

The (A)ngola to (Z)imbabwe of Sanctions

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Mottos For The Day

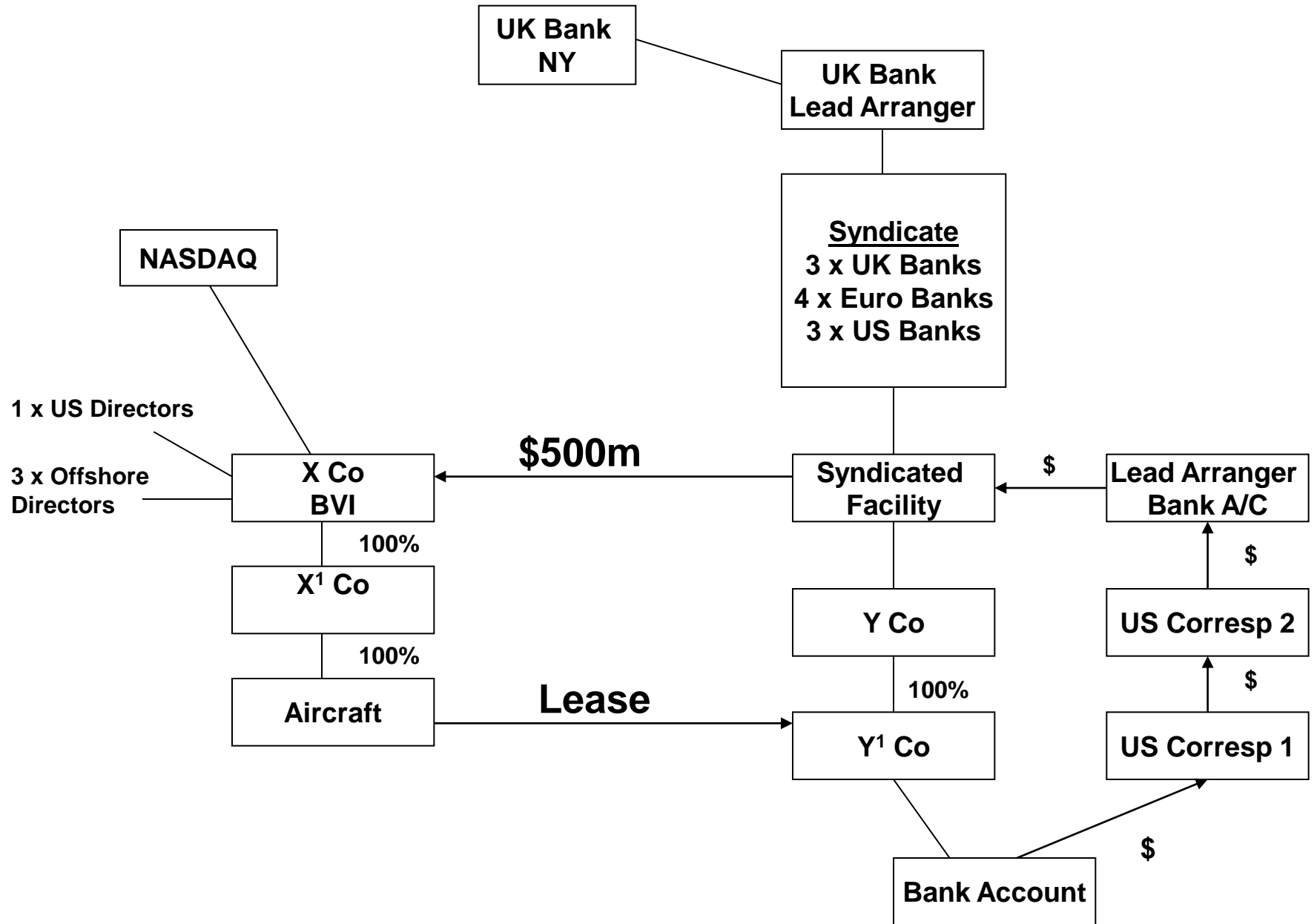
“Money is fungible.”

*“When you’ve got them by their correspondent account,
their hearts and minds will follow.”*



Regimes

- Transnational
 - - UN
 - - EU
- National
 - - Vast Majority are UN or EU domesticated in to local law
 - - US OFAC regime is exceptional. The US regards sanctions as key ‘tools’ in support of its numerous foreign policy objectives.





OFAC

- OFAC Regulations apply based on:
 - ***Nationality/Residence*** – all “U.S. Persons” must comply with U.S. regulations for all transactions, anywhere in the world.
 - ***Geography*** – OFAC Regulations apply to all transactions that take place within the United States, regardless of whether the participants are U.S. Persons.



OFAC

- Who is a “U.S. Person”?
 - U.S. citizens and residents.
 - U.S. corporations.
 - Any person or entity “in the U.S.”
 - U.S. chartered banks – both U.S. and foreign offices; all branches and subsidiaries.
 - U.S. offices (subsidiary, branch, agency or representative office) of foreign banks



OFAC SDN List

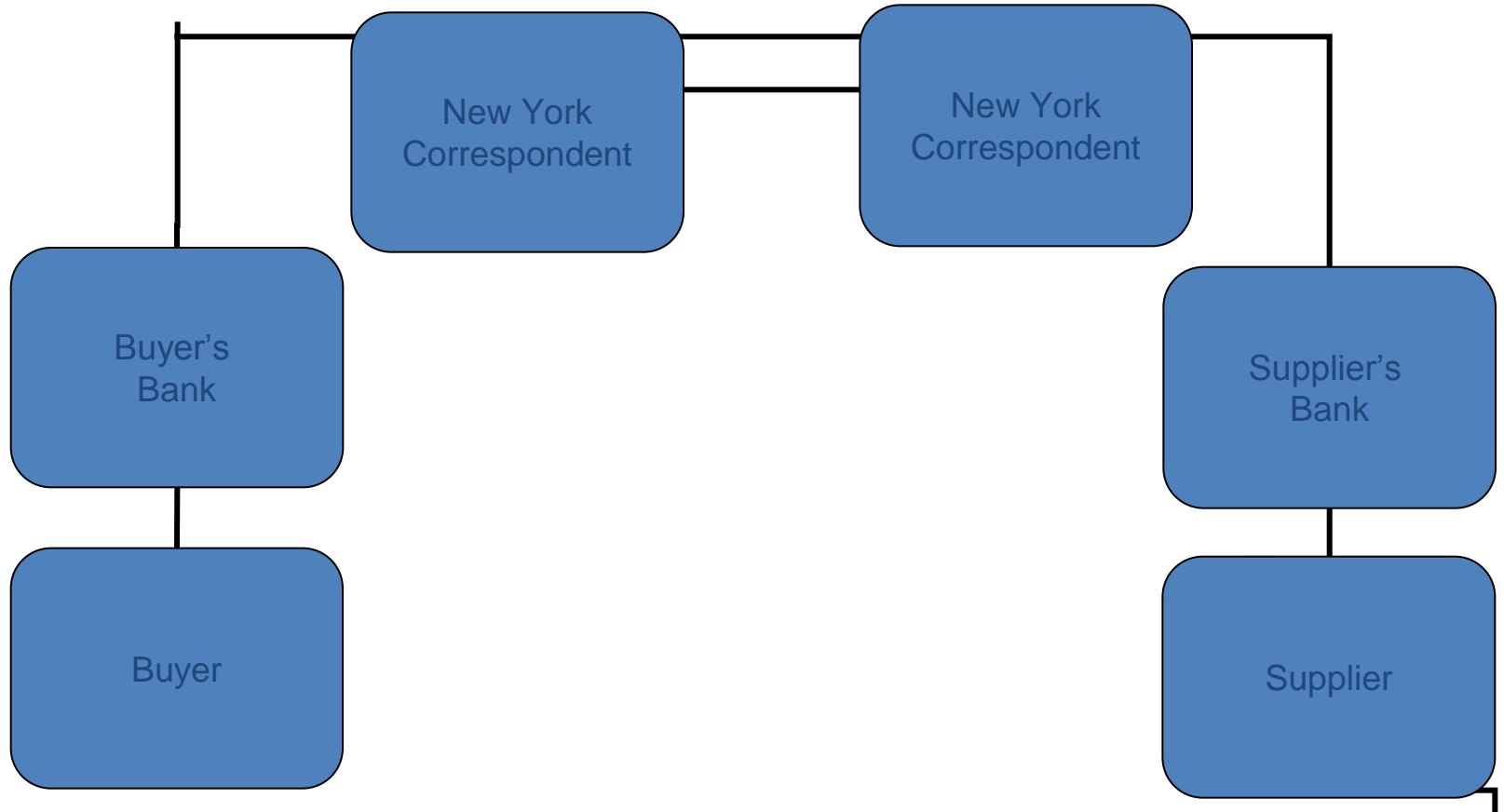
- The SDN list contains roughly 4,500 individuals and organizations not necessarily associated with a listed country with which financial transactions are similarly barred. It is frequently revised and is downloadable from the OFAC website.
- The SDN list includes certain government officials and agencies and government-owned entities that are barred as a result of country sanctions. This list is not comprehensive.
- The SDN list includes a special section with names and identifying information for vessels owned or controlled by blocked countries, entities or persons.
- Screening software needs to be applied not just to wire transfers and clearing but also to trade finance transactions.



OFAC

- OFAC Regulations apply to all transactions that take place, in whole or in part, in the United States, *regardless of whether they involve U.S. Persons*, including:
 - Transactions involving U.S. operations or U.S. accounts.
 - Transactions that clear through the U.S.

U.S. Clearing





Risks to Banks with U.S. Office

- The U.S. office of a foreign bank is considered a U.S. person for purposes of OFAC and is directly subject to OFAC regulations.
- Participation by the U.S. office or its personnel in banned transactions carries all of the risks of an OFAC violation by a U.S. bank
- OFAC violations may increase exposure to civil litigation in the U.S. courts. Although compliance may not be helpful in such litigation, non-compliance will almost certainly be harmful.



Risks to Banks without a U.S. Office

- Transfers that do not comply with OFAC regulations may be rejected, causing delay, or “blocked” (seized from the N.Y. correspondent account). Depositor may have valid repayment claim under local law, exposing bank to risk of double payment.
- A foreign bank may be sued civilly in U.S. for facilitating terrorism or human rights violations if it provides banking services (even outside the U.S.) terrorists, dictators, or other wrongdoers.
- A failure to comply with U.S. AML or sanctions compliance standards could cause a foreign bank’s U.S. correspondent to close its accounts.



Hypothetical

- Company A, an English company, instructs its bank, Local Bank, to wire \$1 million to a Nigerian supplier's bank account at First Nigeria Bank. Local Bank instructs its correspondent bank in New York to make the payment to First Nigeria's N.Y. correspondent bank.
- Local Bank's New York correspondent bank blocks/freezes the transaction because, while Nigeria may not be an OFAC blocked country, First Nigeria Bank is an SDN because it is believed to be a front for the government of Zimbabwe.



OFAC in Practice - Evasion

- OFAC Regulations preclude
 - *“any transaction by any U.S. person or within the United States that evades or avoids, has the purpose of evading or avoiding, or attempts to violate any of the prohibitions set forth in this part.”*
- Foreign banks may not avoid U.S scrutiny by disguising or “stripping” customer names or identifying information from transfer information.
- Although a foreign bank may not be a “U.S. Person,” it is prohibited from engaging or attempting to engage in an evasion transaction “within the United States.”



OFAC in Practice – Evasion

- Causation
 - *It shall be 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 chapter.*

50 U.S.C. § 1705



OFAC in Practice – Evasion

- Cuban customer of Foreign Branch of Bank B asks Foreign Branch to process a U.S. dollar transaction through its U.S. correspondent bank.
- Branch manager of Foreign Branch suggests to customer that he process his transaction in Euros instead of U.S. dollars because of OFAC restrictions.
- Customer agrees to denominate the transaction in Euros and Foreign Branch completes the transaction through a European (non-U.S.) bank.
- Is Bank B guilty of evasion??
 - Does it matter whether Bank B is a U.S. Bank?
 - Does it matter whether Bank B has a U.S. branch?
 - Does it matter whether Bank B's U.S. branch is involved in the transaction?



OFAC in Practice – Evasion

- Foreign Branch of Bank A is processing U.S. dollar transactions for Iranian customers.
- In order to avoid scrutiny in the U.S., Foreign Branch has deleted customer names and all references to Iran from the transfer instructions.
- Transfer instructions are sent to Bank A's U.S. correspondent, which is unaware that customer information has been deleted from the documentation.
- Is Bank A guilty of evasion??
 - Does it matter whether Bank A is a U.S. Bank?
 - Does it matter whether Bank A has a U.S. branch?
 - Does it matter whether Bank A's U.S. branch is involved in the transaction?



Lloyds TSB

- No involvement of Lloyds TSB branches in U.S.
- No wrongdoing in U.S.
- The first occasion on which the U.S. has asserted jurisdiction over a non U.S. person on a sanctions issues
- The largest ever penalty for violations of U.S. sanctions – Total penalty U.S. \$350m



Agreed Factual Statement

- *' ...Beginning in or about the mid 1990s and continuing until January 2007, Lloyds, in the United Kingdom, systematically violated both New York State and United States laws by falsifying outgoing United States Dollar ("USD") payment messages that involved countries, banks, or persons listed as sanctioned parties by the United States Department of the Treasury's Office of Foreign Assets Control ("OFAC"). In doing so, 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 investigation, or rejected pursuant to OFAC services to those sanctioned countries, and falsified business records of banks primarily located in New York'*



Consequences

- \$175m to DOJ
- \$175m to New York District Attorney
- Adoption of the Wolfsberg Anti-Money Laundering Principles for Correspondent Banking.
- Review and disclosure over 5 year period of:
 - All MT100 and MT200 Payment instructions involving Iranian Banks
 - All transactions with SDN's STN's etc etc



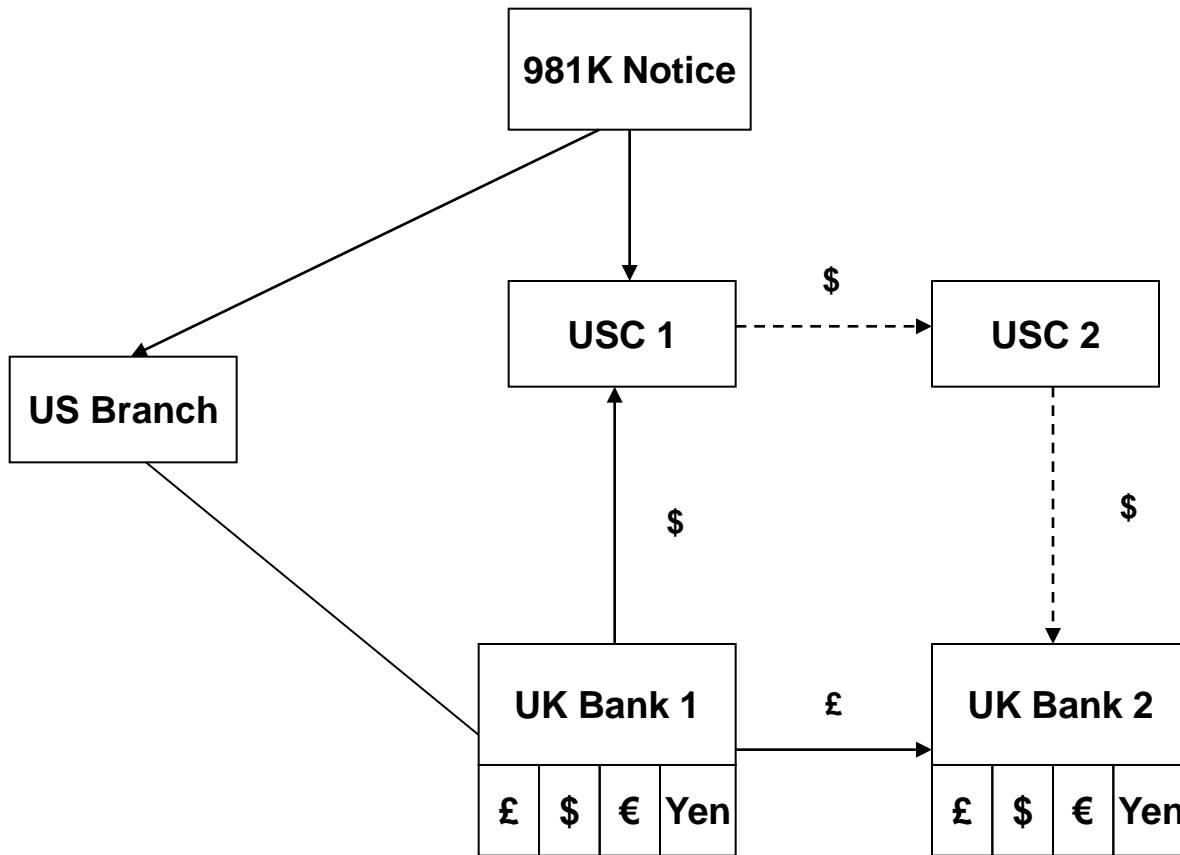
Other members of the 'Strip Club'

- ANZ - \$5,750,000.
- Barclays - \$298,000,000
- Credit Suisse - \$536,000,000



Anti-Money Laundering and USA Patriot Act § 319

- Deposits into foreign banks are considered deposits into any bank account the bank may have in the U.S.
- Restraining orders and warrants for seizure related to overseas money laundering deposits can be made against funds held in the U.S. institution even if the depositor has no funds in the U.S., the funds are not in dollars and there is no crime committed in the country of deposit (“§ 981k Order”).
- Foreign banks that maintain U.S. correspondent accounts must designate an agent to receive U.S. subpoenas. Subpoenas may request information concerning any bank transaction, account or customer.





Anti-Terrorism Act

- *Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, [is guilty of a crime]. . . To violate this paragraph a person must have knowledge that the organization is a designated terrorist organization . . . has engaged in terrorist activity . . . or that the organization has engaged in or engages in terrorism.*
- The term "material support or resources" means any property, tangible or intangible, or service, including financial services. . .
- A civil complaint under the ATA may be filed by any U.S. national injured "by reason of" international terrorism.



Anti-Terrorism Act

- Money is fungible.
- Knowledge that the organization is involved in terrorism is the only requirement.
- Not tied to specific terrorist act, or even to terrorism in general.
- Intent is largely irrelevant.
- Knowledge may be inferred at the pleading stage from bank's "KYC" obligations and policies, from lists, and from media coverage.
- Material support includes routine banking services.



The ATA – A Real Risk to Banks

- NINE NON-U.S. Banks have been sued in New York in the last five years for providing banking services to purported terrorists.
 - **NatWest** was sued for maintaining accounts and processing transfers for Interpal, a Palestinian charitable group.
 - **Credit Lyonnais** was sued for maintaining an account for CBSP, or the Comité de Bienfaisance pour la Solidarité avec la Palestine.
 - **UBS** was sued for providing banking services to Association de Secours Palestinien.
 - **Arab Bank** was sued for providing banking services to the Saudi Committee for the Support of the Intifada al Quds.
 - **Habib Bank** was sued for providing banking services to the Al-Rashid Trust (voluntarily dismissed).
 - **Three Lebanese Banks and American Express International Bank** were sued for providing banking services to Hizbollah front organizations.

Weiss v. National Westminster Bank

- Basic Claim

Aiding and abetting and providing material support to terrorist organizations in the Middle East, including Hamas.

- Plaintiffs

Dozens of U.S. citizens and U.S. heirs of foreign citizens injured or killed in 10 terrorist attacks that occurred in Israel in 2002-2003.

- Jurisdiction

NatWest maintains a branch network in New York and is subject to general personal jurisdiction in New York.

Weiss v. National Westminster

- NatWest provided banking services *in England* to Interpal, a Palestinian charitable organization.
- At the time NatWest maintained Interpal accounts, it was legal in England to do business with Interpal.
- United Kingdom charity commission had twice "found no evidence of wrongdoing" by the charity.
- Interpal was added to the U.S. OFAC list in August 2003.
- Plaintiffs claim that Interpal raised money for Hamas, that NatWest processed wire transfers to and from Interpal in which the counter party was a Hamas-controlled charity and that Hamas funded and instigated terrorist attacks that injured them.
- Plaintiffs assert that because NatWest provided material support to Hamas, it is liable for Hamas' conduct.

Weiss v. National Westminster

- Plaintiffs claim that NatWest was on notice of Interpal's terrorist ties because:
 - Interpal's website referenced its connection to Hamas-linked charities.
 - Transfer and account records show transfers between suspect organizations – World Association of Muslim Youth and Union of Good – and Interpal.
 - Interpal has twice been investigated by the Charity Commission for links to Hamas.
 - Israel and U.S. listed Interpal as a terrorist organization.
 - Media reports suggested a connection between Interpal and Hamas.

Allegations of the Complaint

- Plaintiffs rely on NatWest's own compliance program to permit the Court to infer that the bank had knowledge of Interpal's support of Hamas and other terrorist groups or that it was willfully blind to it.
 - Adoption of KYC Guidelines.
 - Adoption of Wolfsberg Principles.
 - Public commitment to *"procedures for consulting applicable lists and taking reasonable and practicable steps to determine whether a person involved in a prospective or existing business relationship appears on such a list."*



Scenario 1

- Non US bank with US branch
- Dubai branch disguises origin of monies
- Originator is OFAC sanctioned
- What are potential consequences?



Scenario 2

- UK Bank with US branch has customer whose name appears on OFAC
- US\$ transaction between UK and EU country
- Cover transaction through US branch
- US regulator happens across transaction randomly
- Consequences?



Scenario 3

- Swiss bank with US branch
- US residents evading tax through offshore branches of Swiss bank
- US authorities learn of evasion
- Consequences?



Scenario 4

- UK bank with US branch
- Former East African PEP laundering bribe money through London in US\$
- Victim country launches recovery action
- DOJ decides to assist for 'strategic reasons'



Scenario 5

- UK bank with no US presence
- Former East African PEP laundering bribe money through London in US\$
- Victim country launches recovery action
- DOJ decides to assist for 'strategic reasons'



Scenario 6

- UK bank with no US presence
- UK bank maintains US correspondent relationship
- Former East African PEP laundering bribe money through London in Euros
- Victim country launches recovery action
- DOJ decides to assist for 'strategic reasons'



Scenario 7

- Foreign bank runs US\$ account for an exporter
- Export of goods from non-sanctioned country A to non-sanctioned country B
- Payment in US\$ through US Correspondent
- Transpires that goods were shipped to country B on an Iranian vessel
- Consequences?



Scenario 8

- UK bank with NY Branch
- Cayman Co with 2 US directors
- Transaction with Iranian shipping Co
- Payment through Cayman Co account at NY Branch
- Consequences?




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