U.S. EXPORT CONTROLS APPLY EXTRATERRITORIALLY

Circumstances In Which Foreign Persons Are Subject To
U.S. Export Laws And Regulations

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The primary statutory authorities for U.S. export controls are the Arms Export Control Act ("AECA"), 22 USCA § 2751, *et seq*., which regulates exports of defense articles and defense services and the Export Administration Act ("EAA"),[1] 50 USCA app. § 2401, *et. seq*., which regulates exports of commercial and "dual-use"[2] commodities and technology. Two regulatory regimes implement this legal authority. The International Traffic in Arms Regulations ("ITAR"), 22 CFR Parts 120-130, which implement the AECA, set forth requirements relating to the export of defense articles and defense services and includes the United States Munitions List ("USML").[3] The Export Administration Regulations ("EAR"), 15 CFR Parts 730-774, which implement the EAA, set forth requirements relating to the export of commercial and dual use items, and includes the Commerce Control List ("CCL").[4]

Both the AECA and the EAA, along with their implementing regulations, have been interpreted to apply extraterritorially. While certain other U.S. statutes derive their extraterritorial reach by broadly defining "U.S. persons" and often covering foreign subsidiaries, extraterritorial jurisdiction under the AECA and the EAA "follows the part" and is derived from the "U.S. nationality" of the item or service exported from the United States. As a result, ***all*** foreign persons whose activities involve the export or reexport of items and/or technology controlled by the ITAR or EAR (hereinafter collectively referred to as "controlled goods and technology") must be concerned about compliance with the AECA and EAA.

Given the substantial penalties that may be imposed for violations of U.S. export control laws and regulations,[5] it is advisable that foreign persons who work with U.S. controlled goods

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[1] Although the EAA expired on August 21, 2001, its provisions have continued in effect pursuant to Executive Order 13222.

[2] "Dual use" items "can be used in both military and other strategic uses (e.g. nuclear) and commercial applications." 15 CFR § 730.3.

[3] The ITAR and USML are administered by the Department of State's Directorate of Defense Trade Controls ("DDTC").

[4] The EAR and the CCL are administered by the Department of Commerce's Bureau of Industry and Security ("BIS").

[5] While a discussion of penalties for violation of U.S. export laws and regulations are beyond the scope of this article, it is worth noting that violations of the ITAR may be subject to denial of export privileges and penalties

or technology, as well as U.S. persons who may be implicated as a result of exports to foreign persons, develop an understanding of when activities by foreign persons may be subject to U.S. jurisdiction. By way of background, Part I of this article sets forth the extraterritorial bases for the AECA and EAA and their implementing regulations which have been relied upon to assert jurisdiction over foreign persons. Part I also compares the jurisdictional provisions of the AECA and EAA with those of the Trading With The Enemy Act ("TWEA") and the Anti-Boycott Regulations in order to highlight the differences in how and when these laws are applied extraterritorially. Part II of this article identifies the primary circumstances in which foreign persons will be subject to U.S. export laws and regulations.[6]

I. The Extraterritorial Bases of the AECA and the EAA

It is a well established canon of statutory construction that statutes are generally presumed to apply only within the territorial jurisdiction of the United States. *See, e.g.*, *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) ("canon is based on the assumption that Congress is primarily concerned with domestic conditions"). The presumption against extraterritoriality can be overcome, however, and a statute can be applied outside the United States when Congress has clearly expressed its intent to extend U.S. jurisdiction extraterritorially. *Id.* The intent by Congress to extend U.S. jurisdiction extraterritorially over U.S. controlled goods and technology has been found in both the AECA and EAA.

While neither the AECA nor the EAA contain an express statement of jurisdictional reach, both statutes contemplate regulation of U.S. origin goods and technology outside the U.S. The AECA broadly authorizes the President "in furtherance of world peace . . . to control the import and the export of defense articles and defense services . . . and to promulgate regulations for the import and export of such articles and services." *See*, *e.g.*, *United States v. Evans*, 667 F. Supp. 974, 985 (S.D.N.Y. 1987), *citing* 22 USCA § 2778(a)(1). This provision has been interpreted to reflect an "intent to control the international flow of armaments." *Id*. In addition, the AECA provides that "any person who willfully violates section 2778 or the regulations issued" may be penalized. *Id., citing* 22 USCA § 2778(c). The EAA incorporates a similarly

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of up to $500,000 (civil) and/or $1,000,000 (criminal) per violation. Violations of the EAR may be subject to denial of export privileges and penalties of up to $10,000 (civil) and/or $50,000 (criminal) per violation, or, if the violation was willful, up to $250,000 (individuals) or $1,000,000 (entities).

[6] Due to the scope and complexity of the issue, this article does not address "brokering activities," *i.e*., activities which facilitate the manufacture, export, and import of defense articles or services. It is important to note, however, that DDTC broadly construes the brokering provisions set forth at ITAR Part 129 and their applicability to foreign persons. In particular, ITAR § 129.2 includes the activities of "foreign persons subject to U.S. jurisdiction involving defense articles or defense services of U.S. or foreign origin which are located inside or outside the United States" as "brokering activities." DDTC has taken the position that virtually all foreign persons who assist U.S. companies in marketing U.S. origin defense articles and services are brokers "otherwise subject to the jurisdiction of the United States" within the meaning of the ITAR and must register with DDTC. 22 CFR § 129.3. DDTC has maintained this position, notwithstanding the recent appeals court case *United States v. Yakou*, 393 F.3d 231 (D.C. Cir. 2005), which seemed to suggest that foreign persons outside the United States could not be brokers within the meaning of the AECA and ITAR.

broad provision in § 2405(a)(1), which states that the President may "prohibit or curtail the exportation of any goods, technology or other information subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States. . . " 50 USCA app. § 2405(a)(1).

The extraterritorial nature of the AECA and EAA is found in other U.S. statutory and regulatory schemes, such as the TWEA, 50 USCA app. 5, *et. seq*., the statutory basis for the Cuban Assets Control Regulations ("CACR"), 31 CFR Part 515. The TWEA authorizes the President to regulate transactions in times of war involving "any person, or with respect to any property, subject to the jurisdiction of the United States." 50 USCA app. § 5(b)(1)(B). Like the AECA and the EAA, the TWEA provides that jurisdiction can be asserted over any person, wherever located, deemed to be subject to the jurisdiction of the United States.

However, unlike the AECA and the EAA, the CACR asserts jurisdiction based on the quasi-U.S. nationality of entities which are "owned or controlled by" a citizen or resident of the United States or an entity organized under the laws of the United States. 15 CFR § 515.329(d). In effect, this provision extends the meaning of U.S. persons to include entities which are "owned or controlled" by U.S. persons. The CACR approach is not unlike that of the Anti-Boycott Regulations, 31 CFR Part 760, another regulatory scheme with international application under which a U.S. person is defined to include "controlled in fact" foreign subsidiaries of U.S. domestic concerns. 15 CFR § 760.1(b).

In contrast, the AECA and EAA, as well as the ITAR and the EAR, employ a more narrow definition of a U.S. person. For example, neither the ITAR nor the EAR include the "owned or controlled" or "controlled in fact" language which is found in the CACR and the Anti-Boycott Regulations. Under the ITAR, a "U.S. person" is simply a "person . . . who is a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) [the U.S. Immigration and Nationality Act ("INA")] . . . or who is a protected individual as defined by 8 U.S.C. 1324b(a)(3) [INA]. It also means any corporation, business association, partnership, society, trust, or any other entity, organization or group that is incorporated to do business in the United States. It also includes any governmental (federal, state or local) entity." 22 CFR § 120.15. A "foreign person" is clearly defined as "any natural person who is not a lawful permanent resident" of the United States "or who is not a protected individual . . . or any foreign corporation, business association, partnership, trust, society or any other entity or group that is not incorporated or organized to do business in the United States, as well as international organizations, foreign governments and any agency or subdivision of foreign governments." *Id*. at § 120.16.

Like the ITAR, the EAR contains no language which contemplates the definition of U.S. person as including foreign entities that are "owned or controlled" by U.S. persons. Instead, the EAR defines "U.S. person" as follows: "(1) Any individual who is a citizen of the United States, a permanent resident alien of the United States . . . (2) Any juridical person organized under the laws of the United States or any jurisdiction within the United States, including foreign branches;

and (3) Any person in the United States." 15 CFR Part 772.[7] As such, by definition, wholly owned subsidiaries of U.S. companies are not U.S. persons under either the ITAR or the EAR.

Notwithstanding the narrower constructions of a "U.S. person" under the AECA and EAA and their implementing regulations compared to those set forth in the CACR and Anti-Boycott Regulations, the extraterritorial application of U.S. export controls is still quite broad. This is because jurisdiction is based on the nationality of the controlled goods and technology as well as the nationality of the person receiving or exporting them. In other words, a U.S. person, wherever located, will be subject to U.S. export laws and regulations whether dealing with U.S. or foreign origin goods. Because U.S. export controls "follow the part," foreign persons, on the other hand, will be subject to U.S. export controls when exporting goods or technology from the United States or when dealing with U.S. origin controlled goods and technology, inside or outside the U.S., because the goods or technology retain their "U.S. nationality". As such, in considering the extraterritorial application of U.S. export control laws, the relevant jurisdictional question is not merely whether an entity is a U.S. person, but whether the goods or technology in question are of U.S. origin.

The notion that U.S. export control laws and regulations "follow the part" is supported by more specific provisions of the ITAR and the EAR which make it clear that foreign persons must comply with restrictions on the reexport of U.S. controlled goods and technology. The ITAR accomplishes this first by specifically providing that portions of the regulations are intended to apply to both U.S. and foreign persons: "If a provision in this subchapter does not refer exclusively to a foreign person (§ 120.16) or U.S. person (§ 120.15), then it refers to both." 22 CFR § 120.14. Accordingly, ITAR § 123.9, which requires that "[t]he written approval of the Department of State must be obtained before reselling, diverting, transferring, transshipping, or disposing of a defense article in any country other than the country of ultimate destination as stated on the export license," must be read as applying to foreign persons.

In addition, the ITAR restricts reexports by U.S. or foreign persons by broadly defining the types of "exports" it regulates to capture both activities inside and outside the United States. Such activities include:

> (2) Transferring registration, control or ownership to a foreign person of any aircraft, vessel, or satellite covered by the U.S. Munitions List, whether in the United States or abroad; or . . .
>
> (4) Disclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad.

[7] While the EAR contains other definitions of U.S. person, such as the one contained in the Anti-Boycott Regulations at 15 CFR § 760.1(b), it is the definition at 15 CFR Part 772 which is applicable to export controls.

(5) Performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad.

22 CFR § 120.17. None of these activities are specifically limited to U.S. persons and thus must be read to include transfers, disclosures, and performance of defense services by foreign persons where the articles, technical data, or services are of U.S. origin or where the activities are undertaken in the U.S. Similarly, the sections of the ITAR which identify violations do not refer exclusively to U.S. persons and therefore must be read to be applicable to foreign persons. Accordingly, the ITAR makes it unlawful for U.S. persons ***and*** foreign persons to export, temporarily import, or reexport a U.S. defense article, service, or technology without authorization. *See* 22 CFR § 127.1.

The EAR communicates the requirement that foreign persons comply with restrictions on the reexport of dual use items in a more direct manner, by identifying the items that are subject to the EAR. These include:

(1) All items in the United States . . . ;

(2) All U.S. origin items wherever located;

(3) U.S. origin parts, components, materials or other commodities integrated abroad into foreign-made products, U.S. origin software, and U.S. origin technology, commingled with foreign technology;

(4) Certain commodities produced by any plant or major component of a plant located outside the United States that is a direct product of U.S.-origin technology or software, as described in § 736.2(b)(3) of the EAR.

15 CFR § 734.3(a). In specifying that all U.S. origin items, components, and technology "wherever located" are subject to the EAR, this provision makes it clear that ***any*** person who handles U.S. origin items, components, and technology is subject to the EAR and is thus expected to comply with its restrictions on the reexport of U.S. controlled goods and technology.

In sum, the AECA and the EAA, and their implementing regulations, have laid a solid foundation for exercising extraterritorial jurisdiction over foreign persons. While not all of the provisions in the ITAR and the EAR will be applicable to foreign persons, as a practical matter, those which concern the reexport of U.S. controlled goods and technology likely will be triggered in the instances described in more detail below. Failure to comply with U.S. export controls in these instances can result in a loss of export privileges and severe monetary penalties, not only for foreign persons, but for U.S. persons who make exports with knowledge that a violation is likely to occur.[8] As such, foreign persons, as well as involved U.S. persons, should proceed carefully when their activities involve any of the following circumstances.

[8] The EAR defines "knowledge" as "[k]knowledge . . . that [a] circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person's willful avoidance of facts." 15 CFR Part 771. The ITAR does not define knowledge.

II. Instances in Which Foreign Persons May Be Subject To U.S. Export Control Laws and Regulations

The relevant inquiry for determining whether U.S. export control laws and regulations apply to a foreign person essentially turns on whether the foreign person is dealing with U.S. origin controlled goods and technology. In general, jurisdiction will be triggered where (1) the foreign person has custody of U.S. origin goods or technology; (2) the foreign person develops a foreign made item which contains U.S. origin parts or components; or (3) the foreign person develops a product from U.S. technology. A discussion of each of these instances and their possible effect on foreign persons follows.

A. A Foreign Person Has Custody of U.S. Controlled Goods or Technology

1. The AECA and the ITAR

Once U.S. controlled goods and technology have been exported from the U.S., the ITAR contains numerous reexport provisions which explicitly require compliance by foreign persons and affect a foreign person's ability to export or transfer an ITAR controlled part or technology. For example, the ITAR requires that exporters from the U.S. incorporate a statement in the bill of lading and invoice accompanying USML items which states that the items "may not be transferred, transshipped on a non-continuous voyage, or otherwise disposed of in any other country, either in their original form or after being incorporated into other end-items, without prior written approval of the Department of State." 22 CFR § 123.9. In addition, the ITAR requires that both U.S. persons and foreign persons (including the foreign consignee and foreign end user) execute a Non-Transfer and Use Assurance, Form DSP-83 as a prerequisite for receiving ITAR controlled equipment or technical data designated as "Significant Military Equipment," under a Department of State export license. 22 CFR § 123.10. Specifically, "[t]he certificate stipulates that, except as specifically authorized by prior written approval of the Department of State, the foreign consignee and foreign end user will not reexport, resell or otherwise dispose of the significant military equipment enumerated in the application outside the country named as the location of the foreign end-use or to any other person." *Id.*

In addition, in order to receive defense services which require the prior authorization of the Department of State under a Technical Assistance Agreement ("TAA") or Manufacturing License Agreement ("MLA") executed by both the U.S. applicant and foreign licensees, the licensees must agree to a number of boilerplate reexport restrictions. *See, e.g.*, 22 CFR § 124.8(5) (required statement providing that "[t]he technical data or defense service exported from the United States in furtherance of this agreement and any defense article which may be produced or manufactured from such technical data or defense service may not be transferred to a person in a third country or to a national of a third country except as specifically authorized in this agreement unless the prior written approval of the Department of State has been obtained."). *Id.* Finally, under the ITAR, DDTC may deny or revoke its approval of a license or agreement if it believes that the AECA or ITAR or the terms of the relevant export authorization have been violated. *See generally* 22 CFR § 126.7(a)(2).

Unlike the EAA and the EAR, extraterritorial jurisdiction of the AECA and the ITAR is not limited to defense articles, services, or technical data which originate in the United States. As a result, the ITAR arguably could be deemed to be applicable to any item listed on the USML even after it has been exported from the United States, regardless of whether it was manufactured in a third country. However, the exercise of extraterritorial jurisdiction over foreign origin goods once they have left U.S. soil seems highly tenuous. Based upon published cases and enforcement actions, it does not appear that jurisdiction has ever been claimed under these circumstances and it seems unlikely that such jurisdiction would be upheld.

In the absence of precedent, the application of ITAR reexport provisions to the activities of foreign persons undertaken wholly outside the U.S. might seem overbroad. However, both the courts and DDTC have exercised broad extraterritorial reach over foreign persons with respect to USML articles and technology. *See Evans*, 667 F. Supp. at 986. In *Evans*, foreign persons were charged with conspiring to sell and transfer American-made defense articles to other foreign persons. The defendants claimed that the assertion by the United States of extraterritorial jurisdiction over them was improper. However, the court determined that the AECA and the ITAR apply to foreign persons who attempt to transfer American-made weapons situated abroad.

In reaching this conclusion, the court noted that there was nothing in the statutory language or legislative history of the AECA to indicate a congressional intent to limit the President's authority to promulgate regulations that control the transfer of American-made weapons after they are exported directly from the United States. *Id.* at 985. The court also noted that nothing in the AECA and ITAR indicate that the statute is intended to limit itself to the control of the original export of American defense articles. *See id.* (internal citations omitted).

DDTC has enforced reexport controls over foreign persons consistent with this broad congressional and judicial grant and has charged foreign companies with violations of the ITAR in a number of enforcement actions. First, in *Japan Aviation Electronics Industry Ltd.* (1992), DDTC found that Japan Aviation Electronics ("JAE") of Tokyo, Japan violated the ITAR for transferring various gyroscopes in violation of an existing TAA or MLA or without proper export authorization from DDTC to Iran.

In *Delft Instruments, N.V.* (1992), Delft Instruments ("Delft") of the Netherlands, by and through its subsidiaries and successors, was charged with transferring or causing to be transferred various infra-red detectors and thermal imaging systems containing U.S. origin defense articles to Iraq and Jordan without the required export authorization from DDTC. Delft faced new charges and paid additional penalties in 1997, in connection with allegations that its senior officers had made misrepresentations of fact during the 1992 investigation. *See Delft Instruments, N.V.* (1997). In *Raytheon Company* (2003), both Raytheon Company and its wholly owned Canadian subsidiary, Raytheon Canada Ltd., were charged with violations of the AECA and the ITAR, among other things, for exports and reexports of military troposcatter equipment to Pakistan.

In sum, there is strong support for the conclusion that both the courts and DDTC assert jurisdiction over foreign persons under the AECA and ITAR with respect to defense articles, technical data and defense services listed on the USML that have been exported from the United States.

2. The EAA and the EAR

Because the provisions of EAA and the EAR contemplate jurisdiction over U.S. origin items and technology wherever located, foreign persons are required to comply with reexport restrictions imposed by the EAR. 15 CFR § 734.3(a). These include prohibitions on the reexport of controlled items to countries for which a license would be required or to countries which are subject to a general prohibition or embargo by the United States. 15 CFR § 736.2(b). According to a 2003 BIS "Guidance on Reexports and Other Offshore Transactions Involving U.S.-Origin Items," http://www.bis.doc.gov/licensing/ReExportGuidance.htm, persons outside the United States must comply with reexport license requirements regarding U.S. origin items or risk the imposition of civil penalties and/or denial of the eligibility to receive U.S. exports.

Indeed, BIS has routinely brought enforcement actions against foreign persons for violations of the EAR with respect to items manufactured in the United States. For example, in *Beijing Rich Linscience Electronics*, 70 Fed. Reg. 44084 (2005), a Chinese entity was charged with participating in the unlicensed export of national security electronic components and semiconductor chips from the United States to China. In *Sunford Trading Ltd*., 70 Fed. Reg. 49910 (2005), BIS charged a Hong Kong entity with causing unlicensed reexports from Hong Kong to China. BIS has also taken enforcement action against foreign companies which facilitate the reexport of U.S. origin goods. In *Petrochemical Commercial Co. Ltd*, 70 Fed. Reg. 23983 (2005), BIS charged a British company with aiding and abetting the solicitation of U.S. origin compressor parts to Iran when it forwarded an order from an Iranian company for the parts to a Dutch company and, subsequently, a price quote to the Iranian company, with the knowledge that the parts were of U.S. origin.

It is interesting to note, however, that because only "U.S. origin items wherever located" are subject to the EAR, dual use and commercial items and technology which are of non-U.S. origin clearly are no longer subject to the EAR after their initial export from the United States. While the EAR does not specifically define "U.S. origin" it does define items which are not U.S. origin as "items that are made outside the United States." 15 CFR § 732.2(d).

B. A Foreign Person Develops Foreign-Made Items which Contain U.S. Components

1. The AECA and the ITAR

As mentioned above, U.S. export controls "follow the part". In fact, DDTC has taken the position (known as the "look through" doctrine) that commercial or dual use items become subject to the ITAR in the event they incorporate or are integrated with an ITAR controlled part or component. *See* Consent Agreements of The Boeing Company and Goodrich Corporation/L-3 Communications Corp. (2006). Therefore, it is not surprising that DDTC takes the position that under the AECA and the ITAR, a foreign-made article which incorporates items on the USML that have been exported from the United States is considered subject to the ITAR because the

U.S. maintains jurisdiction under the ITAR over the items no matter where they are and regardless of whether they have been incorporated into a foreign made article.

This rationale is supported by the AECA's provision for an end-use monitoring program to ensure that items which incorporate ITAR controlled components or technology are not diverted to unauthorized end-users. 22 USCA § 2785. It is further supported by the ITAR requirement that exporters from the U.S. incorporate a statement in the bill of lading and invoice accompanying USML items which provides that the items may not be reexported "either in their original form or after being incorporated into other end-items, without prior written approval of the Department of State." 22 CFR § 123.9. Finally, because there is no provision in the ITAR, such as can be found in the EAR, which creates an exception for foreign-made items which contain a *de minimis* amount of U.S. components, it must be presumed that the ITAR is applicable to foreign items that contain ITAR components, regardless of the value the component contributes to the item.

2. The EAA and the EAR

Like the AECA and the ITAR, the EAA/EAR controls will apply to a foreign-made commodity if it contains commercial or dual use U.S. origin components. However, the EAA contains an exception to this general rule. Specifically, the EAA provides that export controls may not be imposed solely on the basis that a good contains parts or components subject to export controls if such parts are (1) essential to the good; (2) customarily included in sales of the good in non-controlled countries; and (3) comprise less than 25% of the total value of the good. *See* 50 USCA app. § 2404(m).

This EAA provision has been incorporated into the EAR as what is known as "the *de minimis* rule." 15 CFR § 732.2(d). However, the definition of *de minimis* varies in the EAR, depending on the ultimate destination of the item. If an item is destined for an embargoed or terrorist-supporting country, then the U.S. content cannot exceed 10%. *Id*. at § 732.3(e). With respect to all other countries, an item is not subject to the EAR provided that the U.S. content does not exceed 25%. The *de minimis* content of a commodity is determined by calculating the total value of those components on the CCL which would require a license for reexport and dividing it by the price of the foreign-made item. *Id*. at § 732.2(d)(2).

While the *de minimis* rule offers foreign manufacturers some relief from the EAR, determining the percentage of U.S. components a product contains can be challenging, particularly when it involves valuing U.S. technology. Consequently, foreign persons must undertake a thorough analysis of the product and any technology it contains in order to determine whether the *de minimis* rule is applicable. Finally, it is important to note that the *de minimis* rule does not authorize transactions that may still be illegal based on other U.S. laws and regulations (for example it would still be illegal under the CACR for a foreign subsidiary of a U.S. company to export products or technology to Cuba).

C. A Foreign Person Develops Products Derived From U.S. Technology or Software

1. The AECA and the ITAR

The AECA expressly controls foreign defense articles produced or manufactured from U.S. origin technical data. There are a number of sections of the AECA which clearly establish the intent to control the export of foreign defense articles produced under an offshore procurement, coproduction arrangement or cooperative project involving the U.S. government or a U.S. commercial entity. For example, the AECA provides that the agreement not to transfer title to, or possession of, any foreign defense articles produced in a cooperative project is a prerequisite for consent by the President to the arrangement. 22 USCA § 2753(a); *see also* 22 CFR § 124.8(5). The general provisions of the AECA also caution that in carrying out the Act, "consideration shall also be given to coproduction or licensed production outside the United States of defense articles of United States origin when such production best serves the foreign policy, national security and economy of the United States." 22 USCA § 2791(a).

With respect to sales of defense articles outside the United States, the AECA provides that consideration of any sale should include an evaluation of "the portion of the defense articles so manufactured which is of United States origin." *Id*. The AECA further provides that no guarantee shall be issued in any case involving coproduction or licensed production outside the United States of any defense article of United States origin unless the Secretary of State provides Congress with full information concerning the proposed transaction, including "a description of the particular defense article or articles which would be produced under license or coproduced outside the United States." *Id*. at § 2791(b).

Finally, the AECA provisions relating to end-use monitoring of defense articles and services sold under government-to-government arrangements require consideration of U.S. technology incorporated in foreign defense articles. The AECA provides that the President shall ensure that an end-use monitoring program is established which (1) provides for the end-use verification of defense articles and defense services that incorporate sensitive technology, defense articles and defense services that are particularly vulnerable to diversion or other misuse, or defense articles or defense services whose diversion or other misuse could have significant consequences; and (2) prevents the diversion (through reverse engineering or other means) of technology incorporated in defense articles. 22 USCA § 2785(b).

Products derived from ITAR controlled technology are further controlled outside the U.S. through the provisions of TAAs and MLAs, which foreign persons are required to enter into in order to receive ITAR controlled technology. *See* 22 CFR § 124.1. Such agreements are required to contain language prohibiting the transfer of products produced or manufactured from technical data subject to the TAA or MLA to a person in a third country or to a national of a third country without authorization from DDTC. *Id*. at § 124.8.

2. The EAA and the EAR

The EAA and the EAR regulate products abroad if they are the product of certain U.S. technology and/or software. In the EAA, Congress expressly recognized the importance of controlling not just exports of technology, but "goods which contribute significantly to the transfer of such technology." 50 USCA app. § 2401(8). Accordingly, the EAR specifically prohibits the reexport of items produced outside the U.S. to Cuba or any other country in

Country Group D:1[9] if the item is a direct product of certain U.S. technology and software or a direct product of a plant outside the United States that is derived from certain U.S. technology or software. *See* 15 CFR § 736.2(b)(3). This restriction is only applicable, however, if the foreign-made product meets the following conditions: (1) it requires written assurance under (o)(3)(i) of Supplement No. 2 to Part 748 of the EAR[10] or as a pre-condition for the use of License Exception TSR (Technology and Software Under Restriction) at § 740.6 of the EAR; and (2) it is subject to national security controls as designated on the CCL at Part 774 of the EAR. *Id*.

Whether a product is derived from U.S. technology and/or software may be difficult to determine, however, particularly when dealing with software programs. Products which are developed as a result of a joint venture between a U.S. company and a foreign company may be considered products derived from U.S. technology, as a result of the expertise, software, or technology contributed by the U.S. company in the process of developing the product. Issues relating to U.S. origin software and technology frequently arise in connection with the development of foreign origin software which either contains or enables U.S. origin encryption (including publicly available encryption). Consequently, foreign persons should conduct a thorough analysis of the product or software in question in order to determine whether it contains any U.S. origin technology or software.

III. Conclusion

As discussed, the AECA and the EAA have been interpreted as providing broad extraterritorial authority to regulate U.S. controlled goods and technology, wherever they may be. This extraterritorial jurisdiction follows the controlled goods and technology and applies whether the person or entity in custody of the commodity is a U.S. person or a foreign person. As a result, any foreign person who deals with U.S. controlled goods or technology is subject to certain requirements of the ITAR and the EAR, even if the entity is not owned or controlled by a U.S. person. While the expenditure of resources necessary to comply with U.S. export laws may seem burdensome to foreign companies, such expenditures are warranted in order to avoid losses that could stem from an ITAR or EAR violation, including civil and criminal penalties, as well as a loss of privileges to receive controlled goods and technology exported from the United States. Additionally, U.S. companies should ensure that they notify foreign persons of applicable controls and that they do not "knowingly" export goods to foreign persons where a subsequent violation will occur, since U.S. persons may also be implicated in such violations.

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[9] Country Group D:1 can be found at Supplement 1 to Part 740 of the EAR. As of the writing of this article, Country Group D:1 includes Albania, Armenia, Azerbaijan, Belarus, Cambodia, China, Georgia, Iraq, Kazakhstan, Kyrgyzstan, Laos, Macau, Moldova, Mongolia, North Korea, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam.

[10] Section (o)(3)(i) of Supplement No. 2 to Part 748 of the EAR requires that applicants seeking to export items to countries not listed in Country Group D:1 or E:2 which are controlled for national security reasons must be able to provide, upon request, a written letter from the ultimate consignee assuring that the item will not be reexported to a country listed in Country Group D:1 or E:2 unless prior authorization is obtained from BIS.