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Andrea Bonomi /
Krista Nadakavukaren Schefer (eds)

US Litigation Today: Still a Threat For European Businesses or Just a Paper Tiger?

Conference proceedings
from the 29th Journée de droit
international privé of 23 June 2017



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1. The Mysterious Case of Reza Zarrab

On 1 January 2013, Turkish customs officials at Istanbul International Airport discovered 3000 pounds of gold on a cargo-plane from Accra (Ghana) en route to Dubai. The cargo boxes were labelled as mineral samples. It was the beginning of what became to be known as the “gold for gas scandal”, a scheme which explored a loophole in the U.S. sanctions regime regarding the Islamic Republic of Iran. Turkey had longstanding energy ties with Iran and was a major customer for Iranian natural gas. As the sanctions tightened, Iran was cut off from the global transactions network SWIFT in March 2012 and was no longer able to conduct transactions in U.S. dollars or in Euro. But the sanctions did not extend to Turkish Lira and they did not, at that time, extend to precious metals such as gold. Thus, in formal alignment with the sanctions regime, Iran shipped gas to Turkey in exchange for Turkish Lira. The Turkish Lira being of little use for Iran as a currency, it was exchanged into gold before reaching Iran (it was flown to Dubai and then ferried across the Gulf to Iran). The Obama administration closed the “golden loophole” in the summer of 2013.

At the center of these operations stood Reza Zarrab, a 33-year-old Turkish-Iranian business tycoon, owner of twenty buildings, seven yachts and a private jet, married to one of Turkey’s biggest pop stars.¹ When in 2012 the transactions reached their climax, Zarrab was exchanging a metric ton of gold for Iranian natural gas every day.² When Turkish officials investigated the cargo incident of 1 January 2013, it lead them not only to Reza Zarrab, but also to a massive bribery scheme in which millions of dollars had been paid to senior officials in Erdogan’s government to allow Zarrab to proceed with his gold transports.³ Zarrab was arrested and charged. The ongoing criminal investigation caused a political turmoil in Turkey. President Erdogan accused the exiled cleric Fettullah Gülen of trying to launch a coup against him. This triggered the first of many purges of the Turkish government, including the dismissal, transferal or imprisonment of

¹ The New Yorker, 14.04.2017 (A Mysterious Case Involving Turkey, Iran and Rudy Giuliani).

² The New Yorker, 14.04.2017 (A Mysterious Case Involving Turkey, Iran and Rudy Giuliani).

³ Telepolis, 24.03.2016 (USA verhaftet Erdogans Schützling Reza Zarrab).

thousands of prosecutors and police officers. The charges against Zarrab were dropped and he was released from jail.⁴ He would have lived happily ever after – had he not decided to take a trip to Disney World in Orlando, Florida, with his wife and five year-old daughter.

On 19 March 2016, F.B.I. agents arrested Reza Zarrab in Florida and transferred him to New York, where he was charged with conspiracy to defraud the United States, conspiracy to violate U.S. embargo laws, conspiracy to commit bank fraud and conspiracy to commit money laundering. On 17 October 2016, the United States District Court of the Southern District of New York denied Zarrab’s motion to dismiss the indictment, refuting Zarrab’s argument that his prosecution amounted to a jurisdictional overreach by the U.S. authorities. In April 2017, Zarrab hired Rudy Giuliani, former mayor of New York and trusted friend of President Donald Trump, and Michael Mukasey, Attorney General under George W. Bush, to join his defense team. It was later revealed that both men had travelled to Turkey in February 2017 to find a diplomatic solution to the case.⁵

The diplomatic solution did not materialize, however. Zarrab was still awaiting trial on March 27, 2017, when Mehmet Hakan Attila, a Turkish top banker at Halkbank, was arrested at JFK airport.⁶ Attila was accused of laundering money in connection with Zarrab’s gas-for-gold transactions and of forging documents to conceal the true nature of the transactions vis-à-vis the U.S. authorities.⁷ The prosecution was obviously gaining momentum, and so Reza Zarrab chose another strategy. On 22 November 2017, the Federal Bureau of Prisons (BOP) updated Zarrab’s profile to show him as “released” per 8 November 2017.⁸ Court documents which were unsealed on 28 November 2017 show that on 26 October 2017, Zarrab had pleaded guilty to all counts against him, including conspiracy to violate the U.S. sanctions against Iran.⁹ The trial continued but with Mehmet Atilla as the only defendant, while Zarrab testified as a government witness.¹⁰ On 3 January 2018 Atilla was convicted of five of the six counts against him, including bank fraud and conspiracy to violate the Iran sanctions, but acquitted of money

⁴ The New Yorker, A Mysterious Case Involving Turkey, Iran and Rudy Giuliani.

⁵ The New Yorker, A Mysterious Case Involving Turkey, Iran and Rudy Giuliani, 14.04.2017.

⁶ Die Presse, 29.03.2017 (USA/Türkei: Der seltsame Fall des Reza Zarrab); The New Yorker, 14.04.2017 (A Mysterious Case Involving Turkey, Iran and Rudy Giuliani, 14.04.2017).

⁷ See Die Presse, 29.03.2017 (USA/Türkei: Der seltsame Fall des Reza Zarrab).

⁸ See The Associated Press, 12.11.2017 (‘Stealth’ Turkish businessman a no-show for trial this month. One of Zarrab’s lawyers said that he wasn’t released). See also Hurriyet Daily News, 12.11.2017 (Zarrab still in prison, his lawyer says).

⁹ The New York Times, 28.11.2017 (Reza Zarrab, Turk at Center of Iran Sanctions Case, Is Helping Prosecution).

¹⁰ NBC News, 27.11.2017 (Reza Zarrab, Turkish gold trader tied to Erdogan, avoids trial).

laundering. On May 16, 2018, Mehmet Atilla was sentenced to 32 months in prison.¹¹ The prosecution had sought a sentence of about 20 years. But Judge Berman saw Mr. Atilla only as a person following orders and not the mastermind of the scheme.¹²

“Foreign banks and bankers have a choice: you can choose willfully to help Iran and other sanctioned nations evade U.S. law, or you can choose to be part of the international banking community transacting in U.S. dollars,”

Joon Kim, the acting U.S. attorney in Manhattan, said in a statement after the verdict was read. “But you can’t do both.”¹³

The arrest of Reza Zarrab and the ensuing events have become a test of U.S.-Turkish relations, already at one of the lowest points in the countries’ longstanding alliance.¹⁴ Turkey’s president Erdogan had been raising the issue at the highest levels of both the Obama and Trump administration, calling the Zarrab trial a “clear plot against Turkey”¹⁵ and that it was policitally motivated by the Gülen Movement.¹⁶ Erdogan’s fervent reaction fuelled speculations about his involvement in the case. The Turkish files from the cargo plane incident of 2013 indicate that Erdogan’s close family was a part of Zarrab’s operation.¹⁷ In his testimony at Atilla’s trial, Zarrab stated that he had paid former economy minister Zafer Caglayan tens of millions of dollars in bribes.¹⁸ He also testified that Caglayan told him in 2012 that President Erdogan (then Turkey’s prime minister)

¹¹ Sentencing transcript, United States v. Mehmet Hakan Atilla, S4 15 Cr. 867, 15G3AT11 (Sentencing), available at <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=629> (13.08.2018).

¹² *Id.*, p. 20-21.

¹³ The Guardian, 03.01.2018 (Turkish baker found guilty in Iran sanctions case allegedly tied to Erdogan).

¹⁴ Bloomberg Politics, 16.11.2017 (Where Is Reza Zarrab?).

¹⁵ Reuters, 20.11.2017 (Zarrab trial in U.S. is a ‘clear plot against Turkey’).

¹⁶ Initially, shortly after Zarrab’s imprisonment, he said his detention in the U.S. is „none of Turkey’s business“. See also SFC, 27.04.2017 (Erdogan Says Reza Zarrab Is His Citizen, Turkey Has to Stand Behind Him); The New Yorker, 14.04.2017 (A Mysterious Case Involving Turkey, Iran and Rudy Giuliani).

¹⁷ The New Yorker, 14.04.2017 (A Mysterious Case Involving Turkey, Iran and Rudy Giuliani). Prosecutors note in court filings that they have taped conversations and other records suggesting that Zarrab told Erdogan of the scheme and sought his support, see Bloomberg Politics, 16.11.2017 (Where Is Reza Zarrab?).

¹⁸ The New York Times, 29.11.2017 (Reza Zarrab Testifies That He Bribed Turkish Minister); The New York Times, 30.11.2017 (Erdogan helped Turks evade Iran sanctions, Reza Zarrab says). Caglayan is indicted in this case, as is the former chief of Halkbank, Suleyman Aslan. Both men are in Turkey and out of U.S. reach. It is unlikely that they will chose the U.S. as a travel destination.

had given orders to two Turkish banks to participate in the scheme.¹⁹ Zarrab's testimony continued to send political tremors through Turkey. "It is now understood that the U.S.A. has a plan against us. It is obvious that this trial is brought up as a tool to blackmail us to give up our claims in the region," Erdogan said, while repeatedly denouncing the case as a fabrication.²⁰

Now that the trial is over, Zarrab is said to find himself in an awkward position. In Turkey, he had been portrayed by pro-government media as a hero who narrowed Turkey's current-account deficit. Now, an Istanbul prosecutor has charged him with espionage and ordered the seizure of all his assets and those of his associates. Under terms of his plea agreement, Zarrab will get protection from U.S. law enforcement officials if he should request it.²¹ At the time of writing, Zarrab is still awaiting his own sentencing.²²

With Reza Zarrab's guilty plea the issue of U.S. jurisdiction has become moot in this particular case. Yet the case remains relevant for the general discussion of U.S. jurisdiction in the embargo context. The Zarrab matter is a rare (and possibly unique) case where the only nexus to the U.S. was that a dollar transaction originating in a foreign country and destined to a foreign country "passed" U.S. territory for clearing purposes. This so-called "correspondent account jurisdiction" has been invoked by the U.S. government before, but generally not on a stand-alone basis. Furthermore, there is no judicial precedent regarding the question because the cases where the U.S. government claimed jurisdiction on the grounds of correspondent account jurisdiction ended with a settlement.

This article traces the development of the Zarrab matter from the perspective of U.S. law and then offers an analysis from an international law perspective.

¹⁹ The New York Times, 30.11.2017 (Erdogan Helped Turks Evade Iran Sanctions, Reza Zarrab Says).

²⁰ The New York Times, 07.12.2017 (Reza Zarrab Recounts Death Threat to Iran Sanctions Jury).

²¹ Bloomberg Politics, 03.01.2018 (Turkish Banker Guilty in U.S. of Iran-Sanctions Conspiracy).

²² Bloomberg Politics, 05.04.2018 (Zarrab's Turkish Lawyer Implicated in Prison Bribery Plot).

2. Jurisdiction from a U.S. Law Perspective

2.1. The Indictment

The prosecution announced the contents of its first unsealed indictment on 21 March 2016,²³ expanding its charges in several superseding indictments.²⁴ The last indictment included charges that Reza Zarrab had bribed a corrections officer to bring alcohol and a cell phone into the federal correction center where he was detained.²⁵ For the purpose of the extraterritoriality issue the four initial charges are the relevant ones.

2.1.1. The Charges

The four initial charges alleged that Reza Zarrab had committed the following crimes: first, conspiracy to defraud the United States and to impede the lawful functions of the United States Department of Treasury, Office of Foreign Assets Control (OFAC);²⁶ second, conspiracy to violate the International Emergency Economic Powers Act (IEEPA) and the Iranian Transactions and Sanctions Regulations (ITSR);²⁷ third, conspiracy to commit bank fraud;²⁸ and fourth, conspiracy to commit money laundering.²⁹

The common basis for all four of the conspiracy charges was that Zarrab and others operated a multi-billion dollar network of companies located in Turkey and the United Arab Emirates, providing financial services to Iranian individuals and companies which were subject to U.S. sanctions. Although the “Gold Export Scheme” and the “Fraudulent Food and Medicine Trade Scheme” were described in detail in a superseding indictment³⁰, the charges themselves were based on the

²³ Indictment, *United States v. Zarrab et al.*, 15 Cr. 867, available at <https://www.justice.gov/opa/file/834146/download> [21.12.2017].

²⁴ See Court Listener, *United States v. Zarrab*, 1:15-cr-00867, available at <https://www.courtlistener.com/docket/4356296/united-states-v-zarrab> [21.12.2017], for a complete list of the docket entries. The decision and order regarding the motion to dismiss the case was issued on the grounds of a superseding indictment filed on 30.03.2016.

²⁵ Superseding Indictment S5, *United States v. Zarrab*, S5 15 Cr. 867, 16.10.2017, available at <https://www.courtlistener.com/docket/4356296/364/united-states-v-zarrab> [21.12.2017]. Count seven (p. 9) of the Indictment reads: Conspiracy to Commit Bribery and Posses Contraband in a Federal Detention Center.

²⁶ § 18 U.S.C. § 371.

²⁷ 50 U.S.C. §§ 1701-1706 (IEEPA) and 31 C.F.R. §§ 560.202-205 (ITSR).

²⁸ 18 U.S.C. §§ 1344, 1349.

²⁹ 18. U.S.C. §§ 1956-1957.

³⁰ Superseding Indictment S4, *United States v. Zarrab et al.*, S4 15 CR 867, 06.09.2017, available at <https://www.courtlistener.com/docket/4356296/293/united-states-v->

allegation that Zarrab (and others) conducted “international financial transactions using Turkish and Emirati companies and entities in order to conceal from the U.S. banks and others that services were being provided to Iran, to the Government of Iran, and to agents or affiliates of the IRGC in violation of the IEEPA, the ITSR, and the IFRS.”³¹

The prosecution describes roughly a dozen financial transactions allegedly carried out by Zarrab’s money service businesses located in Turkey and in the United Arab Emirates on behalf of U.S. sanctioned Iranian persons and companies.³² The alleged transactions include a transfer in January 2011 of approximately \$900’000 on behalf of an Iranian bank to a Canadian company, a transfer in February 2011 of approximately \$76’000 on behalf of an Iranian bank to a Chinese company, a transfer in March 2011 of approximately \$9’000 on behalf of an Iranian bank to a Hong Kong Company which was blocked by an U.S. bank, and a transfer in January 2013 of \$600’000 on behalf of a Turkish company to a Turkmenistan company.³³

None of the transactions originated in the U.S. and none of them had the U.S. as its final destination. Nevertheless, the United States Attorney of the Southern District of New York claims to have jurisdiction over Reza Zarrab.

2.1.2. The Relevant Statutes and Regulations

2.1.1.1. Conspiracy to Defraud the U.S., Bank Fraud, Money Laundering

In order to better understand the charges brought by the prosecution, it is necessary to briefly summarize the different provisions which the prosecution claims are violated. The linchpin of the prosecution’s charges regards the violation of the U.S. Embargo regulations (second charge). It will be addressed separately.

The first charge alleges a violation of 50 U.S.C. § 371. This provision is of a general nature and sanctions conspiracy to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any

zarrab [21.12.2017], para. 33–55. A similar allegation had already been made in Superseding Indictment S1, *United States v. Zarrab et al.*, S1 15 Cr. 867, 30.03.2016, available at <https://timinhonolulu.files.wordpress.com/2016/04/20160330-7-superseding-indictment-nysd.pdf> [21.12.2017], para. 9.

³¹ Superseding Indictment S1, *United States v. Zarrab et al.*, S1 15 Cr. 867, 30.03.2016, para. 12.

³² See Superseding Indictment S1, *United States v. Zarrab et al.*, S1 15 Cr. 867, 30.03.2016, para. 14; explained in more detail in Superseding Indictment S4, *United States v. Zarrab et al.*, S4 15 CR 867, 06.09.2017, para. 58–84.

³³ Superseding Indictment S4, *United States v. Zarrab et al.*, S4 15 CR 867, 06.09.2017, para. 58.

purpose. The third charge alleges conspiracy to bank fraud (18 U.S.C. § 1344). This provision is also general in nature, including any execution or attempts to execute a scheme to defraud a financial institution or to obtain any of the moneys, funds, credits, etc. under the control of a financial institution by means of false or fraudulent pretenses. The provision in 18 U.S.C. § 1349 extends the penalty to the act of conspiracy. The fourth charge regards conspiracy to commit money laundering. The provision in 18 U.S.C. § 1956 contains the general money laundering provision, whereas 18 U.S.C. § 1957 regards monetary transactions in property derived from specified unlawful activity.

The brief description of the provisions makes it clear that the core charge of the prosecution is the second charge: the conspiracy to violate the International Emergency Economic Powers Act, and more specifically, the Iran sanctions regime. Without the violation of the Iran sanctions regime, the other charges would not stand. Indeed, the conspiracy charge to defraud the United States (50 U.S.C. § 371) is that Zarrab obstructed

“the lawful and legitimate governmental functions and operations of the U.S. Department of Treasury, Office of Foreign Assets Control (“OFAC”) in the enforcement of economic sanctions laws and regulations administered by that agency.”³⁴

The conspiracy charge to commit bank fraud (18 U.S.C. § 1344) is that, among other things, Zarrab agreed with others to conceal from the banks the fact that the transactions were conducted on behalf of sanctioned Iranian entities, and that, as a result, these transactions were illegal.³⁵ Finally, the conspiracy to commit money laundering (18 U.S.C. § 1956) rests on the allegation that Zarrab and others conducted financial transactions

“with the intent to promote the carrying on of a specified unlawful activity, to wit, the illegal export of services to Iran as charged in Count Two of this Indictment and bank fraud as charged in Count Three of this indictment ...”³⁶

2.1.1.2. IEEPA and ITSR (Iran Sanctions)

Sanctions against the Islamic Republic of Iran have been enacted since the 1980s with various objectives.³⁷ The U.S. have always been at the forefront of the

³⁴ Superseding Indictment S1, *United States v. Zarrab et al.*, S1 15 Cr. 867, 30.03.2016, para. 13.

³⁵ The Indictment S1 merely tracks the language of the relevant provisions, see *United States v. Zarrab et al.*, S1 15 Cr. 867, 30.03.2016, N 19-20. The argument is spelled out in the Government’s Memorandum of Law in Opposition to Defendant Reza Zarrab’s Motion to Dismiss the Indictment and to Suppress the Evidence, 08.08.16, p. 27.

³⁶ Superseding Indictment S1, *United States v. Zarrab et al.*, S1 15 Cr. 867, 30.03.2016, N 23.

sanctions regime, imposing the most extensive sanctions.³⁸ The U.S. sanctions program regarding Iran is currently based on 27 executive orders issued by the President, 11 statutes passed by Congress and 4 administrative regulations, published in the Code of Federal Regulations (C.F.R.) codified by the Department of the Treasury's Office of Foreign Assets Control OFAC.³⁹

Of particular importance is the International Emergency Economic Powers Act (IEEPA)⁴⁰ which is referred to in the second charge brought by the prosecution. The IEEPA empowers the President of the United States to employ economic sanctions in response to situations which the President has declared to be national emergencies. The extent of these powers and the penalties are laid down in 50 U.S.C. §§ 1701-1706. Pursuant to § 1704, the President may issue such regulations as may be necessary for the exercise of the authorities granted under the IEEPA. Various Presidents have issued executive orders covering general trading and investment for all U.S. companies with Iran.⁴¹ Pursuant to President Reagan's executive order of 29 October 1987, the Office of Foreign Assets Control (OFAC) promulgated the Iranian Transactions and Sanctions Regulations (ITSR) to implement the Iranian embargo. The ITSR are codified in the Code of Federal Regulations, 31 C.F.R. § 560. The relevant provisions start in 31 C.F.R. § 560.203.⁴² It contains the general provision which extends the scope of the ITSR prohibitions to all transactions which evade or avoid or (indirectly) cause a violation of the ITSR, or include an attempt to do so, as well as any conspiracy formed to violate the ITSR. The regulation in 31 C.F.R. § 560.204 prohibits the exportation, reexportation, sale, or supply of goods, technology or services from the United States, or by a United States person, wherever located, to Iran. And 31 C.F.R. § 560.205 prohibits the exportation, reexportation, sale, or supply of goods,

³⁷ The aim was, on the one hand, to prevent Iran's support for terrorism and to limit its strategic power in the Middle East. On the other hand, sanctions have been imposed for human rights violations, Iran's interference in various neighbouring countries and its missile and general weapons programmes. Finally, the sanctions should ensure that Iran's nuclear programme would only have civilian benefits. For an overview of the various sanctions, see KATZMANN, *Iran Sanctions*, p. 1–37.

³⁸ For comparison of U.S., UN. and EU-Sanctions, see KATZMANN, *Iran Sanctions*, p. 51–54.

³⁹ See the overview of the U.S. Department of the Treasury, available at <https://www.treasury.gov/resource-center/sanctions/programs/pages/iran.aspx> (21.12.2017).

⁴⁰ 50 U.S.C. §§ 1701–1706.

⁴¹ See e.g. Exec. Order No. 12170, 44 Fed. Reg. 65729 (14.11.1979); Exec. Order No. 12613, 52 Fed. Reg. 41940 (02.10.1987); Exec. Order No. 12957, 60 Fed. Reg. 14615 (15.03.1995, Pres. Clinton); Exec. Order No. 12959, 60 Fed. Reg. 24757 (06.05.1995).

⁴² 31 C.F.R. § 560.202 is also mentioned in the indictment. It is reserved for further regulation and is presently empty.

technology or services from the United States to Iran or the Government of Iran by persons other than United States persons.⁴³

2.2. Zarrab's Motion to Dismiss the Indictment

On 18 July 2016, Zarrab's defense team moved to dismiss the indictment in its entirety. It argued that, as a non-U.S. national, Zarrab "is free to engage in transactions with Iranian businesses without running afoul of U.S. laws that criminalize U.S. sanctions against Iran. Like most of the rest of the world, as long as he does not engage in such transactions in or from the U.S., he is unencumbered by restrictions placed on U.S. citizens as a function of U.S. foreign policy. Despite that obvious limit on U.S. sanctions laws, not to mention the presumption against extraterritoriality and the rule of lenity, Zarrab stands accused of violating U.S. law for agreeing with *foreign* persons in *foreign* countries to direct *foreign* banks to send funds transfers from *foreign* companies to other *foreign* banks for *foreign* companies. This is a prosecutorial overreach of first order. It is as unprecedented as it is problematic. These transactions are fundamentally foreign, and they are entirely legal under the foreign law that directly governs foreign persons and foreign transactions."⁴⁴

The motion to dismiss included a number of other arguments. But in essence, Zarrab argued that the court did not have jurisdiction because the only jurisdictional nexus was that the transactions were conducted in U.S. currency.⁴⁵

2.3. The Government's Opposition to the Motion to Dismiss the Indictment

The prosecution filed a memorandum of law in opposition to Zarrab's motion to dismiss on 8 August 2016.⁴⁶ Its main argument was that Zarrab had designed a scheme to "cause United States banks unwittingly to conduct financial transfers on behalf of and for the benefit of Iranian entities, including Iranian government-

⁴³ This provision is mentioned in the indictment. Surprisingly, the prosecution's argument and the court decision in the Zarrab case are based on 31 C.F.R. §560.203 and 204.

⁴⁴ Memorandum of Law in Support of Defendant Reza Zarrab's Motion to Dismiss the Superseding Indictment, 18.07.2016 (U.S. Opp.), p. 1 (emphasis in original), available at <https://timinhonolulu.files.wordpress.com/2016/07/20160718-63-motion-to-dismiss-superseding-indictment.pdf>.

⁴⁵ Memorandum of Law in Support of Defendant Reza Zarrab's Motion to Dismiss the Superseding Indictment, 18.07.2017, p. 2.

⁴⁶ Government's Memorandum of Law in Opposition to Defendant Reza Zarrab's Motion to Dismiss the Indictment and to Suppress the Evidence, 08.08.2016, available at: <https://www.docketbird.com/court-cases/USA-v-Zarrab-et-al/nysd-1:2015-cr-00867> [charge for download, on file with the author].

owned companies”⁴⁷. He had knowingly and intentionally *used* the U.S. financial system to process U.S. dollar transactions for Iranian banks and entities, and he *concealed* the identity of his Iranian clients because he was aware that U.S. banks would not process such payments.⁴⁸ Zarrab’s actions therefore “*caused effects* inside U.S. borders in violation of the criminal statutes.”⁴⁹ In the eyes of the prosecution,

“without Zarrab and his network of exchange houses and front companies to secretly conduct sanctions-evading international financial transfers, Zarrab’s Iranian co-conspirators would have been excluded from access to the U.S. financial system and the ability to engage in U.S. dollar transactions through U.S. correspondent banks.”⁵⁰

Furthermore, the prosecution argued that it is entitled to “prosecute those who willfully seek to exploit the American financial system to help a nation that, through its sponsorship of terrorism and fomenting of global unrest, presents a significant threat to this country’s national security”.⁵¹

2.4. The Court’s Decision

On 17 October 2016, Judge Richard M. Berman of the United States District Court, Southern District of New York, denied Zarrab’s motion to dismiss the indictment.⁵²

2.4.1. Conspiracy to Defraud the U.S., Bank Fraud, Money Laundering

In connection with the charge of conspiracy to defraud the United States (50 U.S.C. § 371), the court found that U.S. law is applicable in situations where the only connecting factor is payments routed through the United States.⁵³

As to the charge for conspiracy to bank fraud (18 U.S.C. § § 1344, 1349), the court held that Zarrab’s conduct constituted misrepresentation under the bank fraud statute because he omitted the material information that the payments were made on behalf of U.S. sanctioned Iranian entites.⁵⁴ The court followed the argument of the prosecution that the banks would not have made the (discretionary) decision

⁴⁷ Id., p. 1 (emphasis added).

⁴⁸ Id., p. 2.

⁴⁹ Id., p. 3.

⁵⁰ Id., p. 2.

⁵¹ Id., p. 3–4.

⁵² Decision and Order, *United States v. Zarrab*, 15 Cr 867, 17.10.2016, available at <https://www.courtlistener.com/docket/4356296/90/united-states-v-zarrab> [21.12.2017].

⁵³ Id., p. 8–11.

⁵⁴ Id., p. 27.

to proceed with the funds transfers had they known that these transfers benefitted sanctioned entities. It also held that a misrepresentation under the bank fraud statute is material if it influences, or is capable of influencing, the decision-making body to which it is addressed.⁵⁵ Finally, the court found that the bank(s) suffered a loss under the bank fraud statute because Zarrab exposed the bank to harm by “denying [the bank] the right to control [its] assets by depriving [the bank] of the information necessary to make discretionary economic decisions.”⁵⁶ The court does not mention the underlying assumption of its holding, but it is important to mention it: there is only a material misrepresentation in an omission if there is a duty of information. There would be such a duty if the funds transfers were illegal under U.S. law – which brings us back to the question whether U.S. sanctions law is applicable in the case at hand.

Regarding the charge for conspiracy to commit money laundering (18 U.S.C. § 1956), the court found that the indictment sufficiently alleged the elements of such a conspiracy because there was a transmission of funds with the intent to carry on a specified illegal activity.⁵⁷

The affirmation of jurisdiction in all three counts rests on the assumption that the Iran sanctions regime extends to a non-U.S. person who, from outside the United States, conducts money transfers from one foreign account to another foreign account. If the Iran sanctions do not apply, it is not fraudulent to conceal the true nature of the transactions vis-à-vis the government or the U.S. banks, and there is also no illegal activity in the transmission of such funds.

2.4.2. IEEPA and ITSR (Iran Sanctions)

This brings us to the linchpin of the Zarrab case, namely, the violation of the IEEPA and the ITSR (50 U.S.C. §§ 1701-1706 and 31 C.F.R. §§ 560.202-205). And here again, the court followed the prosecution and held that the conspiracy to violate the IEEPA and the ITSR were sufficiently alleged. Specifically, it found a sufficient *domestic* nexus between Zarrab’s conduct and the United States.⁵⁸ Therefore, it did not need to decide the question of extraterritoriality. However, it did address the question on an *arguendo* basis and found that the IEEPA and the ITSR have an extraterritorial reach.

⁵⁵ Id., p. 28–29.

⁵⁶ Id., p. 31.

⁵⁷ Id., p. 33.

⁵⁸ Id., p. 17.

2.4.2.1. Domestic Jurisdiction

As to the *domestic* jurisdiction, the court referred to *United States v. Banki*⁵⁹ and found that

“the Second Circuit Court of Appeals has made it clear that the execution of money transfers on behalf of others from the United States to Iran may constitute the exportation or supply of a prohibited ‘service’, in violation of the IEEPA and the ITSR.”⁶⁰

In the *Banki* case the defendant was a U.S. citizen and the payments originated from his United States bank account. The applicability of the sanctions regime turned on the question whether there was an exportation of a service where the service was not undertaken for a fee.⁶¹ *Banki* does not answer the question whether 31 C.F.R. § 560.204 (prohibition of the “exportation ... from the United States, or by a United States person, wherever located, of any goods, technology, or services to Iran or the Government of Iran”) is applicable in the case at hand. In the *Zarrab* case, the question turns on whether the *clearing, in the United States*, of a payment originating and terminating at foreign banks, constitutes *an exportation of services from the United States* under 31 C.F.R. § 560.204. The court affirms this question, and by doing so, also affirms that the conduct is domestic in nature.⁶²

2.4.2.2. Extraterritorial Jurisdiction

In a second line of argument, the court found that, even if one were to find that it is applying U.S. law extraterritorially in the *Zarrab* case, it still had jurisdiction. This line of argument has to be seen in the context of the U.S. Supreme Court decision in *Morrison v. National Australian Bank Ltd.*, where the court held that U.S. law is not applicable extraterritorially absent a clear intention of Congress. In other words, there is a presumption against the extraterritorial application of domestic law.⁶³ The court in *Zarrab* affirmed the presumption against extraterritoriality but pointed to case law which holds that this presumption does not apply “in situations where the law at issue is aimed at protecting the government to defend itself.”⁶⁴ The court in *Zarrab* argued that the IEEPA and the ITSR “reflect the United States’ interest in protecting and defending itself against, among other

⁵⁹ *United States of America v. Mahmoud Reza Banki*, 685 F.3d 106, (2d Cir. 2012), as amended (Feb. 22, 2012).

⁶⁰ Decision and Order, *United States v. Zarrab*, 15 Cr 867, 17.10.2016, p. 15.

⁶¹ This is openly stated in the *Zarrab* decision, see Decision and Order, *United States v. Zarrab*, 15 Cr 867, 17.10.2016, p. 15–16.

⁶² Decision and Order, *United States v. Zarrab*, 15 Cr 867, 17.10.2016, p. 17.

⁶³ 561 U.S. 247, 255 [2010]: “[I]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”

⁶⁴ Decision and Order, *United States v. Zarrab*, 15 Cr 867, 17.10.2016, p. 18, citing *United States v. Vilar*, 729 F.3d, p. 73.

things, Iran's sponsorship of international terrorism, Iran's frustration of the Middle East peace process, and Iran's pursuit of weapons of mass destruction, which implicate the national security, foreign policy, and the economy of the United States."⁶⁵ Accordingly, in the eyes of the court the presumption against extraterritoriality is overcome in the context of the embargo regulations.⁶⁶

The conclusion the court draws from this finding is that the IEEPA and the ITSR encompass not only conduct by a U.S. person, but also conduct "emanating" from the United States.⁶⁷ This conclusion is not conclusive. The embargo regulations explicitly mention the "exportation" from the United States. To say that they cover conduct "emanating" from the United States does not shed any light on the decisive jurisdictional question which the court should have clarified. The question is whether the term "exportation" from the United States is to be construed broadly in order to include the clearing, in the United States, of a payment originating and terminating at foreign banks. Evidently, the court answers this question by "yes", since it affirms jurisdiction under the extraterritoriality test. But the decision itself remains silent on this point.

2.5. Consequences of the Court's Decision

2.5.1. Affirming Correspondent Account Jurisdiction in the Embargo Context

Correspondent account jurisdiction affirms a jurisdictional hook when a transaction is routed through a territory for clearing purposes. In the *Zarrab* case, the Court affirmed that there is correspondent account jurisdiction in the context of the embargo regulations. Correspondent account-based jurisdiction has been increasingly evoked by U.S. authorities,⁶⁸ including in the embargo context. In the past years, a number of European banks faced charges of conspiracy to violate U.S. sanctions law because they offered financial services in U.S. currency to sanctioned companies or persons. In all the cases, the transactions originated and ended outside of the United States; the only jurisdictional link was that they were

⁶⁵ Decision and Order, *United States v. Zarrab*, 15 Cr 867, 17.10.2016, p. 19.

⁶⁶ Actually, there is little question that the Embargo regulations apply extraterritorially, since they explicitly apply to all U.S. persons, wherever located. See 31 C.F.R. § 560.204. The court does not use this argument. Instead, it points at other provisions which supposedly indicate the clear intent of Congress to apply the IEEPA and the ITSR extraterritorially. The author finds that the examples are not conclusive.

⁶⁷ Decision and Order, *United States v. Zarrab*, 15 Cr 867, 17.10.2016, p. 22–23.

⁶⁸ Another area of law where correspondent account liability has been evoked is the anti-bribery context. See SHEARMAN & STERLING LLP, *FCPA Shoe Drops*. For a legal analysis see WILSON, *Pushing the limits*, p. 1063–1087.

cleared in the United States. Since all cases settled,⁶⁹ the doctrine of correspondent account jurisdiction was not tested in court. The *Zarrab* case changed this; now there is a precedent for correspondent account jurisdiction in the embargo context, one where the clearing is the one and only nexus with the U.S.; i.e. correspondent account jurisdiction is used as a stand-alone jurisdictional basis.

Zarrab is not an overwhelmingly strong precedent. The court emphasized that to dismiss a case on jurisdictional grounds at the indictment stage is an extraordinary remedy reserved only for extremely limited circumstances implicating fundamental rights.⁷⁰ In the decision, it uses language which supports this perspective, affirming jurisdiction at the “motion of dismissal stage”⁷¹. In other words, the court indicates that it is merely undertaking a summary examination of the jurisdictional question. The fact that *Zarrab* had already been detained in a federal correction center for seven months did not seem to involve fundamental rights in the eyes of the court.

Yet even if the *Zarrab* decision is no overwhelmingly strong precedent, the decision stands and there can be little mistake regarding the fact that it sets a very low bar for establishing U.S. jurisdiction in embargo cases against foreign nationals.⁷²

2.5.2 Correspondent Account Jurisdiction: Global Reach of U.S. Law?

In the case of the U.S. currency, correspondent account jurisdiction has significant consequences. Today, over 80% of all currency transactions are made in U.S. dollars.⁷³ The major part of these transactions are cleared in the United States, even if the payor and the payee are located outside the United States.⁷⁴

⁶⁹ Examples include: BNP Paribas (\$8.9736 billion), Deutsche Bank (\$258 million), Crédit Agricole (\$787 million), ING Bank (\$619 million), Standard Chartered (\$667 million), HSBC (\$1.9 billion). For a more detailed account see EMMENEGGER, *Extraterritorial Economic Sanctions*, p. 632–633.

⁷⁰ Decision and Order, *United States v. Zarrab*, 15 Cr 867, 17.10.2016, p. 5.

⁷¹ This is supported by language in the decision which affirms the bank fraud charge “at the motion of dismissal stage”. See Decision and Order, *United States v. Zarrab*, 15 Cr 867, 17.10.2016, p. 29.

⁷² See also FLICKER/MANLEY/FIEBIG, *United States of America v. Reza Zarrab*, p. 1.

⁷³ See NZZ, 04.11.2016 (Der Dollar als internationale Leitwährung? Ein unverschämtes Privileg). See also *Bericht des Bundesrates über die Bedeutung des US-Dollars und des US-Zahlungs- und Abwicklungssystems für den Schweizer Finanzsektor in Erfüllung des Postulats 13.3651* (12.08.2015), p. 6–7.

⁷⁴ For an account of the different scenarios involving U.S. dollar transactions see GRUSON, *Transfers of U.S. Dollars*, p. 725–731.

By way of example, consider the following hypothetical. If French resident A wants to make a dollar transfer to Canadian resident B, then in the regular course of events this will ultimately involve a transfer between two U.S. banks. Both A and B have local bank accounts. These local banks have accounts at U.S. banks (correspondent banks, Bank XX and Bank YY) to conduct transactions in U.S. dollars, such as receiving deposits or making payments. The U.S. banks have bank accounts at the Federal Reserve Bank (“Fed”). When A instructs his local bank to transfer a U.S. dollar amount to B, his local bank will transmit the order to its U.S. correspondent bank XX. Bank XX will transfer the amount to Bank YY, the U.S. correspondent bank of the Canadian local bank of Canadian resident B. If the transfer is made via the Fed wire payment system, this results in a clearance and settlement in the Federal Reserve Bank of New York, where the account of Bank YY is credited and the account of Bank XX is debited. Another possibility for the U.S. correspondent banks is to use the Clearing House Interbank Payment System. The effect is the same: The clearing happens in U.S. territory.

Apart from this standard scenario, there are possibilities to conduct U.S. dollar transactions where the clearing takes place outside of the United States (e.g. in Tokyo, Hong Kong, Singapur or Manila).⁷⁵ Another possibility is that the foreign banks of the parties have a correspondent account at a third bank located outside the United States. Finally, the payor and the payee could have a U.S. dollar account at the same non-U.S. bank in which case the transfer would be conducted in-house. However, none of these alternatives are viable for larger transfers and for general commercial purposes.

If correspondent account jurisdiction is accepted as a general jurisdictional link, then this confers to the United States a global law-making power.

3. Jurisdiction from an International Law Perspective

Reza Zarrab is a non-U.S. person who is being prosecuted in the United States for conduct which essentially took place in foreign countries where his conduct was legal. The jurisdictional link in the Zarrab case is correspondent account jurisdiction on a stand-alone basis. The international law perspective on this type of jurisdiction has been analyzed in more depth elsewhere.⁷⁶ The following paragraphs provide a brief summary.

⁷⁵ See GRUSON, *Transfers of U.S. Dollars*, p. 728–731.

⁷⁶ See EMMENEGGER, *Extraterritorial Economic Sanctions*, p. 633–659.

3.1. Jurisdictional Principles in International Law

The starting point for jurisdiction in international law is that each nation possesses an exclusive jurisdiction within its territory. The territoriality principle is universally recognized as a ground for jurisdiction. It is said to be “the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power”⁷⁷. The territoriality principle is interpreted widely; it extends to conduct that partly occurs within domestic territory, as long as this part is substantial (so-called "subjective territoriality principle").⁷⁸

The territoriality principle is also embedded in the accepted principle of the *lex monetae*, i.e. the monetary sovereignty of a state. This doctrine states that, within its territory, a state has the competence to determine what values are accepted as legal tender and the nominal value of the currency, and to replace its currency with a new currency.⁷⁹

Another extension of the territoriality principle regards conduct that, even though carried out abroad, produces a "direct, substantial and reasonably foreseeable effect" in the state asserting jurisdiction.⁸⁰ Here, domestic jurisdiction is based on the so-called "effects doctrine".⁸¹ The effects doctrine has grown into a separate (although not uncontroversial)⁸² jurisdictional link in the context of customary

⁷⁷ *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F. 2d 909, 921 (D.C. Cir. 1984).

⁷⁸ See CRAWFORD, *Public International Law*, p. 458.

⁷⁹ GRUSON, *Transfers of U.S. Dollars*, p. 723; BISMUTH, *Extraterritorialité du droit américain*, p. 796–797.

⁸⁰ See e.g. Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a(1)(A); Council Regulation 648/2012, OTC Derivatives, Central Counterparties and Trade Repositories (EMIR), 2012 O.J. (L 201/1). 17; Council Regulation 600/2014, Markets in Financial Instruments (MiFIR), 2014 O.J. (L 173/84), 117.

⁸¹ See RANDALL, *Universal Jurisdiction*, p. 787 note 8 (“The ‘effects doctrine’ or the ‘objective territorial principle’ refers to jurisdiction arising when the offender intentionally has caused negative consequences within the state, although the offense itself occurs outside of the prosecuting state’s territory.”).

⁸² SCHIFF BERMAN, *Global Legal Pluralism*, p. 1182 (“In an electronically connected world the effects of any given action may immediately be felt elsewhere with no relationship to physical geography at all.”). See also JENNINGS, *Extraterritorial Jurisdiction*, p. 159–161 and 175 (noting that the acceptance of the effects doctrine will lead to a limitless State jurisdiction); AKEHURST, *Jurisdiction in International Law*, p. 154 (noting that the effects principle is “a slippery slope which leads away from the territorial principle towards universal jurisdiction.”); MANN, *Jurisdiction*, p. 41–43; FITZGERALD, *Pierre Goes Online*, p. 91 (noting that the effects doctrine is problematic because of disagreements as to how substantial the effects have to be in order to suffice as a basis for jurisdiction); RYNGAERT, *Secondary Boycotts*, p. 643 (referring to the effects doctrine as controversial in the context of secondary boycotts).

international law.⁸³ Although it is mostly seen as an exercise of *extraterritorial* jurisdiction,⁸⁴ some authors conceptualize it as *territorial* jurisdiction.⁸⁵

An uncontroversial link for jurisdiction under international law is the active personality principle, according to which a state has jurisdiction over its nationals even if they are abroad.⁸⁶ The passive personality principle permits a state to exercise jurisdiction over an alien for acts committed abroad if one of the state's nationals is offended.⁸⁷ However, this principle is highly controversial.⁸⁸

Also among the generally accepted principles of jurisdiction is the protective principle.⁸⁹ A state can lawfully claim jurisdiction when its vital interests – first and foremost regarding sovereignty or right to political independence – are affected.⁹⁰

Lastly, under the universality principle, a state can exercise jurisdiction even if there is no connection between the crime and the regulating state – but only if the act falls under a specified international crime.⁹¹ The universality principle covers

⁸³ See *Restatement* (Fourth) of the Foreign Relations Law of the United States, Council Draft No. 2, § 213 (Am. Law Inst. 2016) ("International Law recognizes a state's jurisdiction to prescribe law with respect to conduct that has a substantial effect within its territory.").

⁸⁴ See HERDEGEN, *International Economic Law*, p. 86 ("Jurisdiction based merely on the effects of actions on a State's territory carried out abroad ['effects doctrine'] is a most important factor in the extraterritorial application of laws"); PARRISH, *Evading Legislative Jurisdiction*, p. 1682–1683; ZERK, *Extraterritorial Jurisdiction*, p. 7–8 and 19; SCOTT, *The New EU*, p. 1356; SCOTT, *Extraterritoriality*, p. 92.

⁸⁵ See COLANGELO, *Extraterritorial Jurisdiction*, p. 1322 (noting that regulating activity abroad that produces effects in the United States "may be conceptualized as an assertion of territorial jurisdiction."); PARRISH, *Evading Legislative Jurisdiction*, p. 1691–1697 (noting that, originally, U.S. courts treated effects-based jurisdiction as extraterritorial, but that the courts' attitudes have changed and that such jurisdiction is now treated as territorial).

⁸⁶ RYNGAERT, *Jurisdiction*, p. 104; AKEHURST, *Jurisdiction in International Law*, p. 156. See also WATSON, *Passive Personality*, p. 28.

⁸⁷ WATSON, *Passive Personality*, p. 2.

⁸⁸ KERN, *Extra-territorial Jurisdiction*, p. 470; WATSON, *Passive Personality*, p. 2; MANN, *Jurisdiction*, p. 47 "[passive personality jurisdiction] should be treated as an excess of jurisdiction."

⁸⁹ See RYNGAERT, *Jurisdiction*, p. 114–119.

⁹⁰ INTERNATIONAL BAR ASSOCIATION, *Report of the Task Force*, p. 14. See also RYNGAERT, *Jurisdiction*, p. 114 (noting that no actual harm needs to have resulted from the foreign acts and that this distinguishes the protective principle from the effects doctrine).

⁹¹ See INTERNATIONAL LAW ASSOCIATION, *London Conference*, p. 2 ("Under the principle of universal jurisdiction a state is entitled or even required to bring proceedings in respect of certain serious crimes, irrespective of the location or the crime, and irrespective of the nationality of the perpetrator or the victim."). See also RANDALL, *Universal Jurisdiction*, p. 788.

crimes against international humanitarian law such as slave trade, genocide, war crimes and torture.⁹²

3.2. Correspondent Account Jurisdiction

From the international law perspective, the following jurisdictional principles come into play in the examination of the Zarrab case: First, the territoriality principle in the guise of subjective territoriality and the form of the *lex monetae*. Second, the effects doctrine which is an extension of the territoriality principle but has evolved into a distinct jurisdictional link. Third, the protective principle, and lastly, the universality principle.

Whether correspondent account liability is acceptable under international law in the context of U.S. embargo law has to be examined in the light of these principles.⁹³

3.2.1 Territoriality principle

3.2.1.1. Subjective Territoriality

The first and central argument for jurisdiction in the Zarrab case is that there has been relevant conduct within the United States because the transfer cleared through a U.S. account.

However, the subjective territoriality principle requires that a “substantial part” of the conduct takes place within the territory. Here, the only part of the conduct is the (electronic) transition of funds through the U.S. correspondent banks. Therefore, the “substantial part” threshold is not met.⁹⁴

3.2.1.2 Lex monetae

Another jurisdictional hook which requires a brief analysis is the *lex monetae*. It could be argued that monetary sovereignty includes the power of a state to determine the use of its currency, wherever it is located. Accordingly, there would

⁹² See *Restatement (Fourth) of the Foreign Relations Law of the United States*, Tentative Draft No. 2, § 217 (Am. Law Inst. 2016) (mentioning genocide, crimes against humanity, war crimes, certain acts of terrorism, piracy, slave trade, and torture); RANDALL, *Universal Jurisdiction*, p. 788. See also INTERNATIONAL BAR ASSOCIATION, *Report of the Task Force*, p. 14–16 (regarding the differentiations between criminal and civil law). See also BRADLEY, *Universal Jurisdiction*, p. 324; DIMITRAKOS, *Universal Jurisdiction*, 12.

⁹³ For a similar account see ALEXANDER, *Iran and Libya Sanctions*, p. 1601–1633.

⁹⁴ EMMENEGGER, *Extraterritorial Economic Sanctions*, p. 655–656, with further references.

be jurisdiction in the Zarrab case because U.S. currency was used in transactions which were prohibited by U.S. law.

This argument was not put forward in the U.S. proceedings, and rightfully so. The *lex monetae* does not confer to a state the power to exercise jurisdiction over transactions involving its currency when these transactions occur outside of its borders.⁹⁵

3.2.2. Effects Doctrine

The effects doctrine is another possible jurisdictional ground in the Zarrab case, as the clearing of the transactions by U.S. banks undoubtedly caused effects within the territory of the United States.

Yet it is doubtful that these effects fall within the scope of the effects doctrine in international law. The effects doctrine requires that foreign conduct produces *direct, substantial and foreseeable* effects within the territory. There is no direct effect within the territory of the United States if Zarrab, by his payment orders, causes U.S. banks to violate domestic law; the effect is merely an indirect one. Furthermore, this indirect territorial effect does not meet the substantiality threshold. The domestic payment market is not affected by the transactions in cause; they do not disrupt the U.S. payment system or make it less reliable or more expensive for its users. Neither do they affect the domestic authority of the sanctions; within the U.S., they are the law, and U.S. firms are bound by it. What is affected is the sanctions' global effectiveness, because firms outside the U.S. can engage in the conduct prohibited by U.S. law. But this is not a domestic effect.⁹⁶

3.2.3. Protective Principle

Another possible jurisdictional link for jurisdiction in the Zarrab matter is the protective principle, as it can be argued that the U.S. has a legitimate interest in exercising jurisdiction because Iran poses a threat to its national security.

But here again, the question is not so much whether Iran poses a national security threat to the United States, but rather whether the type of conduct in which Zarrab engaged lies within the scope of the protective principle. The answer is “no”. Arguably, Iran’s nuclear weapons program qualifies as a direct threat to the U.S. national security. Sanctions against actors that support Iran's weapon's program would therefore be covered by the protective principle.⁹⁷ However, it is much less

⁹⁵ See BISMUTH, *Extraterritorialité du droit américain*, p. 797, with further references; GRUSON, *Transfers of U.S. Dollars*, p. 723–724.

⁹⁶ For these arguments see EMMENEGGER, *Extraterritorial Economic Sanctions*, p. 656–657.

⁹⁷ MEYER, *Secondary Sanctions*, p. 940.

evident why the validity of the jurisdictional claim should extend to ordinary business dealings which have no direct link to the Iran weapons programs. For activities not directly linked to the cause of the national security threat, the protective principle does not provide a sufficient basis for jurisdiction.⁹⁸

3.2.4. Universality Principle

Finally, the threat to international security suggests an application of the universality principle. This is problematic because this principle has not yet been accepted in the economic context.⁹⁹ Even if the principle was deemed applicable in the economic context, the hurdle remains high. General assertions regarding nuclear proliferation, human rights violations, and support of terrorism would not be sufficient to legitimize jurisdiction.¹⁰⁰

3.3. Correspondent Account Jurisdiction: Dubious Legality Under International Law Principles

From an international law perspective, correspondent account jurisdiction in the context of unilateral economic sanctions is of dubious legality.¹⁰¹ If at all, it can be justified under the protective principle. But the legitimizing power of the protective principle is limited to transactions which are directly linked to the national security threat. The legal doctrine has rightfully pointed out that the protective principle lacks the capability to serve as a justification for much of the extraterritorial application of export controls.¹⁰² In the case of Reza Zarrab, the transactions were not connected to the Iran weapons program or to activities which sponsored terrorism. The protective principle can therefore not serve as a legitimizing link for jurisdiction.

⁹⁸ BOWMAN, U.S. Export Controls, p. 663 (noting that "protective jurisdiction only justifies jurisdiction over items abroad when national security-levels are at stake. It does not justify blanket item origin-based jurisdiction."). See also RYNGAERT, Secondary Boycotts, p. 643 (casting doubts about validity of the Iran sanctions); RENSMANN, Völkerrechtliche Grenzen, p. 110; MEYER, Secondary Sanctions, p. 941.

⁹⁹ RENSMANN, Völkerrechtliche Grenzen, p. 110.

¹⁰⁰ BOWMAN, U.S. Export Controls, p. 666 ("[U]niversal jurisdiction . . . is not a viable basis for extraterritorial prescriptive export control jurisdiction."). See also RENSMANN, Völkerrechtliche Grenzen, p. 110; RYNGAERT, Secondary Boycotts, p. 644.

¹⁰¹ For the same conclusion: BISMUTH, Extraterritorialité du droit américain, p. 796.

¹⁰² BOWMAN, U.S. Export Controls, p. 662.

4. U.S. Jurisdiction: A Paper Tiger?

This paper was presented at a conference entitled “U.S. Litigation: Still a Threat for European Businesses or Just a Paper Tiger?” The title is a reference to an article by Steven Burbank in the University of Pennsylvania Journal of International Law.¹⁰³ According to Burbank, recent case law has made it much harder to maintain jurisdiction in U.S. courts. In his view, European companies’ fears of U.S. litigation is based on a premise that is on the edge of obsolescence. Among the decisions he mentions are the famous *Morrison v. National Australia Bank*¹⁰⁴ and its presumption against the extraterritorial reach of U.S. law, as well as *Goodyear Dunlop Tires Operations, S.A. v. Brown*¹⁰⁵ and *McIntyre Machinery, Ltd. v. Nicastro*¹⁰⁶, two decisions which raise the threshold to sue foreign defendants in U.S. courts.

In Europe, *Morrison* has probably received the most attention, as the presumption against extraterritoriality seems to counterbalance the traditionally extensive U.S. jurisdiction.¹⁰⁷ And indeed, the Supreme Court in *Morrison* put an end to the so-called “foreign-cubed” claims, i.e. claims involving *foreign* investors purchasing shares of a *foreign* issuer on a *foreign* exchange.¹⁰⁸

But *Morrison* has its limits. Let us remember that Reza Zarrab argued that he “stands accused of violating U.S. law for agreeing with *foreign* persons in *foreign* countries to direct *foreign* banks to send funds transferring from *foreign* companies to other *foreign* banks for foreign companies.”¹⁰⁹ Reza Zarrab was an inmate in the Metropolitan Correctional Center in Manhattan between March 19, 2016, and November 8, 2017. Since then, he has been held in custody by the FBI at an undisclosed location. He has pleaded guilty to the violation of U.S. laws and he is likely to serve additional time in prison. If Reza Zarrab were asked whether litigation in U.S. courts is a becoming a paper tiger, we know what his answer would be.

¹⁰³ See STEPHEN B. BURBANK, International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?, U. Pa. J. Int’l L., p. 663 [2012].

¹⁰⁴ 130 S. Ct. 2869 [2010].

¹⁰⁵ 131 S. Ct. 2646 [2011].

¹⁰⁶ 131 S. Ct. 2780 [2011]. See, e.g. DROBAK, Personal Jurisdiction in a Global World, p. 1707.

¹⁰⁷ After *Morrison*, the presumption against extraterritoriality was affirmed in *Kjibel v. Royal Dutch Petroleum Co*, 133 S. Ct. 1659 [2013] and in *RJC Nabisco v. European Community*, 136 S. Ct. 2090 [2016].

¹⁰⁸ BURBANK, International Civil Litigation, p. 665.

¹⁰⁹ See Memorandum of Law in Support of Defendant Reza Zarrab’s Motion to Dismiss the Superseding Indictment, 18.07.2017, p. 1.

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