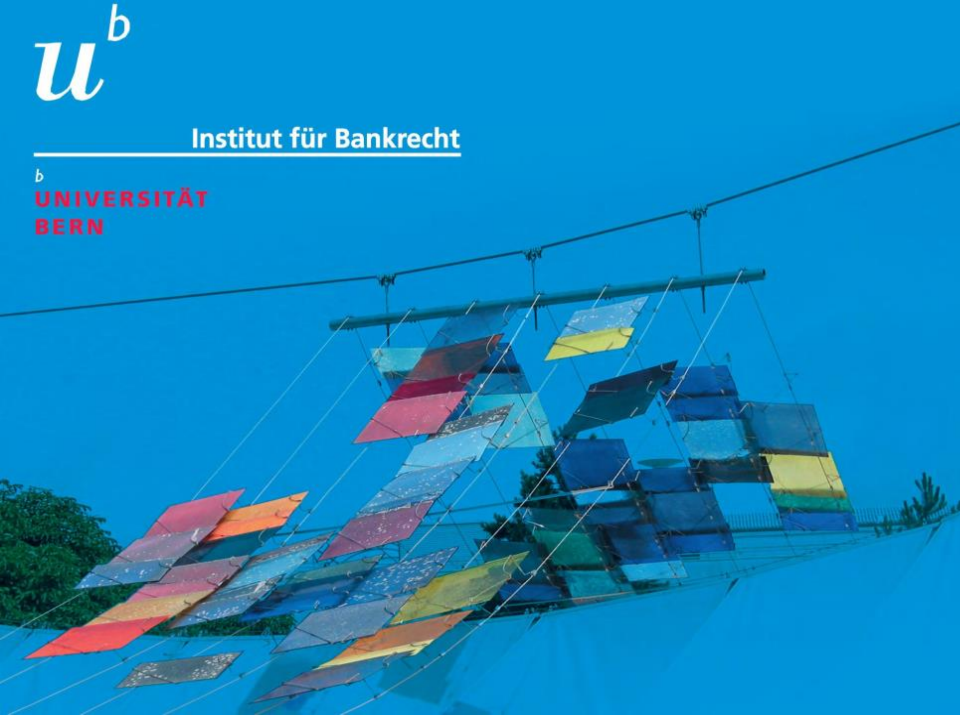


U.S. Litigation Today: Still a Threat or a Paper Tiger?

Institut suisse de droit comparé
Schweizerisches Institut für Rechtsvergleichung
Istituto svizzero di diritto comparato
Swiss Institute of Comparative Law

Extraterritorial Application of U.S. Sanctions Law

Prof. Dr. Susan Emmenegger, LL.M.
University of Bern, Switzerland

The Mysterious Case of Reza Zarrab

On January 1, 2013, Turkish officials found 3000 pounds of gold on a cargo-plane from Accra (Ghana) headed to Dubai. They were labeled as "mineral samples".

It was the beginning of what came to be known as the "**gold for gas scandal**".

In 2012, US lead international sanctions against Iran prevented Iran from receiving payments in dollars or euro. Turkey had long imported oil and natural gas from Iran. No longer allowed to pay in dollars or euro, the Turks used to Turkish lira to buy gold. The gold was flown from Turkey to Dubai and ferried to Iran across the Gulf. Until July 2013, there were no sanctions against trading precious metals with Iran. By that time, an estimate of $8 billion had been channeled to Iran.

Reza Zarrab

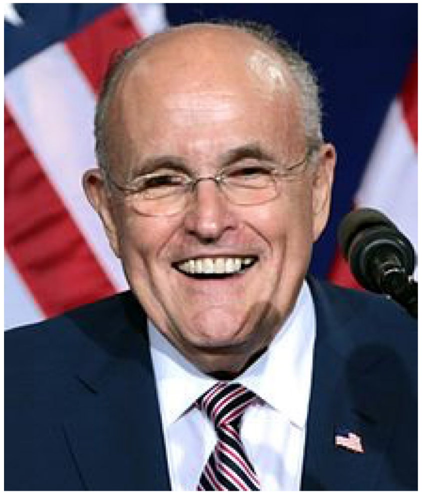
- Iranian, Azeri, Turkish business man.
- Friend of Recep Tayyip Erdogan. Close ties to former Iranian President Ahmadinejad.
- Arrested after the cargo-plane incident. The investigation found extensive bribery of Turkish officials, including Erdogan's inner circle.
- Exonerated in 2014 after the Turkish government removed all persons in charge of the case.
- Arrested on March 19, 2016 by FBI agents while vacationing at Disney World with his wife and 5 year old daughter. Charged with violating Iran-related U.S. sanctions law. Bail denied.

Recep Tayyip Erdogan

- Turkish President
- Calls Zarrab a philantropist
- Requests release of Zarrab; raised the Zarrab iusse with Vice-President Joe Biden in 09/16 and with President Trump on 03/17

Preet Bharara

- US attorney who indicted Reza Zarrab
- Accused by President Erdogan to have ties to the Gülen movement
- Fired by US president Trump in March 2017



Rudy Giuliani

- Ex-Mayor of NYC. Considered for the posts of Attorney General and Secretary of State in the Trump adminstration.
- Hired by Zarrab in 03/2017 to explore a possible diplomatic resolution of the case, together with former Attorney General Michael Mukasay (Bush administration)
- Giuliani and Mukasay met with President Erdogan and US officials to discuss the case
- According to Giuliani, both sides are "receptive" to a diplomatic solution of the case

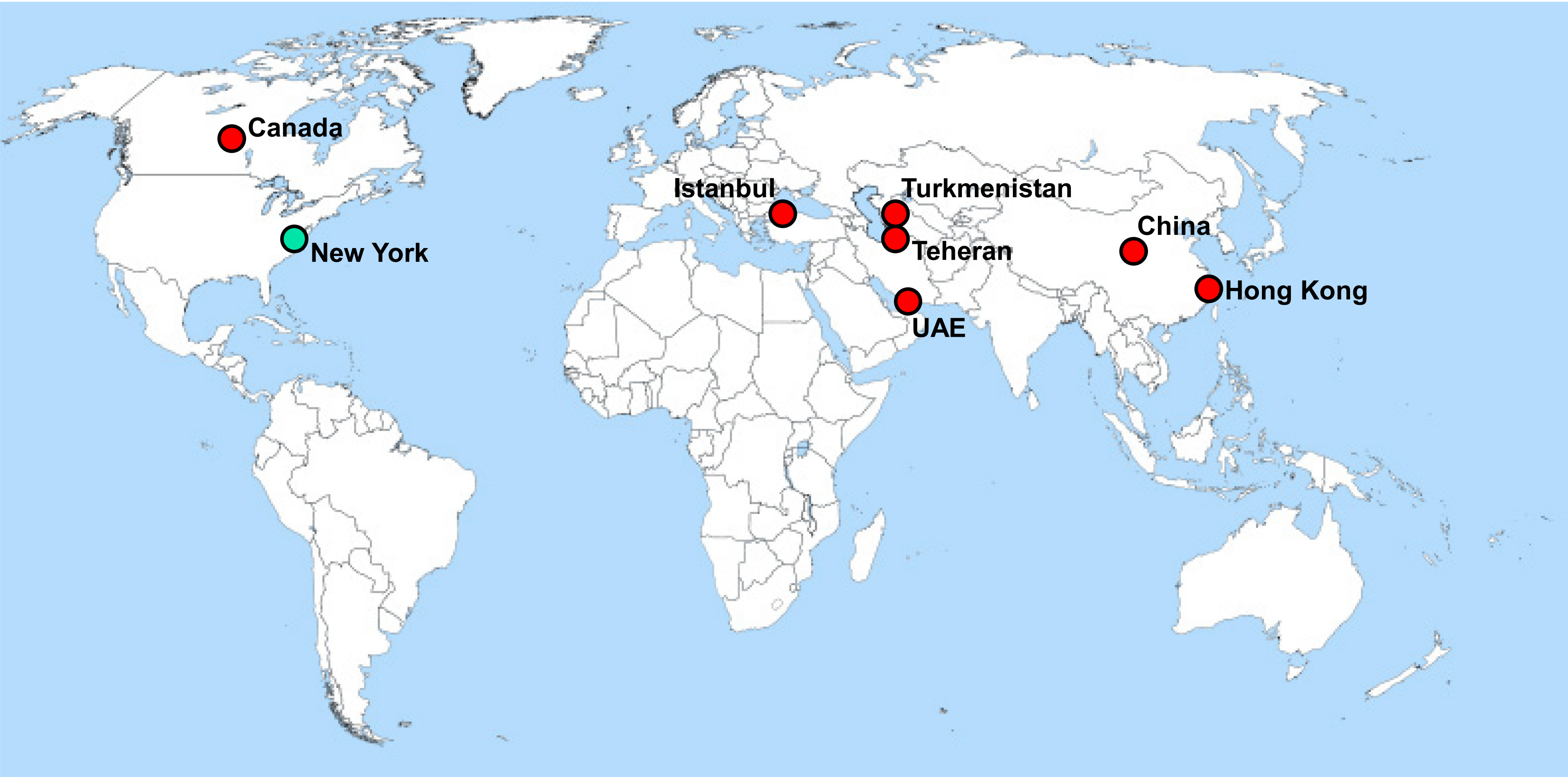
Iran Sanctions

- 27 presidential decrees, 10 Statutes and 5 administrative regulations. Most relevant:
- **International Emergency Economic Powers Act** (IEEPA)
  - Empowers U.S. president to employ economic sanctions
- **Iranian Transactions and Sanctions Regulations** (ITSR)
  - Bars the import of Iranian goods or services into the U.S.
  - Prohibits exportation from the U.S. of any goods, technology, or services to Iran or the Iranian government
  - Prohibits transactions which evade or have the purpose to avoid said prohibitions; prohibits any conspiracy to violate said prohibitions
- General: Defraud the United States by impeding the lawful functions of the United States Department or its agencies
  - Includes actions to defraud the United States Department of Treasury, Office of Foreign Assets Control (OFAC)

Facts Alleged by the Prosecution

- NOT facts related the oil for gold deal, but:
- Roughly a dozend financial transactions carried out by:
  - Zarrab's money service businesses located **in Turkey** and in the **UAE**
  - **On behalf** of U.S. sanctioned **Iranian** persons/companies.
- Examples
  - 01/2011: transfer of USD 900'000+ on behalf of Iranian bank to a Canadian company
  - 02/2011: transfer of USD 76'000+ on behalf of Iranian bank to Chinese company
  - 03/2011: transfer of USD 9'000+ on behalf of Iranian bank to Hong Kong Company (blocked by US bank)
  - 01/2013: transfer of USD 600'000 on behalf of Turkish company to a Turkmenistan company

Why New York?



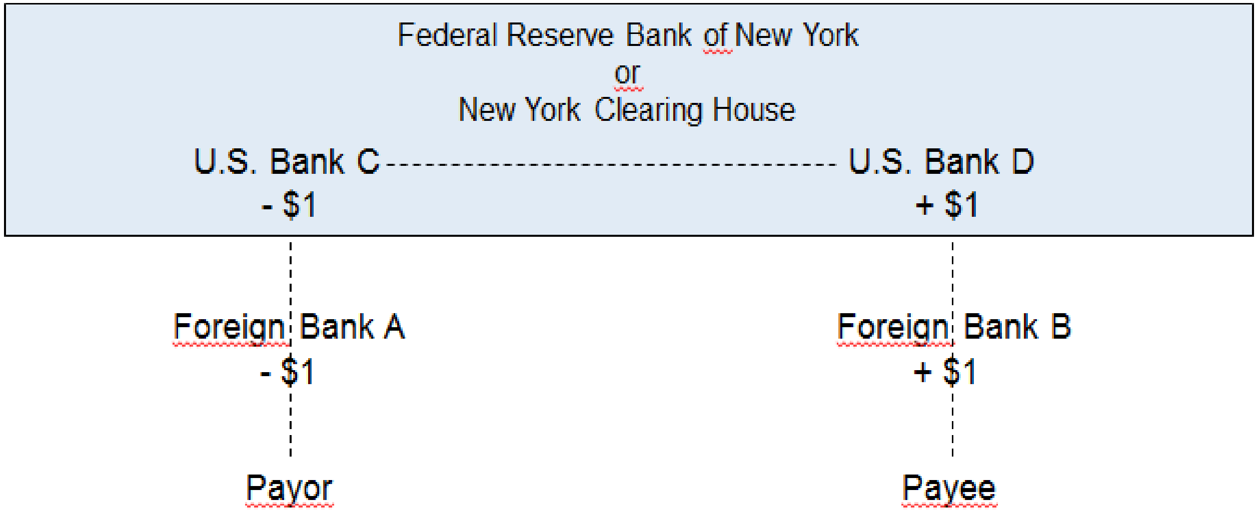
- Via UAE: $900'000+ on behalf of IR bank to a CAN company
- Via UAE: $76'000+ on behalf of IR bank to CN company
- Via UAE: $9'000+ on behalf of IR bank to HK company
- Via TR: $600'000 on behalf of TR company to a TM company

Why New York?

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.** Motion to dismiss 07/17/16

Jurisdictional Nexus According to the Prosecution

- The currency used in the transaction: **U.S. dollars**



- A payment in US dollars between two foreign banks will regularly involve clearing in **U.S. territory** (and did so in the case at hand)
  - **Exceptions**: Use of Clearing Systems outside U.S. (Tokyo, Hong Kong, Singapore, Manila) – only small payments // If both foreign banks have a correspondent account at a third bank also located outside the U.S.: account transfer at this third bank // If Payor and Payee both have a U.S. Dollar account at the same non-U.S. bank: In-house-transfer

Jurisdictional Nexus According to the Prosecution

- In more concrete terms:
  - Zarrab **exported** a service **from the U.S.** which involved **U.S. banks**
  - Zarrab **caused U.S. banks** to violate **U.S. law**
  - Zarrab **caused effects** in the **U.S.**

➢ **Domestic Jurisdiction**

- And even if jurisdiction were considered extraterritorial, it would be justified:
  - Economic sanctions are an exercise of the government's right to **defend itself** and to deal with foreign threats. In these cases, the presumption against extraterritoriality does not apply.

➢ **Extraterritorial Jurisdiction**

Arguments in Zarrab: Successful in Settlement Cases

- **BNP Paribas** (2014)**:** Paris headquarter and Geneva subsidiary processed dollar transactions on behalf of Cuban, Sudanese and Iranian entities. Settlement: $8.9 billion

- **Similar cases (all settled):**
  - **2015: Deutsche Bank**: $258 m. +++ **Crédit Agricol**: $787 m.
  - **2012: ING Bank**: $619 m. +++ **UK Standard Chartered:** $227 m. +++ **HSBC**: 1.256 b.

... and now also Successful in Court

U.S. District Court, Southern District of New York, October 17, 2016 (quoting case law):

- When foreign banks direct funds transfers through U.S. banks en route to other foreign banks, then this establishes a **sufficient nexus with the U.S.**
- This conduct amounts to the exportation of services **from the U.S.** The question of extraterritoriality need not to be reached.
- Even if jurisdiction were considered extraterritorial, the presumption against extraterritoriality would be overcome by the U.S. **interest in defending itself**.

Note: The decision regards the indictment only. The dismissal of an indictment is an extraordinary remedy. Jurisdiction will (presumably) be an issue again at trial.

Result: Global Relevance of U.S. Sanctions Law

- Take-away: For U.S. courts to have jurisdiction it is sufficient that a transaction is made in U.S. currency
- 88% of all currency transactions are made in U.S. dollars

- Does the fact that a country issues a global currency make this country a global law maker?

Jurisdiction: Relevance of International Law

- The relevance of international law regarding jurisdiction:
  - Jurisdiction is a central aspect of (national) sovereignty. Relations between sovereign nations are a matter of international law.
  - The legitimacy of domestic jurisdiction depends on international law's jurisdictional principles, which were established to foster cooperative foreign relations by avoiding and resolving conflicting assertions of domestic personal authority
    (Kenneth Randall, 66. Tex. L. Rev. 758, 786 (1988)
  - An act of Congress out never to be construed to violate the law of nations if any other possible construction remains
    (Murray v. The Charming Betsey, 6 U.S. 118 (1804), U.S. Supreme Court)

Jurisdictional Principles in International Law

- **Territoriality Principle**
  - Conduct which takes place within the territory; conduct partly takes place abroad, as long as the domestic part is substantial (subjective territoriality principle).
- **Territorial Effects Principle**
  - Conduct is carried out abroad, but produces direct, substantial and foreseeable effects within the territory (traditionally: extension of the territoriality principle, today: independent ground for jurisdiction)
- **Personality Principle**
  - Active: A state has jurisdiction over its nationals, even if they are abroad.
  - Passive: A state has jurisdiction if its nationals are victim of a conduct occurring abroad (contested, but emerging in cases of terrorism)

Jurisdictional Principles in International Law

- **Protective Principle**
  - A state can assert jurisdiction when its vital interests are concerned (sovereignty, right to political independence)
- **Universality Principle**
  - Certain serious crimes against international humanitarian law are prohibited worldwide and can therefore be regulated by every state (genocide, slave trade, war crimes)

Arguments in Favor of U.S. Jurisdiction from an International Law Perspective

- **Subjective Territoriality Principle**
  - Payments "passed" U.S. territory (correspondent account jurisdiction)
  - <u>But</u>: No *substantial* part takes place in U.S.

- **Effects Jurisdiction**:
  - Zarrab caused the U.S. correspondent banks to violate U.S. law; domestic effects.
  - <u>But</u>: effects jurisdiction requires *direct, substantial and foreseeable* domestic effects

Arguments in Favor of U.S. Jurisdiction from an International Law Perspective

- **Protective Principle**
  - Iran is a threat to national security; U.S. has right to defend itself.
  - <u>But</u>: Covers specific threat issues (transactions related to weapons program). Not: Blanket item origin-based jurisdiction

➢ Questionable whether the U.S. sanctions cases meet the threshold for jurisdiction under international law.

U.S. Litigation Today:

Still a Threat or a Paper Tiger?

Ask Reza Zarrab, inmate at the Metropolitan Correctional Center, Manhatten, since March 19, 2016

U.S. Sanctions: The Next Controversy

Germany Threatens Retaliation if U.S. Sanctions Harm Its Firms

By REUTERS JUNE 16, 2017, 12:12 P.M. E.D.T.

BERLIN/BRUSSELS — Germany threatened on Friday to retaliate against the United States if new sanctions on Russia being proposed by the U.S. Senate end up penalizing German firms.

The Senate bill, approved on Thursday by a margin of 98-2, includes new sanctions against Russia and Iran. Crucially, it foresees punitive measures against entities that provide material support to Russia in building energy export pipelines.

Berlin fears that could pave the way for fines against German and European firms involved in Nord Stream 2, a project to build a pipeline carrying Russian gas across the Baltic.

Among the European companies involved in the project are German oil and gas group Wintershall, German energy trading firm Uniper, Royal Dutch Shell, Austria's OMV and France's Engie.

"For several years, we have underlined to the United States the difficulties that extraterritorial legislation spark," a French foreign ministry spokesman told reporters.

"However, we can't accept the threat of illegal and extraterritorial sanctions against European companies," the two officials said, citing a section of the bill

"Europe's energy supply is a matter for Europe, and not for the United States of America," Kern and Gabriel said.

Christian Kern: Chancellor of Austria
Sigmar Gabriel: Foreign Minister of Germany

APPENDIX I

50 U.S. Code § 1701 [IEEPA]. Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities

(a) Any 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. […]

50 U.S. Code § 1702 [IEEPA]. Presidential authorities

(a)(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise --

(A) investigate, regulate, or prohibit --

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities,

by any person, or with respect to any property, subject to the jurisdiction of the United States; […]

APPENDIX II

50 U.S. Code § 1705 [IEEPA]. Penalties

(a) Unlawful acts
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.

(b) […]

(c) Criminal penalty
A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of, an unlawful act described in subsection (a) of this section shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

APPENDIX III

31 C.F.R. §560.203 [ITSR] Evasions; attempts; causing violations; conspiracies.

(a) Any transaction on or after the effective date that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this part is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this part is prohibited.

APPENDIX IV

31 C.F.R. §560.204 [ITSR] Prohibited exportation, reexportation, sale, or supply of goods, technology, or services to Iran.

Except as otherwise authorized pursuant to this part, and notwithstanding any contract entered into or any license or permit granted prior to May 7, 1995, the exportation, reexportation, sale, or supply, directly or indirectly, 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 prohibited, including the exportation, reexportation, sale, or supply of any goods, technology, or services to a person in a third country undertaken with knowledge or reason to know that:

(a) Such goods, technology, or services are intended specifically for supply, transshipment, or reexportation, directly or indirectly, to Iran or the Government of Iran; or

(b) Such goods, technology, or services are intended specifically for use in the production of, for commingling with, or for incorporation into goods, technology, or services to be directly or indirectly supplied, transshipped, or reexported exclusively or predominantly to Iran or the Government of Iran.

APPENDIX Va

31 C.F.R. §560.205 [ITSR] Prohibited reexportation of goods, technology, or services to Iran or the Government of Iran by persons other than United States persons; exceptions.

(a) Except as otherwise authorized pursuant to this part, and notwithstanding any contract entered into or any license or permit granted prior to May 7, 1995, the reexportation from a third country, directly or indirectly, by a person other than a United States person, of any goods, technology, or services that have been exported from the United States is prohibited, if:

(1) Undertaken with knowledge or reason to know that the reexportation is intended specifically for Iran or the Government of Iran; and

(2) The exportation of such goods, technology, or services from the United States to Iran was subject to export license application requirements under any United States regulations in effect on May 6, 1995, or thereafter is made subject to such requirements imposed independently of this part (see §560.414).

APPENDIX Vb

31 C.F.R. §560.205 [ITSR] Prohibited reexportation of goods, technology, or services to Iran or the Government of Iran by persons other than United States persons; exceptions.

(b) The prohibitions of paragraph (a) of this section shall not apply to those goods or that technology subject to export license application requirements if such goods or technology have been:

(1) Substantially transformed into a foreign-made product outside the United States; or

(2) Incorporated into a foreign-made product outside the United States if the aggregate value of such goods and technology described in paragraph (a)(2) of this section constitutes less than 10 percent of the total value of the foreign-made product to be exported from a third country (see §560.420).

(c) Reexportation by United States persons or from the United States is governed by other sections in this part, including §§560.204 and 560.206.

APPENDIX VIa

31 C.F.R. §560.410 [ITSR] Provision of services.

(a) The prohibition on the exportation, reexportation, sale or supply of services contained in §560.204 applies to services performed on behalf of a person in Iran or the Government of Iran or where the benefit of such services is otherwise received in Iran, if such services are performed:

(1) In the United States, or

(2) Outside the United States by a United States person, including by an overseas branch of an entity located in the United States.

(b) The benefit of services performed anywhere in the world on behalf of the Government of Iran is presumed to be received in Iran.

APPENDIX VIb

31 C.F.R. §560.410 [ITSR] Provision of services.

(c) The prohibitions on transactions involving blocked property contained in §560.211 apply to services performed in the United States or by U.S. persons, wherever located, including by an overseas branch of an entity located in the United States:

(1) On behalf of or for the benefit of the Government of Iran, an Iranian financial institution, or any other person whose property and interests in property are blocked pursuant to §560.211; or

(2) With respect to property interests of the Government of Iran, an Iranian financial institution, or any other person whose property and interests in property are blocked pursuant to §560.211.

(d) *Example*. A United States person is engaged in a prohibited exportation of services to Iran when it extends credit to a third-country firm specifically to enable that firm to manufacture goods for sale to Iran or for an entity of the Government of Iran. *See also* §560.416.

APPENDIX VII

31 C.F.R. §560.416 [ITSR] Brokering services.

(a) For purposes of the prohibitions in §§560.201, 560.204, 560.205, 560.206, and 560.208, the term services includes performing a brokering function.

(b) *Examples*. A person within the United States, or a United States person, wherever located, may not:

(1) Act as broker for the provision of goods, services or technology, from whatever source, to or from Iran or the Government of Iran;

(2) Act as broker for the purchase or swap of crude oil of Iranian origin or owned or controlled by the Government of Iran;

(3) Act as broker for the provision of financing, a financial guarantee or an extension of credit by any person to Iran or the Government of Iran;

(4) Act as a broker for the provision of financing, a financial guarantee or an extension of credit to any person specifically to enable that person to construct or operate a facility in Iran or owned or controlled by the Government of Iran; or

(5) Act as a broker for the provision of financing, a financial guarantee, or an extension of credit to any person specifically to enable that person to provide goods, services, or technology intended for Iran or the Government of Iran.