

LEGAL NOTES



UNAUTHORIZED TRANSFERS OF DEFENSE ARTICLES AND SERVICES

By

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Numerous laws and regulations govern the transfer of U.S. Department of Defense articles and services to foreign governments and international organizations. As simple as it sounds, one basic concept must be constantly kept in mind: articles and services procured with U.S. appropriated funds are intended to be used for the purpose for which the appropriation was made. Articles and services procured for U.S. Government use may not, therefore, be transferred to non-U.S. Government recipients without proper authority.

Within the Department of Defense, certain transfers of government articles and services to foreign governments and international organizations are authorized and governed by specific statutory authority. The Arms Export Control Act, as amended, the Foreign Assistance Act of 1961, as amended, and 10 U.S.C. Section 2667 (1976) are among the several sources of authority for the transfer of U.S. defense articles and services. Absent such authority, the transfer of defense articles and services is generally improper. In this context, the term "transfer" relates to virtually any means of conveyance whereby the recipient obtains the use of that which is conveyed. The terms "articles" and "services" are likewise interpreted quite broadly. Of particular significance is the fact that "defense services," as used in the security assistance community, typically involves training activities. Further, training is typically defined, for security assistance purposes, to include formal and informal instruction, whether by officers and employees of the United States, or by the use of information publications and media of all kinds, correspondence courses, military advice, orientation and training aids or exercises.

When a foreign government or international organization makes a direct request, through normal U.S. security assistance channels, to obtain U.S. defense articles and services, there is usually little problem in determining what U.S. legal authority and procedures govern

the transaction. The command or office receiving the request is specifically qualified and equipped to process it in accordance with U.S. law.

Many transactions with foreign governments and international organizations contain "hidden" security assistance problems, which have the potential for conflict with U.S. laws and regulations concerning the transfer of defense articles and services. Because the transaction with the foreign government is not immediately recognizable as a security assistance matter, it may not be originally routed to the security assistance organizations of the U.S. military departments for action. If the DoD office to which the matter is routed for action also fails to recognize security assistance implications, potential problems and the possibility of ultimate conflict with U.S. laws and regulations may not be addressed early enough to enable meaningful or effective corrections to be made.

Examples of transactions with foreign governments and international organizations which contain "hidden" security assistance problems are not difficult to find. Because of the broad definition given to "training" within the U.S. security assistance community, many of the security assistance problems which are not immediately recognized as such have to do with foreign personnel and training. Personnel exchange programs, U.S. hosting of liaison or loan personnel, courtesy tours for VIP's of foreign countries, and similar activities all contain the potential for the unauthorized transfer of U.S. training services. Security assistance related problems are not limited to training, however. Seemingly innocuous transactions with foreign governments, even transactions which are demonstrably in the best interests of the U.S., may involve the unauthorized transfer of U.S. defense articles or services other than training. For instance, U.S. military units visiting foreign countries may be invited to participate in combined exercises with host country forces. While the diplomatic potential for good is enormous in such a situation, and while the U.S. forces might clearly benefit from the exercises, that would not, by itself, justify U.S. forces repairing equipment of the host forces used in the exercise. Nor would the potential U.S. benefit, by itself, justify the "loan" or other transfer of U.S. equipment to host forces. Specific legal authority for the transfer of U.S. services and equipment would have to exist before the transfer could be deemed proper.

Obviously not every "hidden" security assistance problem, or even every category of problems, involved in transactions with foreign governments and international organizations can be listed. If that were possible, a checklist could be printed and distributed to all U.S. DoD personnel, worldwide, to use in dealing with foreign governments, so that security assistance problems could be identified early and coordinated with appropriate DoD agencies. Since such a checklist is not possible, a greater burden falls on members of the U.S. security assistance community to help other DoD members recognize and resolve potential conflicts with U.S. law. The suggestion is not

that members of DoD security assistance organizations act as "watch-dogs" over the remainder of the DoD community. It is simple logic, however, that those familiar with the rather esoteric rules involved in U.S. security assistance programs are better equipped to recognize security assistance and transfer problems than those who are not familiar with such rules. In particular, lawyers providing advice and assistance to DoD components involved in U.S. security assistance efforts have frequent opportunities to recognize problems that may not be immediately apparent to others. Whether through review of message traffic, correspondence, or legal queries not directly related to the security assistance field, members of the DoD legal community have everyday opportunities to point out potential pitfalls related to transfers of defense articles and services to their client commands and organizations.

While it may be stating the obvious to security assistance personnel to suggest that every DoD transaction should be examined to see if any transfer of defense articles and services is involved and what authority exists for such transfer, such examination and the answers thereto may not be obvious at all to one not familiar with security assistance laws and regulations. For those who work with the transfer of defense articles and services, familiarity with U.S. law and regulations may tend to lead to the conclusion that all DoD personnel are equally familiar with such laws and regulations. A casual review of General Accounting Office reports dealing with unauthorized transfers of DoD articles and services to foreign governments proves that such is not the case. For those in the security assistance business, therefore, when the opportunity arises to review a transaction between DoD and a foreign government, perhaps the best advice is to not only provide assistance on that which is asked, but to also attempt to determine what questions have not been asked.