Statement of Facts:

- (a) BNPP intentionally used a non-transparent method of payment messages, known as cover payments, to conceal the involvement of Sanctioned Entities in U.S. dollar transactions processed through BNPP New York and other financial institutions in the United States.
- (b) BNPP worked with other financial institutions to structure payments in highly complicated ways, with no legitimate business purpose, to conceal the involvement of Sanctioned Entities in order to prevent illicit transactions from being blocked when transmitted through the United States.
- (c) BNPP instructed the co-conspirator financial institutions not to mention the names of Sanctioned Entities in U.S. dollar payment messages sent to BNPP New York and other financial institutions in the United States.
- (d) BNPP followed instructions from co-conspirator Sanctioned Entities not to mention their names in U.S. dollar payment messages sent to BNPP New York and other financial institutions in the United States.
- (e) BNPP removed information identifying Sanctioned Entities from U.S. dollar payment messages in order to conceal the involvement of Sanctioned Entities from BNPP New York and other financial institutions in the United States.

Statement of Facts, *supra* note 112, ¶ 16. See also Lee, *Part II*, *supra* note 1, 750-751.

119. Statement of Facts, *supra* note 112, ¶ 21.

120. *Id.* ¶ 22.

121. *Id.* ¶ 23.

122. *Id.* ¶ 24.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 519

bank to a U.S. bank as a way to avoid sanctions.¹²³ BNPP executives resolved accordingly.¹²⁴

It did not take long for BNPP compliance and legal officers to realize that this shift was insufficient to make those transactions legal. But they continued allowing the transactions to take place,¹²⁵ and when they discussed the matter with the bank's executives, the latter dismissed the case and acted as if the discussion had never taken place.¹²⁶ The goal was, evidently, to preserve the longstanding relationship with clients in sanctioned countries, especially in Sudan.¹²⁷ At the time, the letters of credit issued by BNPP represented approximately one quarter of the country's exports and one fifth of its imports.¹²⁸ Although outside counsel warned that omitting relevant information from payment messages could entail the banks' criminal liability, illegal transactions continued, with BNPP processing \$6.4 billion with Sudan in 2007 alone.¹²⁹ Reiteration of the criminal conduct notwithstanding the warnings and the pending investigations also occurred in respect of Iran¹³⁰ and Cuba.¹³¹ BNPP then continued with cover transfers for long after its own compliance officers had denounced their illegality.¹³²

In addition, compliance officers suggested that—to circumvent the risk of economic sanctions enforcement—customers switch to another currency,

123. *Id.* ¶¶ 28 – 34. Outside counsel suggested that “[i]f a non-U.S. BNPP entity were to initiate a U.S. dollar payment to a payee domiciled in Cuba, Sudan or Iran through a U.S. bank not affiliated with BNPP, U.S. sanctions should not apply to BNPP (assuming no involvement by any U.S. person of BNPP), but U.S. sanctions would call for the payment to be frozen or blocked by the U.S. bank.” *Id.* ¶ 34. The Statement of Facts does not reveal the name of the law firm acting as outside counsel. *Id.* ¶ 30.

124. Statement of Facts, *supra* note 112, ¶ 30. In particular, “[i]n implementing the switch [. . .], BNPP relied on incorrect advice that outside counsel (“U.S. Law Firm 1”) provided, which suggested that BNPP may have been able to protect itself from being penalized by U.S. authorities if it conducted these prohibited transactions through another U.S. bank. This was memorialized in a legal memorandum in October 2004.” *Id.*

125. *Id.* ¶ 31. *See also* Lee, *Part II*, *supra* note 112, 753, noting that “[o]n several occasions senior compliance and legal personnel at BNPP Geneva raised concerns about BNPP’s business with Sudanese entities, but they were generally rebuffed with the indication that the Sudanese transactions had the ‘full support’ of management at BNPP Paris.”

126. Statement of Facts, *supra* note 112, ¶ 33.

127. *See id.* ¶ 37, remarking that “BNPP continued to process transactions involving Sudanese Sanctioned Entities—despite being well aware that its conduct violated U.S. law—because the business was profitable and because BNPP Geneva did not want to risk its longstanding relationship with Sudanese clients.”

128. *Id.* ¶ 19.

129. *See* Statement of Facts, *supra* note 112, ¶¶ 35–41. Outside counsel advised BNPP that “U.S. sanctions could apply to BNPP even when the transactions are processed by [a U.S. bank] instead of BNPP New York.” *Id.* ¶ 35.

130. *Id.* ¶¶ 45–46. In fact, “despite beginning its internal investigation in early 2010 at the request of U.S. law enforcement authorities, BNPP failed to provide the U.S. authorities with meaningful materials from BNPP Geneva until May 2013 and those materials were heavily redacted due to bank secrecy laws in Switzerland.” Lee, *Part II*, *supra* note 1, at 757.

131. Statement of Facts, *supra* note 112, ¶ 49.

132. *Id.* ¶¶ 51, 56.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

520 THE INTERNATIONAL LAWYER

[VOL. 51, NO. 3

mainly euros. This attempt, however, failed miserably as clients obviously resisted the change, so that ultimately most credit facilities continued to be processed in U.S. dollars.¹³³ Besides that, on occasion BNPP compliance officers in Paris had wondered if BNPP's practice was in line with U.S. laws and regulations; while some suspected it was not, others expressly recognized it was not.¹³⁴

BNPP's liability was aggravated by the fact that, at the time of its violations, precedent existed that made all the practices put in place by BNPP suspicious. The next paragraph discusses these precedents.

C. NOTHING DIFFERENT: THE PRACTICE OF OTHER FOREIGN BANKS

The inaccuracy in reporting suspicious activities, the incompleteness of the information relating to wire transfers, and the under-implementation of monitoring programs have been of interest to the U.S. government for a long time, even before September 11, 2001. But afterwards, such efforts intensified.¹³⁵

In early 2005, for example, Banco de Chile agreed with the Department of Treasury and the Federal Reserve Board to no longer allow unreferenced payment messages, and to precisely identify the sender or the beneficiary of a wire transfer.¹³⁶ This enforcement action by the Department of the Treasury resulted in an order for Banco de Chile to pay \$3 million in a civil

133. *Id.* ¶ 69 (“[d]espite the pressure from compliance personnel to convert the remaining Cuban Credit Facility into euros, BNP continued to receive U.S. dollar payments related to the facility until early 2010.”).

134. *Id.* ¶ 63. Moreover, a 2004 opinion issued by an American law firm advised that “any BNPP transaction with a Cuban counterparty cleared in the United States by any bank [. . .] would fall within the scope of the Cuba sanctions.” *Id.* ¶ 60. As before, the firm suggested to switch to a U.S. non-affiliated bank (an advice that, as it was lately discovered, was ill-grounded), but the advice went unheard as BNPP at the time processed almost 96% of its transactions via the BNPP office in New York. A second legal opinion was issued by the same law firm two years later that predicted “the risk of serious regulatory sanction[s]. . . .” *Id.* ¶ 57. And yet, instead of instructing the compliance offices accordingly, once again BNPP did exactly the opposite: a senior officer at BNPP Paris ordered the deletion of the e-mail containing the legal opinion and summoned his colleagues and staff to disregard it as “it was a draft memo and should not have been distributed to just anyone.” *Id.*

135. See *The USA Patriot Act and Due Diligence Requirements for Foreign Correspondence and Private Banking Accounts: Part II*, 2 J. PAYMENT SYS. 187 (2006).

136. Banco de Chile, New York Branch, No. 2005-2, AA-EC-05-09, 2005 WL 3967697 (Dep't of the Treas., Off. of the Comptroller of the Currency, Feb. 1, 2005) (Consent Order) (the bank committing to “a prohibition against accepting or remitting any wire which does not identify the sender or the beneficiary [so that] incoming wires which merely indicate ‘from one of our customers’ shall not be accepted.” *Id.* at *5.) Cease and Desist Order Issued Upon Consent Pursuant to the Federal Deposit Insurance Act, Docket Nos. 05-001-B-FR, 05-001-B-FRB (Fed. Res. Bd. of Governors) (Feb. 1, 2005). Suspicious activities have been detected also in respect of the New York branch of Arab Bank. Federal Branch of Arab Bank PLC, New York, No. 2005-14, AA-EC-05-12, 2005 WL 3967697, (Dep't of the Treas., Off. of the Comptroller of the Currency, Feb. 24, 2005).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 521

penalty for failing to monitor suspect transactions and making false statements to the bank's supervisors.¹³⁷ But instead of looking at the red flag raised by the case, global banks continued in their ordinary business, revealing what later turned out to be a regular pattern.

In late 2005, the Dutch ABN AMRO N.V. entered into an agreement with various agencies of the U.S. government for, *inter alia*, violations of economic sanctions against Iran and Libya. When, according to this agreement, ABN AMRO paid \$80 million to the U.S. government, the news spread that the overseas branches of the bank had manipulated the information in its transactions by concealing the SDNs involved.¹³⁸ This technique was already too well known to the investigators to pass unnoticed.¹³⁹ In this specific regard, the agreement signed by ABN AMRO with the U.S. government received significant attention by the press, so that its practice and the related treatment by U.S. authorities could hardly go unnoticed, serving as a warning for other banks.¹⁴⁰

In 2009 and 2012, two important settlements were entered into by non-American banks regarding OFAC sanctions. The first was the London Lloyds TSB Bank PLC, which forfeited \$350 million to the DOJ and the District Attorney for the County of New York, New York (DANY).¹⁴¹ Basically, Lloyds had had an internal policy of manipulating and deleting information from payment records on behalf of SDNs since 1995.¹⁴² These practices started to be questioned internally in 2002, after the enactment by the Financial Action Task Force (FATF) of Special Recommendation VII—a key provision for fighting terrorism financing and now also a best practice for international banking transactions—under which financial institutions were required to ensure full information for the funds transfers and the

137. Banco de Chile, New York Branch, No. 2005-140, AA-EC-05-84, 2005 WL 3967701 (Dep't of the Treas., Off. of the Comptroller of the Currency, Oct. 11, 2005) (Consent Order for Civil Money Penalty).

138. Order of Assessment of a Civil Money Penalty, Monetary Payment and Order to File Reports Issued Upon Consent, Docket No. 05-035-CMP-FB, 2005 WL 4158131, at *3 (Fed. Res. Bd. of Governors, Dec. 19, 2005).

139. Danforth Newcomb, *Non-U.S. Banks Are Target of Recent Economic Actions by U.S. Government*, 125 BANKING L. J. 468, 473 (2008) (noting that “the practice . . . of stripping names from transaction documents to conceal their . . . origin ha[d] already led to record-setting penalties . . . and could lead to more in the future for the unwary”). See also Paul L. Lee, *Compliance: Further Thoughts on a New Paradigm*, 122 BANKING L. J. 291, 308 (2005) (noting the “increasing[] enforcement actions” concerning amended payments).

140. Lee, *Part I*, *supra* note 1, 668.

141. See *supra* note 96 and accompanying text. See also Lee, *Part I*, *supra* note 1, at 669–674.

142. Settlement Agreement, *supra* note 96, ¶ 6. In fact, “Lloyds removed material data from payment messages in order to avoid detection of the involvement of OFAC-sanctioned parties by filters used by U.S. depository institutions. This allowed transactions to be processed by Lloyds’ U.S. correspondent banks that they otherwise could have blocked for investigations, or rejected pursuant to OFAC regulations. During the course of the conduct, Lloyds employees commonly referred to this process as ‘stripping.’ Lloyds’ criminal conduct was designed to assist its clients in avoiding detection by filters employed by U.S. banks because of United States economic sanctions. . . .” Exhibit A, *in* Lloyds DPA, *supra* note 96, ¶ 2.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

522 THE INTERNATIONAL LAWYER

[VOL. 51, NO. 3

related messages and to preserve such information as it related to the entire payment chain.¹⁴³ As a response, Lloyds' payment-processing unit wrongly assumed that FATF's recommendation did not apply to them,¹⁴⁴ and instructed their SDN clients on how to prevent detection by OFAC filters.¹⁴⁵ That same year, the Dutch bank ING Bank, N.V. ("ING") also entered into several deferred prosecution agreements with the DOJ, the District Attorney of New York, and OFAC for \$619 million relating to multiple breaches of sanctions against Iran, Libya, Sudan, and Myanmar.¹⁴⁶

The other paramount case of an ineffective compliance function is HSBC. In 2012 the Dutch subsidiary of British HSBC Bank ("HSBC"), together with its affiliate HSBC Bank U.S.A., N.A., paid the DOJ and the District Attorney of New York \$1.921 billion for alleged violations of U.S. economic

143. "Countries should take measures to require financial institutions, including money remitters, to include accurate and meaningful originator information (name, address and account number) on funds transfers and related messages that are sent, and the information should remain with the transfer or related message through the payment chain. Countries should take measures to ensure that financial institutions, including money remitters, conduct enhanced scrutiny of and monitor for suspicious activity funds transfers which do not contain complete originator information (name, address and account number)." FINANCIAL ACTION TASK FORCE (FATF), *FATF Special Recommendations on Terrorist Financing*, in FATF IX SPECIAL RECOMMENDATIONS 2, VII (2001). The FATF explains that the first purpose of this provision is "to assist [appropriate law enforcement and/or prosecutorial authorities] in detecting, investigating, prosecuting terrorists or other criminals and tracing [their] assets. . . ." FATF, REVISED INTERPRETATIVE NOTE TO SPECIAL RECOMMENDATION VII: WIRE TRANSFERS 1 (2008); see also JUNJI NAKAGAWA, INTERNATIONAL HARMONIZATION OF ECONOMIC REGULATION 309 (Jonathan Bloch & Tara Cannon trans., 2011) (considering Special Recommendation VII among the international best practices of money laundering prevention); Anand A. Shah, *The International Regulation of Informal Value Transfer Systems*, 3 UTRECHT L. REV. 193, 204 (2007); COMMONWEALTH SECRETARIAT, COMBATING MONEY LAUNDERING AND TERRORIST FINANCING: A MODEL OF BEST PRACTICE FOR THE FINANCIAL SECTOR, THE PROFESSIONS AND OTHER DESIGNATED BUSINESSES 151 (2005) (commenting on Special Recommendation VII).

144. Exhibit A, in Lloyds DPA, *supra* note 96, ¶ 29.

145. In 2003, Lloyds' Group Executive Committee received by the financial crime unit a memorandum highlighting the risks associated with this practice, but again, instead of halting it, the firm spent six months discussing the memorandum's implications. Lloyds Settlement Agreement, *supra* note 96, ¶¶ 11–13.

146. See *United States v. ING Bank, N.V.*, No. CR-12-00136 (D.D.C., June 12, 2012); Deferred Prosecution Agreement, *United States v. ING Bank, N.V.*, No. CR-12-00136, 2012 WL 12957113 (June 12, 2012) (ING Bank DPA); see also *ING Bank, N.V.*, MUL-565595 (Dep't of the Treas., Off. of Foreign Assets Control) (ING Bank Settlement Agreement) (June 11, 2012), available at https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/06122012_ing_agreement.pdf. ING Bank, N.V. was investigated by both the DOJ and the New York District Attorney in relation to the "intentional manipulation and deletion of information about U.S.-sanctioned parties in more than 20,000 financial and trade transactions routed through third-party banks located in the United States between 2002 and 2007." The case involved designated entities from Iran, Myanmar, Sudan, and Libya. *Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and ING Bank, N.V.*, U.S. DEP'T OF THE TREASURY (June 12, 2012, 11:47 AM), <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20120612.aspx>.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 523

sanctions against Cuba, Iran, Libya, Sudan and Burma.¹⁴⁷ In relation to this case, the Sub-commission on Investigations of the U.S. Senate opened an enquiry on HSBC's money laundering policy and its role in supplying sanctioned entities with access to the U.S. financial system.¹⁴⁸ During the investigation, the Sub-commission provided evidence that the bank's compliance office was aware of the violations but lacked prompt and effective reaction.¹⁴⁹ Like in *Lloyds*, HSBC's violations concerned cover payments and instructions from and to SDNs to circumvent the U.S.

147. Under a host of deferred prosecution agreements, HSBC Bank and its affiliates agreed to forfeit \$1.256 billion to the DOJ (which satisfied \$375 million assessed by OFAC), \$500 million to the Office of Comptroller of the Currency (OCC) and \$165 million to the Federal Reserve Board. See *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y., Dec. 11, 2012) (HSBC DPA), available at http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/HSBC_1.pdf (retrieved July 12, 2017); HSBC, MUL-615225 (Dep't of the Treas., Off. of Foreign Assets Control) (HSBC Settlement Agreement) (Dec. 11, 2012), available at https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121211_HSBC_Settlement.pdf. See also Attachment A, in HSBC DPA, *supra* note 147, ¶ 63 (stating that “[t]he total value of OFAC-prohibited transactions for the period of HSBC Group’s review, from 2000 through 2006, was approximately \$660 million. This includes approximately \$250 million involving Sanctioned Entities in Burma; \$183 million on behalf of Sanctioned Entities in Iran; \$169 million on behalf of Sanctioned Entities in Sudan; \$30 million on behalf of Sanctioned Entities in Cuba; and \$28 million on behalf of Sanctioned Entities in Libya”); HSBC Bank USA, N.A., No. 2012-261, AA-EC-2012-140 (Dep't of the Treas., Off. of the Comptroller of the Currency, Dec. 11, 2012) (Consent Order), available at <http://www.occ.gov/news-issuances/news-releases/2012/nr-occ-2012-173a.pdf>; HSBC Bank USA, N.A., No. 2015-063 (Dep't of the Treas., Off. of the Comptroller of the Currency, June 16, 2015) (Consent Order for the Assessment of a Civil Money Penalty), available at <http://www.occ.gov/static/enforcement-actions/ea2015-063.pdf>; Order of Assessment of a Civil Money Penalty Issued upon Consent, Docket Nos. 12-062-CMP-FB, 12-062-CMP-HC (Fed. Res. Bd. of Governors, Dec. 11, 2012), available at <https://www.federalreserve.gov/newsevents/press/enforcement/enf20121211a1.pdf>; Order to Cease and Desist Issued upon Consent, Docket No. 12-062-B-FB (Fed. Res. Bd. of Governors) (Dec. 11, 2012), available at <https://www.federalreserve.gov/newsevents/press/enforcement/enf20121211a2.pdf>.

148. “HSBC Group Compliance knew of [HSBC USA’s] insistence on full transparency for . . . the practice of HSBC affiliates to conceal the Iranian transactions sent through their U.S. dollar correspondent accounts at [HSBC USA]. HSBC Group Compliance, as well as other senior HSBC Group executives, allowed the HSBC affiliates to continue to engage in these practices, which even some within the bank viewed as deceptive, for more than five years without disclosing the extent of the activity to [HSBC USA, N.A.]. The bank documents show that, from 2000 to 2005, the practice of altering . . . documentation was repeatedly brought to the attention of HSBC Group Compliance, including by [HSBC Europe] personnel who objected to participating in the alteration of documents and twice announced deadlines to end the activity. Despite receiving this information, HSBC Group Compliance did not stop HSBC affiliates from sending concealed Iranian transactions through [HSBC USA’s] accounts until the bank decided to exit Iran altogether in 2007.” PERMANENT SUBCOMM. ON INVESTIGATIONS, U.S. SENATE, U.S. VULNERABILITIES TO MONEY LAUNDERING, DRUGS, AND TERRORIST FINANCING: HSBC CASE HISTORY 114 (July 17, 2012) (U.S. Senate Subcomm. Rep.).

149. *Id.*; see also Christopher Wieman, *Money Laundering*, 52 AM. CRIM. L. REV. 1357, 138–82 (2015) (discussing the penalties applied to HSBC and BNPP and “their role in money laundering schemes”).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

government's filters.¹⁵⁰ At the time, HSBC's compliance function was so dramatically understaffed, basically for cost-saving purposes,¹⁵¹ that only four employees were supposed to review the 13,000 to 15,000 suspicious transactions that the bank carried out every month.¹⁵²

All attempts by the bank to remedy or regulate compliance projects failed miserably. For example, in 2003 HSBC auditors raised with the compliance office the question of certain transactions with Iran that reported the ordering party as "selves."¹⁵³ The compliance office opened an investigation and found that the purpose of this practice was to prevent OFAC's intervention and to circumvent the filters in place.¹⁵⁴ HSBC management, however, refused to implement the internal protocol the compliance office created to ensure the complete disclosure of suspect transactions.¹⁵⁵ Moreover, in 2005, HSBC's compliance office adopted a new global compliance policy that prohibited corporate officials from performing transactions that were subject to OFAC sanctions.¹⁵⁶ Such a general prohibition was nevertheless accompanied by a series of exceptions that ultimately hindered the effective respect of OFAC mandates, allowing the continuation of the covering practice as a result.¹⁵⁷ Also, the policy was intended to apply only to U.S. dollar transactions but continued to allow the execution of non-U.S. dollar business with countries and persons that were prohibited according to the OFAC list.¹⁵⁸ Finally, to address the risk of infringing U.S. laws notwithstanding the new policy, HSBC suggested to discuss with clients verbally, avoiding leaving any written record.¹⁵⁹ Despite the attempts to strengthen the internal compliance policy, from 2001 to 2007 HSBC processed approximately 25,000 OFAC sensitive transactions

150. Lee, *Part II, supra* note 1, at 737. According to the Statement of Facts attached to the DPA, HSBC failed to conduct the due diligence on suspicious transactions by setting the related monitoring system (called Customer Account Monitoring Program, "CAMP") in a way to detect only high-risk transactions, so that \$200 trillion in wire transfers from 2006 to 2009 went totally undetected. Attachment A, *in HSBC DPA, supra* note 147, ¶ 17.

151. Attachment A, *in HSBC DPA, supra* note 147, ¶ 26 (mentioning the management's "desire to save costs").

152. *Id.* ¶ 27 (adding that "[i]n contrast, following remedial measures undertaken by HSBC, HSBC Bank USA currently has approximately 430 employees reviewing suspicious wire alerts").

153. HSBC Settlement Agreement, *supra* note 147, ¶ 6.

154. *Id.*

155. Lee, *Part II, supra* note 1, 739.

156. S. K. Green, *GCL 050047 - Compliance with Sanctions* (Jul. 28, 2005), *in* EXHIBIT'S HEARING ON U.S. VULNERABILITIES TO MONEY LAUNDERING, DRUGS 339 (2012), *available at* goo.gl/1uH7MF.

157. *See* HSBC Settlement Agreement, *supra* note 147, ¶ 8; *see also* U.S. Senate Subcomm. Rep., *supra* note 149, at 156 (noting that the new compliance policy "allowed HSBC affiliates to continue to use cover payments when sending them through U.S. accounts for processing, which meant the transactions would continue to circumvent the OFAC filter and any individualized review by the recipient U.S. bank, including [HSBC U.S.]").

158. U.S. Senate Subcomm. Rep., *supra* note 149, at 156.

159. *Id.* at 157 ("[v]erbal discussions with affected clients would be preferable").

with Iran, amounting to \$19.4 billion.¹⁶⁰ Of these figures, more than eighty-five percent were undisclosed.¹⁶¹

Understaffing was another serious and enduring problem for HSBC. The DOJ strongly reproached HSBC in this respect.¹⁶² In 2009, the bank underwent an examination by the Office of the Comptroller of the Currency (OCC), that recommended an increase in the compliance personnel.¹⁶³ A few months later, however, the U.S. HSBC Director for Specialized Compliance announced that HSBC was still not compliant with OFAC regulations.¹⁶⁴ In 2011, another report from the OCC found deficiencies in HSBC worldwide with its OFAC compliance program that was due to the lack of information sharing within the group.¹⁶⁵ The DPA makes clear that at the level of HSBC Holdings, “a philosophy of ‘HSBC does not “air the dirty linen of one affiliate with another”’ defined the approach to compliance.”¹⁶⁶

All these cases clearly illustrate that, while the compliance officers of the targeted banks were fully aware of the violations of U.S. economic sanctions, they either failed to act for lack of implementation of the warnings from management or sided with the latter in covering OFAC-sensitive transactions. Either way, the consequences for the banks have been disastrous. Besides having to admit their failures and pay large amounts to the U.S. government, these banks were also obliged to re-engineer their compliance function to meet U.S. standards and practices, marking eventually the hegemony of the United States in the field of compliance.

III. Correcting Compliance Failures through American Law

This Part examines the reforms that the targeted banks put into place as a result of the agreements entered into with the U.S. government. Even though many of these developments are still ongoing and under a monitoring process, it is fair to say that such reforms changed the structure and philosophy underlying compliance offices of non-American banks (section A). Moreover, it seems plausible to claim that an Americanization of compliance, although still embryonic, is currently underway. Indeed, if European bank Deutsche Bank is reported to have formed the first compliance department of a bank in 1992, the current processes and

160. *Id.* at 166.

161. *Id.*

162. Memorandum and Order, *United States v. HSBC Bank USA, N.A. and HSBC Holdings PLC* at 17, No. CR-12-763 (July 1, 2013) (HSBC Order) (stating that “HSBC Bank USA failed to provide adequate staffing and other resources to maintain an effective [anti-money laundering] program”).

163. U.S. Senate Subcomm. Rep., *supra* note 149, at 181.

164. *Id.*

165. *See id.* at 182.

166. HSBC Order, *supra* note 162, at 17.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

526 THE INTERNATIONAL LAWYER

[VOL. 51, NO. 3

structure of the compliance function of European banks are shaped mostly by American regulatory requirements and sanctions (section B).¹⁶⁷

A. CORPORATE COMPLIANCE OF FOREIGN BANKS AND DPAs

To see how largely corporate compliance of foreign banks is affected by U.S. economic sanctions, let it suffice to mention that, pursuant to—or as a condition for—the agreements they entered into with the U.S. prosecutors, those sanctioned non-American banks have had to restructure and reorganize their whole compliance policies and processes in line with American law. As Peter Kurer reports, a number of banks involved in criminal prosecutions had to agree, as part of a DPA or a similar agreement, to a structural separation of the legal and compliance function.¹⁶⁸ Indeed, corporate compliance has become an organizational structure of corporations whose regulation stems not simply from the law applicable to corporate matters but also from agreements with the governmental agencies themselves. In fact, the various DPAs entered into with the DOJ commit firms to heavy burdens in terms of restructuring, staffing, and empowering their compliance officers.

The most relevant example in this respect is the DPA concluded between HSBC and the DOJ.¹⁶⁹ In reaching an agreement, the DOJ took into consideration, among other factors, HSBC's extensive actions—for which it spent over \$290 million—to remedy the bank's failures in money laundering policy.¹⁷⁰ As stated in the Agreement, HSBC Bank USA and HSBC Group's management undertook significant efforts to improve “tone from the top” and “ensur[e] that a culture of compliance” gains traction within the institution.¹⁷¹ These efforts aimed at improving the bank's money laundering and OFAC compliance programs.¹⁷² As we will show, the adopted remedial measures aimed at reforming its compliance programs involved deep changes in the company's structure and organization.¹⁷³

167. Christoph E. Hauschka, *Grundlagen der Compliance-Organisation*, in *IN-HOUSE COUNSEL IN INTERNATIONALEN UNTERNEHMEN* 205, 205 (Sylvie Hambloch-Gessin et al. eds., 2010).

168. Kurer, *supra* note 73, at 146.

169. See generally *supra* notes 147–166.

170. Attachment A, in HSBC DPA, *supra* note 147, ¶ 81.

171. *Id.*

172. *Id.* These considerations are in line with the U.S. Sentencing Guidelines under which the existence of an effective compliance program may lead to preclude a criminal prosecution or in any case to a sentence downgrade if the company is convicted for a crime perpetrated by one of its agents. See U.S. SENTENCING COMMISSION, *GUIDELINES MANUAL* § 8C2.5(f) (2016); see also Philip A. Wellner, *Effective Compliance Programs and Corporate Criminal Prosecutions*, 27 *CARDOZO L. REV.* 497 (2006).

173. Richard Gruner once predicted that the development of compliance programs would broaden the function and influence of the Chief Legal Officer (CLO) within the corporation. See Richard S. Gruner, *General Counsel in an Era of Compliance Programs*, 46 *EMORY L.J.* 1113, 1113–16 (1997). In this article we observe that the compliance reforms corporations implement in the follow-up of DPAs together with a dramatic shift to a risk approach in addressing legal

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 527

Regarding staffing, HSBC North America and HSBC Holdings appointed a new leadership team and, for the latter, even a new CEO, Chairman, Chief Legal Officer, and Head of Global Standards Assurance.¹⁷⁴ Moreover, “[a]s a result of its [money laundering] violations and program deficiencies, HSBC North America and HSBC Bank USA ‘clawed back’ deferred compensation (bonuses) for a number of their most senior [anti-money laundering] and compliance officers, to include the Chief Compliance Officer, [anti-money laundering] Director and Chief Executive Officer.”¹⁷⁵ In line with these developments, HSBC Group also restructured its bonus system according to accomplishment of compliance targets.¹⁷⁶ Indeed, global standards, notably risk and compliance measures, were given a minimum weight of twenty-five percent in the scorecard used to assess performance of HSBC’s Group management board members.¹⁷⁷

Furthermore, the DOJ took into account the tenfold increase of HSBC Bank USA’s anti-money laundering staffing, which went from ninety-two full-time employees and twenty-five consultants in January 2010 to approximately 880 full-time employees and 267 consultants in May 2012.¹⁷⁸ HSBC Group also appointed new senior officers. “Eighteen of the top twenty-one most senior officers” were hired “since the beginning of 2011.”¹⁷⁹ By 2014, HSBC Group counted 7,000 employees working in risk and compliance, which is around ten percent of the bank’s total staff.¹⁸⁰ This example was followed by other European banks such ING,¹⁸¹ Standard Chartered,¹⁸² and CommerzBank,¹⁸³ which also agreed to remedial recruitment as part of the DPA with the U.S. prosecution authorities.

concerns have diminished the CLO function and empowered the CCO’s scope of action and autonomy.

174. Attachment A, *in* HSBC DPA, *supra* note 147, at 27, 29.

175. *Id.* ¶ 81(b).

176. *Id.* ¶ 81(b, e–g).

177. HSBC, HSBC REMUNERATION PRACTICES AND GOVERNANCE 5–6 (2018), *available at* <https://goo.gl/E3Wcwb> (stating also that “[r]isk and compliance is a critical part of the performance rating and variable pay assessment process”).

178. Attachment A, *in* HSBC DPA, *supra* note 147, ¶ 81(d).

179. *Id.* ¶ 81 (g).

180. Margot Patrick, *HSBC Third-Quarter Earnings: Key Takeaways*, THE WALL STREET J. (Nov. 3, 2014), <https://blogs.wsj.com/moneybeat/2014/11/03/hsbc-third-quarter-earnings-key-takeaways/>.

181. Dutch bank ING agreed in its DPA to expand its compliance program and double the number of staff in the compliance risk management function. *See United States v. ING Bank, N.V.*, No. CR-12-00136 (D.D.C., June 12, 2012) ¶ 74(a).

182. British Bank Standard Chartered agreed to “[s]ubstantially increasing personnel and resources devoted to sanctions compliance.” *See United States v. Standard Chartered Bank*, No. CR-00-262, ¶ 107(b) (D.D.C., Dec. 10, 2012) (Standard Chartered DPA).

183. CommerzBank’s Global Head of Compliance acknowledged a shortage of compliance personnel in Frankfurt to deal with requests for information worldwide. As a consequence, the bank has since more than doubled its U.S. based compliance staff. *See United States v. CommerzBank AG, CommerzBank AG New York Branch*, No. CR-00-031, ¶ 86 (D.D.C., Mar. 12, 2015).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

Regarding structural transformations, HSBC Group converted the Head of HSBC Group Compliance position to a Group General Manager and replaced the individual serving as Head of HSBC Group Compliance, assigning him with new responsibilities, such as the direct oversight over every compliance officer globally.¹⁸⁴ As a consequence, accountability, reporting lines and escalation now lead to and stem from the HSBC group compliance.¹⁸⁵ Finally, these transformations have been accompanied with the hire of more senior personnel. For instance, the Head of HSBC Group Compliance is nowadays one of the fifty most senior employees at HSBC globally.¹⁸⁶

Moreover, the compliance function was modified with the aim of giving it a “stronger voice,” “real independence” and an “effective enterprise-wide compliance risk management program.”¹⁸⁷ In this sense, HSBC has undertaken to implement uniform compliance global standards,¹⁸⁸ and has reorganized its U.S.-based anti-money laundering department. For instance, material or systemic anti-money laundering control that is contrary to its global standards and is “reported by the Regional and Global Business Compliance heads are now shared with all other Regional and Global Business Compliance heads facilitating horizontal information sharing.”¹⁸⁹ Through this reform, HSBC gave to compliance the voice and authority it was previously lacking.

If it is true that the organization of the compliance function varies widely across industries and even within the banking industry itself, HSBC’s reforms were clearly designed to strengthen the reporting structure and to elevate the status of compliance within the institution, as per the recommendations and agreements reached in the DPA.¹⁹⁰ In particular,

184. Attachment A, in HSBC DPA, *supra* note 147, ¶ 81(e–f).

185. *Id.*

186. *Id.* ¶ 81(e).

187. “Other lessons initially identified in the case studies in Part I are affirmed by the case studies in Part II. The need for a stronger ‘voice’ for the compliance function is affirmed by virtually every case study in Part II as is the need for real independence of the compliance function. Another lesson learned from the case studies in Part II is the importance of an effective enterprise-wide compliance risk management program. In several cases, for example, the Dubai offices of foreign banks appeared to be running their own operations aiding Iranian banks. In other cases, admittedly, the Dubai offices were simply using the same procedures that were codified in head office operating manuals. In still other cases, the head office of a foreign bank promulgated a directive on OFAC compliance, but with little follow-up to determine whether the directive was in fact being observed in its various offices. An empowered role for the compliance function is one that the international supervisory bodies have declaimed for more than a decade.” Lee, *Part II*, *supra* note 1, at 766.

188. Attachment A, in HSBC DPA, *supra* note 147, ¶ 81(c).

189. *Id.* ¶ 81(h).

190. Most banks have today strong independent compliance organizations but that reporting lines are not always uniform. Indeed, the institutional answer to the question as to whom should the chief compliance officer (CCO) report, or the chief legal officer if the functions are not fully separate, varies widely. The possibilities include reporting to the chief executive officer (CEO), the audit committee, the chief operating officer (COO), the chief risk officer

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 529

HSBC implemented these reforms by: “(i) separating the legal and compliance departments; (ii) requiring that the anti-money laundering Director report directly to the Chief Compliance Officer; and (iii) providing that the [anti-money laundering] Director regularly report directly to the Board and senior management about [HSBC’s] . . . anti-money laundering . . . program.”¹⁹¹ Finally, following the footsteps of American commercial banks such as Citibank and Wells Fargo, HSBC’s CCO now reports directly to the Chief Risk Officer (CRO), instead of the Chief Legal Officer (CLO).¹⁹²

The case of BNPP represents another example of the Americanization of compliance, whereby the bank made changes in the organization and processes of its office and programs after facing criminal prosecution in the United States. Under a separate Memorandum of Understanding with the New York State Department of Financial Services (NYDFS), BNPP undertook “to install an independent consultant . . . on site at the New York Branch to conduct a review of the . . . OFAC compliance programs, policies and procedures in place at the Branch.”¹⁹³ Moreover, a cease and desist order issued by the Federal Reserve and the French financial authority (Autorité de Contrôle Prudentiel et de Résolution) engaged the bank to submit “an acceptable compliance program, including the names of key managers and a timetable for implementation, to ensure compliance with the OFAC Regulations by BNP Paribas’s global business lines.”¹⁹⁴ Additionally, under a separate cease and desist order, the French bank was prohibited from re-employing as a consultant certain individuals who took part in the

(CRO), or directly to the board if the CCO sits on the executive body at the same level of the chief legal officer. By way of example, Kurer shows that in JP Morgan the CCO reports to the COO, in UBS to the CRO and in Goldman Sachs to the board. Kurer, *supra* note 73, at 143. In a broader and separate study across industries, Tanina Rostain provides empirical data about the reporting lines of CLOs. She notes that if most general counsels continue to report to the CEO, an increasing number of them now report to the CFO, which is sometimes seen as a disadvantage. Indeed, this precludes direct access to the board through the formal structure of the corporation and compels CLOs to use informal networks to get their message across to the board. See Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 473 (2008). In our view, these evolutions together point to the fact that in the short term CCOs will gain a more preponderant role in corporate management to the detriment of CLOs.

191. HSBC DPA, *supra* note 147, ¶ 5(e).

192. Kurer, *supra* note 73, at 143. These cases contradict the earlier findings of Tanina Rostain who observed in her case studies that CCOs generally report to CLOs, except, of course, when the CLO combines both functions. See Rostain, *supra* note 190, at 481.

193. BNP Paribas, S.A. New York Branch, ¶ 56 (N.Y. Dep’t of Fin. Servs., June 30, 2014) (Consent Order Under New York Banking Law § 44), *available at* <http://www.dfs.ny.gov/about/ea/ea140630.pdf>.

194. Cease and Desist Order Issued Upon Consent Pursuant to the Federal Deposit Insurance Act § 1, Docket No. 14-022-B-FB, at 4–5, (Fed. Res. Bd. of Governors & Autorité de Contrôle Prudentiel et de Résolution) (June 30, 2014), *available at* <https://www.federalreserve.gov/newsevents/press/enforcement/enf20140630a2.pdf>.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

530 THE INTERNATIONAL LAWYER

[VOL. 51, NO. 3

violations of U.S. economic sanctions.¹⁹⁵ This latter situation brings to mind the case of ING Bank, N.V., which agreed with the DOJ to implement, as a remedial measure, the institution of disciplinary proceedings against more than sixty employees involved in the violation of U.S. economic sanctions.¹⁹⁶

B. THE COMPLIANCE MONITOR AND THE AMERICANIZATION OF COMPLIANCE OFFICES

In the new cooperative model of prosecuting violations to U.S. economic sanctions, monitoring has become an essential part of the process of improving corporate compliance programs. It is the only mechanism that allows confirming that the conditions contained within the agreements with the U.S. government have been met and that future violation will not take place. For this reason, as a condition of a DPA or a conditional discharge in plea agreements, the DOJ and United States' Attorneys often demand a monitor to oversee the company's compliance with U.S. anti-money laundering laws and U.S. sanctions laws.¹⁹⁷ Some banks, such as BNPP and HSBC, were subjected to post-settlement independent monitoring for several years.

In the plea agreement, BNPP agreed as a requirement to its conditional discharge to pay and hire a monitor imposed by the Federal Reserve or the DFS for a period of three years.¹⁹⁸ This monitor would communicate to the DANY any report filed with the Federal Reserve or DFS.¹⁹⁹ Similarly, after signing the settlement with HSBC, the DOJ appointed former New York County prosecutor Michael Cherkasky to be HSBC Compliance Monitor for a period of five years at the expenses of the bank. Mr. Cherkasky was tasked to "evaluate . . . the effectiveness of the internal controls, policies and procedures of HSBC Holdings and its subsidiaries."²⁰⁰ He filed his first full-year report with the DOJ in January 2015:

195. Order to Cease and Desist and Order of Assessment of a Civil Money Penalty Issued Upon Consent Pursuant to the Federal Deposit Insurance Act, as Amended § 2, Docket Nos. 14-022-B-FB, 14-022-CMP-FB, (Fed. Res. Bd. of Governors) (June 30, 2014), *available at* <https://www.federalreserve.gov/newsevents/press/enforcement/enf20140630a1.pdf>.

196. As a result, "[s]eventeen of those employees were disciplined for their conduct with a reprimand or sanction letter; three were forced to retire; and seven were terminated. Several employees under scrutiny left the bank before disciplinary decisions had been rendered." Exhibit A, *in* ING Bank DPA, *supra* note 146, ¶ 74(b).

197. *See, e.g.*, HSBC DPA, *supra* note 147, ¶ 9, at 15.

198. *See* Plea Agreement, *supra* note 112, ¶¶ 11–12.

199. *See id.*

200. Attachment B, *in* HSBC DPA, *supra* note 147, ¶ 1; *see also* Lee, *Part II*, *supra* note 1, at 742 (stating that "HSBC was required to retain an independent monitor acceptable to the DOJ to oversee its compliance with U.S. anti-money laundering laws and U.S. sanctions laws for five years"). A few months later, the DOJ filed with the district court the name of Michael Cherkasky as "independent compliance monitor for HSBC Holdings plc." Letter from the U.S. Attorney's Office to Judge John Gleeson, *United States v. HSBC Bank USA, N.A. and HSBC Holdings plc*, No. CR-12-763 (E.D.N.Y., June 5, 2013), *available at* http://www.complinet.com/net_file_store/new_editorial/1/e/Letter_-_HSBC.pdf.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 531

The critical, 1,000-page report, which summarizes HSBC's first year under a court-appointed monitor, raises doubts about how effective the government's use of deferred and non-prosecution agreements is in reining in wrongdoing and changing culture at the world's largest banks. . . . The report cites a litany of problems with the bank's reforms and compliance procedures, finding that the pace of change is inadequate, said the people, who asked not to be named because the report isn't public. In at least one instance, a bank manager shouted at an internal auditor who was critical of his work. In another example, the monitor discovered that documents justifying a decision to resolve a client alert were created after the fact although they were presented as being contemporaneous. Meanwhile, controls in countries with high levels of financial risk, such as Oman and the Philippines, are inadequate, according to the people.²⁰¹

Therefore, while DPAs are on the rise, the next challenge for U.S. authorities lies in having a transparent and effective monitoring system. Indeed, as Professor Garrett explains, “[k]eeping implementation of corporate deals in the dark” may in the end “harm [] the process immeasurably.”²⁰² In his view, the criticisms of lenient deals with banks in particular have made clear that compliance is problematic and, therefore, that “the efforts of monitors, whether successful or not, [are] all the more crucial to the public interest.”²⁰³

Another emerging concern regarding corporate monitors lies in the extent of their powers inside the corporation. In the exercise of their monitoring role, they have already become the “Trojan horses” shaping the compliance function of foreign banks in accordance with U.S. regulatory standards. But their effective mandate goes well beyond that monitoring function.²⁰⁴ As a U.S. district judge noticed, a corporate monitor “now acts not only as

201. Greg Farrell, *HSBC Falls Short on Compliance, Monitor Said to Report*, BLOOMBERG (March 30, 2015, 2:10 PM), <https://www.bloomberg.com/news/articles/2015-03-30/hsbc-falls-short-on-compliance-monitor-said-to-report>. Regarding the publicity of monitor's report, the question is now being discussed before the Second Circuit Court of Appeals. In 2015, Hubert Dean Moore wrote a letter to Judge John Gleeson asking to see a copy of the HSBC monitor report arguing that the public has the same right to see a compliance monitor's report tracking HSBC's efforts to combat money laundering as it would a plea deal. After the Judge ruled the release of the report—with redactions—both HSBC and the DOJ appealed that decision. The Appeals Court is currently examining the submissions. See *The Battle to Make the HSBC Monitor Report a Public Document*, CORPORATE CRIME REPORTER (Nov. 15, 2016, 12:17 PM), available at <http://www.corporatecrimereporter.com/news/200/the-battle-to-make-the-hsbc-monitor-report-public/>. See also Brandon Garret, *The Public Interest in Corporate Monitorships: The HSBC Case*, OXFORD BUS. L. BLOG (Nov. 16, 2016), <https://www.law.ox.ac.uk/business-law-blog/blog/2016/11/public-interest-corporate-monitorships-hsbc-case> (agreeing with the judge's analysis and highlighting the public interest in corporate monitorships generally).

202. Garret, *supra* note 201.

203. *Id.*

204. Monitors “are charged primarily with monitoring compliance with the relevant settlement agreement, [and they] are also tasked with overseeing and, sometimes even implementing, the

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

532 THE INTERNATIONAL LAWYER

[VOL. 51, NO. 3

financial watchdog . . . but also as an overseer who . . . [may cause] vast improvements in the company's internal controls and corporate governance."²⁰⁵

Actually, corporate monitors might act either as simple corporate supervisors or, more proactively, as agents of change, impacting the work of boards of directors and of top managers on a daily basis. More than the fact of having access to the corporation's entire property, information, and documents, which is granted to them by the settlement agreements, corporate monitors are entitled to inform the prosecutors of any breach of the settlement agreement or additional violation of law—a task that enlarges their role considerably. Obviously, with the increasing practice of agreements with the DOJ and other enforcement agencies, the powers of the monitors have been strengthened proportionally, to the point that some scholars have dubbed them as “the new corporate czar[s],” whose powers exceed even those of CEOs and board of directors.²⁰⁶

In targeted firms, compliance is now designed according to the American conception of the corporate task. Indeed, the firms that reform their compliance pursuant to the instructions of U.S. government de facto introduce a peculiarly American element in their corporate practice. As the French professional monitor Laurent Cohen-Tanugi states in this respect:

The culture shock, and indeed, the conflict of laws created by the confrontation of non-American persons with these realities has nothing to do with an extraterritorial application of American law, but underscores the necessity for corporations and executives doing business in the United States to be thoroughly familiar with the rules of the game and the country's legal culture.²⁰⁷

As a consequence, an Americanization of compliance functions and related executive positions in foreign banks is underway. As such, only three of the ten largest European banks by total assets²⁰⁸ employ a compliance officer, compliance committee chairman or head of compliance with no training or

process necessary for making whole those that the organization's misconduct has injured.” Veronica Root, *Modern-Day Monitorships*, 33 YALE J. REG 109, 127 (2016).

205. *Security Exchange Commission v. Worldcom, Inc.*, 273 F.Supp.2d 431, 432 (S.D.N.Y., July 7, 2003).

206. See generally Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1727 (2006).

207. Cohen-Tanugi, *supra* note 4, at 6.

208. The ten largest European Banks by assets are said to be in descending order: HSBC, BNP Paribas, Crédit Agricole, Deutsche Bank, Barclays, Société Générale, Banco Santander, Groupe BPCE, Lloyds and Royal Bank of Scotland (RBS). The first seven are also part of the twenty largest banks worldwide. Their global headquarters are located in four different countries: France (4), United Kingdom (4), Germany (1), and Spain (1). See Top 100 Banks in the World, BANKS AROUND THE WORLD, <http://www.relbanks.com/worlds-top-banks/assets> (last updated Apr. 2, 2018) (listing the largest banks in Europe and worldwide).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 533

previous experience in the United States whatsoever,²⁰⁹ namely Société Générale,²¹⁰ BNP Paribas,²¹¹ and RBS²¹². The Americanization of the compliance offices of foreign companies expands even beyond banks and includes other industries and legal services. French transport giant Alstom, which recently struck a multi-million-dollar deal for its power business with American company General Electric, restructured its compliance office and hired a fully trained American lawyer as CCO.²¹³ Similarly, the Paris office of New York-based law firm Debevoise & Plimpton hired former U.S. Federal prosecutor and Columbia trained lawyer Frederick T. Davis to work on compliance cases involving European corporations.²¹⁴

Regardless of the undisputable Americanization of the compliance functions and the adoption of American compliance policies by non-

209. In HSBC, the Chief Legal Officer, Stuart Levey, was a Principal Associate Deputy Attorney General at the U.S. Department of Justice. *Stuart Levey*, HSBC, www.goo.gl/ZFpqQF (last visited June 25, 2018). The Chief Risk Officer, Marc Moses, who is also responsible for compliance, previously worked for American bank JP Morgan. *Marc Moses*, HSBC, www.goo.gl/ZgjsZ2 (last visited June 25, 2018). The compliance officers of Deutsche Bank have held several positions in New York. See *Deutsche Bank names new Global Head of Compliance and new Global Head of Anti-Financial Crime*, DEUTSCHE BANK, www.goo.gl/kjJdXb (last visited June 25, 2018); *Michael Roemer*, BARCLAYS, www.goo.gl/AmbtL4 (last visited June 25, 2018); *Groupe BPCE : Jacques Beyssade rejoint le comité de direction générale du Groupe BPCE en qualité de directeur général adjoint*, ZONEBOURSE (Feb. 10, 2016, 4:20 PM), www.goo.gl/4dBJAZ; *Matthew Elderfield appointed Head of Group Compliance*, NORDEA (May 16, 2010, 10:10 AM), www.goo.gl/E6B2dV. At Banco Santander the Risk Supervision, Regulation and Compliance Committee is led by independent director Bruce Neil Carnegie-Brown, British national, with an extensive experience in the U.S., working eighteen years at JPMorgan Chase and four years at Bank of America. *Mr Bruce Carnegie-Brown*, SANTANDER, www.goo.gl/zkzWsd (last visited June 25, 2018). Finally, Crédit Agricole has a dedicated executive risk committee to survey risks associated with U.S. Regulation. Françoise Gri leads the Risk Committee in the United States, whereas the CCO is the HEC-trained manager Jean-Pierre Trémebert. *Françoise Gri*, CRÉDIT AGRICOLE, www.goo.gl/PNfSps (last updated Mar. 2018); *Jean-Pierre Trémebert*, CRÉDIT AGRICOLE, www.goo.gl/waz7uB (last updated Nov. 2015).

210. Édouard-Malo Henry, Group Head of Compliance at Société Générale, was entirely trained in France and has a wide range of experience in compliance functions in Canada and Europe. *Édouard-Malo Henry*, SOCIÉTÉ GÉNÉRALE, <https://www.societegenerale.com/en/content/edouard-malo-henry> (last visited June 25, 2018).

211. In BNP Paribas, Nathalie Hartmann is the current Head of Compliance and has not worked or received training in the United States. *The General Management and the Executive Committee*, BNP PARIBAS, <https://group.bnpparibas/en/group/governance-compliance/general-management-executive-committee/nathalie-hartmann> (last visited June 25, 2018).

212. Jon Pain, Chief conduct and regulatory affairs officer RBS, is a former regulator of the U.K. Financial Services Authority, with extensive experience in compliance matters. But he has no training or experience in the United States. See Philip Aldrick, *RBS Names Former FSA Man as Head of Conduct*, THE TELEGRAPH (May 27, 2013, 12:01 AM), <https://goo.gl/Xo3qPA>.

213. Alstom Transport restructured entirely its legal and compliance departments. Michael A. Julian, a West Virginia University College of Law graduate, now leads the compliance department. *Michael Julian*, LINKEDIN, <https://www.linkedin.com/in/michael-julian-6316ba8/?ppe=1> (last visited June 25, 2018).

214. See *Frederick T. Davis*, DEBEVOISE & PLIMPTON, <https://www.debevoise.com/frederick-davis?tab=biography> (last visited June 25, 2018).

American banks, it seems still premature to affirm that an irreversible “Americanization of compliance” has taken place. In order to be able to affirm this, it would be necessary to examine the commitment of sanctioned companies to genuinely fix their long-term compliance programs through American law, and discard the idea that they may be implementing, in haste, “provisional amendments” just to give the impression of honoring commitments entered into through their respective agreements.²¹⁵

In other words, we have to be clear that it has been less than a decade since this new wave of bank prosecutions entered the scene. Only time, through a transparent, effective and public monitoring system, will tell whether DPAs are proper tools for deterring bank corruption. In this regard, we could say that Americanization of compliance is expected to be for foreign banks what rehabilitation is for individuals.

Conclusion

This article explores the dynamics surrounding the enforcement of U.S. economic sanctions vis-à-vis the compliance function of non-American banks. By exploiting its powerful legal arsenal and through a strategic use of the settlement agreements made available by prosecutorial practice, the U.S. government has put pressure on foreign banks to subject themselves to heavy commitments that profoundly reshape their compliance functions. These reform efforts represent an indispensable way to both avoid an increase in the sanctions and prevent “spectacular failures in compliance” from replicating in the future. By doing so, targeted banks have inaugurated a new practice of compliance under which U.S. laws become an integral part of the function itself, gradually setting American laws as the main framework to design the compliance structure and processes of foreign banks.

The considerations that led foreign banks to settle and the preventive aim that lies behind the reform efforts potentially apply also to foreign corporations in industries other than banking. There is no reason to believe that the U.S. government might not decide, at a certain point, to exercise its extremely broad discretion by starting a criminal investigation against foreign corporations outside the banking or financial system in general, as it is already doing with the Foreign Corrupt Practices Act. In this respect, we suggest that in-house counsel and compliance officers start taking into account the possibility of adopting, as their internal regulations, numerous principles derived from compliance practices that we have highlighted

215. Garrett states in this respect that “[i]t is not clear that these banks are being rehabilitated through compliance terms either. These terms aim to prevent future crimes in a way that the payment of fines—ultimately borne by the shareholders—may not accomplish. We know little about how the compliance terms of prosecution agreements are being implemented, since the process is rarely described publicly by companies or prosecutors, and the reports of independent monitors who are sometimes tasked with supervising compliance are typically not made public.” Brandon L. Garret, *The Rise of Bank Prosecutions*, 126 *YALE L.J. FORUM* 33, 43 (2016), available at <http://ssrn.com/abstract=2811121>.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

U.S. ECONOMIC SANCTIONS 535

earlier in this article, such as separating the legal and compliance offices and strengthening the contacts and interaction between the compliance officers and the corporation's top leadership in order to ensure the independence of compliance officers and the effectiveness of their work. Such reforms, which of course will never take place without the support of the corporation's top management and directors, might bring positive results in case of investigation, allowing the targeted corporations to gain more leniency against violations of U.S. economic sanctions laws. At any rate, the coming years should reveal if other companies will also restructure their compliance offices before the heavy burden of the global U.S. regulatory power falls upon them.

Finally, one wonders who may benefit from these reforms. Certainly, in terms of hegemonic influence over corporate behaviors, the U.S. government would see its power increased on a global scale. But the Americanization of corporate compliance might also benefit corporate actors, decreasing the risk of compliance failures in the future and making transactions safer in the interests of their clients and suppliers. If banks and other corporate actors wish to continue to participate in the American financial markets, they must abide by U.S. laws. The rules of the game have changed, and now is the moment to adjust.

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