THE U.S. JURISDICTION OVER TRANSFERS OF U.S. DOLLARS BETWEEN FOREIGNERS AND OVER OWNERSHIP OF U.S. DOLLAR ACCOUNTS IN FOREIGN BANKS

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I. INTRODUCTION

For a long time, the blocking or freeze of U.S. dollar transfers, including transfers taking place outside the United States, has been an important tool of U.S. foreign policy. After the attack on the United States on September 11, 2001, the U.S. government raised the issue of international terrorism and its financial aspects to a level of primary concern for the international community. The U.S. government has adopted a series of controls on domestic and foreign banking and other financial institutions that might facilitate or assist designated terrorist groups. To prevent the funding of terrorist activities, the United States not only may order the freeze of U.S. dollar transfers but also the seizure of dollar accounts that are maintained by foreign banks outside the United States. These measures against foreign transfers and foreign accounts have a great impact because fifty-five to seventy percent of all U.S. dollars are held abroad.[1] This Article examines the legal basis for the

[1] *See* Hale E. Sheppard, *Dollarization of Ecuador: Sound Policy Dictates U.S. Assistance to this Economic Guinea Pig of Latin America*, 11 IND. INT'L & COMP. L. REV. 79, 82 n.7 (2000); Richard D. Porter & Ruth A. Judson, *The Location of U.S. Currency: How Much is Abroad?*, 82 Fed. Reserve Bull. 883 (1996); Edwin S. Rubenstein, *The Globalization of the U.S. Dollar*, AMERICAN OUTLOOK (1999), *available at* http://www.americanoutlook.org/index.cfm?fuseaction=article_detail&id=1239 (last visited Sept. 1, 2004). *See also* Letter from Richard D. Porter &

jurisdiction of the United States over U.S. dollar assets that are either transferred through the international payment system or deposited at banks outside the United States.

II. DISTINCTION BETWEEN THE JURISDICTION OVER THE U.S. DOLLAR AND THE *LEX MONETAE*

The jurisdiction of U.S. authorities over money transfers in U.S. dollars and over U.S. dollar accounts does not follow from the doctrine of *lex monetae.*

The doctrine of the *lex monetae* states that each sovereign state possesses the exclusive sovereign power to determine what constitutes legal tender within its territory, and the nominal value of the currency.[2] According to Mann, each country also has exclusive authority to replace its currency with a new currency and to fix the conversion rate of the old currency.[3] Other countries must recognize that determination.[4]

However, the issue of U.S. jurisdiction over transfers of U.S. dollars and over U.S. dollar accounts does not relate to the value or the existence of the U.S. dollar as a currency or legal tender. The jurisdiction over money transfers in U.S. dollar and U.S. dollar accounts refers merely to the questions of who can use the U.S. dollar as legal tender and how the U.S. dollar should be used. Furthermore, *lex monetae* refers only to the sovereign power of a state over its currency within the country of such currency and not outside such country,[5] whereas U.S. jurisdiction over transfers of U.S.

Ruth A. Judson, Division of Monetary Affairs of the Federal Reserve Board, to Sam Karnick, Editor-in-Chief, American Outlook, The Hudson Institute (July 30, 1999) (available in the files of the author).

[2] *See* FREDERICK A. MANN, THE LEGAL ASPECT OF MONEY 266-67 & 271-79 (5th ed. 1992). *See also* ARTHUR NUSSBAUM, MONEY IN THE LAW—NATIONAL AND INTERNATIONAL 353-59 (2d ed. 1950); PHILIP R. WOOD, COMPARATIVE FINANCIAL LAW 177 (1995); HUGO J. HAHN, WÄHRUNGSRECHT 382-83 (9th ed. 1990).

[3] *See* MANN, *supra* note 2, at 266-67 & 271-79.

[4] *Id.* at 271-79.

[5] The rule of *lex monetae* has an effect outside the territory of the country of a currency only if another country applies the rule through application of its own conflict of laws rules. The relevant conflict of laws

dollars and U.S. dollar accounts is exercised regardless of where the transfer is executed or the account is held.

III. FREEZING OF DOLLARS MOVING THROUGH THE INTERNATIONAL PAYMENT SYSTEM

Undoubtedly, the United States can block or "freeze" a dollar transfer in which a bank located in the United States is involved. A question about the basis for U.S. jurisdiction arises only where dollars are transferred from one non-U.S. bank to another non-U.S. bank. The assertion of U.S. jurisdiction in the latter case is based on the nature of the Eurodollar.

Eurodollars are deposits of U.S. dollars with foreign banks or foreign branches of U.S. banks located outside the United States. Eurodollars are created when a U.S. or foreign depositor with a bank in the United States transfers a U.S. dollar credit balance to a foreign bank (or to a foreign branch of a U.S. bank) located outside of the United States. The foreign bank assumes a deposit liability to the transferor payable in U.S. dollars, and itself has a corresponding claim in U.S. dollars against the bank in the United States (owns a deposit or credit balance with that bank). The foreign bank may transfer its U.S. dollar deposits to a second foreign bank, the second foreign bank may transfer the deposit to a third foreign bank, and so forth. In each case the transferee foreign bank becomes the owner of the dollar deposit in the United States and assumes a deposit liability payable in U.S. dollars to the transferor foreign bank. The dollars originally deposited with a bank in the United States never leave the U.S. bank or the United States, so that the total of the bank

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rule (also frequently called *lex monetae*) provides that if the law of the contract is not the law of the country of the currency in which the contract must be performed, the court must nevertheless apply the monetary law of the country of the currency in the event of a substitution of currencies. *See* Michael Gruson, *The Scope of Lex Monetae in International Transactions: A United States Perspective*, *in* INTERNATIONAL MONETARY LAW—ISSUES FOR THE NEW MILLENNIUM 433, 456 (Mario Giovanoli ed., 2000).

deposits in the United States remains unchanged, but additional dollar deposits are created abroad.[6]

In connection with blocking of dollar transfers between two non-U.S. banks, three fact situations must be distinguished:

A. Case 1: U.S. Dollar Transfers Cleared at a Federal Reserve Bank in the United States

A transfer of money by a customer (the Payor) of a non-U.S. bank (Bank A) to a customer (the Payee) of another non-U.S. bank (Bank B) in many cases involves ultimately a transfer between two U.S. banks, namely, a transfer from Bank A's U.S. correspondent bank (Bank C) to Bank B's U.S. correspondent bank (Bank D) by way of the Clearing House Interbank Payment System (CHIPS), and clearance of such transfers in the New York Clearing House[7] or the Fed wire payment system and clearance of such transfer in the

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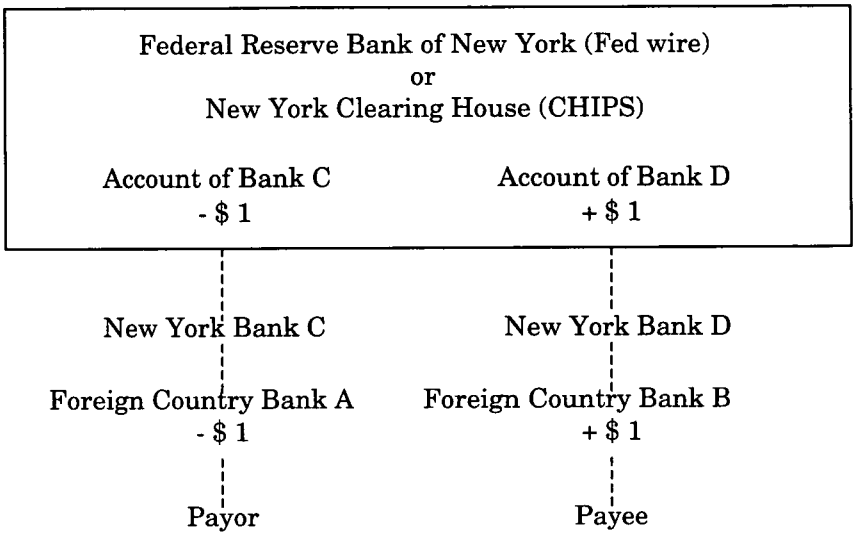
[6] *See* Michael Gruson, *Legal Aspects of International Lending*, *in* HANDBOOK OF INTERNATIONAL MANAGEMENT (Ingo Walter ed., 1988). The seminal article on Eurodollars is Robert C. Effros, *The Whys and Wherefores of Eurodollars*, 23 BUS. LAW. 629 (1968). *See also* Alexander D. Calhoun, Jr., *Eurodollar Loan Agreements: An Introduction and Discussion of Some Special Problems*, 32 BUS. LAW. 1785 (1977); Henry Harfield, *International Money Management: The Eurodollar*, 89 BANKING L.J. 579 (1972); MANN, *supra* note 2, at 63-64, 199-200. In *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660, 663 (1990), the U.S. Supreme Court defined Eurodollars as "United States dollars that have been deposited with a banking institution located outside the United States, with a corresponding obligation on the part of the banking institution to repay the deposit in United States dollars."

[7] For a discussion of the CHIPS payment system, *see* MARCIA STIGUM, THE MONEY MARKET 580 (3d ed. 1990). *See* CHIPS Rules and Administrative Procedures (November 2003) [hereinafter CHIPS rules and procedures], *at* http://www.chips.org. (last visited Sept. 1, 2004). Each settling bank that, on a net-net basis, has a debit balance with CHIPS sends over the Fed wire to the account that CHIPS maintains at the Federal Reserve Bank of New York the sum required for it to settle. After CHIPS has received these monies, it in turn wires out, again over the Fed wire, all monies it owes settling banks who have ended the day on a net-net basis with a credit balance at CHIPS. *See* STIGUM, *supra*, at 581.

Federal Reserve Bank of New York.[8] This process is demonstrated by the following diagram:



In this case, a person who maintains a U.S. dollar account at a bank outside the United States transfers U.S. dollars to a person who maintains a U.S. dollar account at another bank outside the United States. Both foreign country banks use their U.S. correspondent banks to effectuate the transfer

[8] For an example of this system and its applications, *see* Libyan Arab Foreign Bank v. Bankers Trust Co., 3 All E.R. 252, 270 (Q.B. 1989) (discussing complex transactions). The case involved a bank account maintained by the London branch of Bankers Trust, a U.S. bank, for a Libyan bank. On January 8, 1986, the U.S. president froze all Libyan assets in the United States or in the possession or control of U.S. persons, including U.S. banks and their overseas branches. Bankers Trust refused to honor the Libyan bank's demand for payment because of the freeze order. The court held that performance of a contract would be excused if it had become illegal by the proper law of the contract or necessarily involved doing an act that was unlawful by the law of the place where the act had to be done. The court found that English law governed the deposit relationship and that performance of the payment demand did not require an act in New York (i.e., clearance) because the demand could be performed by payment in cash. For a discussion of this case, *see* Peter S. Smedresman & Andreas F. Lowenfeld, *Eurodollars, Multinational Banks, and National Laws*, 64 N.Y.U. L. REV. 733, 751-61 (1989).

and the money transfer takes place through the U.S. clearing system in the United States. Any U.S. dollar transferred in such a way anywhere in the world will be cleared ultimately at the Federal Reserve Bank in the United States.[9] Money transfers that use Federal Reserve Banks by way of the Fed wire payment system are subject to U.S. federal law.[10]

If the U.S. portion of the money transfer uses CHIPS, U.S. law governs that portion of the transfer. Pursuant to Rule 3 of the Rules and Administrative Procedures of the CHIPS,[11] the rights and obligations of participants in CHIPS and all other parties to a funds transfer of which a CHIPS payment message is a part, that arise from the funds transfer or from the CHIPS Rules, are governed by the law of the State of New York. A "funds transfer" is defined in Rule 3 as the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order and includes any payment order issued by the originator's bank or an intermediary bank intended to carry out the originator's payment order.

U.S. commercial banking institutions may only participate in CHIPS if their offices in the United States are subject to regulation by a federal or state bank authority. Furthermore, foreign banks must agree that the obligations of their branches or agencies in the United States through which the clearing occurs, are the legal, valid, and binding obligations of the foreign bank itself and are enforceable against the foreign bank.[12]

Case 1 describes the most frequent transfer scenario. Such transfers are subject to U.S. law and, consequently, can be blocked under U.S. law.

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[9] *See* MANN, *supra* note 2, at 200; R.M. GOODE, PAYMENT OBLIGATIONS IN COMMERCIAL AND FINANCIAL TRANSACTIONS 120 (1983); Thomas C. Baxter, Jr., *Dollarization and its Impact on U.S. Law*, 35 INT'L LAW. 1427, 1430 (2001).

[10] 12 C.F.R. § 210.25 (2004) (subpart B of Regulation J). *See infra* note 18 for a discussion of 12 C.F.R. § 210.25.

[11] CHIPS rules and procedures, *supra* note 7.

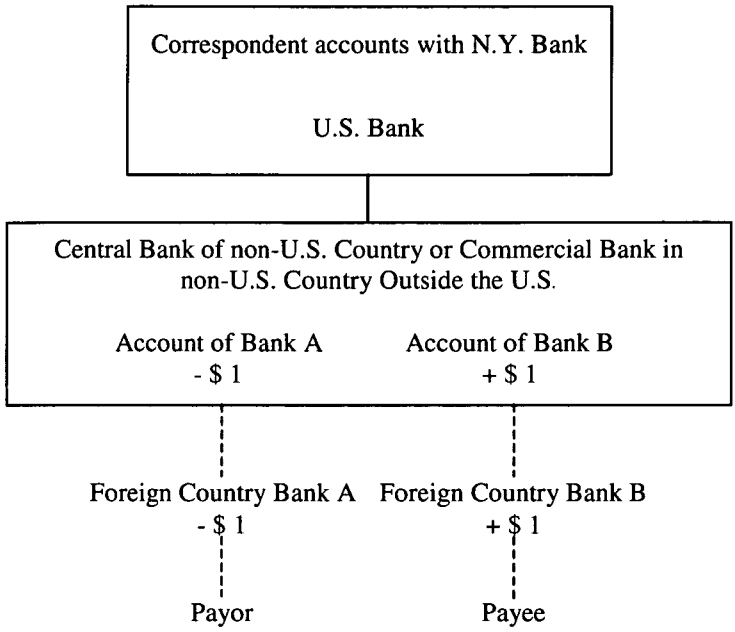
[12] *Id.*, Rule 19(a) & (b).

B. Case 2: U.S. Dollar Transfers Not Cleared at a Federal Reserve Bank in the United States

Dollar transfers are not necessarily cleared in the United States. They are not cleared in the United States if the foreign bank of the payor and the foreign bank of the payee both have correspondent accounts with a third bank also located outside of the United States. In this case, transfers are not processed through CHIPS or Fed wire, but by account transfer at the third bank outside the United States. Furthermore, nothing would prevent the central bank of a country other than the United States from clearing dollar transfers among banks of its country. It remains correct that U.S. dollars held in the banking system of the foreign country are ultimately reflected in a dollar deposit with a U.S. bank and that these dollars (other than cash) "never leave the United States." However, if clearing takes place outside of the United States, no money transfer takes place in the United States. This situation was discussed in *Libyan Arab Foreign Bank*[13], in which the U.S. government claimed jurisdiction over foreign money transfers. This case is demonstrated by the following diagram:

[13] Libyan Arab Foreign Bank, 3 All E.R. at 270-71 & 278. The court said at 270:

> Any account transfer must ultimately be achieved by means of two accounts held by different beneficiaries with the same institution. In a simple case the beneficiaries can be the immediate parties to the transfer. If Bankers Trust held an account with the A bank which was in credit to the extent of at least $131m, and the Libyan bank also held an account at the A bank, it would require only book entries to achieve an account transfer. But still no property is actually *transferred*. The obligation of Bankers Trust is extinguished, and the obligation of A bank to Bankers Trust extinguished or reduced; the obligation of A bank to the Libyan bank is increased by the like amount.



C. Case 3: U.S. Dollar Transfer Without Interbank Clearing

Finally, it is possible that U.S. dollar money transfers may occur without clearance through another bank or a Federal Reserve Bank in the United States. This occurs when the Payor and the Payee both have a U.S. dollar account with the same non-U.S. bank. This bank merely debits the account of the Payor and credits the account of the Payee ("intra-bank-clearing") without involving another bank or a Federal Reserve Bank. In this case, transfers are not processed through CHIPS, because funds are not transferred but merely rebooked.[14] Obviously, if a payor who

[14] HERBERT SCHIMANSKY, HERMANN-JOSEF BUNTE & HANS-JUERGEN LWOWSKI, BANKRECHTS-HANDBUCH, vol. III, § 116, margin no. 32 (2d ed. 2001). *See also* Libyan Arab Foreign Bank, 3 All E.R. at 270-71 & 278. The court said at 270:

> On occasion a method of account transfer which is even simpler may be used. If X Ltd. also hold an account with Bankers Trust London, and the Libyan bank desire to benefit X Ltd., they instruct Bankers Trust to transfer

maintains a U.S. dollar account at a bank outside the United States withdraws a sum of dollars and hands it over to the payee, no U.S. dollar transfer that touches the United States takes place.[15]

In all three cases, clearing ultimately occurs by way of an "in-house transfer" at an institution which maintains accounts for the transferor and the transferee or the bank of the transferor and the bank of the transferee, so that the credit balance of one can be increased and that of the other reduced.[16] The three cases differ only in the location of the institution that holds accounts for both parties, in that the institution is located inside or outside of the United States. Only in case 1 are the transfers of U.S. dollars cleared through a Federal Reserve Bank in the United States. In cases 2 and 3, a clearance occurs outside the United States, without the involvement of any U.S. Federal Reserve Bank or any U.S. commercial bank. In cases 2 and 3, the dollar that is being transferred is reflected by a dollar located in the United States; however, that dollar does not move. If no dollars are moved through CHIPS or Fed wire, U.S. law does not apply to such a transfer. The transfers in cases 2 and 3 do not touch the United States and unless the parties agree on U.S. law to govern the non-U.S. transfer, U.S. law does not apply. If the parties in cases 2 and 3 agreed on the application of U.S. law, they also agreed on the application of those laws that permit the blocking of money transfers.[17] Even in case 1, U.S. law does not apply to the contractual relationship between Payor and Foreign Country Bank A, to the contractual relationship between Payee and Foreign

> $131 [million] to the account of X Ltd. The obligation of Bankers Trust to the Libyan bank is extinguished once they decide to comply with the instruction, and their obligation to X Ltd is increased by the like amount. That method of account transfer is featured in *Momm v. Barclays Bank Int'l Ltd.*, [3 All E.R. 588 (Q.B. 1976)].

[15] *See* Libyan Arab Foreign Bank, 3 All E.R. at 273 & 280. *See also* MANN, *supra* note 2, at 200-01.

[16] *See* Libyan Arab Foreign Bank, 3 All E.R. at 270.

[17] *See* discussion *infra* Part III.D.

Country Bank B, and to the contractual relationship between Payor and Payee.[18]

[18] 12 C.F.R. § 210.25 *et seq.* (2004), subpt. B of Regulation J (the rules on Fed wire) apply to relations between the Federal Reserve Bank and *senders* and *receiving banks* that send or receive a payment order *directly* to and from a Federal Reserve Bank, 12 C.F.R. § 210.25(b)(2) (2004). Both the sender and the receiving bank must have an account with a Federal Reserve Bank. The rules also apply to other parties to a funds transfer any part of which is carried out through Fed wire to the extent provided in U.C.C. § 4A-507. 12 C.F.R. § 210.25(b)(2)(v) (2004). U.C.C. § 4A-507(c), *reprinted in* 12 C.F.R. pt. 210, subpt. B, App. B, provides that a choice of law rule provided for in 12 C.F.R. § 210.25(b)(2)(v) (2004) is binding on the originator, other sender, or a receiving bank having notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender or receiving bank issued or accepted a payment order. The beneficiary of a funds transfer is bound by the choice of law if, when the funds transfer is initiated, the beneficiary has notice that the funds-transfer system might be used in the funds transfer and of the choice of law of the system. As to notice, *see* U.C.C. § 1-201(25). However, under U.C.C. § 4A-507(b) & (d), a choice of law by agreement of the parties takes precedence over a choice of law made by the funds-transfer system rules. A Commentary published in App. A to 12 C.F.R. pt. 210 subpt. B states under Section 210.25 *sub* (b)(3):

> If originators, receiving banks, and beneficiaries that are not in privity with a Federal Reserve Bank have the notice contemplated by Section 4A-507(c) or if those parties agree to be bound by Subpart B, Subpart B generally would apply to payment orders between those remote parties, including participants in other funds-transfer systems.

U.C.C. § 4A-507 does not follow the approach of U.C.C. art. 8, which permits the application of a different law for each step in the indirect holding system involved in a transfer of securities. *See* U.C.C. § 8-110(b) (in the indirect holding system the acquisition of a person's security entitlement is governed by the law of the jurisdiction of that person's securities intermediary, and the termination of a person's security entitlement is governed by the law of that person's securities intermediary). Different laws may apply to each step of a transfer in the indirect holding system. *See* Michael Gruson, *Global Shares of German Corporations and Their Dual Listings on the Frankfurt and New York Stock Exchanges*, 22 U. PA. J. INT'L ECON. L. 185, 241-43 (2001) [hereinafter Gruson, *Global Shares*].

D. Legal Authority Under the International Emergency Economic Powers Act to Freeze U.S. Dollar Transfers

The ability of U.S. authorities to freeze assets at one time were issued under Section 5(b) of the Trading with the Enemy Act of 1917 ("TWEA") after the president had declared a national emergency.[19] Since December 28, 1977, however, TWEA provides authority for new sanctions only during times of war by permitting the president to suspend or prohibit economic contracts with an enemy during wartime.[20] Since 1977, each freeze of assets has been implemented by an executive order based on Sections 1701 and 1702 of the International Emergency Economic Powers Act of 1977 ("IEEPA").[21]

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[19] 50 U.S.C. app. §§ 1-44 (2000). Asset freezes, e.g., were imposed against North Korea, Vietnam, and Kampuchea on Dec. 17, 1950 (31 C.F.R. 500.23, 15 Fed. Reg. 9,040), against Cuba on July 8, 1963 (31 C.F.R. 515.313, 28 Fed. Reg. 6,974) and against Rhodesia on Jan. 5, 1967 (Exec. Order No. 11,322, 32 Fed. Reg. 119).

[20] Removal of National Emergency Powers under the Trading with the Enemy Act, Pub. L. No. 95-223, § 101, 91 Stat. 1625 (1977).

[21] 50 U.S.C. §§ 1701-1706 (2000). *See, e.g.*, asset freezes imposed against Iran on Nov. 15, 1979 (31 C.F.R. 535.203, 44 Fed. Reg. 65,956), against Libya on Jan. 8, 1986 (Exec. Order No. 12,544, 51 Fed. Reg. 1,235), against Panama on Apr. 8, 1988 (Exec. Order No. 12,635, 53 Fed. Reg. 12,134), against Iraq on Aug. 2, 1990 (Exec. Order No. 12,722, 55 Fed. Reg. 31,803), against Yugoslavia (Serbia and Montenegro) on May 30, 1992 (Exec. Order No. 12,808, 57 Fed. Reg. 23,299), against Haiti on June 30, 1993 (Exec. Order No. 12,853, 58 Fed. Reg. 35,843), against Sudan on Nov. 3, 1997 (Exec. Order No. 13,067, 62 Fed. Reg. 59,989), against Burma on May 20, 1997 (Exec. Order No. 13,047, 62 Fed. Reg. 28,301), against Angola on Aug. 18, 1998 (Exec. Order 13,098, 63 Fed. Reg. 44,771) and against the Taliban on July 4, 1999 (Exec. Order 13,129, 64 Fed. Reg. 36,759).

President Bush issued Executive Order No. 13,224 on Sept. 23, 2001 (66 Fed. Reg. 49,079), that imposed financial sanctions on banks, financial institutions and any persons or business entities (domestic or foreign) that provide material support for individuals or groups involved in international terrorism. In addition to the persons subject to U.S. jurisdiction, the order also prohibits all foreign third parties from assisting or providing material support for, or associating with, terrorists. This order attempts to freeze assets belonging to terrorist groups that are being

IEEPA is the primary legal authority for the establishment of economic sanctions by the executive branch.[22] It authorizes the president to impose sanctions in response to circumstances deemed by the president to constitute an "unusual and extraordinary threat" to the national security, foreign policy, or economy of the United States.[23] Since the enactment in 1977, presidents of the United States have extensively relied on IEEPA to establish broad economic embargos against and freeze assets of countries and entities.[24] Economic sanctions maintained under IEEPA include, among others, asset-blocking orders and other embargo measures against Iran, Libya, Panama, Iraq, Cuba and Sudan.[25] Authority to implement the sanctions is generally granted to the Treasury Department,

held by third parties, such as banks or business entities, on behalf of terrorist groups within or outside the United States. With this order, the United States exerts its authority over the international dollar payment system.

[22] Besides IEEPA, the United Nations Participation Act, 22 U.S.C. § 287c (2000), gives the president the authority to freeze assets that are deposited in the United States. 22 U.S.C. § 287c(a) (2000) gives the president the authority to regulate or prohibit a wide range of economic relations if the U.N. Security Council calls on the United States to apply such measures.

[23] Section 1701(a) of the IEEPA, 50 U.S.C. § 1701(a) (2000). However, note that according to § 1701(a) of IEEPA the president must have declared a national emergency, pursuant to Section 1621 of the National Emergency Act, 50 U.S.C. §§ 1601 *et seq.* IEEPA further grants the president the authority to "nullify" or "prohibit" any "transaction" in which a foreign country or national has any interest. Section 1702(a)(1)(B) of the IEEPA, 50 U.S.C. § 1702(a)(1)(B) (2000). *See* Dames & Moore v. Regan, 453 U.S. 654 (1981). IEEPA provides for criminal penalties of up to ten years' imprisonment and fines of up to $50,000 for each violation of a freeze order. Section 1705(b) of the IEEPA, 50 U.S.C. § 1705(b) (2000).

[24] For instance, the Executive Orders mentioned *supra* note 21.

[25] Assets subject to a freeze order are not expropriated. Consequently, the owner of blocked or frozen funds cannot withdraw the funds but they continue to accrue interest in accordance with the pre-freeze agreement of the parties. The owner is not even precluded during the freeze from designating investments of the funds. *See* Bank Markazi Iran and The Federal Reserve Bank of New York, Iran-United States Claims Tribunal, Case No. 823, Award No. 595-823-3 (Nov. 16, 1999), *sub* The Merits, II, C & D.

which acts through its Office of Foreign Assets Control ("OFAC").[26]

The executive orders on the basis of IEEPA properly limit their reach to property within the United States. The executive orders typically block "all property and interest in property that are in the United States or that hereafter come within the United States, or that are or hereafter come within the possession or control of a United States person."[27] If a dollar transfer is cleared, as shown above in case 1, at a Federal Reserve Bank in the United States, there is little doubt that the dollars being transferred are under the control of a U.S. person and that the transferor and the transferee have an interest in the funds being transferred. Thus, the executive orders apply and do not have any extraterritorial effect. If a dollar transfer is ultimately not cleared in the United States (cases 2 and 3), the funds transferred are never within the United States, are not under the control of a U.S. person and are not covered by the executive order. The United States might argue that each dollar held in a bank account outside the United States is reflected by a dollar held by a U.S. bank in the United States[28] and that therefore the United States has jurisdiction also over transfers in cases 2 and 3. However, the dollar held in the United States is neither owned by the transferor or the transferee, nor does either have a contractual right to or interest in that dollar. The dollar is owned by the U.S. bank and the foreign bank that has an account with the U.S. bank has a contractual right to have that money returned to

[26] OFAC administers and enforces economic and trade sanctions against targeted foreign countries, terrorists and their sponsors and international narcotics traffickers. OFAC plays a key role on the inter-agency working group, chaired by the Treasury, that has been targeting and listing individuals and entities pursuant to Executive Order No. 13,224, *supra* note 21.

[27] *See, e.g.*, Exec. Order No. 13,224, *supra* note 21, (Terrorists) and Exec. Order No. 13,129, *supra* note 21, (Taliban). Some executive orders expressly specify that overseas branches of U.S. banks are U.S. persons, e.g., Exec. Order No. 12,853, *supra* note 21, (Haiti) and Exec. Order No. 12,544, *supra* note 21, (Libya).

[28] *See supra* text accompanying note 6.

it or transferred in accordance with its instructions.[29] Since the Queen's Bench decided in *Libyan Arab Foreign Bank*[30] that the United States has no jurisdiction over U.S. dollar transfers that are not cleared through a Federal Reserve Bank, the U.S. government has not publicly claimed or tried to enforce jurisdiction under its executive orders over dollar transfers that take place wholly outside the United States. Even if the United States asserted jurisdiction in cases 2 and 3, it could not enforce the executive orders outside the United States.

Furthermore, the U.S. government has not asserted jurisdiction under IEEPA over the mere holding of U.S. dollars by non-U.S. residents in accounts at foreign banks or in cash.

IV. SEIZURE OF DOLLARS DEPOSITED AT A FOREIGN BANK

The Patriot Act, enacted on October 26, 2001,[31] extends the jurisdiction of U.S. authorities beyond the scope of IEEPA. Title III of the Patriot Act[32] contains the authority to take actions against countries, institutions, transactions, or types of accounts that the Secretary of the Treasury (the "Secretary") finds to be of primary money laundering

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[29] For further discussion of this issue, *see infra* Part IV.D.

[30] *Supra* note 8.

[31] President Bush signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, H.R. 3162 [hereinafter Patriot Act]. The Patriot Act terminates on or after the first day of the fiscal year 2005, if Congress enacts a resolution to that effect. Section 303(a) of the Patriot Act. Thus, Section 303(a) of the Patriot Act is not a sunset clause. The sunset clause of Section 224 of the Patriot Act relates only to Title II of the Patriot Act, which is not being discussed in this article.

[32] Title III of the Patriot Act is entitled International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001. Section 301 of the Patriot Act. The Patriot Act amends, *inter alia,* certain provisions of the Bank Secrecy Act of 1970, 31 U.S.C. §§ 5311-5330 (2000), and the Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956-1957 (2000).

concern. It also contains a significant extension of the jurisdictional authority of U.S. financial regulators to supervise the activities of foreign banks and their customers. The aim is to disrupt and eliminate the financial framework that supports terrorism as well as the abatement of money laundering. This can be achieved by cutting off supporting persons or organizations from funding and transferring money and freezing their assets.

A. Measures against U.S. Banks Having Dealings with Foreign Banks

1. Authority of the Secretary to Impose Special Measures

Section 311(a) of the Patriot Act[33] authorizes the Secretary to require U.S. financial institutions[34] and financial agencies[35] to take special measures if the Secretary finds that reasonable grounds exist for concluding that (1) a foreign jurisdiction, (2) a foreign financial institution operating outside the United States, (3) a class of transactions within or involving a foreign jurisdiction, or (4) a type of account, *is of primary money laundering concern*. This authorization is remarkably broad. A very wide range of businesses fall under the definition of financial institution,[36] and the Secretary is authorized to add by

[33] 31 U.S.C. § 5318A(a)(1), added by Section 311(a) of the Patriot Act.

[34] The term *financial institution* is defined in 31 U.S.C. § 5312(a)(2) (2000). *See infra* note 36.

[35] A *financial agency* is a person acting for a person as a financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, gold, or a transaction in money, credit, securities, or gold. 31 U.S.C. § 5312(a)(1) (2000).

[36] 31 U.S.C. § 5312(a)(2)(A)-(X) (2000), as amended by §§ 321(a) & 359(a) of the Patriot Act, defines *financial institution* as (A) an insured bank (as defined in § 3(h) of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(h) (2000)); (B) a commercial bank or trust company; (C) a private banker; (D) an agency or branch of a foreign bank in the United States; (E) any credit union; (F) a thrift institution; (G) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a *et seq.*); (H) a broker or

regulation further businesses to the definition of financial institutions.[37] The *account* that could be of primary money laundering concern means any banking or business relationship under which services are provided;[38] the account need not be related to a foreign jurisdiction. In making a finding that reasonable grounds exist for concluding that any

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dealer in securities or commodities; (I) an investment banker or investment company; (J) a currency exchange; (K) an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments; (L) an operator of a credit card system; (M) an insurance company; (N) a dealer in precious metals, stones, or jewels; (O) a pawnbroker; (P) a loan or finance company; (Q) a travel agency; (R) a licensed sender of money or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system; (S) a telegraph company; (T) a business engaged in vehicle sales, including automobile, airplane, and boat sales; (U) persons involved in real estate closings and settlements; (V) the United States Postal Service; (W) an agency of the United States Government or of a State or local government carrying out a duty or power of a business described in this paragraph; (X) a casino, gambling casino, or gaming establishment with an annual gaming revenue of more than $1,000,000 which is licensed as a casino, gambling casino, or gaming establishment under the laws of any State or any political subdivision of any State, or is an Indian gaming operation conducted under or pursuant to the Indian Gaming Regulatory Act other than operation which is limited to class I gaming (as defined in Section 4(6) of such Act).

[37] *Financial institution* also means: (Y) any business or agency which engages in any activity which the Secretary determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage; or (Z) any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters. 31 U.S.C. § 5312(a)(2)(Y), (Z) (2000).

[38] The term *account* is defined in 31 U.S.C. § 5318A(e)(1)(A), added by § 311(a) of the Patriot Act, as a formal banking or business relationship established to provide regular services, dealings, and other financial transactions. The term includes a demand deposit, savings deposit, or other transaction or asset account and a credit account or other extension of credit. The term *account* for purposes of financial institutions other than banks will be defined by regulation. 31 U.S.C. § 5318A(e)(2), added by § 311(a) of the Patriot Act.

of the above-mentioned foreign jurisdictions, foreign financial institutions, foreign transactions or accounts is of primary money laundering concern,[39] the Secretary must consider the so-called jurisdictional[40] and institutional[41] factors. Upon such finding of primary money laundering

[39] 31 U.S.C. § 5318A(c)(1), added by Section 311(a) of the Patriot Act. In making such finding of primary money laundering concern, the Secretary shall consult with the Secretary of State and the Attorney General. *Id.*

[40] The jurisdictional factors are relevant for a finding of primary money laundering concern with respect to a foreign jurisdiction. The jurisdictional factors are: evidence that organized criminal groups, international terrorists, or both, have transacted business in that jurisdiction; the extent to which that jurisdiction or financial institutions operating in that jurisdiction offer bank secrecy or special regulatory advantages to nonresidents or nondomiciliaries of that jurisdiction; the substance and quality of administration of the bank supervisory and counter-money laundering laws of that jurisdiction; the relationship between the volume of financial transactions occurring in that jurisdiction and the size of the economy of the jurisdiction; the extent to which that jurisdiction is characterized as an offshore banking or secrecy haven by credible international organizations or multilateral expert groups; whether the United States has a mutual legal assistance treaty with that jurisdiction, and the experience of United States law enforcement officials and regulatory officials in obtaining information about transactions originating in or routed through or to such jurisdiction; and the extent to which that jurisdiction is characterized by high levels of official or institutional corruption. 31 U.S.C. § 5318A(c)(2)(A), added by Section 311(a) of the Patriot Act.

[41] The institutional factors are relevant for a finding of primary money laundering concern with respect to foreign financial institutions, foreign transactions and types of accounts. The institutional factors are: the extent to which such financial institutions, transactions, or types of accounts are used to facilitate or promote money laundering in or through the jurisdiction; the extent to which such institutions, transactions, or types of accounts are used for legitimate business purposes in the jurisdiction; and the extent to which such action is sufficient to ensure, with respect to transactions involving the jurisdiction and institutions operating in the jurisdiction, that the purposes of subchapter II (31 U.S.C. §§ 5311-5332) continue to be fulfilled, and to guard against international money laundering and other financial crimes. 31 U.S.C. § 5318A(c)(2)(B), added by Section 311(a) of the Patriot Act.

concern, the Secretary decides whether and which measures shall be implemented.[42]

When selecting a special measure, the Secretary shall take into account whether similar action has been or is being taken by other nations or multilateral groups; whether the imposition of any particular measure would create a significant competitive disadvantage, including any undue cost or burden, for U.S. financial institutions.[43] Furthermore, the Secretary shall consider the extent to which the action or the timing of the action would have a significant adverse systemic impact on the international payment, clearance and settlement system, or on legitimate business activities involving the particular jurisdiction, institution, or class of transactions, and the effect of the action on United States national security and foreign policy.[44]

2. Special Measures That May Be Taken by the Secretary

If the Secretary finds primary money laundering concerns with respect to a foreign jurisdiction, foreign financial institution, foreign transaction or an account, he can request domestic financial institutions or domestic financial agencies[45] to:

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[42] 31 U.S.C. § 5318A(a)(1) & (4), added by Section 311(a) of the Patriot Act. In making the selection of special measures, the Secretary must consult with certain governmental agencies. 31 U.S.C. § 5318A(a)(4)(A), added by Section 311(a) of the Patriot Act.

[43] 31 U.S.C. § 5318A(a)(4)(B)(i) & (ii), added by Section 311(a) of the Patriot Act.

[44] 31 U.S.C. § 5318A(a)(4)(B)(iii) & (iv), added by Section 311(a) of the Patriot Act. No later than ten days after the date the Secretary of the Treasury has imposed any special measure, he shall notify, in writing, the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing and Urban Affairs of the Senate of any such action. 31 U.S.C. § 5318A(d), added by Section 311(a) of the Patriot Act.

[45] The terms *domestic financial institution* and *domestic financial agency* apply to an action in the United States of a financial institution or agency. 31 U.S.C. § 5312(b)(1) (2000).

- maintain records and file reports concerning the transactions with respect to a foreign jurisdiction or foreign financial institution, foreign transactions or a type of account, including the identity, address and legal capacity of the participants in a transaction or relationship, the identity of the originator of a funds transfer and the identity of the beneficial owner of the funds involved;[46]
- obtain, retain and disclose information concerning the beneficial ownership[47] of an account opened or maintained in the United States by a foreign person or a representative of such a foreign person that involves a foreign jurisdiction, a foreign financial institution, a foreign transaction or a type of account;[48]
- identify each customer (and representative of such customer) of a foreign financial institution that opens or maintains a payable-through account[49] or a correspondent account[50]

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[46] 31 U.S.C. § 5318A(b)(1)(A) & (B), added by Section 311(a) of the Patriot Act. 31 U.S.C. § 5318(*l*), added by Section 326(a) of the Patriot Act, instructs the Secretary to promulgate regulations setting forth minimum standards regarding the identity of customers opening accounts.

[47] 31 U.S.C. § 5318A(e)(3), added by Section 311(a) of the Patriot Act, requires the Secretary to issue regulations defining beneficial ownership of an account for purposes of 31 U.S.C. § 5318A and for purposes of 31 U.S.C. §§ 5318(i) & (j).

[48] 31 U.S.C. § 5318A(b)(2), added by Section 311(a) of the Patriot Act.

[49] *Payable-through account* means an account, including a transaction account (as defined in Section 19(b)(1)(C) of the Federal Reserve Act), opened at a depository institution by a foreign financial institution by means of which the foreign financial institution permits its customers to engage, either directly or through a subaccount, in banking activities usual in connection with the business of banking in the United States. 31 U.S.C. § 5318A(e)(1)(C), added by Section 311(a) of the Patriot Act. A payable-through account is a checking account established by a U.S. bank for a foreign bank. The foreign bank solicits customers ("subaccount holders") that reside outside the United States who (for a fee) are provided with the means (frequently by the use of checks) to conduct banking transactions in the U.S. payment system through the foreign bank's account at the U.S. bank. *See* Alexander Kern, *Extraterritorial U.S.*

in the United States who is permitted to use, or whose transactions are routed through, such payable-through account or correspondent account;[51] and obtain, with respect to each such customer (and each such representative), information that is substantially comparable to that which the depository institution obtains in the ordinary course of business with respect to its customers residing in the United States;[52] and

- to prohibit, or impose conditions upon, the opening or maintenance of a correspondent account or a payable-through account in the United States by any domestic financial institution or domestic financial agency for or on behalf of a foreign banking institution if such account involves a foreign jurisdiction, foreign banking institution or if transactions may be conducted through such accounts that have been found to be of primary money laundering concern.[53]

The prohibition, or the imposition of conditions upon, the opening or maintenance of accounts may be imposed only by regulation, while each of the other above-mentioned measures may be imposed by regulation, order, or otherwise

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Banking Regulation and International Terrorism: The Patriot Act and the International Response, 3 J. INT'L BANKING REG. 307, 316 (2002).

[50] *Correspondent account* means an account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution. 31 U.S.C. § 5318A(e)(1)(B), added by Section 311(a) of the Patriot Act.

[51] 31 U.S.C. § 5318A(b)(3)(A) & (4)(A), added by Section 311(a) of the Patriot Act.

[52] 31 U.S.C. § 5318A(b)(3)(B) & (4)(B), added by Section 311(a) of the Patriot Act. (It follows from the context that the term *depository institution* refers to the domestic financial institution or domestic financial agency that opens the payable-through or correspondent account.)

[53] 31 U.S.C. § 5318A(b)(5), added by Section 311(a) of the Patriot Act. The Secretary must consult with the Secretary of State, the Attorney General, and the Chairman of the Board of Governors of the Federal Reserve System before imposing such prohibitions or restrictions. *Id.*

as permitted by law.[54] An order may not remain in effect for more than 120 days, except pursuant to a rule promulgated on or before the end of a 120-day period beginning on the date of issuance of such order.[55] The various measures may be imposed in such sequence or combination as the Secretary shall determine.[56]

Furthermore, U.S. financial institutions that establish a private banking account[57] or correspondent account in the United States for a non-U.S. person must establish due diligence policies, procedures and controls that are reasonably designed to detect and report instances of money laundering through such accounts.[58] Enhanced due diligence policies, procedures and controls apply if a U.S. financial institution establishes a correspondent account for a foreign bank operating under an offshore banking license[59] or a license issued by a country that has been designated by an intergovernmental organization as being uncooperative with international money laundering principles or by the Secretary as warranting special measures due to money laundering concerns.[60] Finally, a covered U.S. financial

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[54] 31 U.S.C. § 5318A(a)(2)(B) & (C), added by Section 311(a) of the Patriot Act.

[55] 31 U.S.C. § 5318A(a)(3), added by Section 311(a) of the Patriot Act.

[56] 31 U.S.C. § 5318A(a)(2)(A), added by Section 311(a) of the Patriot Act.

[57] *Private banking account* is defined in 31 U.S.C. § 5318(i)(4)(B), added by Section 312(a) of the Patriot Act, as an account that requires a minimum deposit of $1 million, is established on behalf of one or more individuals who have a direct or beneficial ownership interest in the account and is assigned to, or administered by, an officer of a financial institution acting as a liaison between the financial institution and the direct or beneficial owner of the account.

[58] 31 U.S.C. § 5318(i)(1), added by Section 312(a) of the Patriot Act. Minimum due diligence standards for private banking accounts are set forth in 31 U.S.C. § 5318(i)(3), added by Section 312(a) of the Patriot Act.

[59] *Offshore banking license* is defined in 31 U.S.C. § 5318(i)(4)(A), added by Section 312(a) of the Patriot Act.

[60] 31 U.S.C. § 5318(i)(2)(A), added by Section 312(a) of the Patriot Act. The enhanced policies, procedures and controls are described in 31 U.S.C. § 5318(i)(2)(B), added by Section 312(a) of the Patriot Act.

institution[61] is prohibited from opening correspondent accounts for a shell bank,[62] i.e., a bank that has no physical presence in any country.[63]

B. Authority to Request Records from Foreign Banks

A foreign bank that maintains a correspondent account[64] in the United States may be the addressee of a summons or subpoena of the Secretary or the Attorney General requesting from the foreign bank records related to such accounts, including records maintained outside of the United States relating to the deposit of funds *into the foreign bank*.[65] If the foreign bank fails to comply with the summons or with the subpoena to provide records or to contest in a U.S. court such summons or subpoena, the Secretary or the Attorney General may instruct the domestic covered financial institution[66] to terminate any correspondent relationship with the foreign bank.[67] A U.S. financial institution that

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[61] 31 U.S.C. § 5318(j)(1), added by Section 313(a) of the Patriot Act, defines *covered financial institutions* as the financial institutions referred to in 31 U.S.C. § 5312(a)(2)(A)-(G), i.e., an insured bank; a commercial bank or trust company; a private banker; an agency or branch of a foreign bank in the United States; any credit union; a thrift institution; and a registered broker-dealer. The term *covered financial institution*s is narrower than the term *financial institution* defined in 31 U.S.C. § 5312(2). In effect, covered financial institutions are "real banks" and registered broker-dealers.

[62] 31 U.S.C. § 5318(j), added by Section 313(a) of the Patriot Act.

[63] 31 U.S.C. § 5318(j)(1), added by Section 313(a) of the Patriot Act.

[64] For the definition of *correspondent account, see supra* note 50. 31 U.S.C. § 5318(k)(1)(B), added by Section 319(b) of the Patriot Act.

[65] 31 U.S.C. § 5318(k)(3)(A)(i), added by Section 319(b) of the Patriot Act. If the foreign bank does not have a representative in the United States, the summons may be served in the foreign country pursuant to any treaty regarding international law enforcement assistance. 31 U.S.C. § 5318(k)(3)(A)(ii), added by Section 319(b) of the Patriot Act.

[66] For the definition of *covered financial institution*, *see supra* note 61.

[67] 31 U.S.C. § 5318(k)(3)(C), added by Section 319(b) of the Patriot Act.

disregards the aforementioned instruction is liable for a civil penalty.[68]

C. Forfeiture of Funds Deposited at Foreign Financial Institutions

1. Legal Authority

Under 18 U.S.C. § 981(a), which predates the Patriot Act, property that is involved in, constitutes, is derived from or is traceable to proceeds obtained directly or indirectly from certain criminal offenses[69] is subject to civil forfeiture in the United States.[70] Furthermore, 18 U.S.C. § 981(a) includes all assets, foreign or domestic, of persons engaged in

[68] 31 U.S.C. § 5318(k)(3)(C)(iii), added by Section 319(b) of the Patriot Act, provides for a civil penalty of up to $10,000 per day until the correspondent relationship is terminated.

[69] An extensive list of offenses is set forth in 18 U.S.C. § 981(a)(1)(A)-(F), as amended by Sections 320, 372(b)(1) & 373(b) of the Patriot Act, and by Pub. L. No. 106-185 (2000), §§ 2(c)(1)(A) & 20(a), 114 Stat. 210, including, e.g., laundering of monetary instruments; engaging in monetary transactions in property derived from specified unlawful activities; prohibition of illegal money transmitting businesses; receipt of commissions or gifts by employees of financial institutions for procuring loans; forgery of obligations, securities or coins; smuggling; theft, embezzlement or misapplication by bank employees; various types of fraud against U.S. financial institutions; unlawful acts in connection with explosive materials; and unlawful acts in connection with motor vehicles. 18 U.S.C. § 981(a)(1)(A)-(F) make it clear that there must be a connection with the criminal offense and the funds in the account. The statute uses words such as "involved," "derived from," and "traceable to." It should be noted that the authority to take special measures against U.S. institutions maintaining a *correspondent account* under 31 U.S.C. § 5318A, added by Section 311(a) of the Patriot Act, depends on reasonable grounds for a conclusion of primary money laundering concern, whereas the authority of forfeiture of 31 U.S.C. § 981(k)(1), added by Section 319(a) of the Patriot Act, is based on a more comprehensive group of offenses. However, all offenses must be violations of U.S. statutes, except 18 U.S.C. § 981(a)(1)(B), which refers to offenses against a foreign nation or involving controlled substances (defined in the Controlled Substances Act, 18 U.S.C. § 1956 (2000), and that are punishable by the foreign nation *and* under the laws of the United States.

[70] For the procedure regarding forfeiture, *see* 18 U.S.C. § 981(b), added by Pub. L. No. 106-185 (2000), § 5(a), 114 Stat. 213-14.

international terrorism, acquired by a person with the intent of engaging in international terrorism or derived from, involved in, or used or intended to be used in any way for acts of terrorism or for the financing of terrorism.[71] Finally, any property involved in a violation or attempted violation, or which constitutes or is derived from proceeds traceable to a violation, of 18 U.S.C. § 2339C (prohibitions against the financing of terrorism), is subject to civil forfeiture in the United States.[72] The property and assets referred to in 18 U.S.C. § 981(a) are not limited to assets located in the United States;[73] however, if property or assets subject to civil forfeiture under 18 U.S.C. § 981(a) consists of funds

[71] 18 U.S.C. § 981(a)(1)(G), added by Pub. L. No. 107-56 (2001), § 806, 115 Stat. 378. The term *international terrorism* is defined in 18 U.S.C. § 2331(1), as amended by Section 802(a)(1) of the Patriot Act, as activities that (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

[72] 18 U.S.C. § 981(a)(1)(H), added by Pub. L. No. 107-197 (2002), § 301(d), 116 Stat. 728. 18 U.S.C. § 2339C is violated if a person provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used in order to carry out either an act which constitutes an offense within the scope of a treaty specified in 18 U.S.C. § 2339C(e)(7) or any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

[73] There is one exception to this rule. The property derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation, if the offence would be punishable in the foreign nation and under the laws of the United States, is subject to forfeiture only if within the jurisdiction of the United States. 18 U.S.C. § 981(a)(1)(B), amended by Section 320 of the Patriot Act.

deposited at a foreign bank outside the United States, the United States could not enforce the forfeiture.

Section 319(a) of the Patriot Act[74] goes beyond 18 U.S.C. § 981(a) in that it enables U.S. enforcement authorities to seize funds held for a foreign bank in a U.S. interbank account[75] at a U.S. financial institution[76] without the need to trace the funds to an illegal act. The Patriot Act now provides that if tainted funds are deposited into an account at a foreign bank that has an interbank or correspondent account in the United States with a *covered financial institution*,[77] the funds so deposited "shall be deemed [for purposes of a forfeiture under 18 U.S.C. § 981(a)] to have been deposited into an interbank account in the United States."[78] This is irrespective of the country where the targeted depositor's account is held and irrespective of whether there has been a money transfer or not. As 18 U.S.C. § 981(a) merely refers to funds traceable to a specified criminal act, it does not matter whether the funds in the foreign account are held in U.S. dollars or in a foreign currency.[79] The new jurisdiction introduced by the Patriot

[74] 18 U.S.C. § 981(k)(1)(A), added by Section 319(a) of the Patriot Act. Section 319(a) adds a new subsection (k) on "interbank accounts" to 18 U.S.C. § 981, thereby expanding the circumstances under which money deposited in a U.S. interbank account may be subject to forfeiture.

[75] The term *interbank account* is defined in 18 U.S.C. § 981(k)(4)(A), added by Section 319(a) of the Patriot Act, by reference to 18 U.S.C. § 984(c)(2)(B), as amended by Section 13(a) of Pub. L. No. 106-185 (2000), 114 Stat. 218-19, as an account held by one financial institution at another financial institution primarily for the purpose of facilitating customer transactions.

[76] 18 U.S.C. § 981(k)(1)(A), added by Section 319(a) of the Patriot Act, refers to *covered financial institution* as defined in 31 U.S.C. § 5318(j)(1), in other words, to "real banks" and registered broker-dealers. *See supra* note 61.

[77] 18 U.S.C. § 981(k)(1), added by Section 319(a) of the Patriot Act, in conjunction with 31 U.S.C. § 5318(j)(1) referring to 31 U.S.C. § 5312(a)(2)(A)-(G). *See supra* note 61.

[78] 18 U.S.C. § 981(k)(1)(A), added by Section 319(a) of the Patriot Act.

[79] It seems obvious that the funds in the interbank account are held in U.S. dollars as the account is usually maintained by the foreign bank to

Act seems to be based merely on the fact that the foreign depositor's foreign bank maintains an interbank account in the United States, regardless of the place of the deposit, the currency of the deposit or any transfer related to the deposit. Obviously, the aim is to allow U.S. law enforcement authorities to seize funds in the U.S. account as a substitute for the funds held in a foreign account over which the U.S. authorities have no jurisdiction, irrespective of whether the funds in the interbank account are derived from or related to or traceable to a criminal act.[80] Herein lies a significant change of the law in favor of the U.S. government.[81]

The Patriot Act uses a fiction, namely, that funds deposited in a foreign account are deemed to have been

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facilitate dollar transactions. However, it seems that the foreign funds can be denominated in any currency.

[80] 18 U.S.C. § 981(k)(2), added by Section 319(a) of the Patriot Act, provides that in the event of a forfeiture action against funds in the interbank account it shall not be necessary for the Government to establish that the funds are directly traceable to the funds that were deposited into the foreign bank. This provision only clarifies what 18 U.S.C. § 981(k)(1)(A), added by Section 319(a) of the Patriot Act, already implies, namely that there does not need to be any connection between the funds deposited at the foreign bank account and those deposited at the U.S. interbank account. This needs to be distinguished from the necessary connection between the funds deposited in the foreign account and the criminal or terrorist activities as laid out by 18 U.S.C. § 981(a)(1), *see supra* notes 69 & 70 and accompanying text.

[81] Prior to the Patriot Act, the U.S. government was required to show a nexus between the illegal conduct and the funds seized from an interbank account (in other words, the proceeds in the interbank account had to be directly traceable to the criminal conduct, unless the financial institution in holding the account knowingly engaged in the offense). This followed from 18 U.S.C. § 984(d)(1) (2000), dealing with civil forfeiture of fungible property. Thus, in a forfeiture trial concerning the seizure of interbank account funds, the government must have had at least probable cause to connect the interbank account to criminal activity. *See* Marine Midland Bank, N.A. v. United States, 11 F.3d 1119 (2d Cir. 1993). The Patriot Act explicitly eliminates this tracing or nexus requirement for interbank accounts in 18 U.S.C. § 981(k)(2), added by Section 319(a) of the Patriot Act. 18 U.S.C. § 984 (2000) was rewritten by Pub. L. No. 106-185 (2000), § 13(a), 114 Stat. 218-19.

deposited in a U.S. account.[82] The question is whether there are limits on the legislative use of such fictions. In particular, can Congress create jurisdiction over an extra-territorial act with the help of the fiction that the act took place in the United States? If the United States cannot seize certain illegal funds because they are located outside the territory of the United States, can Congress seize an equal amount of funds from a third person who is not involved in the illegal act by establishing a fiction that the funds of the third person are the funds of the person involved in the illegal act? The amount of funds that can be seized in the interbank account is limited by the value of the funds deposited into the account at the foreign bank.[83]

Seizures of these funds shall generally be made pursuant to a warrant obtained in the same manner as provided for a search warrant under Rule 41(d) of the Federal Rules of Criminal Procedure.[84]

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[82] A fiction assumes the existence of a state of facts irrespective of their truth or falsity. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 844 (1933). *Fictio idem operatur quod veritas* (a fiction has the same effect as the truth), *see* S. Dionysius Gothofredus, *quoted in* LATEINISCHE RECHTSREGELN UND RECHTSSPRICHWÖRTER 84, No. 25 (Detlef Liebs ed., 6th ed. 1998) [hereinafter Liebs].

[83] 18 U.S.C. § 981(k)(1)(A), added by Section 319(a) of the Patriot Act.

[84] 18 U.S.C. § 981(b)(2), as amended by Pub. L. No. 106-185 (2000), § 5(a), 114 Stat. 213. Pursuant to Rule 41(d)(1) of the Federal Rules of Criminal Procedure, a magistrate judge or a judge of a state court of record must issue the warrant if there is probable cause to search for and seize a person or property in one of the following cases: (1) evidence of a crime; (2) contraband, fruits of crime, or other items illegally possessed; (3) property designed for the use, intended for use, or used in committing a crime; or (4) a person to be arrested or a person who is unlawfully restrained. Rule 41(d)(2) includes provisions regarding the warrant on an affidavit or on sworn testimony. Pursuant to Rule 41(d)(3) a magistrate judge may issue a warrant based on information communicated by telephone or other appropriate means.

Seizure may be made without a warrant if a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem, or if there is probable cause to believe that the property is subject to forfeiture, or if the property was lawfully seized by a State or local law enforcement agency and transferred to a Federal agency. 18 U.S.C. § 981(b)(2)(A)-(C).

Unlike under IEEPA, there is no requirement of a genuine link between the seized funds and the targeted foreign funds. In other words, there is no requirement of genuine link between the foreign funds and U.S. territory. The link is created by a fiction, that property located abroad is deemed to be located in the United States, or, to be more precise, that an account relationship abroad is deemed to be an account relationship in the United States. With such kind of fiction, the United States could extend its jurisdiction to practically all foreign property or acts. Although fictions are a recognized legislative tool, it is doubtful whether they are appropriate in jurisdictional provisions. Jurisdiction, in particular personal jurisdiction and in rem jurisdiction, by nature, is based on contacts; if these contacts can be fictionally created, there would be no limit whatsoever to the assertion of jurisdiction.

2. Judicial Remedy in Case of Forfeiture

The person who deposited the funds in the account at the foreign bank may contest the forfeiture by filing a claim under Section 316(a) of the Patriot Act in conjunction with Section 319(a) of the Patriot Act[85] and 18 U.S.C. § 983(d) (innocent owner defense). Section 319(a) of the Patriot Act restricts the group of persons, which pursuant to 18 U.S.C. § 983(a)(2) are allowed to file a claim by defining the owner as follows. *Owner* means a person with an ownership interest[86] in the funds that were deposited into the foreign

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Probable cause exists if apparent facts are such that a reasonably discreet and prudent man would be led to believe that law was being violated. *See* Dumbra v. United States, 268 U.S. 435 (1925); Locke v. United States, 11 U.S. 339, 348 (1813); Steele v. United States, 267 U.S. 498, 504-05 (1925). It may rest upon evidence that is not legally competent in a criminal trial, *see* Draper v. United States, 358 U.S. 307 (1959); and it need not be sufficient to prove guilt in a criminal trial, *see* Brinegar v. United States, 338 U.S. 160 (1949); United States v. Ventresca, 380 U.S. 102 (1965).

[85] 18 U.S.C. § 981(k)(3), added by Section 319(a) of the Patriot Act.

[86] The ownership interest, pursuant to 18 U.S.C. § 983(d)(6)(A), includes a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest.

bank *at the time such funds were deposited.*[87] A general unsecured interest in, or claim against, the funds, however, is not sufficient.[88] This definition makes the targeted foreign depositor the owner.

The foreign bank or any financial institution acting as an intermediary in the transfer of the funds into the interbank account is specifically excluded from the scope of the term owner.[89] Only in two exceptional cases may the foreign bank be considered to be the owner of the funds: first, if the basis for the forfeiture is wrongdoing committed by the foreign bank,[90] or second, if the foreign bank establishes, by a preponderance of the evidence, that prior to the restraint, arrest or seizure of the funds, the foreign bank had discharged all or part of its obligation to the prior owner of the funds, in which case the foreign bank shall be deemed the owner of the funds to the extent of such discharged obligation.[91] Thus, in most cases, the innocent owner defense

[87] 18 U.S.C. § 981(k)(4)(B)(i)(I), added by Section 319(a) of the Patriot Act, in conjunction with 18 U.S.C. § 983(d)(6).

[88] 18 U.S.C. § 983(d)(6)(B), which provides that the term *owner* does not include (i) a person with only a general unsecured interest in, or claim against, the property or estate of another; (ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or (iii) a nominee who exercises no dominion or control over the property.

[89] 18 U.S.C. § 981(k)(4)(B)(i)(II), added by Section 319(a) of the Patriot Act, provides that the term *owner* does not include either the foreign bank or any financial institution acting as an intermediary in the transfer of the funds into the interbank account.

[90] 18 U.S.C. § 981(k)(4)(B)(ii)(I), added by Section 319(a) of the Patriot Act.

[91] 18 U.S.C. § 981(k)(4)(B)(ii)(II), added by Section 319(a) of the Patriot Act. If the foreign bank has discharged its obligations to the prior owner of the funds, i.e., repaid the tainted funds to the depositor, the fiction of 18 U.S.C. § 981(k)(1)(A), added by Section 319(a) of the Patriot Act, *see supra* text accompanying note 78, no longer applies. Funds that were deposited with a foreign bank and later withdrawn can no longer be deemed to have been deposited into an interbank account in the United States. *Id.* It is conceivable that 18 U.S.C. § 981(k)(4)(B)(ii)(II) implies that once tainted funds have been deposited with a foreign bank but were later withdrawn or the account relationship between the foreign bank and the targeted foreign depositor has been terminated, the correspondent

can only be brought by the customer of the foreign bank but not by the foreign bank itself. This creates a problem for the foreign bank in the event a seizure occurs before it has discharged its obligation to its customer: under most foreign laws the foreign bank would still be liable to its customer, the depositor of the funds, but it cannot contest the seizure of the funds under the Patriot Act.

By excluding the foreign bank from the definition of owner, Section 319(a) of the Patriot Act[92] seems to deny the foreign bank standing to sue.[93] However, even if the relevant

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account remains subject to seizure. It is more likely, however, that 18 U.S.C. § 981(k)(4)(B)(ii)(II) should be read as permitting the defense that the targeted depositor no longer has a deposit claim against the foreign bank. It is logical that only the foreign bank can make this claim.

[92] 18 U.S.C. § 981(k)(4)(B)(i)(II), added by Section 319(a) of the Patriot Act.

[93] Under U.S. law, standing to sue is a federal constitutional principle, grounded in Article III of the U.S. Constitution and also governed by prudential principles. Standing addresses the question of whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy, *see* Sierra Club v. Morton, 405 U.S. 727 (1972), and focuses primarily on the party seeking to get its complaint before a federal court, *see* Flast v. Cohen, 392 U.S. 83 (1968). For a more comprehensive account of the law of standing, see generally CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS ch. 2, §§ 12 & 13 (6th ed. 2002); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-14, at 385-92 (3d ed. 2000).

It seems that the U.S. Supreme Court has arrived at a three-part standing test, which sums up the previous case law and is outlined, e.g., in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). As stated in that case, the minimum requirements for standing under Article III are that (1) the plaintiff has suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, and not conjectural or hypothetical; (2) there is a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Even when these requirements are met, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those

provision of Section 319(a) of the Patriot Act[94] were not applicable, the foreign bank, under the general principles of banking law, would not be able to rely on the innocent owner defense. The relevant banking law principle is that with the deposit of the funds a debtor-creditor relationship between the depositor (here the foreign bank) and the deposit taker (here the U.S. bank administering the interbank account) is established.[95] Even in the absence of the specific exclusion of the foreign bank from the owner definition by Section 319(a) of the Patriot Act,[96] the depositing foreign bank merely has an unsecured claim for the funds held in the interbank account at the U.S. bank. There is no fiction that the foreign bank that deposited funds into the U.S. correspondent bank is the owner of such funds. Such an unsecured claim does not create an ownership interest.[97] Furthermore, even the savings clause of Section 316(c)(2) of the Patriot Act[98] does not help the foreign bank as another remedy does not seem to be available.[99] This lack of a remedy violates the general

litigants best suited to assert a particular claim, *see* Gladstone, Realtors v. Bellwood, 441 U.S. 91 (1979). These prudential principles are that (1) the plaintiff's interest must come within the zone of interests arguably protected or regulated by the law in question, *see* Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970); (2) the courts will not hear generalized grievances shared in substantially equal measure by all or a large class of citizens, *see* United States v. Richardson, 418 U.S. 166 (1974), *as well as* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); and (3) the plaintiff must assert its own legal interests rather than those of third parties, *see* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

[94] 18 U.S.C. § 981(k)(4)(B)(i)(II), added by Section 319(a) of the Patriot Act.

[95] *See infra* Part IV.D. for further discussion of this issue.

[96] 18 U.S.C. § 981(k)(4)(B)(i)(II), added by Section 319(a) of the Patriot Act.

[97] *See supra* notes 86 & 88 and accompanying text.

[98] Section 316(c)(2) of the Patriot Act provides that nothing in Section 316 of the Patriot Act shall limit or otherwise affect any other remedies that may be available to an owner of property under 18 U.S.C. § 983 or any other provision of law.

[99] 5 U.S.C. § 702 (2000) (part of the Administrative Procedure Act), which provides that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the

proposition that there should be a judicial remedy for every legal injury, reflected in the common law maxim *ubi jus, ibi remedium.*[100] The provisions of the Patriot Act do not specifically refer to the necessary (when applying the principles of the debtor-creditor relationship) seizure of the foreign bank's claims against the correspondent bank in addition to the forfeiture of the funds in the correspondent account and certainly do not provide the affected foreign bank with a remedy applicable in the most likely case, i.e., the situation where the foreign depositor still has a valid claim against the foreign bank under foreign law and the foreign bank cannot therefore argue the exceptional circumstances set out in Section 319(a) of the Patriot Act.[101] Practically, the foreign bank would not receive any kind of compensation for the seizure of its claims as a depositor against the U.S. bank. The Patriot Act does not exclude the foreign bank's standing to sue as owner of the claim of a depositor, rather than as owner of the deposited funds.

Furthermore, the savings clause of Section 316(c)(2) of the Patriot Act[102] could be read as indicating that general constitutional principles still apply and the foreign bank's

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meaning of a relevant statute, is entitled to judicial review thereof," would probably not provide another remedy. The judicial officer issuing the seizure warrant arguably would not qualify as an agency, i.e., as an authority of the Government of the United States pursuant to 5 U.S.C. § 701(b)(1). As an officer of the judiciary, the judicial officer would fall outside the scope of the Administrative Procedure Act pursuant to 5 U.S.C. § 701(b)(1)(B). Moreover, the judicial officer would act pursuant to the provisions introduced by the Patriot Act and presumably do so in a formally correct way. A court may well find the action to be consistent with the written law at the time. The underlying act of Congress, however, cannot be challenged under 5 U.S.C. § 702 as, pursuant to 5 U.S.C. § 701(b)(1)(A), Congress is also not considered an agency within the scope of 5 U.S.C. § 702.

[100] *See* TRIBE, *supra* note 93, § 3-31, at 601. *See* Liebs, *supra* note 82, at 232, No. 12. The same idea is expressed in the maxim *lex semper dabit remedium*. *See id.* at 124, No. 48.

[101] 18 U.S.C. § 981(k)(4)(B)(ii), added by Section 319(a) of the Patriot Act. *See also supra* notes 90 & 91 and accompanying text.

[102] *See supra* note 98.

standing to sue even as innocent owner of the funds deposited in the interbank account is not denied.

In any event, the foreign bank should be able to rely on the doctrine of judicial review.[103] In light of the fact that the principles of standing to sue and judicial review are based on the U.S. Constitution, one would have to conclude that Congress could not, and did not intend to, deny these rights. A statute should not be interpreted as intending to do so.

In order to counter the explicit exclusion of the foreign bank from the group of possible claimants it seems appropriate to conclude that under the principles of standing and judicial review, the foreign bank may contest the measure in question in the relevant federal court.[104] Arguably, the provisions of Section 319(a) of the Patriot Act[105] and 18 U.S.C. § 983(d)(6)(B)(i)[106] would seem to violate the doctrine of judicial review, and standing to sue would have to be granted. One may even argue that the seizure of the funds and the claim of the foreign bank against the U.S. correspondent bank is inconsistent with the Fourth as well as the Fifth Amendment.[107]

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[103] The doctrine of judicial review derives from the Supreme Court's early case, Marbury v. Madison, 5 U.S. 137 (1803), where the Court held that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

[104] This would usually be the district court as court of first instance.

[105] 18 U.S.C. § 981(k)(4)(B)(i), added by Section 319(a) of the Patriot Act.

[106] *See supra* note 88.

[107] The Fourth Amendment guarantees the right to be secure in one's effects against unreasonable seizures. The Fifth Amendment protects against the deprivation of property without due process of law and such deprivation without just compensation. Both Amendments apply also to alien corporations, *see* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE § 14.5, 528 (3d ed. 1999). The claims that the foreign bank has against the U.S. bank with whom it maintains its interbank account should qualify as property protected by the Constitution. Thus, the foreign bank could possibly rely on the provisions of the Fourth and Fifth Amendments. However, substantial obstacles to this approach will be met in case the foreign bank has no further links of residence or establishment with the United States other than the mere position as creditor regarding the correspondent

However, even if one were to argue that the foreign bank should be denied standing, redress may be found in 28 U.S.C. § 1491(a)(1).[108] This provision grants the United States Court of Federal Claims jurisdiction over, among others, "any claim against the United States founded either upon the Constitution, or any Act of Congress."[109] Authorized are "actions based on constitutional provisions that mandate the payment of compensation by the United States, such as the Fifth Amendment prohibition against takings without just compensation."[110] If the foreign bank is able to show that the forfeiture violating its rights under the Fifth Amendment does not come with adequate compensation, it may successfully sue the United States for money damages. Accordingly, a judgment may be rendered holding Section

account. Whether in such case the foreign bank may be able to invoke rights under the U.S. Constitution would have to be analyzed carefully. Furthermore, one would have to examine whether the seizure amounts to a taking under the Fifth Amendment or whether it merely constitutes a provisional measure.

[108] 28 U.S.C. § 1491 (2000) is also referred to as the Tucker Act.

[109] Note that concerning claims not exceeding $10,000 in amount, the U.S. district courts have original jurisdiction, concurrent with the jurisdiction of the United States Court of Federal Claims. 28 U.S.C. § 1346(a)(2). Furthermore, the Tucker Act is a jurisdictional statute only and does not create any substantive rights to money damages enforceable against the United States. *See* United States v. Testan, 424 U.S. 392 (1976). It is a general grant of jurisdiction and is superseded when a more specific federal statute provides for jurisdiction over a particular cause of action. *See* People of Enewetak v. United States, 864 F.2d 134 (Fed. Cir. 1988), where it was held that because the United States had withdrawn its consent to be sued and established an alternate tribunal, the Tucker Act could not apply. However, in the forfeiture scenario discussed in this article, there is neither a more specific statute providing for jurisdiction, nor has the United States withdrawn its consent to be sued. *See supra* notes 98 & 99 and accompanying text. For further information on 28 U.S.C. § 1491, *see* 1 CIVIL ACTIONS AGAINST THE UNITED STATES—ITS AGENCIES, OFFICERS, AND EMPLOYEES (Trial Practice Series) §§ 1:16 *et seq.* (2d ed. 2002) [hereinafter CIVIL ACTIONS AGAINST THE UNITED STATES].

[110] *See* CIVIL ACTIONS AGAINST THE UNITED STATES, *supra* note 109, § 1:20, referring to United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). It seems possible that the forfeiture of the funds constitutes a taking under the Fifth Amendment. *See supra* note 107.

319(a) of the Patriot Act[111] and 18 U.S.C. § 983(d)(6)(B)(i) unconstitutional.[112]

Finally, another way of addressing a forfeiture under Section 319(a) of the Patriot Act would be for the foreign bank to enter into negotiations with the Attorney General. If the Attorney General determines that a conflict of law exists between the laws of the jurisdiction in which the foreign bank is located and the laws of the United States, he, after consulting the Secretary, may suspend or terminate the forfeiture.[113]

D. The Patriot Act Violates Basic Principles of U.S. Commercial Law

Section 319(a) of the Patriot Act[114] modifies a basic rule of the law. Under U.S. law it is a long-standing principle that if a customer "deposits money with a bank, the title to the money passes to the bank, and the latter becomes the debtor . . . to that amount."[115] "[T]he depositor receives a contract claim against the bank for an amount equal to the account balance."[116] The same principle is applied in other jurisdictions, e.g., under English law,[117] as well as under German law.[118] Accordingly, at the time of the seizure, the

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[111] 18 U.S.C. § 981(k)(4)(B)(i), added by Section 319(a) of the Patriot Act.

[112] *See supra* note 88. Again, one should note that further scrutiny as to the applicability and scope of the takings clause of the Fifth Amendment may be necessary. *See supra* notes 107 & 110.

[113] 18 U.S.C. § 981(k)(1)(B), added by Section 319(a) of the Patriot Act.

[114] 18 U.S.C. § 981(k)(4)(B)(i)(I), added by Section 319(a) of the Patriot Act.

[115] *See* Thompson v. Riggs, 72 U.S. 663 (1866).

[116] *See* Parker v. Community First Bank (*In re* Bakersfield Westar Ambulance, Inc.), 123 F.3d 1243 (9th Cir. 1997). For an extensive overview of this issue, *see* 5A MICHIE ON BANKS AND BANKING ch. 9, § 1 (2003).

[117] *See* Libyan Arab Foreign Bank v. Bankers Trust Co., 3 All E.R. 252, 276 (Q.B. 1989).

[118] *See* SIEGFRIED KÜMPEL, BANK- UND KAPITALMARKTRECHT, margin nos. 3.33-3.44, 342-345 (3d ed. 2004).

U.S. correspondent bank holds title to the funds in the interbank account.

Justice Staughton states this universal rule very clearly in *Libyan Arab Foreign Bank*:[119]

> It is elementary, or hornbook law to use an American expression, that the customer does not own any money in a bank. He has a personal and not a real right. Students are taught at an early stage of their studies in the law that it is incorrect to speak of "all my money in the bank:" see *Foley v Hill* (1848) 2 HL Cas 28 at 36, [1943–60] All E.R. Rep 16 at 19, where Lord Cottenham LC said:
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> > Money, when paid into a bank, ceases altogether to be the money of the principal. . . . It is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. . . . The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with as he pleases.

Owner is defined in the context of the civil forfeiture provision of 18 U.S.C. § 981 as a person with an ownership interest in the specific property sought to be forfeited.[120] Section 319(a) of the Patriot Act recognizes that the depositor of funds at the foreign bank is no longer owner of such funds after the deposit. This recognition is reflected in Section 319(a),[121] which explicitly refers to the depositor's ownership at the time the funds *were* deposited and not at the time of the seizure. The reference to the ownership in the past reflects not only a recognition of the fact that the foreign bank at the time of the seizure, under accepted legal principles, is not the owner of the funds, but also a rejection of that rule.

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[119] *See Libyan Arab Foreign Bank*, 3 All E.R. at 268.

[120] 18 U.S.C. § 983(d)(6)(A), Pub. L. No. 106-185 (2000), § 2(a), 114 Stat. 202.

[121] 18 U.S.C. § 981(k)(4)(B)(i)(I), added by Section 319(a) of the Patriot Act.

If a depositor transfers $1 to his dollar account at a non-U.S. bank, the U.S. correspondent account that the non-U.S. bank maintains with a U.S. bank will increase by $1 (unless the $1 was transferred from another account at the same bank). Immediately after receipt of the $1 transfer, the bank may have made a $1 loan to another customer by crediting the borrower's dollar account. The U.S. correspondent account still shows the $1, but it reflects money owed to the other customer. This $1 in the correspondent account may be seized under the Patriot Act. If the bank transfers the $1 to another bank designated by the borrower or if it purchases goods for $1 and transfers $1 to the bank of the seller, the bank's correspondent account will be reduced by $1. However, $1 may still be seized under the Patriot Act. It is important to note that a bank is not required to hold funds in cash or in bank accounts in the amount of all claims of its depositors, nor is a bank required to match its foreign currency assets with foreign currency liabilities. The bank may wish to decrease the gap between dollar assets and dollar liabilities and borrow $1 from another bank. In that case its correspondent account would increase by the amount borrowed. The bank may sell dollars against euros, in which case its correspondent account would decrease. The important point is that there is no relationship between the dollar deposits of customers at the foreign bank and the dollar balance of the foreign bank at its U.S. correspondent account. The well-established debtor-creditor relationship between the bank and its deposit customer is negated by the Patriot Act. Despite the lack of an ownership link between the seized funds and the targeted criminal customer, Section 319(a) of the Patriot Act creates a fiction of law that assigns ownership to a person contrary to an essential principle of commercial law.[122]

If one projects the Patriot Act's view regarding the ownership of the funds onto other areas of law, consequences will be serious. To illustrate this, one may simply examine the possible effects on bankruptcy law. Section 541(a) of the

[122] 18 U.S.C. § 981(k)(4)(B)(i)(I), added by Section 319(a) of the Patriot Act.

U.S. Bankruptcy Code provides that the bankrupt's estate in general comprises the debtor's interests in property.[123] Any power that the debtor may exercise solely for the benefit of an entity other than the debtor is excluded from the estate.[124] Applying the view of the Patriot Act that the depositor remains owner of the deposited funds to depositors of a bankrupt U.S. bank, the bankrupt's estate would be vastly diminished and a substantial disadvantage of the bankrupt's remaining creditors would result. A limitation of this fiction to foreign depositors, on the other hand, would result in reverse discrimination, putting all U.S. depositors in a detrimental position. In any event, consequences would be far-reaching. It seems that Congress has not fully thought through the possible implications of the ownership fiction.

If the view that a depositor has an ownership interest in funds deposited at a bank prevails, the bank could not use such funds freely in its banking business and modern banking business would come to a halt. Like a broker-dealer who is obligated to maintain a financial asset in a quantity corresponding to the aggregate of all security entitlements it has established in favor of its customers,[125] the bank would be obligated to keep available liquid funds equal to its deposit liabilities and matching the currencies of its deposit liabilities.[126]

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[123] *See* 11 U.S.C. § 541(a) (2000). Again, this U.S. provision reflects established international standards. German law, e.g., provides that the bankrupt's estate only consists of the debtor's legal estate. Section 35 of the Insolvenzordnung (Insolvency Act) of Oct. 5, 1994, 1994 BGBl. I 2866, as amended [hereinafter InsO]. Another person's property that is not subject to execution pursuant to the Zivilprozessordnung (Civil Procedure Statute) of Sept. 12, 1950, 1950 BGBl. III 533, as amended, is excluded from the bankrupt's estate. Section 36(I) of the InsO.

[124] 11 U.S.C. § 541(b)(1) (2000).

[125] N.Y.U.C.C. § 8-504 (McKinney 2002 & Supp. 2004).

[126] With respect to deposits, commercial banks would be in the same position as brokers are with respect to customer securities. *Supra* note 125. *See also* N.Y.U.C.C. §§ 8-503 to 508. N.Y.U.C.C. § 8-503 expresses the understanding that securities that a broker holds for its customers are not general assets of the broker subject to a claim of the broker's creditors. N.Y.U.C.C. § 8-503(a) provides that, to the extent necessary to satisfy all customer claims, all units of a security held by the broker are held for the

E. Double Jeopardy of the Foreign Bank

If the U.S. government seizes funds of a U.S. criminal held in an account at a U.S. bank, the U.S. government in effect seizes the right of the criminal arising from the deposit relationship with the bank. The bank now owes the money to the U.S. government. Under the theory of the Patriot Act, the U.S. government would seize assets of the bank but leave the foreign law right of the (foreign) criminal to demand repayment of the deposit untouched. Thus, the seizure only affects an innocent bystander.

In most cases, a foreign bank whose deposits in a U.S. correspondent account have been seized will lose the seized amount twice. The foreign alleged criminal depositor still has a claim under foreign law against the bank for repayment of the deposit. In other cases, particularly in money laundering cases, the foreign bank must under foreign law deliver the tainted money to the foreign government. The U.S. government still can seize the funds from the U.S. correspondent bank account. The author is aware of one case in which the double seizure actually occurred.

F. Violation of the Principle of Territoriality as a Doctrine of International Law

Section 319(a) of the Patriot Act provides U.S. enforcement agencies with a powerful new tool but the authority for this indirect seizure of foreign U.S. dollar accounts must be questioned under international law.[127] Arguably, Section 319(a) of the Patriot Act violates the principle of territoriality.

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entitlement holders (customers), are not property of the securities intermediary (broker), and are not subject to creditors' claims, except as otherwise provided in Section 8-511 of the N.Y.U.C.C. *See* Gruson, *Global Shares*, *supra* note 18, at 235. The customer of a broker is not an owner of the securities in the meaning of the common law property concept. Art. 8 of the U.C.C. has created a sui generis form of property interest. *See* N.Y.U.C.C. § 8-503 cmts. 1-2, § 8-104 cmt. 2.

[127] 18 U.S.C. § 981(k), added by Section 319(a) of the Patriot Act.

The principle of territoriality is a generally recognized basis for jurisdiction.[128] It provides that each nation has the exclusive right to regulate the conduct of all residents, individuals, and corporations within its borders.[129] A corollary to the territorial principle is that foreign governments do not have the right to interfere in the affairs of another state. Therefore, under an absolutist interpretation of the territorial principle, the United States would never have the right to exercise jurisdiction over, for example, a foreign subsidiary of a U.S. bank because such action would impinge on sovereign interests of the country in which the subsidiary operates.

The capacity to legislate in respect of the persons, property or events in question, so-called prescriptive jurisdiction, is primarily territorial. In the *S.S. Lotus* case,[130] which is one of the fundamental cases in regard to the principle of territorial jurisdiction, the Permanent Court of International Justice (the "P.C.I.J.") examined and expressly supported this principle.

The principle of territoriality, however, is not absolute.[131] To some extent, jurisdiction may be based on other grounds as well. In the *Lotus* case, the P.C.I.J. observed on the question of jurisdiction in general that besides the principle of territorial jurisdiction, every state remains free to adopt the principles which it regards as best and most suitable and that, in respect of jurisdiction outside its territory, there is a wide measure of discretion which is only limited in special

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[128] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 310 (4th ed. 1990).

[129] *See* MALCOLM N. SHAW, INTERNATIONAL LAW 574 (5th ed. 2003); BROWNLIE, *supra* note 128, at 298; GERHARD KEGEL & KLAUS SCHURIG, INTERNATIONALES PRIVATRECHT 939 (8th ed. 2000).

[130] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7, 1927), *cited in* WORLD COURT REPORTS, vol. II, 20 *et seq.* (Manley O. Hudson ed. 1935).

[131] *See Lotus* case, 1927 P.C.I.J. at 20, in which the P.C.I.J. observed this view on the specific question of criminal jurisdiction. However, it has to be noted that in the case of prescriptive jurisdiction, there is no major distinction between the civil, criminal, fiscal or monetary jurisdictions. *See* BROWNLIE, *supra* note 128, at 309-10.

cases by prohibitive rules.[132] Thus, the P.C.I.J. did not lay down a general prohibition to the effect that states may not extend their jurisdiction outside their territory. In essence, according to the P.C.I.J., what is not prohibited by international law is permitted. Today, this early approach of the P.C.I.J. is not accepted anymore, as several later decisions of the P.C.I.J.[133] point out. Now a general presumption against the extraterritorial application of municipal legislation exists[134] and extraterritorial jurisdiction is generally seen to be illegitimate.[135] This follows from the principle of sovereignty of states. As an exception, extraterritorial jurisdiction is allowed if the other state granted a permit, or if the exercise of jurisdiction does not involve interference with the legitimate affairs of that other state.[136] In addition to these exceptions, the view has evolved that, especially in the interest of national security, a country has the right to extend its jurisdiction outside its borders.[137]

According to the effects doctrine (which is controversial), a state may exceptionally exercise its jurisdiction on a basis other than territoriality if the conduct of a party is producing effects within its territory, even though the conduct complained of takes place abroad.[138] This doctrine requires that (1) a substantial connection between the specific matter and the state's sovereign authority exists and (2) the exercise of jurisdiction be reasonable.[139] The United States has relied

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[132] *See supra* note 130, at 19.

[133] *See, e.g.*, Fisheries case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18) and Nottebohm case (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6).

[134] *See* SHAW, *supra* note 129, at 612 n.202 with further reference to relevant cases.

[135] *See* Claus Kress & Jochen Herbst, *Der Helms-Burton-Act aus völkerrechtlicher Sicht*, (1997) RECHT DER INTERNATIONALEN WIRTSCHAFT 630, 634 [hereinafter Kress & Herbst].

[136] *See* BROWNLIE, *supra* note 128, at 310.

[137] *See id.* at 304. *See also* SHAW, *supra* note 129, at 591-92.

[138] *See* SHAW, *supra* note 129, at 612. *See also* BROWNLIE, *supra* note 128, at 304.

[139] This has been pointed out in the Resolution on the Opinion of the Inter-American Juridical Committee in Fulfillment of Resolution AG/DOC. 3375/96 of the General Assembly of the Organization of American States;

on the effects doctrine, especially in the area of antitrust laws.[140]

The principle of protection recognizes a country's right to extend its jurisdiction outside its borders if an action threatens the national security or the functioning of government activities.[141] Prior to the Patriot Act, the principle of protection has never been applied in the context of national business law.[142]

In the case of the forfeiture of funds held in interbank accounts under Section 319(a) of the Patriot Act,[143] the U.S. authorities will assert a threat from the outside. Even if the threat does not stem from the country in which the foreign funds are located, the United States would argue that the availability of the funds would cause an indirect threat to the United States, because this money could be used to support terrorist activities. This argument is not persuasive because the foreign funds are still available to support illegal activities. The seizure of an equivalent amount of money from the foreign bank does not extinguish the depositor's foreign law claim against the bank for payment of the deposited money.

The principles permitting extraterritorial action do not apply in the context of terrorism financing. The U.N. Security Council may, in case of a "threat to international peace and security," make an exception from the principle of territoriality by binding resolution.[144] Following September 11, 2001, the U.N. Security Council decided in Resolution

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reprinted in 35 I.L.M. 1329, 1333 (1996). The opinion was rendered in respect of the 1996 Helms-Burton Act. *See* Kress & Herbst, *supra* note 135, at 632. *See also* SHAW, *supra* note 129, at 613.

[140] *See* SHAW, *supra* note 129, at 612, with further reference in n.204.

[141] *See* SHAW, *supra* note 129, at 591. *See also* BROWNLIE, *supra* note 128, at 304. The principle of protection is a well-established concept, although in most of the cases it is connected with the question of criminal jurisdiction. Regarding the distinction between the different types of prescriptive jurisdiction, *see* BROWNLIE, *supra* note 128, at 309-10.

[142] *See* Kress & Herbst, *supra* note 135, at 635, with further reference in n.86.

[143] 18 U.S.C. § 981(k), added by Section 319(a) of the Patriot Act.

[144] U.N. CHARTER arts. 39 *et seq*.

1373[145] that all U.N. Member States are obligated[146] to prevent and suppress the financing of terrorist acts, as well as to freeze funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts. Thus, all U.N. Member States are under an obligation to take necessary measures to implement this Resolution and to accept that other Member States implement this Resolution and may not claim that such foreign legislation violates their own sovereignty. However, if a U.N. Member State properly implements Resolution 1373, there seems to be no justification for the position that, in addition, it has to permit an extraterritorial application of Resolution 1373 as implemented by another Member State, such as the United States. If the citizens of a U.N. Member State were subject to the legislation implementing Resolution 1373 of their home country and also to the laws implementing Resolution 1373, applied extraterritorially, of all other 190 U.N. Member States, chaos would reign. Even if only all U.N. Member States in which a bank maintains correspondent accounts adopted their own version of the Patriot Act or fashioned some other fiction creating jurisdiction over the bank, international banking would be seriously impeded.

At any rate, the assertion that a country's statutes violate the principle of territoriality is of little consequence because there is no forum and no procedure to sue the violating country. Extraterritoriality of a statute could be argued only if it becomes an issue in a private law suit. A U.S. court would probably hold that the seizure of the foreign bank's interest in the U.S. correspondent account took place in the

[145] U.N. Security Council Resolution 1373 (2001) of Sept. 28, 2001, U.N. Doc. S/RES/1373 (2001).

[146] Pursuant to U.N. CHARTER arts. 25 & 48, all Member States are obligated to take all necessary measures, in particular by way of national legislation, in order to implement such binding U.N. Security Council Resolution.

United States because the correspondent account has its situs in the United States.[147]

G. Retaliatory Legislation and Dispute Settlement under GATS

Besides the legal issues already mentioned, the U.S. legislation contains the potential for political conflict with foreign governments. In particular, the extraterritorial impact resulting from the U.S. attempt to seize money held in foreign bank accounts is likely to be perceived as a U.S. intrusion into the internal affairs of foreign countries.[148] Foreign countries could consider retaliatory legislation against U.S. banks doing business in their territory, for instance by seizing from accounts of such U.S. banks, with the help of appropriate fictions, amounts equivalent to the amounts seized from their banks under the Patriot Act. It would not be the first time that foreign governments may be tempted to implement retaliatory legislation to counter U.S. measures.[149] However, whether it will be done, and more

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[147] *See* Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). *See* the discussion of this case in Michael Gruson, *The Act of State Doctrine in Contract Cases as a Conflict-of-Laws Rule*, 1988 U. ILL. L. REV. 519, 536 & 550-51.

[148] *See* JAMES R. ATWOOD, KINGMAN BREWSTER & SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 4:1 (3d ed. 2002).

[149] The use of retaliatory legislation is well demonstrated by disputes in the area of antitrust law. Beyond mere diplomatic protests and the non-cooperation by foreign courts as, e.g., in the British case Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., 1 All E.R. 434 (H.L. 1978), blocking laws have frequently been enacted by foreign governments to contain the extraterritorial reach of U.S. antitrust law and relevant jurisprudence. Early examples are (1) the Dutch Economic Competition Act (June 28, 1956), as amended (July 16, 1958), which apparently resulted from Dutch outrage over the successful effort of the United States to prosecute Philips [*see* United States v. Gen. Elec. Co., 115 F. Supp. 835 (D.N.J. 1953)] and the attempt of the United States to investigate the activities of oil companies incorporated in the Netherlands (*see* ATWOOD, *supra* note 148, § 4:16), (2) the British Shipping Documents and Commercial Documents Act [1964, c. 87] and the German Act of May 24, 1965, [1965 BGBl II 835], which were a response to a U.S. antitrust investigation of the shipping industry (*see* ATWOOD, *supra* note 148, § 4:16), or (3) the New Zealand

Evidence Amendment Act (No. 2) 1980 [1980 NZ Stat. 173 (No. 27)] that also resulted from an investigative demand directed at the shipping industry (*see* ATWOOD, *supra* note 148, § 4:16). Triggered by the threat of treble damages being imposed on a major U.K. minerals company—again Rio Tinto Zinc, which as a foreign producer had no access to the then protected U.S. uranium market (for further background information, *see* A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980,* 75 AM. J. INT'L L. 257, 269 (1981))—as a result of a suit under U.S. antitrust law alleging participation in an international uranium cartel, in the early 1980s, the United Kingdom enacted the Protection of Trading Interests Act 1980 [hereinafter PTIA]. *See* Exchange of Diplomatic Notes Concerning the Act, *reprinted in* 21 I.L.M. 834, 840 (1982). The PTIA repealed and superseded the Shipping Documents and Commercial Documents Act of 1964. The PTIA enabled the British Government to prohibit compliance by persons in the United Kingdom with foreign laws regulating or controlling international trade outside the country concerned which damage or threaten to damage the trading interests of the United Kingdom, as well as to prohibit U.K. persons from providing information or documents to a foreign court or authority where doing so would infringe U.K. jurisdiction. Additionally, the PTIA prevented U.K. courts from ordering the production of evidence in the United Kingdom requested by a foreign court where the request infringes U.K. jurisdiction and from enforcing awards of multiple damages by foreign courts. Furthermore, as a so-called "clawback" provision, it enabled British citizens and corporations and other persons carrying on business in the United Kingdom to recover in U.K. courts the multiple part of multiple damages awarded against them in an overseas court. *See* Nicholas Davidson, *U.S. Secondary Sanctions: the U.K. and E.U. Response,* 27 STETSON L. REV. 1425, 1428 (1997-1998) [hereinafter Davidson, *Sanctions*]. During antitrust proceedings, the PTIA had been successfully used by the U.K. in the case of Laker Airways (*see* the British orders in 267 Av. Daily 330-36 (1983), upheld in In re Application by Laker Airways for Leave to Apply for Judicial Review, 3 W.L.R. 545, 588-91 (C.A. 1983), *aff'd*, 3 W.L.R. 413 (1984), *reprinted in* 23 I.L.M. 727 (1984)), but also in other circumstances, such as the 1982 dispute over the Trans-Siberian pipeline. *See* Davidson, *Sanctions*, *supra*, at 1428-29. To give a further example, Canada as another major trading partner of the United States enacted a blocking law on Feb. 14, 1985: the Foreign Extraterritorial Measures Act, R.S.C. ch. F-29 (1985) (Can.), *available at* http://www.canlii.org/ca/sta/f-29 (last visited Sept. 1, 2004).

Counteractive legislative measures had also been used extensively in the controversy over U.S. anti-Cuba trade laws as, *inter alia*, established by Section 1706(a)(1) of the Cuban Democracy Act of 1992 and the Helms-Burton Act (officially, the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785, codified as amended in scattered sections of 22 U.S.C.). Section 1706(a)(1) of the

Cuban Democracy Act of 1992 prohibited licenses for transactions involving the export to Cuba of goods produced outside the United States by foreign subsidiaries of U.S. companies, as well as the import of Cuban goods by foreign subsidiaries into foreign territories, from being issued under the U.S. Regulations. The Helms-Burton Act imposed sanctions against natural or legal persons, regardless of their nationality, who traffic in property expropriated by Cuba. Similarly, concerning trade with Libya and Iran, the Iran and Libya Sanctions Act of 1996 [hereinafter ILSA] Pub. L. No. 104-172, § 1, 110 Stat. 1541 (1996)—also known as the D'Amato Bill—represented another U.S. attempt to influence investment decisions of non-U.S. companies. This legislation required the President of the United States to impose sanctions against any person who would invest more than 40 million U.S. dollars a year in the petroleum industries of Iran and Libya. Already on Oct. 9, 1992, the Canadian government issued the Foreign Extraterritorial Measures (United States) Order, 1992 [SOR/92-584] under the Foreign Extraterritorial Measures Act, which made it an offence for Canadians to comply with the U.S. legislation. This Order had been revised on Jan. 15, 1996 to counteract directly the Helms-Burton Act. *See* Paul D. Burns, *Canada: U.S. Embargo Against Cuba—The Canadian Response* (1996), *available at* http://www.natlaw.com/pubs/spcacu1.htm (last visited Sept. 1, 2004). In a similar way, the United Kingdom reacted by issuing a blocking order under its existing blocking legislation [The Protection of Trading Interests (US Cuban Assets Control Regulations) Order 1992, No. 2449, *available at* http://www.legislation.hmso.gov.uk/si/si1992/Uksi_19922449_en_1.htm (last visited Sept. 1, 2004)]. Mexico enacted blocking legislation in 1996 [*Ley de proteccion al comercio y la inversion de normas extranjeras que contravengan el derecho internacional*—Law for the Protection of Business and Investment from Foreign Standards that Contravene International Law, D.O. Oct. 23, 1996]. The response of the European Union (E.U.) came in 1996, when the Council adopted Council Regulation 2271/96 1996 O.J. (L 309) 1 [hereinafter Council Regulation 2271/96] that provided protection against effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom. This Regulation was applied immediately to Helms-Burton, ILSA and other Cuban embargo laws and regulations. *See* art. 1 in conjunction with the Annex of Council Regulation 2271/96, *supra*. Its key provisions (1) required E.U. companies affected by the covered laws to submit to the Commission information relevant for the purposes of the Regulation, (2) blocked recognition or enforcement of decisions or judgments giving effect to the covered laws, (3) prohibited compliance with requirements or prohibitions based on or resulting from the covered laws, unless otherwise authorized by the E.U. Commission, (4) provided for the recovery of damages caused by the application of the covered laws and (5) required

importantly, whether it could be done lawfully in the case of fund seizures, is a different issue. In particular, the European Union (the "E.U.") as well as its member states could find it difficult to reconcile retaliatory legislation with the provisions and the underlying ideas of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR") and its accompanying protocols.[150] Another possible, if unlikely, reaction to the U.S. approach could be the redress to the dispute settlement system established by the General Agreement on Trade in

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Member States to determine the sanctions to be imposed for breach of the Regulation. *See* Davidson, *Sanctions*, *supra*, at 1434-35.

[150] The original text of the ECHR does not apply to corporations. However, Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of March 20, 1952 [hereinafter Protocol] provides that "every natural or legal person is entitled to the peaceful enjoyment of his possessions." Through Art. 5 of the Protocol, Art. 1 of the Protocol is incorporated in the ECHR. Exceptions to the peaceful enjoyment principle are permissible on grounds of public interest. *See* Article 1 of the Protocol. Whether such exceptions could be invoked in the situation discussed in this article, however, remains doubtful as retaliation to the detriment of U.S. banks or their affiliates would not seem to fulfill the public interest requirement. Moreover, Art. 14 of the ECHR sets forth the prohibition of discrimination. Again, the retaliatory seizure of funds would hardly seem to be non-discriminatory because it would only affect U.S. banks or their affiliates. Similarly, the justification under Art. 15 of the ECHR, i.e., the derogation from obligations under the ECHR in time of war or other public emergency, seems very unlikely as the relevant extraterritorial U.S. measures hardly justify a characterization as war or emergency. However, as a legal technicality it should be noted that the European Union itself is not party to the ECHR and therefore not bound by its provisions. *See* European Court of Justice, Opinion 2/94 (March 28, 1996), 1996 O.J. (C180), 1, *reprinted in* 33 Common Mkt. L. Rev. 973 (1996). The ECHR is merely binding on the Member States that ratified it, which would at least exclude retaliatory legislation on the part of one or more of the Member States. The European Union itself could only be held accountable with respect to the Charter of Fundamental Rights of the European Union [hereinafter Charter]. This Charter, though, is neither legally binding nor does its wording apply to corporate entities. Provided the European Union acts within the limitations of its jurisdiction under the E.U. treaties, retaliatory legislation could well be permissible. However, any execution of such legislation by the Member States could create substantial conflicts for them as they are bound by the ECHR and possibly their own constitutions.

Services ("GATS"). Generally, at least some part of the foreign bank's business would seem to qualify as financial services as defined in the Annex on Financial Services to the GATS. However, any member state to the GATS agreement that wanted to address the issue successfully has to show that the United States failed to carry out its obligations or specific commitments under the GATS. As the U.S. provisions discussed here apply to any bank, regardless of nationality or other factors, this seems rather difficult to achieve.

Since the forfeiture provisions of Section 319(a) of the Patriot Act apply only to non-U.S. banks, they may constitute a discrimination of banks licensed by member states of the European Union because the Patriot Act does not treat such banks in the same way it treats U.S. domestic banks (denial of national treatment).[151] If a country outside the European Union discriminates against credit institutions licensed in a member state of the European Union, the European Commission may initiate negotiations with that country to remedy the situation.[152] The European Commission may also decide that, in addition to initiating negotiations, the European Union member states must limit or suspend their decisions regarding pending or future requests by United States entities for the authorizations of credit institution subsidiaries in the European Union or for the approval of the acquisition of holdings in credit institutions authorized by European Union member states.[153]

V. CONCLUSIONS

The IEEPA only grants authority to act within the United States in the case of an international emergency involving

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[151] Art. 23(5), Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, O.J. L. 126, 1 (2000).

[152] *Id.*

[153] *Id.* *See* Michael Gruson, *Banking Regulation of the European Union*, in 2 REGULATION OF FOREIGN BANKS, BANKING LAWS OF MAJOR COUNTRIES AND THE EUROPEAN UNION (Michael Gruson & Ralph Reisner, eds.), § 5.03[5][b] (4th ed. to be published in 2004.)

the United States. It does not provide a legal foundation to take measures like the freezing of assets in foreign countries. Therefore, the direct extraterritorial effects of the IEEPA are rather limited.

However, the linking of jurisdiction to the clearing of money transfers through CHIPS and Fed wire leads to an extraterritorial effect of the IEEPA. Dollar accounts located in foreign countries are drawn under U.S. jurisdiction by way of making the final clearing transaction through CHIPS or Fed wire the decisive factor. Nevertheless, this seems to constitute a genuine link of the frozen funds with U.S. territory, at least in those cases in which the clearing actually took place in the United States. Because of this genuine link, there should be little concern, from a legal perspective, about this assumption of jurisdiction under the IEEPA.

An evaluation of the provisions introduced by the Patriot Act that apply U.S. jurisdiction over funds held abroad with a foreign bank would have to reach a different conclusion. Although the aim of preventing and cutting off the funding for international terrorism is laudable, the means employed by the U.S. legislature raises doubts. Section 319(a) of the Patriot Act[154] violates established legal principles. Unlike under the IEEPA, there is no genuine link between the seized funds and the targeted foreign funds. In other words, there is no genuine link between the foreign funds and U.S. territory. The link is created by a fiction that property located abroad is deemed to be located in the United States, or, to be more precise, that an account relationship abroad is deemed to be an account relationship in the United States. With such kind of fiction, the United States could extend its jurisdiction to practically all foreign property or acts. Although fictions are a recognized legislative tool, it is doubtful whether they are appropriate in jurisdictional provisions. It is in the nature of personal jurisdiction and in rem jurisdiction that it is based on contacts; if these contacts are fictionally created, there would be no limit whatsoever to the assertion of jurisdiction.

[154] 18 U.S.C. §§ 981 *et seq.*, added by Section 319(a) of the Patriot Act.

The Patriot Act takes a unilateralist approach that inherently bears potential for political conflict and for injustice to foreign banks. First and foremost, however, the foreign banks maintaining a correspondent account in the United States may suffer the full consequences of this U.S. legislation. It is their money at risk when funds in their interbank accounts are seized unilaterally without adequate protection against the depositors' claims in their domestic jurisdiction. The foreign banks' possibilities to meet these new difficulties without directly challenging the underlying U.S. legislation seem largely impracticable.[155]

The misguided provision of § 319(a) of the Patriot Act alone is probably not going to weaken the United States' role in the international monetary system; however, danger could lie in cumulative effects of the provision and the constant use of freeze orders as a political tool. These measures, in the long run, may send out negative signals to the international business community, which, as stated above, holds fifty-five

[155] One way could be a contractual agreement between the foreign bank and the depositor waiving the bank's obligation to repay the deposit to the depositor in case the depositor is the cause for a seizure of funds in a U.S. correspondent account under the Patriot Act. At least from a German perspective this approach seems to be difficult to achieve as the inclusion of such waivers would render the general terms and conditions underlying the deposit contract so complicated that they are very unlikely to withstand review under the German provisions concerning general terms and conditions, *see* §§ 305 *et seq.* Bürgerliches Gesetzbuch (Civil Code), (2002) BGBl. I 42, 45, as amended. Another option could be the assignment to the bank of the depositor's procedural claim pursuant to Section 316(a) of the Patriot Act, in conjunction with 18 U.S.C. § 981(k)(3) and 18 U.S.C. § 983(d) (innocent owner defense). However, this would have to face similar concerns regarding the bank's general terms and conditions. In any event, it would seem that customers may rarely be willing to give up their rights against their bank. They might rather prefer to do business with a bank without an interbank correspondent account in the United States. If foreign bank A has no correspondent account with a U.S. bank, it must hold dollar deposits at a correspondent account with another foreign bank that, in turn, has a U.S. correspondent account. Judged by the wording of the statute, bank A is probably not covered by 18 U.S.C. §§ 981 *et seq.* However, whether the U.S. judiciary would take the same view is open to question.

to seventy percent of all dollars. The already weak U.S. currency may well suffer in the long run.

An internationally accepted approach to the fight against the financing of terrorism could be based on a distinction between countries that have comprehensive rules dealing with the financing of terrorism and those that do not. If a country has such rules, there is no need to apply the correspondent account provision of the Patriot Act. If a country does not have such rules, banks from such country should be prevented from maintaining U.S. correspondent accounts. There is precedent for such an approach. Only banks from countries that, in the view of the Board of Governors of the Federal Reserve System, have a system of "comprehensive supervision on a consolidated basis" may open branches in the United States.[156]

The extremely short time period between the terrorist attacks on September 11, 2001 and the enactment of the Patriot Act on October 26, 2001 indicates that the political pressure to react quickly and rigorously was greater than the pressure to present a deliberate legal response to the new international threat. Ultimately, the analysis of the U.S. approach to jurisdiction shows once again that today's international problems and issues cannot be solved on a unilateral basis.

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[156] 12 C.F.R. § 211.24(c)(1)(i)(A) (2004) (Regulation K). *See also* 12 C.F.R. § 225.92(e)(2)(i) & (ii) (2004) (Regulation Y) (election by foreign bank to become a financial holding company) and 12 C.F.R. § 225.13(a)(4) (2004) (Regulation Y) (acquisition of U.S. bank by foreign bank). *See* Michael Gruson, *Consolidated and Supplementary Supervision of Financial Groups in the European Union* (part II), (2004) DER KONZERN 249, 258 n.352 and accompanying text.