Defending Liberty
Pursuing Justice

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John B. Bellinger III
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U.S. Department of State
2201 C Street NW
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Dear Mr. Bellinger:

On behalf of the American Bar Association, I am writing with respect to the requirement in the Arms Export Control Act (AECA) that certain persons involved in brokering defense trade transactions register with the Department of State. We understand that the Department plans to publish a revised regulation regarding this issue. As discussed below, the ABA has two major concerns. First, we recommend the Department ensure that its proposed approach is consistent with generally accepted international law principles against extraterritorial trade measures. Second, we urge that the Department formulate its brokering registration requirement in a manner that is consistent with the AECA, based upon standard principles of statutory construction, the AECA's legislative history and a decision by the Court of Appeals for the District of Columbia Circuit.

Background

The AECA requires registration by "every person" who engages in brokering activities with respect to the manufacture, export, import or transfer of a defense article or defense service, regardless of origin. See AECA § 38(b)(1)(A), 22 U.S.C. § 2778(b)(1)(A)(ii). The International Traffic in Arms Regulations (ITAR), which implement the AECA, apply the provision to "U.S. person[s], wherever located, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States." 22 C.F.R. § 129.3(a) (2007). According to our information, the Department of State interprets the AECA as authorizing the Department to require registration of any foreign person, wherever located, who is involved in brokering a defense trade transaction involving a U.S.-origin defense article.

The Department is currently revising 22 C.F.R. Part 129. While a proposed regulation has not yet been published, a State Department official responsible for this revision has stated publicly that the revised regulation will clarify that all foreign persons involved in brokering U.S.-origin defense articles will be required to register, and indeed that this is the Department's interpretation of the AECA and its current regulation.[1]

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[1] See The Export Practitioner, April 2007, quoting Directorate of Defense Trade Controls Compliance Director David Trimble.

General Considerations

We ask that the Department take into account the appropriate limitations on U.S. assertions of extraterritorial jurisdiction. The American Bar Association's established policy is that the United States should regulate extraterritorial trade with caution. See ABA Report and Recommendation, available on-line at http://www.abanet.org/intlaw/policy/tradecustoms/tradesanctions.pdf (attached). The Report in support of this Recommendation explains that extraterritorial foreign trade control measures, such as the brokering registration requirement here, are inconsistent with the most widely accepted basis in international law for prescribing legal rules of conduct, namely the territorial principle. The Report also summarizes the "effects doctrine," an extension of the territorial principle, under which a country may proscribe or sanction conduct that occurs outside its borders, where such conduct has, and is intended to have, "substantial effects" within its territory. Here, however, the State Department has sought to regulate extraterritorial trade transactions without demonstrating the substantial effects within the United States that would occur if all foreign persons located outside the United States and promoting sales of U.S. origin defense articles are not required to register as brokers. Finally, the Recommendation explains the numerous policy concerns that caution against extraterritorial application of U.S. foreign trade control measures.

U.S. Legal Analysis

In addition to the above fundamental considerations, we ask that the Department formulate a brokering registration requirement that is consistent with the AECA, based upon standard principles of statutory construction, the AECA's legislative history and a recent decision by the Court of Appeals for the District of Columbia Circuit.

The AECA should be construed to apply extraterritorially only if, and to the extent that, Congress has clearly expressed its intention to do so. Under standard principles of statutory construction, Congress legislates against the backdrop of a presumption against extraterritoriality. See, e.g., EEOC v. Arabian Am. Oil. Co. ("ARAMCO"), 499 U.S. 244, 248 (1991). Federal laws are deemed to apply only within the territorial jurisdiction of the United States unless Congress provides "affirmative evidence" to the contrary. Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 176 (1993). This intention must be "clearly expressed." ARAMCO, 499 U.S. at 248.

The text of the AECA is silent on the extraterritorial application of the brokering provision, and therefore does not provide any "affirmative evidence" or "clear express[ion]" that Congress intended the brokering provision to apply outside the territorial jurisdiction of the United States. Moreover, the structure of the AECA – i.e., the AECA brokering provision's application to foreign-origin defense articles, not just U.S.-origin defense articles -- shows that Congress did not intend the brokering registration provision to apply generally to foreign persons. If the AECA applied generally to foreign persons, then the brokering provision would require registration by foreign persons brokering foreign-origin defense articles, which would be an untenable approach.

The legislative history demonstrates that Congress only intended the provision to apply extraterritorially in specific circumstances. The House Report on the brokering amendment stated that the AECA as then in effect "does not authorize the Department to regulate the activities of U.S. persons (and foreign persons located in the United States) brokering defense transactions overseas (except for transactions involving a small number of terrorist countries)… This provision provides those authorities." House Report 104-519, Part 1, at 11-12.

Accordingly, based on principles of statutory construction enunciated by the U.S. Supreme Court, as applied to the text and legislative history of the brokering provision, the AECA brokering registration amendment may not be applied broadly to foreign persons located outside the United States. The Act's brokering registration requirement is limited in its extraterritorial application to two classes of persons, namely, U.S. persons and foreign persons located in the United States (who may engage in activities abroad). A foreign person located outside the United States may not be subjected to the brokering registration requirement. (All persons, of course, remain subject to the AECA and ITAR rules that require a State Department license for the export or reexport of U.S. origin defense articles and services. See 22 C.F.R. §§120.9, 120.17.)

The conclusion that the brokering registration requirement was not intended to apply to foreign persons located outside the United States is supported by a recent opinion of the U.S. Court of Appeals for the District of Columbia Circuit. See United States v. Yakou, 393 F.3d 231 (D.C. Cir. 2005), as amended by court order, available at http://pmddtc.state.gov/docs/yakou_case.pdf. The Court affirmed the dismissal of an indictment, on the grounds that the "aiding and abetting" provision in the AECA brokering statute did not apply to a foreign person acting outside the United States. The Court discussed the presumption against extraterritoriality, and the text and legislative history of the brokering statute, and concluded:

> In the Brokering Amendment, then, Congress was concerned with both United States brokers of arms and foreign brokers of arms located in the United States, but not with foreign brokers located outside the United States, see id., even though each type of individual could be involved in brokering activities affecting the United States…
>
> Congress has not expressed with the requisite clarity that it sought to apply the Brokering Amendment and, by extension the ITAR's brokering provisions, in such an extraterritorial manner [i.e., to apply to "non-U.S. persons located and acting outside the United States."] [citations omitted] … Accordingly, while the Brokering Amendment and the ITAR have extraterritorial effect for "U.S. persons," they do not have such effect for "foreign persons," like Yakou, whose conduct occurs outside the United States.

As noted earlier, the ITAR applies the brokering registration requirement to foreign persons located outside the United States who are "otherwise subject to" U.S. jurisdiction. 22 C.F.R. § 129.3(a) (2007). Because the United States did not argue that Yakou was "otherwise subject to" U.S. jurisdiction, the Yakou court did not address the issue of whether the brokering registration requirement does, in fact, apply to this class of persons. In our view, however, the AECA does not authorize the Department to apply the brokering registration requirement to foreign persons located outside the United States. Again, this follows from established principles of statutory construction, as applied to the text and legislative history of the relevant provision.

The ABA encourages your engagement in ensuring that the State Department's approach in this area is fully consistent with the authorizing statute, as well as international legal principles regarding extraterritorial measures. We would be pleased to meet with you and other Department officials to discuss this issue at your convenience.

Thank you for your attention to this important matter. For additional information or to arrange a meeting, please don't hesitate to contact Kristi Gaines in the ABA's Governmental Affairs Office at 202-662-1763.

Sincerely,

William H. Neukom

Enclosure

cc: John Rood, Acting Under Secretary for Arms Control and International Security
Stephen Mull, Acting Assistant Secretary for Political-Military Affairs

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 3-4, 1998

RESOLVED, that the American Bar Association recommends that the United States adhere to the following principles in the adoption and maintenance of export controls and economic sanctions measures:

First, to consult with, and seek the support and cooperation of, foreign governments sharing common objectives in devising and carrying out programs to constrain foreign trade and investment detrimental to shared U.S. national security and foreign policy objectives.

Second, to refrain from the adoption or maintenance of extraterritorial foreign trade control measures that do not conform to jurisdictional principles of international law as generally accepted by the international community and create the potential for conflicts with other nations, including:

- Controls on foreign trade transactions of foreign corporations, where those transactions have no jurisdictional relationship to the United States other than ownership interests of U.S. nationals in the foreign corporations;

- Controls on foreign trade transactions of foreign parties, where those transactions have no jurisdictional relationship to the United States other than the U.S. origin of transaction products, content or technology; and

- Retaliatory trade sanctions on foreign parties by reason of their foreign trade transactions, where those transactions have no jurisdictional relationship to the United States and are not in violation of any U.S. law that conforms to jurisdictional principles of international law.

REPORT[*]

I. Explanation of the Recommendation

This Recommendation would put the American Bar Association ("ABA") on record in favor of U.S. cooperation with like-minded countries in the adoption of measures that further U.S. national security and foreign policy objectives, and express opposition to extraterritorial U.S. foreign transaction controls that do not comport with generally accepted international law jurisdictional principles and create the potential for conflicts with foreign nations.

The Recommendation supports U.S. participation in international efforts, including the Nuclear Non-Proliferation Treaty, the Australia Group and the Missile Technology Control Regime, to constrain the spread of weapons of mass destruction and the means for their delivery. It also supports U.S. participation in the "Wassenaar" arrangement, as the successor to COCOM, to control "dual use" product and technology exports through collective national security efforts. Finally, it supports multinational controls to address unacceptable international conduct, such as those adopted under United Nations auspices to deal with the Iraq invasion of Kuwait in 1990 and unrest in Bosnia in 1992.

The Recommendation does not endorse, or criticize, unilateral U.S. foreign trade control measures, such as those that have been imposed in recent years on, for example, Libya, Iran, Burma and Sudan, and, more recently, India and Pakistan. However, it does oppose the inclusion in such unilateral programs of extraterritorial features that are not consistent with international law jurisdictional norms and that create the potential for conflict with other nations. Such extraterritorial features include the "person subject" features of certain Treasury Department programs that purport to control transactions of foreign corporations owned by U.S. parties, the non-consensual "reexport" control features of certain Commerce and Treasury Department foreign trade control programs, and certain "retaliatory" trade control sanctions imposed on foreign parties in third countries that trade or invest in targeted countries.

The objectives sought to be achieved by these extraterritorial measures generally can be achieved by other techniques consistent with international law jurisdictional principles. For example, consistent with this Recommendation, U.S. companies may be prevented from authorizing or facilitating objectionable foreign transactions of their foreign affiliates. And foreign parties may be required, as a condition of the right to receive U.S. exports of sensitive products or technology, to agree to limit the use and reexport of such items. Finally, consistent with this Recommendation, foreign parties that engage in objectional foreign trade or investment may be deprived of discretionary U.S. government largess, such as eligibility for federal contracts, even though there is no U.S. jurisdictional nexus with the trade transactions giving rise to such sanctions.

The Recommendation would supersede and replace a recommendation adopted by the House of Delegates in 1983. The 1983 resolution was more narrowly drafted to deal with certain extraterritorial features of the Export Administration Act of 1979, in the context of Cold War considerations then still prevailing and the aborted 1982 Soviet gas pipeline sanctions. The resolution recommended here is framed more broadly to address a growing variety of multilateral and unilateral U.S. foreign trade control measures, some of which have attracted intense international concern, including blocking measures.

II. Terms Used in the Recommendation

The term "extraterritorial foreign transaction control measures," as used in this Recommendation, means U.S. government measures that prohibit, regulate or penalize international trade transactions of foreign nationals, including export-import trade between foreign countries and foreign cross-border investment and funds transfers, that take place entirely outside the territory of the United States.

Consistent with international law norms, the term "foreign nationals," as used in this Recommendation, includes business entities, such as corporations, partnerships and other ventures with centralized management, that, irrespective of ownership by or managerial accountability to United States parties, are organized in and operate under the laws of foreign countries, and have their principal managerial offices in foreign countries. The term "foreign nationals" does not include unincorporated foreign branches of U.S. corporations.

As used in this Recommendation, the term "retaliatory trade sanctions" means U.S. measures that deprive a foreign party of access to U.S. exports, the right to import into the United States, the right to entry for its personnel into the United States and similar punitive measures, in retaliation for lawful international trade transactions, i.e., transactions with other countries that do not contravene U.S. laws that are consistent with international law jurisdictional principles.

However, the term "retaliatory trade sanctions," as used here, is not intended to include ineligibility for discretionary U.S. governmental benefits, such as U.S. government foreign economic assistance, governmental agency loans or other financing or investment guarantees, or eligibility to contract with the federal government, except to the extent that such rights may be afforded to nationals of a foreign country under a treaty to which the United States is a party. Nor does the term "retaliatory sanctions" include punitive actions, such as the denial of U.S. export trading privileges, that are imposed upon foreign nationals by reason of unlawful diversions of U.S. exports in contravention of consensual undertakings or other violations of U.S. trade controls that are consistent with international law jurisdictional norms.

III. Background

For more than 50 years, since the end of World War II and, particularly, since the inception of the Cold War, the United States has regulated U.S. export trade and, to a degree, foreign trade transactions having some connection with the United States, in the interests of U.S. national security, foreign policy and other national objectives. Increasingly, in recognition of the diffusion of technology and the inability to accomplish national objectives through unilateral controls, the United States has sought the cooperation and assistance of like-minded nations.

The earliest of these cooperative efforts was the "Coordinating Committee" of the NATO and other closely allied countries that sought to restrict the flow of military and "dual use" technologies to the Soviet Union and other communist nations during the Cold War period. More recently, the United States has been the leader in establishing the Nuclear Suppliers Group, the Australia Group and the Missile Technology Control Regime to deter the proliferation of weapons of mass destruction, as well as the Wassenaar Arrangement, successor to COCOM, to restrict the flow of weapons and sensitive dual use technologies to countries of common concern.

Freed of Cold War veto threats, the United States also has sought support from other nations through the United Nations Security Council to counteract objectionable foreign conduct by means of multilateral trade sanctions and related measures that have targeted, for example, Iraq (after its 1990 invasion of Kuwait) and the Federal Republic of Yugoslavia (after its interventions in Bosnia and Croatia). This Recommendation expresses support for these multilateral trade control measures as the appropriate means for the accomplishment of shared objectives through international cooperation, consistent with international law norms.

In recent years the United States has also acted unilaterally to impose trade sanctions on particular countries and parties considered to be acting contrary to important national interests. Typically, these unilateral sanctions programs prohibit U.S. export-import trade with the target country and bar most or all business and financial dealings by U.S. persons with the target countries or parties. Examples include comprehensive trade sanctions imposed on Libya in 1986, on Iran in 1995 and on Sudan in 1997. Narrower programs restrict certain business activity with Burma, India and Pakistan. Former sanctions programs targeted Haiti, Nicaragua and Panama. This Recommendation does not express opposition to such unilateral controls, provided they do not incorporate extraterritorial features, although many observers believe that at least some unilateral controls are not effective and may damage longer-run U.S. objectives.

The United States has incorporated extraterritorial features in a number of its foreign transactions control programs. Through its Foreign Assets Control Regulations, under the authority of the 1917 Trading with the Enemy Act, the Treasury Department has prohibited foreign corporations owned or controlled by persons in the United States from engaging in trade and commerce with several Asian countries, currently limited to North Korea but formerly also including the People's Republic of China, Vietnam and Cambodia. A similar prohibition has applied to trade with Cuba on the part of U.S.-controlled foreign companies but, until 1992, such trade was routinely licensed. As described below, the removal of this licensing authority has given rise to serious controversy with other nations.

A less well-known but significant example of extraterritorial foreign trade control is the "reexport" scheme embodied in the Commerce Department's Export Administration Regulations that prohibits certain unlicensed exports from foreign countries of (i) U.S.-origin and U.S.-content products and technology, and (ii) the foreign-made "direct products" of U.S.-origin technology. Similar reexport provisions have found their way into some Treasury Department economic sanctions programs. These reexport controls do not depend, for the most part, on actual or presumed consensual undertakings by foreign recipients of U.S. products or technology.

In recent years the United States has resorted, largely through legislative initiatives, to measures that deny governmental benefits or impose sanctions on foreign parties that engage in objectionable trade with or investment in third countries or parties. One of these measures, Public Law 104-172, styled "The Iran and Libya Sanctions Act of 1996," requires the President, unless he exercises certain waiver powers, to take at least two of six specified actions against foreign persons that make significant investments (initially, $40 million or more within a one-year period) that contribute to the development of the petroleum resources of Iran or Libya. There are a number of antecedents to the Iran and Libya Sanctions Act under which U.S. actions may or must be taken against foreign parties that engage in foreign trade disfavored by U.S. policy. Some of these actions withdraw discretionary U.S. government benefits, such as government contract eligibility or Export-Import Bank financing, and to that extent do not conflict with this Recommendation. Other actions deny access to U.S. trade or travel and to that extent are not consistent with this Recommendation.

Another controversial 1996 measure, Public Law 104-114, popularly styled the "Helms-Burton Act" for its principal Congressional sponsors, creates a new right for U.S. nationals to sue foreign persons in U.S. courts and recover treble damages by reason of foreign trade or investment in Cuba that is deemed to involve "trafficking" in properties confiscated by the Castro regime as long as 30 years ago. Although this feature of the Helms-Burton Act has been characterized as extraterritorial, it also has been defended as vindicating rights of persons whose properties were confiscated in violation of international law. The President so far has suspended the right to sue under Helms-Burton and this Recommendation does not address this feature. Another Helms-Burton provision that has become operative directs the Secretary of State to bar entry into the United States of foreign nationals who are officials of entities engaged in trafficking, as well as the immediate families of such individuals.

IV. Conflicts with Foreign Laws

The efforts of the United States government to punish or regulate foreign trade transactions outside its borders have given rise to serious controversy with important U.S. trading partners. For example, the prohibition on third-country trade with China by U.S.- controlled foreign companies (included in the definition of any "person subject to the jurisdiction of the United States") was the subject of a well-known case in the French courts, and led to serious conflicts with Canada and European countries until that prohibition was ended in 1971.

In 1982 then-President Reagan directed the Commerce Department to utilize "person subject" and other authorities in the Export Administration Act of 1979 to bar foreign subsidiaries and licensees of U.S. companies from providing foreign-made equipment to be used in a gas pipeline from the Soviet Union to Western Europe. The pipeline measure gave rise to strong protests by our West European allies and, for a time, threatened the NATO alliance. Within a few months the President was compelled to withdraw the pipeline sanctions. However, before the President's action, the pipeline sanctions had provided the impetus for the issuance of blocking orders by the British government under the Protection of Trading Interests Act of 1980, the first such moves to nullify U.S. foreign transaction controls and the model for later actions in Canada, Mexico and the European Union.

Similar conflicts arose, notably with Canada, several countries in Latin America and some European countries, under the parallel provisions of the Cuban Assets Control Regulations, adopted in 1963 in the wake of the Castro revolution. However, an exception for certain third country trade transactions of "persons subject," and later a liberally administered licensing regime for such transactions, limited this conflict, until the passage of the Cuban Democracy Act in 1992 barred further licensing. That law prompted widespread foreign criticism and led to the adoption of blocking measures in both Canada and the United Kingdom. These blocking measures prohibited British and Canadian companies, notwithstanding their ownership by U.S. persons, from complying with the U.S. embargo of Cuba, thereby placing such companies at risk of violating either U.S. law or the law of the country of their nationality and in which they conduct business.

The Canadian blocking order was significantly strengthened and amended in January, 1996. After the passage of the Helms-Burton Act, the Canadian parliament amended Canada's Foreign Extraterritorial Measures Act, the statutory foundation for its 1992 and 1996 blocking orders, to expand the government's authority to compel production or to suppress foreign production of records, block foreign judgments, provide for "claw-back" recovery of Helms-Burton litigation judgments and expenses, and increase penalties for violations of blocking orders.

In October of 1996 Mexico enacted a broad blocking measure, targeting not only the Helms-Burton Act and the extraterritorial features of the U.S. embargo of Cuba, but all similar foreign extraterritorial measures, broadly defined, characterized as being in contravention of international law. This measure prohibits compliance with such foreign measures, denies enforcement of foreign judgments based thereon and permits parties that have sustained economic losses in foreign proceedings to recover them back in Mexican courts.

Finally, in November of 1996 the Council of Ministers of the European Union approved legislation that precludes nationals of member states from complying with specified foreign extraterritorial foreign trade control measures, including the U.S. embargo of Cuba, the Helms-Burton Act and the Iran and Libya Sanctions Act, except as may be permitted by the European Commission. The E.C. regulation also permits "claw back" recovery in the courts of member states of economic losses sustained by the application of such extraterritorial measures.

The United States has its own blocking measure, antedating all of these foreign initiatives. It was enacted in 1977 in response to the "secondary" features of the Arab boycott of Israel, including the "blacklisting" of U.S. firms and their consequent exclusion from commerce with the boycotting Arab countries by reason of their having past or current trading, investment or financial relationships with Israel. The U.S. antiboycott statute, incorporated into the Export Administration Act of 1979, effectively blocks the application of these secondary boycott features in the United States by prohibiting U.S. persons from complying with such requirements.

Experience has shown that blocking measures are the likely responses of foreign governments to measures of other states that seek to control the trade and investment conduct of nationals of another country. Inevitably, such counter-measures, which themselves are not subject to legitimate criticism on grounds of international law or jurisdiction to prescribe or to enforce, create conflicting legal obligations which interfere with the conduct of international trade.

V. Economic and Foreign Policy Costs

Apart from legal conflicts, extraterritorial foreign transaction controls can have significant economic consequences. Parties in foreign countries understandably are reluctant to procure goods and technology from U.S. suppliers, if the consequence will be to subject their own transactions to U.S. regulation. Thus, the existence of U.S. "reexport" controls, or the potential to impose or expand such controls, may lead foreign parties to "design out" U.S. goods or technology. Similarly, foreign governments and other contractors may prefer not to enter into contracts with U.S.-owned foreign companies that may be regulated as "persons subject to the jurisdiction of the United States" and prevented from fulfilling contract obligations.

It is difficult to quantify these indirect economic costs of extraterritorial foreign transaction controls. The aborted 1982 Soviet gas pipeline controls certainly created a broad recognition in foreign countries of the dangers of relying upon American-connected goods, technology or parties. For example, China and India have maintained significant shares of Russian aircraft in their fleets in order to reduce reliance upon U.S. suppliers. Airbus Industrie, which formerly relied upon U.S. engine suppliers, recently has begun to offer aircraft with engines produced by suppliers not affiliated with U.S. producers.

Extraterritorial U.S. foreign transaction controls also have a significant foreign policy cost. The current controversy over the Helms-Burton Act led the European Union to file a complaint in the World Trade Organization, prompting the United States to assert that the WTO has no authority to address measures that concern U.S. national security and foreign policy and to refuse to participate in the WTO proceedings. This standoff, which could have done seriously damage the effectiveness of the WTO, was at least temporarily resolved by the withdrawal of the European Union complaint in April of 1998, in anticipation of a settlement of disputes over U.S. extraterritorial measures. The 1982 Soviet gas pipeline sanctions presented a similar challenge to the NATO alliance and the COCOM regime.

VI. Considerations of International Law

Territoriality and nationality have long been accepted as the principal bases in international law to prescribe rules of conduct, but in recent years these concepts have been modified to embrace principles of reasonableness and fairness to accommodate overlapping and conflicting interests of states.

International law also recognizes the right of a state to punish a limited class of offenses committed outside its territory by non-nationals that threaten the security or governmental functions of the state and that are generally recognized as crimes, such as espionage.

The most widely accepted basis in international law for prescribing legal rules of conduct is the territorial principle - that a sovereign may prescribe and apply its laws to conduct that takes place within its territory. Foreign trade control measures that restrict exports from the country imposing such controls or imports into that country are consistent with the territorial principle. So too, are blocking measures that prevent the application in a particular country of transaction control measures enacted by another country. Foreign transaction controls that purport to regulate, proscribe or sanction conduct that takes place entirely outside the territory of a state do not satisfy the general formulation of the territorial principle.

Under the "effects doctrine," an extension of the territorial principle, it is stated that a country may proscribe or sanction conduct that occurs outside its borders, where such conduct has, and is intended to have, "substantial effects" within its territory. The "effects doctrine," has had its principal development in the fields of anti-trust and securities law, where effective regulation of the domestic economy cannot be achieved unless some foreign conduct is constrained. The objectionable domestic "effects" of proscribed foreign transactions are less demonstrable, although such controls may complement domestic transaction controls.

Independent of the territorial principle, under international law a sovereign state may prescribe and sanction conduct outside its borders by nationals of that state. For this purpose, a corporation or other private legal entity has the nationality of the state in which it is incorporated. For example, a French corporation owned by a U.S. company is considered to be a national of France, although an unincorporated French branch of a U.S. company would be a national of the United States. The Recommendation recognizes the legitimacy under international law of applying U.S. trade control measures to foreign activities of U.S. business entities and of foreign branches of U.S. companies under the nationality principle, as well as to foreign actions of individuals who are U.S. nationals.

However, the nationality principle does not justify applying U.S. controls to, for example, foreign transactions of a subsidiary of a U.S. company incorporated in France, since such a subsidiary has the nationality of its place of incorporation. There is, of course, no basis in international law for applying the nationality principle to permit a state to regulate trans- actions outside its territory in goods or technology solely by reason of their country of origin. Thus, the reexport provisions of the Export Administration Regulations cannot be supported on that basis. Nor can the nationality principle support "retaliatory" foreign trade control measures such as certain of the provisions of the Iran and Libya Sanctions Act that penalize foreign nationals for "objectionable" foreign trade conduct.

Even assuming the existence of a premise for jurisdiction to prescribe foreign transaction controls, presumably under the effects doctrine extension of the territoriality principle, countervailing considerations of international comity require deference to the territorial state, if the latter's interests are paramount. The Restatement (Third) lists the following factors that should be considered in determining whether a state may exercise jurisdiction to regulate an activity having connections with another state, even where a basis to proscribe conduct may exist. These factors are:

- The extent to which the proscribed activity has a substantial, direct and foreseeable effect within the proscribing state's territory;
- The extent to which there are connections, such as nationality, residence, or economic activity between the proscribing state and the person principally responsible for the activity or the persons sought to be protected by the proscription;
- The character of the proscribed conduct, its importance to the proscribing state, the extent to which other states regulate such conduct and the degree to which such regulation is generally accepted;
- The existence of justified expectations that might be protected or hurt by proscribing conduct;
- The importance of the proscription to the international political, legal or economic system;
- The extent to which the proscription is consistent with the traditions of the international system;
- The extent to which another state may have an interest in regulating the activity; and

- The likelihood of conflict of the proscription with regulation by another state.

The Restatement (Third) addresses specifically one of the three categories of U.S. foreign transaction controls, regulation of the foreign transactions of U.S.-controlled foreign companies. The view expressed there is that a state may not regulate the activities of such a foreign corporation, other than under exceptional circumstances, applying as criteria for such an exception whether such regulation would be essential to implement a program that furthers a major national interest that can be carried out effectively only if applied to such foreign subsidiaries and whether the regulation would be likely to conflict with the laws or policies of the state exercising territorial jurisdiction. It is doubtful that foreign states would acknowledge even such a narrowly drawn justification for U.S. regulation of foreign transactions of U.S.-owned foreign corporations, but in any case it would be very difficult, if not impossible, to justify any existing or past U.S. "person subject" foreign transaction control measure under the Restatement standard.

While not addressed specifically in the Restatement (Third), an application of the general principles of reasonableness set forth above leads to the conclusion that neither the reexport nor retaliatory U.S. foreign transaction controls satisfy international law criteria. While these measures may be expressions of U.S. policies, they are not demonstrably essential to the fulfillment of policy objectives. They are difficult to enforce in practice and vulnerable to blocking measures. They are not consistent with the practices of other nations and are generally objectionable to them. Other means, consistent with international law norms, exist to achieve U.S. policy objectives.

Outside the United States, all forms of extraterritorial transaction controls almost universally are regarded as an illegitimate interference in the affairs of other countries and an effort to compel other countries to accept U.S. foreign policy objectives. Such controls inherently are vulnerable to foreign blocking measures, and such measures are becoming more common. Given these realities, U.S. extraterritorial transaction controls cannot reasonably be supported by application of the effects doctrine and the reasonableness tests of the Restatement (Third).

There are almost no decided cases that squarely address the status of U.S. extraterritorial transaction control measures under international law. In the one court case that arose in the wake of the 1982 Soviet gas pipeline sanctions, a Dutch court held that the application of U.S. foreign trade controls to excuse a Dutch company controlled by a U.S. corporation from performance of a contractual obligation to supply a French company with goods for shipment to the Soviet Union would violate Dutch private international law and ordered the Dutch company to perform the contract. In adopting their 1996 blocking measures, the European Union and the governments of Mexico and Canada have declared that the extraterritorial aspects of the U.S. embargo of Cuba and the Helms-Burton Act violate international law norms.

Notwithstanding recent U.S. retaliatory foreign transaction control legislation, there is evidence of a growing recognition in the United States that such measures are inappropriate and may be counterproductive, if not violative of inter- national law norms. Perhaps the most egregious examples of extraterritorial transaction controls are the "person subject" features of the embargoes of Asian countries and Cuba that purport to regulate conduct of third-country subsidiaries. These measures were promulgated more than 30 years ago, in the context of the Korean War and the 1962 Cuban missile crisis and at a time when the United States so dominated "free world" commerce that no other nation was disposed to seriously challenge such actions.

The effort to replicate this approach in 1982 to interdict the Soviet gas pipeline was a humiliating defeat for the United States. Subsequently instituted U.S. sanctions programs have taken care not to apply to third-country corporations. Rather, the effort of the United States has been to obtain international cooperation in dealing with threatening or unwanted conduct on the part of irresponsible foreign states, both through actions of the United Nations and through international treaties and cooperative arrangements. This pattern of conduct may be viewed as an acknowledgement of the limitations that international law and avoidance of conflict with trading partners place upon foreign transaction control measures.

VII. Alternatives to Extraterritorial Transaction Controls

Objectives sought to be achieved by extraterritorial controls may be achieved more effectively by alternative means that do not raise legitimate objections from foreign parties. For example, in lieu of regulating the conduct of foreign subsidiaries, the U.S. government might, where the circumstances are compelling, limit the participation of U.S. companies in objectionable foreign trade transactions, e.g., the provision of U.S. parent company financial guarantees, technical support, etc. U.S. trade control measures could, consistent with this Recommendation, preclude the involvement of individual U.S. nationals in certain foreign transactions, although such measures generally should not be adopted readily, as they may create a deterrent to efficient operations and employment opportunities for U.S. citizens. Concepts such as evasion, aiding and abetting, conspiracy and the like, well founded in the U.S. legal system, may be applied to constrain actions of persons subject to U.S. legal process who act to undermine foreign trade controls directed to U.S. persons and U.S. exports.

Further, as an alternative to foreign reexport controls, the U.S. government could, where essential national interests necessitate, require U.S. exporters of critical products and technologies to obtain agreement from foreign recipients not to retransfer such items to particular parties or destinations. Such consensual undertakings would not be inconsistent with international law norms. However, to assert that every foreign party in possession of U.S.-origin, or U.S.-content goods or technology has, by acquiring such items, implicitly consented to the panoply of reexport controls, would amount to the imposition of extraterritorial transaction controls that would conflict with this Recommendation.

The most effective means of achieving national foreign trade control policy objectives is through cooperation with countries that share similar goals, the positive objective of this Resolution. The adoption of extraterritorial transaction control measures may be a significant obstacle to the achievement of such international cooperation, creating a climate of mutual distrust where support and understanding should exist. The United States cannot expect, however, that its views will be shared in every case by other major trading nations, and must accept the fact that foreign trade controls may not be the most effective means to deal with much disfavored foreign conduct.

VIII. Conclusion

This Recommendation supports United States cooperation in international efforts to address objectionable foreign trade and investment conduct, but opposes the use of extraterritorial foreign transaction controls that depart from international law jurisdictional norms and create the potential for conflict with other nations. In a world where the United States may exercise wise leadership but cannot achieve unilateral dominion, extraterritorial foreign transaction controls are not an appropriate or effective technique for achieving important national objectives.