

The U.S. bases its legal position on relatively uncontroversial international law principles for exerting jurisdiction in which it is recognized that states may exercise control over persons on the basis of territory and nationality. However, the provisions of the post-1975 U.S. CACR and the Mack Amendment are to many countries, including Canada, an unacceptable extension of these basic principles in that both measures extend the nationality principle to enable U.S. law to proscribe conduct by not only U.S. citizens, but by any corporations, wherever organized, that are owned and controlled by such persons.

The Canadian position, shared by almost all other western countries, rejects the contention that the nationality principle can be so extended to enable a state to regulate the conduct of corporations organized in foreign states on the basis of the ownership or control of their citizens. From the Canadian perspective, these corporations, by the act of incorporation in Canada, are "nationals" of Canada. The fact that investment enabling such companies to be created came from outside the jurisdiction cannot act as a basis for the laws of that country to follow them over the border. As such, the Canadian position voids the so-called balancing tests utilized by the U.S. in cases where they take the position that they exercise a concurrent jurisdiction over subsidiaries with the territorial state.

To strengthen the ability of the Canadian government to combat this and other unacceptable U.S. assertions of extraterritorial jurisdiction, the Canadian Parliament passed the FEMA in 1984. It provides to the government a legislative basis to counteract the extraterritorial assertion of jurisdiction by foreign law in a number of instances, in particular, for discovery of documents, anti-trust litigation and the application of foreign laws that purport to regulate conduct in Canada. At the time of passage, it was made clear by the government that the FEMA represented a weapon of last resort since the effect of blocking orders is to place persons in the position of conflicting requirements between any Canadian order and the extraterritorial order of the foreign state. Given that the U.S. already exercised an unacceptable jurisdiction that offended international law and given that the Mack Amendment prevented any political solution where the U.S. CACR collided with Canadian law and trade policy, the adoption of the Mack Amendment was a classic case justifying the usage of the FEMA. The passage of an identical provision in legislation (The Cuban Democracy Act) now before Congress would again justify the issuance of an order under FEMA.