

**GOING TOO FAR WITH ITAR:
U.S. Government Expects Blind Faith From Foreign Space Underwriters**

*by
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Communications Satellite Industry: Beware the Ides of March!

It is perhaps appropriate that March 15, 1999 - the anniversary of Julius Caesar's demise - is the effective date of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 ("NDAA").¹ Just as Caesar was done in on March 15th, so may be competitive satellite insurance rates. The International Traffic in Arms Regulations (ITAR), as promulgated, may have the effect of significantly impinging the flow of information from United States satellite manufacturers and insureds to foreign underwriters and brokers. Consequently, it will be difficult, if not impossible, to develop insurance premiums covering unknown risks. There is not enough capacity in the United States alone to cover the space insurance risks. Thus, the foreign insurance markets will continue to be an integral part of this industry. This paper will explore the history of the ITAR regulations, and look at the effect on space insurance.

Background of ITAR

In 1992, jurisdiction over the export control of communication satellites was transferred from the Department of State to the Department of Commerce. The underlying rationale for this change was that commercial communication satellites were believed to be more closely related to a commercial enterprise, not a defense initiative. During this time, licensing of rockets continued to be within the jurisdiction of the Department of State. This division of power was all about to change in the mid-1990's as concerns were raised that the People's Republic of China was engaging in espionage against the United States.

Governmental Action Taken

The first action taken by the United States was the signing of the NDAA into law, which modified the International Traffic in Arms Regulations. An integral component of ITAR is the United States Munitions List ("USML"). The USML identifies categories of articles, services, and associated technical data that are designated as "Defense Articles" or "Defense Services". A Defense Article is defined under 22 CFR 120.6 to include "technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in Sec. 121.1 of this subchapter. It does not include basic marketing information on function or purpose or general system descriptions."

Specifically listed in the USML are "communications satellites, remote sensing satellites, scientific satellites, research satellites, navigation satellites, experimental and multi-mission

¹ Public Law 105-261, signed into law by President Clinton on October 17, 1998.

satellites.”² The prior version of ITAR employed a definition that was narrowed to “satellites, specifically designed or modified for military use”. It is this expanded scope that brings the commercial satellite industry under the purview of ITAR, to the extent that this restricted information must be shared with nationals of other countries. The stricter regulations of ITAR dovetail with the findings of a report issued by the *House Select Committee on U.S. National Security and Military Concerns With the People’s Republic of China* (“Cox Report”), which outlines more than twenty years of breaches of national security as the American nuclear weapons secrets were divulged to the Chinese. Also during that time were illegal transfers of rocket technology. The Committee, called the Cox Committee after the panel chairman, Chris Cox, a Congressman from California, stated that based on the information the Chinese are believed to have obtained, they will probably have the ability to deploy nuclear missiles within three years. Simply put, this is alarming news. Obviously, no American would dispute that steps had to be taken to ensure that no further leaks of information occurred, if national security were truly at stake.

The first action to be taken was that Congress re-delegated all licensing responsibilities for satellites to the Department of State.³ The Cox Committee cited the division of licensing responsibility between the Department of State and the Department of Commerce as playing a key role in the loss of U.S. technology to the People’s Republic of China. For instance, the Department of Commerce did not require Department of Defense monitors for launch campaigns. Consequently, U.S. Government officials were not present to monitor several launches and launch campaigns. Given China’s efforts at acquiring U.S. technology, it is likely that China attempted to take full advantage of this lapse in security.⁴ Perhaps the straw that broke the camel’s back came in 1995, when “a Commerce Department official improperly authorized the transfer, in the context of a launch failure investigation, of information regarding rocket design that would almost certainly have been prevented had the Department of State been consulted.”⁵ So based on the foregoing, the Department of Commerce was out of the satellite licensing business. They were routinely regarded as a “rubber stamp” operation, and thus licenses were quickly given. On the other hand, the Department of State -- with its strong ties to upholding national security — is known for being difficult.

If the premise is followed that national security is indeed at risk, then any action taken by the government to protect that security would be justified. One could understand why such drastic measures were taken, because the national security of the United States is of the utmost importance, and as the Cox Committee noted, “protecting the national security interest simply may not be related to improving a corporation’s ‘bottom line’.”⁶ The question, however, is

² ITAR Category XV - Spacecraft Systems And Associated Equipment

³ Cox Report at 27.

⁴ Id.

⁵ Id.

⁶ Cox Report at 28.

what measures are truly necessary. On first blush, it would appear that ITAR accomplished the U.S. government's objective of preventing any leaks of possibly damaging information to any country that threatens national security. Then again, killing a bug with a hammer also accomplishes the objective, but is it necessary?

Cox on Space Insurance

While space insurers and brokers were not singled out in the Cox report as having engaged in any wrongdoing, the report expressed concerns that commercial space insurance played some role in technology transfer to China.⁷ Specifically, after an Intelsat 708 satellite was destroyed during a failed launch of the Chinese Long March 3B rocket in 1996, the report states that the insurance market pushed satellite manufacturers to help improve the reliability of the Long March rocket by providing Chinese engineers with technical data.⁸ The Great Wall Launch Company, the commercial enterprise behind the Long March, is the same company that is responsible for the Chinese military Inter-continental Ballistic Missiles (ICBMs), and the commercial and military rockets share many of the same components.

In addition, the Cox Committee noted that space insurance brokers and underwriters routinely obtain U.S. space and missile-related technology "outside of the system of export controls that applies to U.S. satellite manufacturers."⁹ It is also noted that "insurance is critical to commercial space launches, the insurance role cannot be eliminated."¹⁰ However, the Cox report states that existing laws address the export of information to brokers and insurers. However, since the Cox Committee believed that these laws have not been enforced, it is affirmatively stated that "the administration of these laws must be applied to exports of sensitive U.S. technology to the space launch and satellite insurance industry."¹¹

What is Wrong With This Picture?

The Cox report goes on, and perhaps justifiably so, about espionage carried out by the People's Republic of China, which has directly jeopardized the United States' national security. The first reaction is to lock up any "technology related information," but is that really necessary. It appears that the problem can be isolated to China. It would also appear to be more prudent to

⁷ Cox Report at 23.

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id.

only apply these strict regulations to dealings with China. And if that means that the Long March is not as attractive as domestic or European rockets, then so be it. It does not seem to make sense to treat American allies, like the United Kingdom, Italy, France and Germany, to name a few, as Chinese spies.

The effect of ITAR will be most severely felt on American companies. As the Cox Committee noted, satellite insurance is an indispensable part of all commercial space activities. Given that most satellite coverage comes from overseas, the onus will be on the American satellite manufacturer and/or the American operator to secure the required licenses, and perhaps add years to its launch schedule. Another unacceptable alternative would be for prospective satellite purchasers to flock to non-American satellite manufacturers in an attempt to entirely circumvent the ITAR restrictions. Time will tell how these possibilities unfold.

Another flaw with the ITAR restrictions regarding commercial satellites is that the employees of these companies that build commercial satellites, may not even necessarily have a security clearance. A U.S. government security clearance is typically required only to work on government programs containing classified information. Building a domestic commercial communication satellite is not a government program. As a result, it is much more likely that a spy would be working inside the satellite manufacturing company, with access to *all* information — not in a foreign satellite brokerage house, hoping that some useful information comes along. And in any event, the satellite information that is routinely passed to Underwriters and brokers is system level — not component level — information. This information would have no use to a spy that wanted to steal U.S. technology. Perhaps the answer to the problem is for a joint “security clearance” issued by the United States and the country wherein the insurance personnel requiring access to the ITAR regulated information resides. In this way, information could be freely shared, and perhaps the sting of the prohibitive ITAR regulations will be minimized. There is already a similar provision in place for those requiring access to the information, wherein they can be named in a Technical Assistance Agreement (“TAA”), wherein in exchange for being named in a TAA, foreign brokers and underwriters will have to agree to not transfer any technical data to those not named in the TAA. This would probably not impose too much of a hardship on the insurance industry, since nondisclosure agreements are routinely entered to protect the proprietary interests of the satellite manufacturers. The advantage to the security clearance system proposed herein would be that it would only require

There does not seem to be any reason for the foreign space insurance industry to use blind faith when assessing American satellite risks, or when evaluating American claims made. The ITAR regulations are not as much of a problem for the foreign space insurance market as they are for the domestic space industry. Domestic manufacturers will have to work to find solutions that satisfy the ITAR framework for exchange of information to foreign insurers, or risk losing business to foreign manufacturers. An ideal solution would be to relax the regulations, without compromising national security. It is undisputed that the foreign space insurance market is vital to the continued success of the American space industry. On the other hand, the Chinese Great Wall Launch Company is not. Maybe it is time for the United States government to distinguish between the two.

