

COOPERATION AFTER THE STORM: A RIGHT STEP IN SATELLITE TRADE REGULATION

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INTRODUCTION

United States government regulation of international trade in commercial communication satellites, their parts and components and associated technical data has been a political hot button for the better part of the last decade.¹ The export controls surrounding the trade in commercial communications satellites saw a slight easing in the earlier part of the 1990s.² This was followed by greater liberalization in 1996.³ By the end of the decade a myriad of events highlighted in the hearings conducted

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¹ See discussion *infra* Parts II.A, III.A, III.B (discussing the history of satellite export control and the multiple changes in regulatory jurisdiction and examining the political fallout of the Cox Committee investigations of alleged export violation concerning the United States satellite industry and China).

² See *Satellite Chiefs Complain Before the Senate*, THE EXPORT PRAC., Aug. 15, 1998, at 4 (laying out the efforts of the satellite industry to change the regulations regarding the export of satellites); discussion *infra* pp. 40-41 (noting the early shifts in satellite jurisdiction).

³ See Michael S. Lelyveld, *Clinton Ripped on Satellites to China*, J. OF COMM., Dec. 14, 1998, at 1A (discussing the jurisdictional shift of the control of commercial communications satellites to the Department of Commerce in 1996 and the history behind that shift).

by the Cox Commission resulted in a tightening of controls that placed added administrative and compliance burdens on the United States satellite industry.⁴

Out of this turmoil came a small ray of sunshine on what was thought to be an otherwise cloudy day. On May 26, 2000, the State Department published an interim final rule in a public notice in the Federal Register creating a new licensing vehicle for the export of satellite parts and components and associated technical data.⁵ The new licensing vehicle, the bulk license was designed in part through the cooperative efforts of the regulators and the satellite industry.⁶ In essence, the new regulation provides the exporter with a greater amount of flexibility in the conduct of international business that should mitigate some of the burden felt after the re-tightening of satellite export controls.⁷

This article examines the construction of that regulation, the climate in which it came about and the relief it offers the United States satellite industry. Part I explores the regulatory framework that administers the export licensing process of commercial communications satellites, their parts and components and associated technical data and the importance of regulatory compliance. Part II provides an historical overview of the International Traffic in Arms Regulations and the control of the export of satellites. Part III contemplates the political fallout of the Cox Committee findings and its resultant effect of the change in satellite export jurisdiction from Commerce to State examining its pros and cons from national security and economic rationales. Part IV outlines the cooperative process be-

⁴ See discussion *infra* Part III.A (discussing the events that lead to the formation of the Cox Committee and industry's reaction to the effects of those hearings).

⁵ See Exports of Commercial Communications Satellite Components, Systems, Parts, Accessories and Associated Technical Data, 65 Fed. Reg. 34,089 (May 26, 2000) (codified at 22 C.F.R. § 123) (announcing the new regulatory regime in the form of an interim final rule); *State Dept. Eases Restrictions on Satellite Exports*, SATELLITE WK, May 29, 2000.

⁶ See 65 Fed. Reg. 34,089, 34,090-91 (codified at 22 C.F.R. § 123) (explaining the substance and the mechanics of the new bulk licensing regime).

⁷ See Interview with William Lowell, then Director of the Office of Defense Trade Controls, United States Department of State (Nov. 13, 2000) [hereinafter Interview with William Lowell] (outlining the advantages the new regulations will provide the satellite parts and component exporter).

tween government and industry of creating a new export-licensing vehicle and examines its effect on the United States and the international satellite industries. Finally, Part V provides recommendations on how the new regulation can be better utilized by industry and better administered by the State Department.

I. HISTORICAL OVERVIEW OF THE CONTROL OF SATELLITE EXPORTS

A. *Historical Portrait of the International Traffic in Arms Regulations*

The Arms Export Control Act⁸ (AECA) provides the President of the United States with the statutory authority to control the import and export of defense articles⁹, services¹⁰ and technologies.¹¹ Under that authority, the President delegated to the Secretary of State the mandate to promulgate regulations to control the export and temporary import of defense goods, services, and technologies.¹² Those regulations, which implement that authority, are the International Traffic in Arms Regulations (ITAR).¹³ Through the Directorate of Defense Trade Controls (DDTC), Bureau of Politico-Military Affairs, the Department of State administers the ITAR.¹⁴

⁸ See 22 U.S.C. §§ 2751 - 2799 (2000); see also Kernan Chaisson, *U.S. Military Export Controls: The Rules are Changing*, J. ELECTRONIC DEF., May 1, 2000 (identifying the Arms Export Control Act of 1976 as the primary law governing the export and transfer of military equipment, technology and services).

⁹ See International Traffic in Arms Regulations, 22 C.F.R. § 120.6 (2000) (defining a "defense article" as any item contained on the United States Munitions List).

¹⁰ See 22 C.F.R. § 120.9 (circumscribing a "defense service" as the furnishing of assistance, technical data, or training in the design, development, manufacture, testing, repair, maintenance, etc. of defense articles).

¹¹ See generally 22 U.S.C. §§ 2751 - 2799 (2000) (showing the statutory authority to control the exports, under criminal penalty, of defense articles and data).

¹² Exec. Order No. 11,958, 42 Fed. Reg. 4311 (1977) (providing the delegation of authority to the Secretary of State to promulgate and administer the regulations for arms export controls).

¹³ See 22 C.F.R. §§ 120-130 (citing the International Traffic in Arms Regulations provides the administrative and regulatory means of controlling arms and space exports).

¹⁴ See 22 C.F.R. § 120.1 (a) (providing the general authorities for the International Traffic in Arms Regulations).

The jurisdiction of the ITAR covers United States persons,¹⁵ foreign persons,¹⁶ and foreign governmental entities engaged in the export, retransfer,¹⁷ and temporary import¹⁸ of defense articles and defense services as defined in the United States Munitions List (USML).¹⁹ In order to export or temporarily import defense goods and services, one is required to be registered²⁰ with DDTC and must obtain a validated license²¹ or other written approval or utilize certain license exemptions outlined in the ITAR.²² In addition, the ITAR imposes extraterritorial control on the re-export or retransfer of any previously exported defense article or service to a third party.²³

¹⁵ See 22 C.F.R. § 120.15 (defining a "U.S. person" as any individual who is either a citizen or permanent resident, any entity incorporated in the United States, and any local, state or federal government entity).

¹⁶ See 22 C.F.R. § 120.16 (defining a foreign person as any person who is not a citizen of the United States or a lawful permanent resident in the United States as defined by 8 U.S.C. § 1101(a)(20)).

¹⁷ See 22 C.F.R. § 120.19 (defining retransfer as the reexport of a defense article to an end-use or end-user not originally authorized by the export license the product was exported under).

¹⁸ See 22 C.F.R. § 120.18 (defining a temporary import as the importation of any article on the U.S.M.L. that will be returned to the destination from which it was shipped, or the importation of an article on the U.S.M.L. which is in transit to a third country destination).

¹⁹ See 22 C.F.R. § 121 (listing all articles, services and technical data, in categories, designated as defense services and defense articles under the regulatory authority of the International Traffic in Arms Regulations).

²⁰ See 22 C.F.R. § 122 (stating the mode, method, and requirements for manufacturers and exporters to register with the Directorate of Defense Trade Controls to engage in the export and temporary import of defense articles and defense services).

²¹ See 22 C.F.R. § 120.20 (defining license as a document issued by the Director of the Directorate of Defense Trade Controls allowing the export of temporary import of a specific good or service controlled under the ITAR); see also Philip S. Rhoads, *The International Traffic in Arms Regulations: Compliance and Enforcement at the Office of Defense Trade Controls*, U.S. Department of State, 798 PLI/COMM. 717, 719 (1999) (explaining the jurisdictional authority of the Arms Export Control Act and the International Traffic in Arms Regulations).

²² See 22 C.F.R. § 123.16 (detailing certain exemptions of general applicability from the normal licensing regime of the International Traffic in Arms Regulations).

²³ See 22 C.F.R. § 123.9(c) (detailing the approval and regulatory procedure for the reexport or retransfer of previously exported defense article and defense services); see also Peter D. Trooboff, *A Brief Primer on the International Traffic in Arms Regulations (ITAR)*, 798 PLI/COMM. 303, 305 (1999) (delineating the significant difference between the retransfer regulatory export scheme of the Departments of Commerce and State).

The USML controls those items that are primarily designed or modified for military or intelligence applications.²⁴ Those goods and services that are dual-use²⁵ or strictly commercial in nature are controlled under the Export Administration Regulations (EAR),²⁶ administered by the Bureau of Industry and Security (BIS), United States Department of Commerce.²⁷ The control and licensing regimes of the Departments of State and Commerce are fundamentally different in both their licensing process and the nature of their controls.²⁸

The ITAR normally does not control products whose applications are commercial in nature, or were originally designed for military use, but now have a predominant commercial use.²⁹ However, when the product or technology retains an important military or intelligence characteristic and is deemed of import to national security or foreign policy then the product will remain captured and controlled under the ITAR.³⁰ A couple of examples of dual-use items controlled under the ITAR are the explosive

²⁴ See Cecil Hunt, *Department of Commerce Export Controls*, 798 PLI/COMM. 29, 39 (1999) (articulating the structure of the U.S. export control system and noting the differences between Department of Commerce and Department of State Controls).

²⁵ See United States General Accounting Office, Report to Congressional Requesters GAO/NSIAD-97-24, *Export Controls: Change in Export Licensing Jurisdiction for Two Sensitive Dual-Use Items*, at 1 (1997) [hereinafter GAO/NSIAD-97-24] (defining a dual-use item as one that has both commercial and military characteristics and applications).

²⁶ See Export Administration Regulations, 15 C.F.R. § 700 (2000) (detailing the commodities and technologies controlled under the Commerce Control List).

²⁷ See Hunt, *supra* note 24, at 38 (outlining the export control system administered by the Department of Commerce).

²⁸ See United States General Accounting Office, Testimony Before the Committees on International Relations and on National Security, House of Representatives GAO/NSIAD-98-211, *Export Controls: Issues Related to the Export of Commercial Communications Satellites*, at 12 (1998) (statement for the record by Katherine V. Schinasi, Associate Director, Defense Acquisition Issues, National Security and International Affairs Division, United States General Accounting Office) [hereinafter GAO/NSIAD-98-211] (detailing the key elements and differences inherent in both systems, the most notable being State's primacy in national security while Commerce weighs the interests of trade and economy against foreign policy and national security).

²⁹ See Hunt, *supra*, note 24, at 39 (explaining the structure of the United States export control system and how products and technologies get captured under the jurisdiction of the ITAR).

³⁰ See *id.* (noting that most dual-use items will not be controlled by the ITAR unless they have significant military or intelligence applicability); see also GAO/NSIAD-97-24, *supra*, note 25, at 1 (1997) (noting that certain dual-use technologies are controlled under the authority of the ITAR).

cartridges used to inflate automobile air bags³¹ and commercial communications satellites.³²

B. Jurisdictional Issues Involved in the Regulatory Control of Satellite Technology

Jurisdictional questions for the control of certain technologies is by no means a docile matter.³³ The jurisdictional saga of commercial communication satellites is not unique in that respect.³⁴ The strategic military and intelligence communities within the United States Government desire to protect the national security while stemming the tide of proliferation of weapons of mass destruction.³⁵ On the other hand, the United States satellite industry and its associated suppliers seek to make legitimate international sales with as little government interfer-

³¹ See International Traffic in Arms Regulations, 22 C.F.R. § 121.1 (2000) (delineating the control of explosives, propellants, incendiary agents, and their constituents under which air bag ignition devices are controlled, in Category V of the United States Munitions List).

³² See 22 C.F.R. § 121.1 (indicating that commercial communications satellites in conjunction with other spacecraft and associated equipment are controlled under Category XV of the United States Munitions List).

³³ See Robert B. Kaimowitz, *Politics at its Worst; Prohibition in the Launching of US Satellite in Chinese Vehicles*, SATELLITE BROADBAND, July 1998, at 45 (noting some people believe a recent House of Representatives vote to prohibit allowing a U.S. satellite to be launched on a Chinese launch vehicle is a political move borne of Republican party political motivations). Republican members of the House were seemingly motivated to vote against allowing U.S. spacecraft to be launched on Chinese vehicles due to a belief that President Clinton transferred satellite export control from the strict regime of the State Department to the more lax regime of the Commerce Department because of campaign contributions received from satellite industry officials. *See id.* However, the change in jurisdiction came about through a public process, spurred by vigorous debate and detailed in numerous industry and news publications. *See id.*

³⁴ See GAO/NSIAD-97-24, *supra*, note 25, at 2 (1997) (discussing the history of the jurisdictional transfer of commercial communication satellites from the State Department to the Commerce Department).

³⁵ See generally, *Hearing on Satellite Export Controls Before the Senate Foreign Relations Committee, Subcommittee on International Economic Policy, Export, and Trade Promotion*, 106th Cong. (2000) (statement of James M. Bodner, Principal Deputy Undersecretary of Defense for Policy) [hereinafter Statement of James M. Bodner] (intimating the defense community's concern over national security as one of the reasons for its restrictive stance on the transfer of certain space technologies and products).

ence as possible to stimulate sales and effectively compete against European manufacturers.³⁶

Under the jurisdictional purview of the ITAR, the initial change in the export licensing of commercial communication satellites and associated parts, components, and technical data took place in October 1992.³⁷ At that time, satellites subject to the ITAR were distinguished by nine militarily sensitive characteristics that could be incorporated in a commercial communication satellite.³⁸ The technologies identified as critical included antijam capability, crosslinks, encryption devices, radiation-hardened devices, propulsion systems, and other highly sensitive space borne technologies.³⁹

The formal transformation in licensing jurisdiction from the Department of State to the Commerce Department's EAR took place in late 1996.⁴⁰ On November 5, of that year, the Department of State published a public notice in the Federal Register amending the ITAR to reflect the jurisdictional shift in the regulation of the export of commercial communication satellites from the State Department to Commerce's Bureau of Export Administration.⁴¹ The shift in jurisdiction, while not an end to control,

³⁶ See generally, *Hearing on Satellite Export Controls Before the Senate Foreign Relations Committee, Subcommittee on International Economic Policy, Export, and Trade Promotion*, 106th Cong. (2000) (testimony of Clayton Mowry, Executive Director, Satellite Industry Association) [hereinafter Testimony of Clayton Mowry] (outlining the view of his association's membership with respect to export control regulation).

³⁷ See GAO/NSIAD-97-24, *supra*, note 25, at 2 (1997) (describing the process that created the initial transfer of the control, to a certain predefined technological level, of certain commercial communication satellites from the ITAR to the EAR); see also Pamela L. Meredith & Sean P. Flemming, *U.S. Space Technology Exports - The Current Political Climate*, 27 J. OF SPACE L. 35, 38 (providing an overview of the jurisdiction of satellite export controls as they've shifted from DDTC to BIS and back again).

³⁸ See GAO/NSIAD-98-211, *supra*, note 28, at 5 (noting that if any of the nine characteristics were included in the satellite it would remain under the control of the ITAR while a satellite having none of the nine would be under the jurisdiction of the EAR).

³⁹ See *id.* at 12 (1998) (identifying those critical military sensitive characteristics, which when any were integrated into a commercial communications satellite would cause the satellite to be controlled under the jurisdiction of the ITAR).

⁴⁰ See GAO/NSIAD-97-24, *supra*, note 25, at 1 (1997) (noting that the Clinton Administration announced the shift in licensing jurisdiction in March of 1996 with the resultant regulation changes following in the October - November time frame).

⁴¹ See 61 Fed. Reg. 56,895 (Nov. 5, 1996) (removing commercial communications satellites and other technologies from the control of the ITAR and placing them under the jurisdiction of the EAR).

was thought to favor the commercial considerations of industry over national security concerns.⁴² This is due in part to the fact that the underlying basis for control differs from the State to the Commerce Department.⁴³

The satellite industry favored the jurisdictional shift.⁴⁴ On the other hand, the defense and intelligence establishments within the Clinton Administration strongly opposed the administrative transfer.⁴⁵ The decision making process to effect the change took five months and was described as a case study in internal governmental strains between the national security establishment and the proponents of commercial and economic viability in defining United States security strategy in the af-

⁴² See Eric Schmitt & Jeff Gerth, *White House Memos to President Reveal Strategy to Shift Purview over Satellite Sales*, N.Y. TIMES, July 18, 1998, at A9 (revealing then deputy national security adviser Samuel Berger arranged the deal transferred commercial communication satellite licensing from the Department of State to the Department of Commerce where it would receive more benevolent treatment). A rationale memorandum penned by then national security advisor Anthony Lake, and the head of the National Economic Council Laura D'Andrea Tyson, noted the U.S. satellite industry should be enamored with the change since it would enable them to deal with the friendlier confines of the Commerce Department when exporting their wares. *See id.*

⁴³ See GAO/NSIAD-97-24, *supra*, note 25, at 4 (1997) (emphasizing the AECA mandates DDTC control exports to further national security without considering the impact such controls may have on U.S. economic or trade interests). On the other hand, BIS considers the effect a particular export will have on the economic security of the U.S. as well as national security and what foreign policy concerns may be in place at that time. *See id.*; see also *Hearing on Satellite Export Controls Before the Senate Foreign Relations Committee, Subcommittee on International Economic Policy, Export, and Trade Promotion*, 106th Cong. (2000) (testimony of William A. Reinsch, Under Secretary of Commerce) (distinguishing the differences between export controls under the EAR and the ITAR and arguing that since commercial communication satellites are commercial in nature they should be controlled under the EAR). *But see Hearings on Munitions Export Licensing Before the House International Relations Committee*, 106th Cong. (2000) (statement of John D. Holum, Senior Adviser, United States Department of State) (testifying the ITAR export licensing process and the underlying responsibilities are directed to further U.S. "foreign policy objectives and national security interests").

⁴⁴ See Lelyveld, *supra* note 3 (explaining that jurisdiction was transferred from the ITAR to the EAR after years of complaints from industry that DDTC was non-responsive resulting in lost sales).

⁴⁵ See Schmitt & Gerth, *supra*, note 42 (iterating that the then Secretary of State Warren Christopher agreed with the Pentagon and intelligence community reasoning that if sensitive satellite technology were exported it would reveal aspects of U.S. military and intelligence gathering capabilities which in-turn could jeopardize U.S. military interests).

termath of the Cold War.⁴⁶ In this and subsequent debates, the real issue of regulatory process, business process, and export control became lost in the mire of policy and political debate.⁴⁷ This, in part, led to the retransfer of the control of commercial communication satellites and their related parts, components, and technical data to the jurisdiction of the Department of State some two years after it resided in the Department of Commerce.⁴⁸

II. CURRENT REGULATORY FRAMEWORK FOR SATELLITES, PARTS AND COMPONENTS, AND ASSOCIATED TECHNICAL DATA

A. *ITAR Regulatory Framework and Satellite Control*

The Department of State, tasked with the primary authority of regulating United States exports of defense articles and defense services, derives its regulatory justification from the AECA.⁴⁹ All exports involve some semblance of risk and the regulatory control of those exports is a means of managing or mitigating that risk.⁵⁰ The level and stringency of ITAR controls, due to its security bias, tend to be more exacting when

⁴⁶ See *id.* (describing the tenor and substance of the debates within the Clinton Administration of the proper jurisdiction of satellite export controls in light of the changing national security landscape).

⁴⁷ See Clayton Mowry, *Haste Makes Waste*, SATELLITE BROADBAND, Aug. 1998 (illustrating the obfuscation of the real issues surrounding the control of sensitive satellite technology fostered in part by press sensationalizing while ignoring industry and regulatory standards and practices that had adequate controls in place).

⁴⁸ See 64 Fed. Reg. 13,679 (March 22, 1999) (codified at 22 C.F.R. pts. 121 & 124) (re-designating commercial communications satellites, their parts, components, and associated technical data to the ITAR), See H.R. REP. NO. 105-851, Vol. III, at 55-64 (1999) (providing the history of satellite export control regulation and the jurisdictional shifts between DDTC and BIS from the first change in 1992 through the 1999 shift back to State of all major aspects of satellites and satellite technology).

⁴⁹ See International Traffic in Arms Regulations, 22 C.F.R. § 120.1 (2000) (providing the general authorities for the control and regulation of the export and temporary import of defense goods and services to include satellites and commercial space technologies).

⁵⁰ See GAO/NSIAD-98-211, *supra*, note 28, at 1 (asserting the control of exports is about the management of risk between greater security and concerns of economy and commerce).

compared to the EAR.⁵¹ Under the ITAR, there are such requirements as Congressional notification⁵² for certain large-ticket sales, and stricter controls on the flow of information and technical exchanges between parties.⁵³ The ITAR requires separate approvals either under a DSP-5⁵⁴ or a Technical Assistance Agreement⁵⁵ (TAA) for technical data that exceeds the normal operations, maintenance, and training information needed to operate a defense article properly.⁵⁶

The USML provides the definitive list of those items, technologies, and types of technical data controlled under the ITAR.⁵⁷ The effective control of satellites, their parts, components, and related technology was placed back in DDTC under USML Category XV where it previously resided before the initial jurisdictional shift to BIS.⁵⁸ Category XV of the USML lays out the controls for spacecraft and associated equipment. It begins with the satellites⁵⁹ themselves then identifies critical sub-

⁵¹ See *id.* at 10 (noting Commerce export procedures are less stringent than the State Department's).

⁵² See 22 C.F.R. § 123.15 (describing the process under the ITAR for export applications which require an added step of Congressional notification and review when the value of the proposed sale reaches certain dollar value thresholds and providing a more favorable time period for Congressional review for NATO allies and Australia, New Zealand and Japan as opposed to other nations).

⁵³ See GAO/NSIAD-98-211, *supra*, note 28, at 10 (saying the ITAR provides a more clearly defined control system for the export of technical data in that there is a separate licensing requirement for data that is non-existent in the EAR).

⁵⁴ See 22 C.F.R. § 123.1(a)(1) (identifying the DSP-5 as the application form for the licensing of permanent exports).

⁵⁵ See 22 C.F.R. § 120.22 (defining a Technical Assistance Agreement as "an agreement (e.g., contract) for the performance of a defense service(s) or the disclosure of technical data, as opposed to an agreement granting a right or license to manufacture defense articles").

⁵⁶ See 22 C.F.R. §§ 125.2 (a) & 125.4 (b)(5) (instructing a DSP-5 is required for the export of unclassified technical data unless that export is exempt under the procedures outlined in the ITAR, which would include basic operations, maintenance and training information related to hardware lawfully exported under the provisions of the ITAR).

⁵⁷ See 22 C.F.R. § 121 (providing the USML is comprised of those articles, services and related technical data therein listed are designated defense articles pursuant to the relevant sections of the AECA).

⁵⁸ See 64 Fed. Reg. 13,679 (March 15, 1999) (returning export control jurisdiction, effective Mar. 15, 1999, to DDTC for "spacecraft, including satellites, and all spacecraft technical data, as well as all components, accessories, attachments, and related technical assistance, including, without exception, all launch support activities").

⁵⁹ See 22 C.F.R. § 121.1 Category XV (a) (enumerating the spacecraft and types of satellites are captured under the control of Category XV as "communications satellites,

systems and components.⁶⁰ In addition, parts and components not specifically enumerated therein yet still utilized in the manufacture of satellites are controlled.⁶¹ Finally, the USML regulates all technical data, as defined in 22 C.F.R. § 120.10, and defense services related to those items captured in the category.⁶²

In addition to the USML defined controls for spacecraft, the ITAR has a section circumscribing a special set of export requirements for defense articles and services that are controlled under Category XV.⁶³ These regulations heighten the level of compliance stipulations placed on the exporter including the use of technology transfer control plans, encryption technology control plans, Department of Defense (DOD) monitoring of technical discussions and launch activities.⁶⁴ Consequently, launch failure investigations and the ensuing reports, like those described in the Cox Committee findings, must be licensed prior to providing any copies to foreign persons.⁶⁵

remote sensing satellites, scientific satellites, research satellites, navigation satellites, experimental and multi-mission satellites").

⁶⁰ See 22 C.F.R. § 121.1 Category XV (b)(c)(d) (listing those critical subsystems and components that are controlled such as global positioning systems, ground stations for the telemetry, tracking and control of spacecraft, and radiation hardened devices and microelectronics).

⁶¹ See 22 C.F.R. § 121.1 Category XV (e) (capturing all parts and components and other equipment specifically or modified for those articles itemized in Category XV).

⁶² See 22 C.F.R. § 121.1 Category XV (f) (defining all technical data and defense services controlled under Category XV of the USML).

⁶³ See 22 C.F.R. § 124.15 (placing specific and exceptional controls on the export of Category XV hardware and associated data for end-use in countries outside of NATO and major non-NATO allied countries). However, while the regulations require these special provisions for countries outside of NATO and other listed allies, the stricter controls still may be applied to NATO and major non-NATO allies at the discretion of the Director of the Directorate of Defense Trade Controls. See *id.*; see also *Treat Allies as Allies on Satellite Exports, Arianespace Says*, SATELLITE WK., June 28, 1999 (complaining that major United States allies are being treated the same as countries of proliferation concern thereby harming the satellite trade).

⁶⁴ See 22 C.F.R. § 124.15 (mandating the use of DOD monitors for certain export activities related to spacecraft and spacecraft launch the cost of which will be fully reimbursable by the exporter).

⁶⁵ See *id.* (proscribing the process of licensing, control and monitoring for launch failure investigations when there is a failure on a foreign launch).

B. Importance of Trade Compliance

A lack of compliance with the ITAR could result in the imposition of fines and penalties of both a civil and criminal nature as well as the possible suspension of an entity or individual's ability to export.⁶⁶ What makes trade compliance so important is the ability of the Office of Defense Trade Controls to impose an interim suspension which effectively shuts down an entity's ability to engage in international trade governed under the ITAR.⁶⁷ In addition, the Department of State may statutorily debar any person or entity from engaging in ITAR regulated trade either directly or indirectly when they are convicted of violating United States criminal statutes referenced in the ITAR.⁶⁸ The effect of either an interim suspension or a debarment⁶⁹ could be catastrophic on companies that regularly rely on foreign sales for a good portion of their profit base.⁷⁰

The United States satellite industry generates sales of approximately \$30 billion annually, of which \$11.5 billion comes from export sales.⁷¹ Much of those sales are spurred by the revolution in information technology which requires high speed cost efficient modes of transmitting voice, data, internet, and broadcast traffic.⁷² Export control violations and the possible loss of the ability to compete in this fast paced market could be extremely deleterious to United States manufacturers.⁷³ Even an

⁶⁶ See 22 C.F.R. § 127 (enumerating the fines and penalties provisions of the ITAR and the consequences that may be suffered in conjunction with violations).

⁶⁷ See 22 C.F.R. § 127.8 (defining interim suspension as a loss of export privileges for possible ITAR violations for a period of up to 60 days unless certain other circumstances are in place).

⁶⁸ See 22 C.F.R. § 127.7 (defining debarment as a loss of export privileges for a period of generally three years).

⁶⁹ See 22 C.F.R. § 127 (noting the portion of the ITAR that identifies the penalties accompanying an interim suspension or a debarment).

⁷⁰ See James Hackett, *Satellite Industry Ensnared*, WASH. TIMES (D.C.), Aug. 5, 1999, at A17 (noting more than one third of U.S. satellite industry sales are derived from overseas markets).

⁷¹ See *id.* (warning sales could be lost to European and Asian competitors who are aggressively challenging the U.S. industry dominance).

⁷² See *id.* (opining time is money and speed to market greatly affects the ability to make sales).

⁷³ See Matthew J. McGrath & Arleigh V. Closser, *Pitfalls for High Technology Companies Involved in International Commerce*, METRO. CORP. COUNS., May 1999, at 14

interim suspension, which statutorily can last no more than sixty days, can delay a program significantly enough to reduce follow-on opportunities if a company is perceived to be a non-reliable supplier.⁷⁴

In July, 2000, the Department of State and Lockheed Martin came to an agreement over a settlement for alleged violations of the ITAR.⁷⁵ Apparently, Lockheed Martin was passing technical reports to a company partially owned by the Chinese government detailing certain workings of rockets.⁷⁶ The terms of the settlement required Lockheed Martin to invest \$5 million in revamping and upgrading its internal control and compliance program with respect to exports.⁷⁷ Moreover, Lockheed Martin was assessed an \$8 million fine to be paid over a four year period.⁷⁸ In an unrelated incident, Boeing Co. found its ability to export temporarily suspended while under a federal grand jury investigation for alleged violations of the ITAR in conjunction with its Sea Launch joint venture.⁷⁹ The temporary suspension

(noting instances of export control violations and the resultant penalties' effects on businesses in noncompliance with the regulations). *See generally* Sam Nunn & Paul Wolfowitz, *Nunn-Wolfowitz Task Force Report: Industry "Best Practices" Regarding Export Compliance Programs*, July 25, 2000 (outlining solid industry practice in export and international trade compliance in a study commissioned by the Board of Directors of the Hughes Electronics Corporation). *Cf.* Donald W. Smith, *Defense of Export Control Enforcement Actions*, 798 PLI/COMM. 743 (1999) (providing strategies for good export compliance and how to internally handle violations on corporate level and manage their disclosure to the cognizant United States Government authorities).

⁷⁴ *See* McGrath & Closser, *supra*, note 73 (assessing the consequences of failing to adequately adhere to the requirement of international trade regulation).

⁷⁵ *See State and Lockheed Settle Export Control Dispute*, ARMS CONT. TODAY, July 1, 2000, at 35 (reporting the settlement of export violations by Lockheed Martin Corporation for the supply of certain unlicensed technical data in relation to China and the penalties incurred for those violations).

⁷⁶ *See id.* (contending Lockheed Martin violated the ITAR by supply the Chinese Asia Telecommunications Corporation with a technical report detailing problems with kick motors used on satellites launched from Chinese launch vehicles thus allegedly aiding the Chinese in their ballistic missile program).

⁷⁷ *See id.* (outlining such required measures as the institution of a computer control system that would cover all technical data and assistance to be provided foreign persons in an approved contract).

⁷⁸ *See id.* (observing the overall penalty of \$13 million was the largest civil fine imposed for a violation of the ITAR up to that point in time); *see also*, *Lockheed Accused of Giving Rocket Information to Chinese*, APWIRES, Apr. 6, 2000, 04:58:00 (noting Lockheed Martin could be fined up to \$15 million for the alleged violations).

⁷⁹ *See* McGrath & Closser, *supra*, note 73 (discussing problems associated with export control violations and their resultant effects on companies found in violation of

was lifted after the Department State and Boeing came to an agreement on a \$10 million civil penalty to be paid by the company for passing military and space technology in violation of the export authorization for the Sea Launch joint venture.⁸⁰

III. THE POLITICS OF TRADE REGULATION: TENSIONS BETWEEN NATIONAL SECURITY AND ECONOMIC VIABILITY

A. *The Cox Committee*

On June 18, 1998, the United States House of Representatives adopted House Resolution 463.⁸¹ Pursuant to H.R. 463, the House established the Select Committee on US National Security and Military/Commercial Concerns with the People's Republic of China. Commonly known as the Cox Committee, its mandate was to investigate the acquisition of sensitive technology by the People's Republic of China in violation of United States export control laws and regulations.⁸² The Cox Commit-

the regulations); see also, Sea Launch Completes Integrated System Testing, AEROSPACE DAILY, Mar. 9, 1999, at 354 (iterating the fines, penalties, and remedies Boeing received for the ITAR violations in conjunction with the Sea Launch program including the requirement for spending \$2.5 million to improve document and technical data handling procedures), Mike Maharry, *Date Set for Sea Launch Debut/But Boeing not so Sure of Russians' March 25 Target for Satellite Launch Venture*, THE NEWS TRIBUNE, Mar. 6, 1999 (elaborating on the myriad of doubts surrounding the first launch for Sea launch including the State Department's uncovering of 207 export violations).

⁸⁰ See McGrath & Closser, *supra*, note 73 (noting the reasons behind DDTC's suspension of the Sea Launch joint venture license that included foreign partners from Russia and Ukraine). See generally *Orbit/FR's Munitions List Application Subject to Denial*, DOW JONES NEWS SERV., Nov. 2, 1999, 16:50:00, (revealing that Orbit/FR plead guilty to ITAR violations when passing sensitive missile technology to the Chinese resulting in a \$600,000 fine while facing a possible 10 year export ban).

⁸¹ See H.R. Rep. No. 105-851, Vol. III, at 206 (1999) (outlining the scope of the Cox Committee's investigation as discerning the affect on national security that certain unauthorized technology exports to the People's Republic of China had) see also Stephen W. Stathis, *Transfer of Missile and Satellite Technology to China: A Summary of H. Res. 463 Authorizing a House Select Committee*, CRS Rep. 98-549, at CRS-1 (June 24, 1998) (providing a summary of the resolution creating the Cox Committee and its jurisdiction, committee structure and rules, funding and staffing, gathering of information, the treatment of classified and sensitive information).

⁸² See H.R. Rep. No. 105-851, Vol. III, at 206-07 (1999) (noting the responsibilities provided to the committee under the resolution and the process in which it conducted the ensuing Congressional investigation); see also CRS Rep. 98-549, at CRS-1 (noting one of the Committee's investigative mandates was to examine the operations of certain

tee, among other things, investigated certain alleged violations of the ITAR by major United States satellite manufacturers.⁸³ In reaction to the Cox Committee's ultimate findings, Congress enacted legislation that reverted the jurisdiction of satellite export controls from the EAR back to the ITAR.⁸⁴

The events that prompted the investigation were two failures of the Chinese Long March launch vehicle carrying United States manufactured satellites.⁸⁵ The failures, however, did not raise US Government concerns; rather, the passing of technical data⁸⁶ between the United States and China during the launch failure investigations raised legitimate concerns of possible export control violations.⁸⁷ During the course of the launch failure investigation prompted by the 1996 loss of a United States manufactured satellite, an employee of the US manufacturer inadvertently sent technical data concerning the failure to the Chinese without the proper export authorization.⁸⁸ In addition to this incident, the Cox Committee determined that a previous

satellite manufacturers to determine whether their actions aided in the enhancement of Chinese missile capabilities).

⁸³ See H.R. Rep. No. 105-851, Vol. I, at xii (1999) (finding, among other things, the People's Republic of China either stole or illegally obtained U.S. missile and space technology thereby bettering their own military and intelligence capabilities).

⁸⁴ See The Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, 112 Stat. 1920 (1998) (requiring the commercial communications satellites, parts and components and associated technical data be returned to the control of the USML).

⁸⁵ See Scott Blake Harris, *Witch Hunt*, SATELLITE BROADBAND, Sept. 1, 1999 (noting the loss of the Space Systems/Loral satellite, through launch failure, led to an investigation by both the launch vehicle manufacturer and the satellite manufacturer); see also *Don't Label Satcoms as Lethal Weapons*, AVIATION WK. & SPACE TECH., Feb. 1, 1999 at 94 (identifying the launch vehicle as the Chinese Long March).

⁸⁶ See International Traffic in Arms Regulation, 22 C.F.R. § 120.10 (2000) (defining technical data as information required in the "design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles . . .").

⁸⁷ Compare Lelyveld, *supra*, note 3 (emphasizing a Pentagon report noted the Chinese gained invaluable data on rockets and missiles from the launch failure investigation reports from Hughes Space and Communications in 1995), with *Don't Label Satcoms as Lethal Weapons*, *supra*, note 85 (reasoning that Congress overreacted concerning the allegations that both Hughes and Space Systems/Loral passed crucial technical data to the Chinese in their launch failure investigations).

⁸⁸ See Harris, *supra*, note 85 (asserting once Space Systems/Loral discovered the unauthorized transfer of technical data to the People's Republic of China it notified the Department of State of the mistake).

Chinese launch failure involving a Hughes manufactured satellite was rife with alleged export violations.⁸⁹

The Committee's findings were a harsh indictment of Chinese espionage activities in the United States.⁹⁰ While the report outlined serious allegations of export control violations, some contend the Committee exaggerated its findings and embroidered its report with a presumption of culpability.⁹¹ Fur-

⁸⁹ See *id.* (contending the Department of Commerce under its export regime without the benefit of State Department consultation officially sanctioned Hughes actions). In the 1996 transfer of jurisdiction, the Department of Commerce was required to adopt more stringent licensing measures to heighten control including the requirement to refer all commercial communications license applications to the Departments of State, Defense, and Energy, and the Arms Control and Disarmament Agency for review and comment prior to the issuance of a license. See GAO/NSIAD-98-211, *supra*, note 28, at 7. But see H.R. Rep. No. 105-851 at xxi (1999) (reporting that neither the Hughes nor the Space Systems/Loral disclosures were voluntary, rather they were made after the US Government demanded they account for their actions).

⁹⁰ See H.R. Rep. No. 105-851, Vol. III, at 166 (1999) (recommending the President provide a semi-annual report to Congress assessing Chinese espionage activities over the last six months in addition to other measures to thwart future Chinese spying activities).

⁹¹ See Lewis L. Franklin, *A Critique of the Cox Report Allegations of PRC Acquisition of Sensitive U.S. Missile and Space Technology*, in THE COX COMMITTEE REPORT: AN ASSESSMENT 81, 86 (M.M. May ed., 1999) (noting the style of writing is inflammatory, laden with a presumption of guilt, and laced with an assuredness the Chinese military made great strides through the illegal acquisition of U.S. technology); see also Robert Scheer, *The China Scandal that Wasn't*, THE STAR LEDGER (Newark, NJ) Dec. 28, 1999, at 13 (reporting when the Stanford study came out debunking the Cox Committee the media generally ignored its release). But see, Gary Milhollin, *Forget National Security, Just Show us the Money*, HOUS. CHRON. Jan. 28, 2000, at 29 (concurring with the Cox Committee's findings that the Chinese improved their missile technology through the illegal acquisition of U.S. technology). Information concerning Chinese activities is still coming to light with new reports culled from documentation provided by a Chinese defector which is only now being translated shows the Chinese concentrated their technology acquisition efforts heavily in the area of missiles. See Walter Pincus & Vernon Loeb, *China Spy Probe Shifts to Missiles: Defectors Papers Steer Inquiry*, WASH. POST, Oct. 19, 2000, at A1 (stating the Chinese expended great resources in aggressively obtaining sophisticated U.S. missile technology during the period the Cox Committee was concentrating on in their report); see also Walter Pincus & Vernon Loeb, *Pentagon to Add 450 Experts to Protect Defense Secrets*, WASH. POST, Oct. 27, 2000, at A2 (remarking on the Department of Defense's reaction to the news that the People's Republic of China obtained sensitive U.S. missile technology). A Chinese defector provided the U.S. government with over 13,000 pages of documents on the Chinese efforts to procure, through whatever means, U.S. nuclear and missile technology. See *id.* Only a portion of the documentation was translated the rest was thought to be mundane until translated under pressure from the Federal Bureau of Investigation whereupon the documents were found to contain ample evidence U.S. missile technology was compromised by both the military and its contractors. See *id.*

thermore, the report's detractors point to the small number of prosecutions as contradictory to the committee's central contention that the Chinese illegally obtained critical missile technology.⁹² The incidents surrounding the Hughes and SS/Loral launch failure investigations were consigned to the United States Attorney's office for criminal investigation with little result.⁹³

Nonetheless, the report's detractors fail to take a number of factors into account.⁹⁴ Lewis Franklin, a former Vice-President at TRW Space and Defense and one of the authors of an assessment criticizing the Cox Committee report, points out both Hughes and SS/Loral adamantly denied any violation of the export control regulations or the provisions of the licenses for the failed launches.⁹⁵ Conversely, the Cox Committee's finding that both Hughes and SS/Loral voluntarily disclosed their violations, after investigations were initiated into the possible illegal transfer, to the Directorate of Defense Trade Controls at the Department of State contradicts Mr. Franklin's assertion.⁹⁶ The fact that the original version of the Committee's report was classified would lead one to believe the public version does not con-

⁹² See Franklin, *supra*, note 91, at 83 (explaining the Cox Committee report rarely mentions convictions for past violations over the many years it alleges that the Chinese were stealing missile technology).

⁹³ See *id.* (elaborating on the fact there are no indictments up to that point and there is even less intimation that any are forthcoming).

⁹⁴ See generally H.R. Rep. No. 105-851, Vol. III, at ii (1999) (noting the report is a declassified summary of the original report, which was determined to contain information that if released would potentially harm national security or jeopardize ongoing criminal investigations).

⁹⁵ See Franklin, *supra*, note 91, at 82 (strengthening his contention by pointing out the Chinese issued a criticism of the report denying its finding and the Cox Committee assessment is flawed with a more likely scenario being the Chinese technology in question was not illegally obtained, rather it was developed through the natural course of scientific growth and general engineering progress).

⁹⁶ See H.R. Rep. No. 105-851, Vol. III, at 150-57 (1999) (extrapolating Space System/Loral's voluntary disclosure was in response to a letter previously received from the State Department stating they suspected possible violations of the ITAR in Loral's dealings with China on the launch failure investigation). The State Department, in their correspondence to Loral, recommended Loral cease and desist all activity requiring prior written approval from DDTC, fully disclose all activities to date, and detail all provisions of technical data to China controlled by the ITAR. See *id.*

tain the necessary evidence or information to back up the Committee's findings of violations.⁹⁷

These alleged regulatory violations prompted the Cox Committee to recommend that the sole licensing authority for satellites should be the Department of State.⁹⁸ In addition, the Committee suggested that the administration should, with all due haste, carry through with the Satellite Export Control Provisions of the Strom Thurmond National Defense Authorization Act for FY 1999.⁹⁹ The act was the implementing legislation transferring the export licensing jurisdiction for commercial communications satellites from the Commerce Department back to the State Department where it originally resided.¹⁰⁰ Some observers in industry and the trade media saw the Cox Committee and the jurisdictional shift as a political witch-hunt.¹⁰¹ Nevertheless, it did not alter the fact the new regulatory framework exporters would operate under was the authority of the Department of State at DDTTC.¹⁰²

⁹⁷ See *id.* at ii (declaring certain classified information was left out of the public version since it may harm national security or interfere with ongoing criminal investigations).

⁹⁸ See *id.* at 170 (addressing the Cox Committee's recommendations):

⁹⁹ See *id.* (recommending the executive branch should implement all provisions of the Strom Thurmond National Defense Authorization Act with respect to the control of satellite exports and their transfer to the jurisdiction of the ITAR); see also Meredith & Flemming, *supra*, note 37, at 39 (discussing the implementation of the Thurmond Act and its resultant amendments to the ITAR and the imposition of stricter controls on the transfer of satellite technology).

¹⁰⁰ See *NATO Allies Protest New U.S. Rules Tightening Curbs on Satellite Exports*, 16 I.T.R. (BNA) 710 (Apr. 28, 1999) (Yerkey, Gary G.) (discussing the legislation authorizing the jurisdictional shift).

¹⁰¹ See Harris, *supra*, note 85 (accusing Congress of orchestrating the shift because of political considerations related to an ongoing campaign finance investigation into the Clinton administration).

¹⁰² See *Removal of Commercial Communications Satellites and Related Items from the Department of Commerce's Commerce Control List for Retransfer to the Department of State's United States Munitions List*, 64 Fed. Reg. 13,338 (Mar. 18, 1999) (amending the EAR by relinquishing control of commercial communications satellites, parts and components, and related technical data); see also *Control of Commercial Communications Satellites on the United States Munitions List*, 64 Fed. Reg. 13,679 (Mar. 22, 1999) (codified at 22 C.F.R. § 121) (amending the ITAR by placing commercial communications satellites back on the USML).

B. Economics v. National Security in Export Regulation

The policy argument on the control of exports and technology for national security reasons and a more liberal control regime for reasons of economic viability has gone on for years.¹⁰³ If trade and economic viability are of primary concern, then the Commerce Department is the customary regulatory regime for controlling products and technologies that are commercial in nature and yet retain certain characteristics that warrant control.¹⁰⁴ Some would argue stricter controls benefit foreign satellite manufacturers in that such controls drive foreign customers away from United States manufacturers due to regulatory uncertainty.¹⁰⁵ Over the last five years, Congress became more conservative on the trade front reversing a post-Cold War trade liberalization process begun during the administration of George H. W. Bush.¹⁰⁶ United States allies complained the regulatory change placed them in the same export control category as those countries about which the United States has legitimate

¹⁰³ Compare Eric Schmitt, *Change in Control of Satellite Sales Gains in Congress*, N.Y. TIMES, Sept. 18, 1998, at A1 (noting the Clinton administration position where US policy must take into account American business interests when fashioning the export regulatory policy concerning satellites), with Bruce S. Middleton, *Satellite Exports: Confusion and Cost*, SATELLITE BROADBAND, May 1, 1999, at 46 (arguing the denials of two export license requests for U.S. manufactured satellites to a majority Chinese owned commercial satellite company was driven by security fears on Chinese ownership and the possible involvement of the Chinese military in the endeavor). See generally Karim K. Shehadeh, Comment, *The Wassenaar Arrangement and Encryption Exports: An Ineffective Export Control Regime that Compromises United States' Economic Interests*, 15 AM. U. INT'L L. REV. 271, 280-84 (1999) (delineating the tensions existent between national security and economic pursuits in the export control of computer software products having encryption capability).

¹⁰⁴ See H.R. Rep. No. 105-851, Vol. III, at 9 (asserting one of the primary objectives of the Export Administration Act of 1979, which was the authority under which the EAR was promulgated, was to "minimize interference with the ability to engage in commerce").

¹⁰⁵ See Middleton, *supra*, note 103 (protesting the U.S. satellite manufacturer is the big loser in the regulatory shift of satellite control while Japanese and European manufacturers will reap the rewards if they can offer a quality product without the export control hassles encountered in the U.S. market).

¹⁰⁶ See Michael S. Lelyveld, *Republicans Take a Populist Turn*, J. OF COMM., Oct. 22, 1998, at 1A (discerning the Republican's rise in Congressional power has resulted in a less tolerant view towards U.S. trade interests).

security concerns.¹⁰⁷ Some in the satellite industry have in part blamed the regulatory shift as a rationale for the precipitous drop in United States satellite exports from 1998 to 1999.¹⁰⁸

The national security and foreign policy interests of the United States are the basis of the export control regime fostered under the Arms Export Control Act.¹⁰⁹ The export licensing process outlined in the ITAR and administered by DDTC is meant to strictly scrutinize each application to ensure it is in line with such interests.¹¹⁰ United States fears of the proliferation of weapons of mass destruction and the possible regional instability that it could cause are not unfounded.¹¹¹ Furthermore, the United States Government found that China made a

¹⁰⁷ See *Treat Allies as Allies on Satellite Exports, Arianespace Says, supra*, note 63 (objecting Arianespace has had as many as ten launch contracts jeopardized by the uncertainty caused by the shift in export regulation mandated by the Defense Authorization Act); see also Yerkey, *supra*, note 100 at 710 (pointing out the embassies of the United Kingdom, Germany, France, and Italy each logged a protest with the Clinton administration over the shift in control that in essence penalizes allies by placing them in the same category as the Chinese or Russians thereby jeopardizing long standing trade ties between U.S. and European space markets).

¹⁰⁸ See Jeremy Singer, *U.S. Laws, Market Cycle Cited in Export Drop*, SPACE NEWS, Dec. 20, 1999, at 8 (noting the drop in 1999 export sales, from the previous year, of non-military satellites and their parts and components was \$275 million constituting a 41 percent reduction).

¹⁰⁹ See 22 U.S.C. § 2778 (2000) (indicating the AECA mandates the President to control the export of defense articles in furtherance of world peace and the national security and foreign policy of the country). The AECA stipulates the considerations to take into account when determining the exportability of a particular license application include whether or not the export would contribute to an arms race, if the export could aid in the design or construction of a weapon of mass destruction, aid a terrorist organization, escalate regional tensions or conflicts or be in contravention to international arms control or proliferation agreements. See *id.*

¹¹⁰ See Lelyveld, *supra*, note 3 (contending Congressional intent in shifting satellite jurisdiction back to State was meant to slow down the licensing process for security reasons and the government is there to regulate industry not foster it, in addition to noting the Department of Defense made claims that China obtained information from both Hughes and Space Systems/Loral, which could aid in the improvement of missile weapon technology).

¹¹¹ See 63 Fed. Reg. 27,781 (May 20, 1998) (giving notice all U.S. export approvals for USML articles are revoked and that future license applications will be denied for India due to India's detonation of a nuclear device and that such revocation was in furtherance of U.S. foreign policy interests); see also 63 Fed. Reg. 33,122 (Jun. 17, 1998) (giving notice that all U.S. export approvals for USML articles are revoked and that future license applications will be denied for Pakistan due to Pakistan's detonation of a nuclear device and that such revocation and future denial was in the foreign policy interests of the United States).

concerted effort to illegally obtain sensitive United States military technology.¹¹² Chinese proliferation of missile technology into destabilized areas, sustained for years, is not isolated outside the normal course of their international dealings.¹¹³ Chinese missile proliferation and attempts to get China to sign up to the Missile Technology Control Regime¹¹⁴ (MTCR) have long been foreign policy concerns of the United States.¹¹⁵ While the debate went on for years, concrete numbers concerning lost sales due solely or primarily to export controls are hard to come by.¹¹⁶ This in turn raises certain doubts concerning the validity

¹¹² See H.R. Rep. No. 105-851, Vol. I, at 42 (describing a U.S. Customs Service operation establishing the Chinese government, through commercial companies and other means, attempted to divert surplus U.S. missile parts, fighter plane navigation systems, tank parts and components, computer equipment and encryption technology).

¹¹³ See Robert Burns, *CIA: China Expanded Missile Role*, AP ONLINE, Aug. 9, 2000 (discussing a recently released CIA report which asserts China aided Pakistan in the development of missile technology and Chinese business entities assisted programs for the development of weapons of mass destruction in Iran, North Korea, and Libya); see also, Helene Cooper & Matthew Forney, *Politics & Economy: U.S. and China to Revive Talks on Arms Issues*, WALL ST. J., July 3, 2000, at A14 (stating China increased supplies of critical missile technology and hardware to Pakistan after the 1998 detonations of nuclear devices in India and Pakistan). One reason for the foray into weapons proliferation is thought to be China's unfriendly relations with India, with which China had a border conflict in the earlier part of the 1960s, and a nuclear capable Pakistan serves as a good buffer. See *id.*; see also, Robert S. Greenberger, *Relations Worsen Between U.S., China as Suspensions, Anger Foment Disputes*, WALL ST. J., July 5, 1995, at A10 (calculating U.S.-Sino relations would not improve in part due to, then, allegations China assisted the Pakistani missile program in violation of certain nonproliferation accords); see also, Gerald F. Seib, *Missile Race in Middle East Continue Despite U.S. Efforts to Stall Buildup*, WALL ST. J., June 8, 1992, at A6 (surmising the spread of long-range missiles in the Middle East to countries such as Syria, Iran, Iraq, and Libya lead to suspicions China may be tied to the missile sales).

¹¹⁴ See United States General Accounting Office, Report to the Chairman, Committee on International Relations, House of Representatives, *Export Controls: Some Controls Over Missile Related Exports to China are Weak*, GAO/NSIAD-95-82, Apr. 1995, at 1 (identifying the MTCR as an organization, currently with 25 member states, started in 1987 by the G-7 member countries to stem the proliferation of missiles and related technology); see also International Traffic in Arms Regulations, 22 C.F.R. § 126.1 (2000) (denoting the MTCR Annex lists all items controlled under the ITAR for missile proliferation concerns).

¹¹⁵ See GAO/NSIAD-95-82, *supra*, note 114, at 3-5 [hereinafter GAO/NSIAD-95-82] (outlining U.S. negotiations with China between 1992 and 1994 to obtain China's adherence to the MTCR).

¹¹⁶ See Singer, *supra*, note 108 (noting the primary reason for the drop in international satellite sales was the cyclical nature of the business). But see Jeffery Silva, *Satellite Reform Costly to U.S. Exports*, RCR RADIO COMM. REP., May 29, 2000, at 24 (arguing satellite exports dropped 40 percent since 1998 due to a tightening of satellite export

of economic contentions surrounding the loss of sales to burdensome regulatory hurdles.¹¹⁷

Whatever the doubts or the strengths of each argument, it must be recognized that both sides have valid concerns that must be addressed in the regulatory process.¹¹⁸ The policy and resultant regulations replacing EAR control with ITAR control were implemented as a means of reducing possible security risks. The government would accomplish this by preventing the wrong technology from getting in the hands of countries seeking to enhance missile capabilities to the possible detriment of United States security interests.¹¹⁹ Both security and economic vigor are important national concerns that are not mutually exclusive; they are in reality conjoined and best served by mutual government and industry cooperation in the regulatory process.¹²⁰ Such cooperation was realized when DDTC enlisted the assistance of the Defense Technology Security Administration (DTSA) and DTAG in the creation of the new special bulk licensing regime for satellite parts, components and associated technical data.¹²¹

restrictions). The 40 percent drop and its reliance on the tightening on export controls as the primary cause must be questioned when the final change in jurisdiction did not take place until 1999, thereby nullifying the arguments premise that the tightening of export controls is the driver of a loss in overseas sales. *See generally* 64 Fed. Reg. 13,679 (Mar. 22, 1999) (codified at 22 C.F.R. pts. 121 & 124) (maintaining the jurisdictional shift and the tightening of controls happened in 1999, and under the shift those items were licensed under Commerce and would be maintained under Commerce's jurisdiction until the licenses expire).

¹¹⁷ *See Treat Allies as Allies on Satellite Exports, Arianespace Says, supra*, note 63 (reasoning the shift in satellite export controls will retard international space commerce, an Arianespace official acknowledges his company neither lost business nor missed the company's launch schedule due to the new regulations).

¹¹⁸ *See* James M. Broder, *Export Rules Protect U.S. Security*, SPACE NEWS, July 10, 2000, at 20 (postulating the Departments of Defense and State, under the new satellite export control regulatory framework are protecting what should be protected while not placing unnecessary burdens on the satellite industry).

¹¹⁹ *See id.* (implying the significance of continued vibrant trade relations in space products between the United States and its "close allies and friends").

¹²⁰ *See id.* (emphasizing the point that the essential tenets of national and economic security are best served through intergovernmental cooperation in the creation and formulation of export control regulations).

¹²¹ *See Defense Trade Security Initiative: Special Commercial Satellite Licensing Regime*, FACT SHEET RELEASED BY THE BUREAU OF POLITICAL-MILITARY AFFAIRS, U.S. DEPARTMENT OF STATE, AND THE OFFICE OF THE UNDERSECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS, U.S. DEPARTMENT OF DEFENSE, (May 24,

IV. RATIONAL BASIS FOR NEW REGULATION: AN ANALYSIS OF CONSTRUCTION

A. New Regulation and a Constructive Approach

Bad press, the concerns of United States allies and heavy political lobbying helped to ensure the insertion of Section 1309 into the fiscal year 2000 Foreign Relations Authorization Act.¹²² The act mandated the State Department, through DDTC, to create a new licensing framework for an expeditious export licensing system for commercial communications satellites, their parts, components, and technologies destined for export by United States industry to North Atlantic Treaty Organization (NATO) allies¹²³ and major non-NATO allies (hereinafter NATO+Major Allies).¹²⁴ In addition to calling for the new licensing regime, the act required DDTC to give priority in the decision making process to United States national security interests and its responsibilities as a party to the Missile Technology Control Regime.¹²⁵

In January, 2000, William Lowell, then Director of the Office of Defense Trade Controls, approached the Defense Trade Advisory Group¹²⁶ (DTAG) and tasked them with assisting

2000) *at*, http://www.state.gov/www/global/ar...reau_pm/dtc/ [hereinafter Fact Sheet] (providing background on the cooperative effort that created the new licensing framework).

¹²² See 65 Fed. Reg. 34,089 (May 26, 2000) (to be codified at 22 C.F.R. § 123) (announcing the new regulations and summarizing the mandate for the regulations as found in the Foreign Relations Authorization Act).

¹²³ See <http://www.nato.int> (Nov. 2, 2000) (enumerating NATO member states in the year 2000 as Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Spain, Turkey, United Kingdom, and United States).

¹²⁴ See H.R. 3427, 106th Cong. § 1309 (1999) (authorizing the State Department to take such action and defining major non-NATO allies as those enumerated in section 644 (q) of the Foreign Assistance Act of 1961).

¹²⁵ See *id.* (placing additional requirements on the Secretary of State when constructing the new licensing regime including license review by the defense and intelligence communities).

¹²⁶ See 57 Fed. Reg. 11,343 (Apr. 2, 1992) (establishing the Defense Trade Advisory Group to provide an official consultative role in the formulation of regulations and policy dealing with the ITAR); see also 63 Fed. Reg. 15,254 (Mar. 30, 1998) (publishing notice the charter of the Defense Trade Advisory Group was renewed for two years), 65 Fed.

DDTC in creating a new bulk licensing process for the export of satellite parts and components and technical data.¹²⁷ Through this process, the Department of State sought a logical and rational solution to a regulatory problem faced by industry.¹²⁸ The jurisdictional shift of satellite export regulations was borne of politics.¹²⁹ The State Department neither asked nor sought the shift, yet they were trying to facilitate the statutory requirements placed upon them with respect to the control of satellite exports.¹³⁰

The DTAG set up the DTAG Comsat Task Force to assist DDTC in this effort.¹³¹ The Task Force began by creating an

Reg. 11,827 (Mar. 6, 2000) (publishing notice the charter of the Defense Trade Advisory Group is being renewed for another two years).

¹²⁷ See *Hearing Before the Senate Foreign Relations Committee, Subcommittee on International Economic Policy, Export, and Trade Promotion*, 106th Cong. (2000) (statement of John D. Holum, Senior Advisor, United States Department of State) [hereinafter Statement of John D. Holum] (detailing the enlistment of the aerospace industry, in the form of the Defense Trade Advisory Group, to form a task force to assist in the implementation of the requirement to create an expedited licensing process for certain satellite technology exports).

¹²⁸ See *id.* (explaining many satellite parts and component manufacturers faced a myriad of problems with the jurisdictional shift back to DDTC when under the Commerce regulations many of them did not require a license to affect a sale and ship product); see also Statement of James M. Bodner, *supra*, note 35 (declaring the Department of Defense's cooperation in the reform of the satellite export control process). In the cooperative effort, the Department of Defense considered the improvement of national security while giving weight to legitimate space business with U.S. allies and friends. See *id.* Mr. Bodner, in his remarks, noted export control reform is a DoD policy position that would maintain the protection of critical technology, preserve the underlying stability of the defense manufacturing base by promoting new technology initiatives through commercial sales, and fostering cooperation with allies and their space and defense industries. See *id.*

¹²⁹ See Public Law 105-261 (shifting the statutory and regulatory authority for the control of satellite exports from the Department of State to the Department of Commerce). See generally H.R. Rep. No. 105-851 Vol. I, II, III (1999) (detailing the findings of the investigation that helped spur the passage of the export control jurisdictional shift of satellites, their parts and components and associated technical data to the Department of State because of concerns of proliferation of sensitive United States technology).

¹³⁰ See Statement of John D. Holum, *supra*, note 127 (recalling while the Department of State was in no way involved in the jurisdictional shift of commercial satellite export controls, since gaining jurisdiction they are committed to the administration of the regulations in a manner which adheres to the statutory directive of protecting national security).

¹³¹ See Interview with Stuart Quigg, President, Q International and Member of the Defense Trade Advisory Group Comsat Task Force (Nov. 10, 2000) [hereinafter Interview with Stuart Quigg] (recounting the formation of the Task Force by William Lowell then Director of the Office of Defense Trade Controls). The DTAG was given a narrowly

internal structure of sub-committees to address three priority areas. The first concentrated on the export of satellite parts and components and associated technical data, including offshore procurement equipment.¹³² This included a limited number of products considered significant military equipment¹³³ (SME), which receive a higher level of control under the ITAR. The second sub-committee addressed the export of technical data necessary to respond to requests for quote (RFQ) and requests for proposal (RFP), which include plant visits, acceptance and quality assurance testing, and the like.¹³⁴ Finally, the third group in this effort examined the export of technical data essential to obtain the requisite insurance for a satellite build and on-orbit health and anomaly insurance.¹³⁵

B. DDTC/D TSA/DTAG: Cooperation in the Creation of a New Regulation.

The United States satellite industry understands the necessity of trade regulation and the importance of national security.¹³⁶ The majority of satellite manufacturers, as well as satellite parts and component manufacturers sell to government and commercial end-users alike.¹³⁷ The primary problem industry has faced is the political football the regulatory sphere has become with essentially four jurisdictional shifts and rule changes

focused obligation, which DDTC received from Congress, and organized itself in a manner that allowing for adequate responsiveness to the assignment at hand. *See id.*

¹³² *See* Fact Sheet, *supra*, note 121 (defining the priority areas where the new bulk licensing regime will focus, mandated by Section 1309(a) of the Fiscal Year 2000 Foreign Relations Authorization Act, which mirror the working groups created by the DTAG Comsat Task Force).

¹³³ *See* International Traffic in Arms Regulations, 22 C.F.R. § 120.7 (2000) (defining significant military equipment and noting a heightened level of export control is necessitated by the greater military or strategic capacity inherent in the technology).

¹³⁴ *See* Fact Sheet, *supra*, note 121 (stating one major element of the new regime is the technical data needed to respond to requests for bids and proposals).

¹³⁵ *See generally* Dave Lenckus, *Space Rates Head Skyward: Best Risks Likely Immune*, BUS. INS., Aug. 30, 1999, at 1 (providing a general overview of the current state of satellite and launch insurance for different coverage scenarios and noting insurance rates are escalating).

¹³⁶ *See* Testimony of Clayton Mowry, *supra*, note 36 (asserting "that the U.S. satellite industry holds concern for national security in the highest regard").

¹³⁷ *See id.* (describing the U.S. satellite industry's work with and for the United States Armed Forces over the last four decades).

in a decade.¹³⁸ Good regulatory compliance is hard to maintain when there is little rationalization to regulatory creation.¹³⁹ In addition, rule shifts mandate the application of additional resources to educate corporate personnel and implement new policies and procedures to ensure compliance.¹⁴⁰

By bringing industry in an advisory capacity through the auspices of the DTAG during the regulatory construction process, DDTC enhanced its ability to create a regulatory scheme that ultimately ensures stated national security objectives while mitigating some of the rigid effects of trade controls under the ITAR.¹⁴¹ The DTAG Comsat Task Force met on a weekly basis, in full committee, examining the issues tasked by DDTC.¹⁴² Either a day or two after each Task Force meeting, the Task Force would meet with officials from DDTC and DTSA to review proposals for possible bulk license structure and provide comment and voice concerns.¹⁴³ The weekly interactions allowed for up-to-date feedback that could be incorporated on a real time basis.¹⁴⁴

¹³⁸ See Interview with William Lowell, *supra*, note 7 (remarking on the problems faced by parts and component manufacturers when jurisdiction was shifted back to the ITAR given that many of them were effectively decontrolled under the EAR). See generally Testimony of Clayton Mowry, *supra*, note 36 (discussing problems faced by the satellite industry as a result of the jurisdictional shifts of regulatory control).

¹³⁹ See Interview with Stuart Quigg, *supra*, note 131 (describing the effect of the regulatory shift on companies Mr. Quigg counsels in export compliance and licensing matters and noting while some are eager to utilize the new bulk license others have not embraced it).

¹⁴⁰ See *id.* (explaining how a number of companies are new to the industry and were never regulated under the ITAR, which then requires a "cradle-to-grave" education process and the institution of internal policies and procedures, not heretofore instituted, to ensure regulatory compliance).

¹⁴¹ See Interview with William Lowell, *supra*, note 7 (declaring the success of the cooperative creation of the bulk license process by having the DTAG reach out to individual aspects and expertise found within industry and outside the orbit of the Washington lobbying community). People are appointed to the DTAG for their individual expertise and not for their company affiliation which allows for a greater openness of discussion and an exchange of ideas when acting in their advisory capacity to the State Department. See Interview with Stuart Quigg, *supra*, note 131.

¹⁴² See Interview with Stuart Quigg, *supra*, note 131 (iterating the structural workings and cooperation between the DTAG Comsat Task Force DDTC).

¹⁴³ See *id.* (commending the fast turn around of the Task Force's work and how the small group meetings on a regular and timely basis fostered the success of the collaborative relationship).

¹⁴⁴ See *id.* (noting by receiving timely feedback on work brought to DDTC, the Task Force was able to react quickly and not waste time with ideas or suggestions contrary to the intended regulation).

In late May 2000, the new bulk license process was published in the Federal Register.¹⁴⁵

The new bulk licensing structure created tools for industry to utilize to reduce licensing volume while increasing license scope.¹⁴⁶ Once DDTC approves the initial license request under the bulk license regulatory scheme, the manufacturer may either export to, or once exported retransfer within, NATO+Major Allies to those programs and firms that are pre-approved and published on the DDTC web-site at <http://www.pmdtc.org>.¹⁴⁷ In order to assist the exporter with use and utilization of the bulk licensing process, DDTC published guidelines for license preparation and application.¹⁴⁸ DDTC also enlisted the aid of the Society for International Affairs¹⁴⁹ (SIA) to sponsor a workshop to rollout the new regulation for bulk licensing to industry.¹⁵⁰

¹⁴⁵ See 65 Fed. Reg. 34,089 (May 26, 2000) (codified at 22 C.F.R. § 123) (publishing new regulations in the ITAR instituting a bulk license for the export of certain satellite parts, components, sub-systems and associated technical data to NATO+Major Allies approved end-users and end-uses).

¹⁴⁶ See Fact Sheet, *supra*, note 121 (announcing the creation of a bulk license under the ITAR for the use in the export of commercial communication satellite parts, components, and technical data to multiple end-users in a defined territory for approved satellite programs in NATO or major non-NATO allied countries). One of the primary benefits of the new bulk license to U.S. manufacturers is once the license is approved product or data may be shipped without advanced provision to DDTC of a contract, purchase order, retransfer authority, or end-use certificates heretofore required prior to the issuance of a license. See *id.* This does not lessen compliance; rather it places the onus of compliance on the manufacturer by requiring electronic post-shipment verification. See *id.*

¹⁴⁷ See *id.* (noting both the list of approved programs and the list of approved firms will be housed on the DDTC web-site).

¹⁴⁸ See *Commercial Communication Satellite Components, Systems, Parts, Accessories, and Associated Technical Data to U.S. Allies: Guidelines for Preparing License Applications for Exports in Accordance with § 123.27*, Oct. 10, 2000, <http://www.pmdtc.org> [hereinafter Bulk License Guidelines for Preparing Applications] (publishing draft guidelines to the satellite industry on how to utilize the new bulk licenses). These guidelines were published on the DDTC Web Site in draft form. See *id.*

¹⁴⁹ See generally Society for International Affairs Internet Web Site, <http://www.siaed.org>, Oct. 12, 2000 (describing the mission and organization of SIA).

¹⁵⁰ See Announcement for *Licensing COMSAT Components, Parts, Accessories and Associated Technical Data*, Society for International Affairs 2000 Summer Workshop, June 28, 2000 (including William Lowell then Director of the Office of Defense Trade Controls, U.S. Department of State, and David Tarbell then Deputy Assistant Secretary of Defense, Defense Threat Reduction Agency, U.S. Department of Defense, as featured speakers in providing an overview of the bulk license process and Ramona Hazera, Chair, DTAG Comsat Task Force heading a discussion panel of industry participants in the regulation's construction). See generally *Commercial Communications Satellites*

V. RECOMMENDATIONS

The satellite trade and export sales are important to the United States economy and have an effect far beyond the mere sale and provision of hardware, parts and components. Satellites provide a conduit for economic activity in telecommunications running telephony, voice, data, and television (video) and expand the reach and breadth of communication and content through the use of celestial bandwidth.¹⁵¹ Certain technologies, nevertheless, utilized in the manufacture, launch, and operation of commercial communications satellites may be utilized in the creation and manufacture of ballistic or theater range missiles capable of carrying weapons of mass destruction.¹⁵² Such weapons could be deleterious by causing shifts in regional balances of power or destabilizing already precarious international situations.¹⁵³ This in turn heightens the necessity of strict national security controls of satellite hardware and technical data to ensure the end-users and end-uses are legitimate.

Whether those controls are administered by the Department of Commerce under the jurisdiction of the Export Administration Regulations or the Department of State under the International Traffic in Arms Regulations is no longer a question for debate.¹⁵⁴ The law has placed the jurisdiction under the

Special Licensing Regime - ITAR Section 123.27, Directorate of Defense Trade Controls Power Point Presentation at the Society for International Affairs 2000 Summer Workshop, June 28, 2000, at <http://www.siaed.org> (providing an overview of how the bulk license process works and how to go about utilizing each of the bulk license types).

¹⁵¹ See Testimony of Clayton Mowry, *supra*, note 36 (testifying as to the importance and far reaching impact the commercial communications satellite industry has on the United States and global economies). See generally International Telecommunications Satellite Organization Internet Web Site, Nov. 16, 2000, <http://www.intelsat.int> (allowing the reader to gain rudimentary knowledge of the kind of services and products distributed by a global commercial communications satellite constellation organization).

¹⁵² See Statement of James M. Bodner, *supra*, note 35 (testifying certain export controls are in place to deter the transfer of technology, which are utilized in ballistic missile production and its direct relation to launch vehicle technology).

¹⁵³ See Helene Cooper & Matthew Forney, *Politics & Economy: U.S. and China to Revive Talks on Arms Issues*, WALL ST. J., July 3, 2000, at A14 (discussing the destabilizing nature of ballistic missile sales and other technologies of proliferation concern to the South Asian region).

¹⁵⁴ See generally *Hearing Before the Senate Committee on Armed Services on the National Security Implications of Export Controls and the Export Administration Act of 1999*, 106th Cong. (2000) (statement by Mr. Donald Mancuso, Deputy Inspector General,

ITAR¹⁵⁵ and the possibility for a shift back to BIS is unlikely in the foreseeable future. Battling over jurisdiction in the press serves little constructive purpose in that it does not provide United States manufacturers of satellites, satellite parts and components any relief from restrictive national security controls. The United States satellite industry needs to utilize the new commercial communications satellite parts and components bulk licensing regime embodied in 22 C.F.R. 123.27.¹⁵⁶ In addition, industry and government need to continue cooperative efforts either through the DTAG, or another equally viable vehicle, to shape and mold the new bulk licensing process to provide flexibility and decreased license processing time while ensuring a high degree of compliance to protect against proliferation.¹⁵⁷

A. Utilization as Mitigation

The new regulation was published in the Federal Register on the May 26, 2000, and presently very few companies sought to utilize it.¹⁵⁸ Prior to the jurisdictional shift many of the satellite parts and component manufacturers had little in terms of licensing and resultant compliance requirements under the EAR.¹⁵⁹ The bulk licensing vehicle provides the manufacturer

Department of Defense) (testifying on the export licensing process and concerns over commerce and national security in export control while noting the deficiencies existent in both EAR and the ITAR and how they are administered).

¹⁵⁵ See Public Law 105-261 (transferring jurisdiction of satellite parts and components to the ITAR).

¹⁵⁶ See Interview with Stuart Quigg, *supra*, note 131 (noting the new licensing mechanism was in place and industry needs to utilize it as a tool and incorporate it into its regular licensing processes). Industry has spent more time complaining since the transfer of jurisdiction back to DDTC instead of utilizing those tools at hand, which could mitigate delays and provide enormous flexibility to a company's ability to win foreign sales. See *id.*; Interview with William Lowell, *supra*, note 7.

¹⁵⁷ See generally Compliance: The Critical Element (Society for International Affairs 1999) (videotape on file with the author) (explaining the necessity for export control compliance as a means of furthering United States national security and foreign policy interests).

¹⁵⁸ See Interview with Stuart Quigg, *supra*, note 131 (describing his amazement that in the first five months the new bulk license regime was in place only one company submitted a license request).

¹⁵⁹ See Interview with William Lowell, *supra*, note 7 (noting when looking at compliance under the new regulation, consideration should be given to the fact many of the satellite parts and component manufacturers were effectively decontrolled when under

the flexibility to rapidly respond to market conditions and ease their overall licensing requirements while not contradicting other portions of the ITAR such as the Congressional notification requirement.¹⁶⁰ The flexibility comes in the ability of a United States satellite parts and component supplier to answer the potential customer on a rapid basis, and to conduct post sale operations in conjunction with the test and acceptance of the products sold.¹⁶¹

Conversely, the new regulation provides the State Department, a means of control by allowing for the review of the technology and technical data proposed for export prior to issuance of a license to the approved territory for approved end-users and projects.¹⁶² It provides for compliance through post shipment verification and allows for the addition of new end-use and projects on an initial review basis.¹⁶³ Satellite manufacturers in the United States and abroad could reduce license process time and many of the hurdles currently complained of by contractually requiring the use of the new bulk license where applicable and where the regulation permits. The ability to retransfer within NATO+Major Allies without prior approval and only post shipment verification saves license process time and allows for flexibility in program and project management planning.¹⁶⁴

the Commerce Department's jurisdiction). Flexibility was built into the system to provide the component manufacturer a speed to market factor mitigating any burdens of DDTC licensing by allowing, after an initial review and approval for use in the NATO+Major Allies territory. *See id.*

¹⁶⁰ *See id.* (describing the advantages given the exporter in under the new bulk licensing regime).

¹⁶¹ *See* Bulk License Guidelines for Preparing Applications, *supra*, note 149 (directing exporters on the use and utilization of the new bulk license and the submission, review and post shipment reporting requirements for obtaining license approval).

¹⁶² *See* Interview with William Lowell, *supra*, note 7 (explaining compliance aspects of the bulk license vehicle such as the reporting and monitoring requirements built into the regulation); Bulk License Guidelines for Preparing Applications, *supra*, note 149; Fact Sheet, *supra*, note 121.

¹⁶³ *See* Bulk License Guidelines for Preparing Applications, *supra*, note 149 (detailing the regime's requirement for electronic post shipment verification, which meet the documentary requirements of the ITAR under §123.1 (c)(4) & (5) for exports and § 123.9 for retransfers as well as the maintenance and publishing of the approved foreign persons and satellite programs).

¹⁶⁴ *See* Interview with Stuart Quigg, *supra*, note 131 (expressing the view the process created a licensing precedent for pre-approval of sales, which provides for greater flexibility in the licensing and business processes of the satellite industry).

B. Refinement of the Process

The conception and construction of the bulk license process was transparent in both its administration and execution.¹⁶⁵ DDTC keeps and maintains lists of both approved foreign persons and approved satellite programs for utilizing the license.¹⁶⁶ Additional countries may be considered for inclusion in a bulk license submission and for addition to the list of approved end-users and projects when those entities are members of either the European Union or the European Space Agency.¹⁶⁷ The application itself is electronic with the requirement that submission of requisite supporting documentation will also be electronic.¹⁶⁸ Moreover, there is a requirement that all post shipment verification reports and the submission of any other documentary requirements imposed by specific provisions on the license must be filed electronically.¹⁶⁹

DDTC must go further and, with the input of industry, incorporate automatic electronic procedures for publication and notification of the list of approved foreign persons and approved satellite programs. Additionally, post shipment reporting and verification should be automatic. Through coordination with the United States Customs Service and through the Automated

¹⁶⁵ See *id.* (detailing the license construction process and its openness of exchange).

¹⁶⁶ See 65 Fed. Reg. 34,089, 34,090 (May 26, 2002) (codified at 22 C.F.R. § 123) (identifying the process for locating and utilizing the lists of approved foreign persons and satellite programs).

¹⁶⁷ See *id.* at 34,092 (noting the method for approval of additional foreign companies and programs and allowing for export to companies from countries resident in the European Union or European Space Agency, which are not resident in the territory of NATO+Major Allies).

¹⁶⁸ See Bulk License Guidelines for Preparing Applications, *supra*, note 149 (directing exporters they are required to file all license applications electronically and a hard copy of the application must be submitted with an original signature following the electronic submission). In addition, DDTC requires the exporter to submit all documentation in support of the license application in an unalterable electronic format. See *id.* See generally Chris Gillis, *Streamlining the Export License Process*, AM. SHIPPER, Sept. 1, 2000, at 68 (discussing how the different areas of the United States Government, tasked with export licensing, are moving to a paperless environment by instituting various forms of electronic licensing).

¹⁶⁹ See Bulk License Guidelines for Preparing Applications, *supra*, note 149 (laying out the process for post shipment reporting).

Export System,¹⁷⁰ whereby shipping documentation is filed electronically, a transmission would be filed with DDTC automatically. DDTC should implement beta tests conducted with industry on the front end to iron out any process or procedural kinks, which were not considered in the creation of the new license vehicle.¹⁷¹

CONCLUSION

The cooperation and coordination between DDTC and the United States satellite industry demonstrated through the DTAG Comsat Task Force proved a good model for export control regulatory construction. Continued cooperation is in the best interests of both parties. The United States satellite industry must make a more concerted effort to utilize the new bulk licensing regime, otherwise it risks alienating the Directorate of Defense Trade controls and any future cooperative efforts in reducing regulatory requirements and processes. However, compliance must be the watchword of industry's international sales strategies. No longer are we in an era, like the Cold War, where the national security threat is easily defined.

Flexibility in the export process will only come about through a dedication of resources, by the senior management of satellite manufactures, to enhance corporate export compliance.

¹⁷⁰ See Automated Export System Main Page, Nov. 17, 2000, <http://www.customs.treas.gov> (explaining the Automated Export System as the computerized system where exporters may file shipping documentation and invoices electronically to the United States Customs Service). The utilization of AES will become mandatory for all exporters regulated under the ITAR sometime in 2004. See *id.*

¹⁷¹ See generally, *Seventeen Agreed Proposals of the Defense Trade Security Initiative*, FACT SHEET RELEASED BY THE BUREAU OF POLITICAL MILITARY AFFAIRS, U.S. DEPARTMENT OF STATE, http://www.state.gov/www/global/ar...au_pm/dtc Aug. 29, 2000 (announcing the seventeen different proposals of the Defense Trade Security Initiative designed to put into place licensing processes and procedures benefiting industry by reducing license cycle time and some of the administrative costs associated with export licensing while still maintaining a high degree of export compliance to address national security concerns); *Export Controls: Albright Announces Reforms to Enhance U.S. Defense Industry Cooperation with Allies*, BNA WASH. INSIDER, May 25, 2000, at d2 (announcing the initiation of the Defense Trade Security Initiative at a NATO meeting). DDTC and the rest of the United States Government national security export control apparatus have shown they are open to bettering the process to lessen industry's export control burden. See *id.* In addition, they were open about the process and elicited industry support on an occasional basis. See discussion *supra*, pp. 53-57.

DDTC also has to work more closely with industry to better foster a cooperative atmosphere in the satellite trade community. The ITAR has a tool to aid the satellite industry in its export sales. Now it's up to the satellite industry to step up to the plate and institute the bulk license into its export operations.