



# I N T E R N A T I O N A L E N F O R C E M E N T L A W R E P O R T E R

## Who is a “U.S. Person?” Are there any limits to American Jurisdiction Under the International Emergency Economic Powers Act?

*A special contribution from Dennis Boyle\**

Sanctions are a powerful tool in the United States’ foreign policy arsenal. Under the International Emergency Economic Powers Act (IEEPA),<sup>1</sup> the U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC), armed with only an executive order, has the power to designate individuals, corporations, organizations or even countries as “Specially Designated Nationals” (SDNs) thereby prohibiting “U.S. persons” from engaging in financial transactions with the SDN. While one may question the wisdom of imposing economic sanctions based upon the collateral economic damage to American firms, few would question the authority of the U.S. to prohibit its citizens from providing financial assistance to those who seek to undermine U.S. security or foreign policy goals.

What happens, however, when a non-U.S. citizen decides to finance or financially support an SDN engaged in activities that run counter to the foreign policy goals of the United States? Suppose this individual is the citizen of a foreign nation that maintains a foreign policy in conflict with that of the United States. Can the long arm of U.S. justice reach around the world to snag this individual and haul him or her before a U.S. court to stand trial? Language in IEEPA and the regulations interpreting it would seem to limit the statute’s application to only “U.S. persons.”<sup>2</sup> Recently, however, the DOJ has announced changes to the Justice Manual.<sup>3</sup> These changes, among other things, encourage private companies to voluntarily self-report (VSR) IEEPA violations directly to the National Security Division of the DOJ and state that reports to OFAC are insufficient to obtain the VSR benefits offered by the DOJ in criminal prosecutions.<sup>4</sup> These changes in the Justice Manual, combined with several recent prosecutions, suggest a heightened emphasis on IEEPA violations, including the prosecution of non-U.S. persons who, at least theoretically, are not subject to U.S. sanctions.

In response to an unusual and extraordinary threat to the United States, 50 U.S.C. §1702 grants the President broad authority to “investigate, regulate or prohibit” financial and other currency transfers “by any person, or with respect to any property, subject to the jurisdiction of the United States.”<sup>5</sup> The statute does not define who is “subject to the jurisdiction of the United States;” however, this phrase has a long precise history dating to the

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<sup>1</sup> International Emergency Economic Powers Act of 1977, Pub. L. 95-223, 91 Stat. 1626.

<sup>2</sup> 50 U.S.C. § 1702(a)(1)(A) prohibits transactions under the statute “. . . by any person, or with respect to any property, subject to the jurisdiction of the United States.”

<sup>3</sup> Department of Justice, Office of Public Affairs, Department of Justice Revises and Re-Issues Export Control and Sanctions Enforcement Policy for Business Organizations (Dec. 13, 2019), available at: <https://www.justice.gov/opa/pr/departments-justice-revises-and-re-issues-export-control-and-sanctions-enforcement-policy>.

<sup>4</sup> *Ibid.*

<sup>5</sup> 50 U.S.C. § 1702(a)(1)(A).

adoption of the Fourteenth Amendment to the U.S. Constitution. The Citizenship Clause of the Fourteenth Amendment states that: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.”<sup>6</sup> Who then were not subject to the jurisdiction of the United States for Fourteenth Amendment purposes? Children of diplomats, Native Americans “not taxed” and persons who were not born or naturalized in the United States.<sup>7</sup> By adopting the same phrase used in the Fourteenth Amendment, it appears that Congress sought to limit IEEPA’s application to persons born or naturalized in the United States and those persons residing in the United States and not subject to the jurisdiction of a foreign power (*i.e.*, diplomats).

This conclusion is consistent with OFAC’s explanation of what transactions are prohibited. In its Frequently Asked Questions, OFAC states “Prohibited transactions are trade or financial transactions and other dealings in which U.S. persons may not engage unless authorized by OFAC or expressly exempted by statute.”<sup>8</sup> A U.S. person is defined as “. . . any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction with the United States (including foreign branches), or any person in the United States.”<sup>9</sup> Therefore, one reading the text of IEEPA or OFAC’s regulations enacted thereunder could reasonably conclude that only American citizens, American companies, permanent residents or those residing in the United States are subject to U.S. sanctions and that anyone else, including citizens of a foreign nation residing in that nation are not subject to U.S. sanctions.

However, in 2015, Reza Zarrab, a Turkish banker residing in Turkey, was indicted for IEEPA violations for assisting the Central Bank of Iran in engaging in dollar denominated transactions. Zarrab was not a “U.S. person;” he was a Turkish citizen subject to the laws of Turkey. He was arrested in the United States, at the Miami airport, only because he attempted to bring his family to the United States to visit Disneyland. Before trial, he moved to dismiss the Indictment alleging that IEEPA did not apply to him because he was not a U.S. person. The government, however, argues that Zarrab was subject to U.S. jurisdiction because he conspired to caused banks in the U.S. to provide services to Iran in violation of U.S. sanctions. The court agreed with the government finding that there was a sufficient nexus between the charged conduct and the United States to establish jurisdiction.<sup>10</sup>

The court’s opinion, however, misses the central issue in the case. The question was not whether Zarrab had a sufficient connection to the United States to establish jurisdiction, although his connections were quite nebulous. The question should have been: does IEEPA allow for the prosecution of non-U.S. persons for sanctions violations? In other words, if IEEPA only prohibits U.S. persons from engaging in financial transactions with sanctioned entities and, if Zarrab was not a U.S. person, does it not follow that his commercial dealings with a sanctioned entity did not violate IEEPA?

While the issue of the meaning of “U.S. person” would have been a viable appeal issue, Zarrab ultimately decided to enter a guilty plea and cooperate with the DOJ in the prosecution of his alleged co-conspirators.<sup>11</sup> In the United States, guilty pleas are by far the norm when it comes to the resolution of criminal cases with over 95% of

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<sup>6</sup> U.S. Const. Amend. XIV.

<sup>7</sup> See *Elk v. Wilkins*, 112 U.S. 94 (1884).

<sup>8</sup> Department of the Treasury, Basic Information on OFAC and Sanctions, available at: [https://www.treasury.gov/resource-center/faqs/Sanctions/Documents/faq\\_all.html](https://www.treasury.gov/resource-center/faqs/Sanctions/Documents/faq_all.html).

<sup>9</sup> See, *e.g.*, Iranian Transactions Regulations, 31 CFR § 560.314.

<sup>10</sup> *United States v. Zarrab*, No. 15 CR 867 (RMB), 2016 WL 6820737, at \*8-10 (S.D.N.Y. Oct. 17, 2016).

<sup>11</sup> Weiser, B. (Nov. 28, 2017), *Reza Zarrab, Turk at Center of Iran Sanctions Case, Is Helping Prosecution*, New York Times, available at: <https://www.nytimes.com/2017/11/28/world/europe/reza-zarrab-turkey-iran.html>.

cases ending in a guilty plea. One of the unfortunate consequences of guilty pleas, however, is that the development of the law is retarded and important issues like those raised in the *Zarrab* case are left unresolved.

There are other cases where the DOJ has sought to criminalize sanctions violations by non-U.S. persons. In *United States v. Dandong Hongxiang Industrial Development* (DHID),<sup>12</sup> a Chinese company was indicted for IEEPA violations for assisting North Korean banks in evading U.S. sanctions. However, the facts as related in the Indictment indicate that DHID was located in the People’s Republic of China in close proximity to North Korea. Most of DHID’s business was conducted with banks in North Korea. Although DHID acted as a “corresponding bank” for at least one sanctioned North Korean entity, this act does not appear to have violated any laws of the PRC. In fact, China had not sanctioned North Korea or any North Korean entities. Nevertheless, DHID was indicted. Ultimately, the Indictment itself is of no precedential value in the United States because DHID has not appeared to answer any charges.

Another case involves Kassim Tajideen. Mr. Tajideen was one of fifteen children born into extreme poverty in Lebanon in the 1950s. By the 2000s, he had risen from poverty to become a successful businessman with commercial operations throughout the Middle East and Africa. In 2009, OFAC declared him to be an SDN, allegedly for providing financial support to Hezbollah. Mr. Tajideen has always denied any involvement with Hezbollah and, for years, his attorneys met with OFAC in an effort to have his name removed from the list.<sup>13</sup> In 2017, Mr. Tajideen was indicted for IEEPA violations, allegedly for purchasing chickens from a U.S. supplier and selling them in Africa.

Tajideen raised the issue of his non-U.S. person status in a motion to dismiss the IEEPA violation, but, once again, as in the *Zarrab* case, the District Court denied the motion. The court determined that IEEPA has extra-territorial application and cited *Zarrab* as precedent.<sup>14</sup> Once again, however, the court failed to come to grips with the “U.S. person” limitation in the IEEPA. As in the *Zarrab* case, Mr. Tajideen opted to accept a favorable plea offer,<sup>15</sup> and the appellate courts were once again deprived of an opportunity to address this issue.

Indictments like the DHID Indictment are nothing more than a formal accusation of criminal conduct; they have no precedential effect. District Court opinions like those in *Zarrab* and *Tajideen* have some significance, but they are not binding on other federal trial courts. It is only reported (precedential) decisions of the Courts of Appeals and the U.S. Supreme Court that bind other courts. Nevertheless, the indictment of individuals followed by pleas of guilty encourage more wide-ranging enforcement action by the DOJ. Each “successful” resolution of a matter encourages the DOJ to prosecute others in similar situations.

Take the most recent case of *United States v. Oleg Vladislavovich Nikitin, et. al.*, for example. According to an Indictment handed down in the Southern District of Georgia, an unnamed but sanctioned Russian company sought to obtain a Vectra 40 G Power Turbine for use on a deep-sea drilling platform in the Arctic Sea. This particular power turbine was manufactured in the U.S. and was subject to export controls. In addition to export

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<sup>12</sup> *U.S. v. Dandong Hongxiang Industrial Development, et al*, Indictment, available at: <https://www.justice.gov/opa/press-release/file/1186081/download>

<sup>13</sup> Zuckerman Spaeder Press Release, available at <https://www.prnewswire.com/news-releases/zuckerman-spaeder-statement-regarding-sentencing-of-kassim-tajideen-300899163.html>.

<sup>14</sup> *United States v. Tajideen*, Criminal No. 2017-0046 (D.D.C. 2018).

<sup>15</sup> Department of Justice, Office of Public Affairs, Lebanese Businessman Tied by Treasury Department to Hezbollah Pleads Guilty to Money Laundering Conspiracy in Furtherance of Violations of U.S. Sanctions, available at: <https://www.justice.gov/opa/pr/lebanese-businessman-tied-treasury-department-hezbollah-pleads-guilty-money-laundering>.

controls, IEEPA also made it a felony for the U.S.-based manufacturer to engage in commercial transactions with the sanctioned Russian company.<sup>16</sup>

This is where Mr. Nikitin and a variety of other characters enter the picture. Mr. Nikitin, his company, KS Engineering, and an employee of KS, Anton Cheremukhin, according to the Indictment, enlisted the aid of an Italian company, GVA International Oil and Gas Services, its principle, Gabriele Villone and an employee, Bruno Capriani.<sup>17</sup> Finally, an American, Dali Bagrou and his company, World Oil and Mining Supply, was brought into the transaction to further obscure the final destination of the power turbine. It would appear, at least according to the Indictment, that the co-conspirators were attempting to mislead both the manufacturer of the power turbine and the U.S. government as to the ultimate user of the power turbine. Nikitin, Villone and Bagrou were all arrested in Georgia, U.S., when they arrived to consummate the transaction.<sup>18</sup>

Nikitin is not a U.S. person. From the Indictment and accompanying press release, he appears to be a Russian national who was aiding a Russian company in procuring a power turbine to engage in deep sea oil exploration. The Russian company in question is sanctioned by the U.S. because of the Russian “annexation” of the Crimea. However, Russian and U.S. American foreign policy goals diverge when it comes to the issue of the Crimea, and it seems unreasonable for the U.S. to require Russian citizens living in Russia to support contrary U.S. foreign policy goals or face U.S. criminal sanctions. Indeed, if this were permitted to happen, it could very well place the U.S. in violation of both the United Nations Charter<sup>19</sup> and other international law principles of sovereignty.<sup>20</sup> The expansive enforcement of U.S. criminal laws could lead to unnecessary and complicated conflicts between nations. If Russia were to take the same expansive views of its own laws, it could charge and perhaps try American corporations and individuals for undermining Russian foreign policy goals by taking actions that are both legal in the U.S. and supportive of U.S. foreign policy.

Fortunately, it may be possible to avoid these difficult issues of international law and conflicting claims of sovereignty. One need only look to the language of IEEPA to determine that non-U.S. persons are not subject to IEEPA. As the DOJ pushes further with these prosecutions, the courts should be forced to come to terms with the language of the statute and realize that only U.S. persons can be prosecuted for IEEPA violations and limit DOJ’s zeal in the prosecution of foreign nationals. Such a conclusion by the courts would recognize the importance of the language of the statute, ensure compliance with international law and protect U.S. persons from prosecution by overzealous foreign prosecutors who seek to expand the scope of their prosecutions.

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<sup>16</sup> Department of Justice, Office of Public Affairs, Department of Justice Announces Indictment Charging Russians, Italians and Others With Attempting to Evade Security Sanctions, available at: <https://www.justice.gov/opa/pr/departement-justice-announces-indictment-charging-russians-italians-and-others-attempting>.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> U.N. Charter, Art. 2, para. 1 (recognizing the principle of “sovereign equality”).

<sup>20</sup> International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, p. 171.