

ITAR

'UNDERSTANDING THE PROBLEMS AND POSSIBLE SOLUTIONS'

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Brussels



Impact of ITAR contamination in aerospace, security and defense R&D collaboration and export control reform in the United States

George N. Grammas

Squire, Sanders & Dempsey (US) LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004
+1.202.626.6234
george.grammas@ssd.com

Discussion outline

ITAR

- ITAR Contamination
 - When and how does it occur?
 - What is the impact on EU business?
 - How does one contain the “virus”?
- US Export Controls Reform
 - “Immediate Improvements”
 - Phased Implementation Plan

Framework of US Export Controls

ITAR

Defense Articles / Services

Government Agency:
US Department of State,
Directorate of Defense Trade
Controls (DDTC)

Legal Authority:
Arms Export Control Act
(AECA)

Implementing Regulations:
International Traffic in Arms
Regulations (ITAR)

Control List:
US Munitions List (USML)

Website (guidance):
pmdrtc.state.gov

Dual-Use Articles

Government Agency:
US Department of Commerce,
Bureau of Industry and Security
(BIS)

Legal Authority:
International Emergency
Economic Powers Act (IEEPA),
Export Administration Act (EAA)
- lapsed

Implementing Regulations:
Export Administration
Regulations (EAR)

Control List:
Commerce Control List (CCL)

Website (guidance):
bis.doc.gov

Dealings - Sanctioned Countries

Government agency:
US Department of the
Treasury, Office of Foreign
Assets Control (OFAC)

Legal authority:
International Emergency
Economic Powers Act
(IEEPA); Trading with the
Enemy Act (TWEA)

Selected Programs:
Cuba Syria Sudan Iran
SDN-driven programs

Website (guidance):
treas.gov/offices/enforcement/ofac

Scope of the ITAR: Conceptual

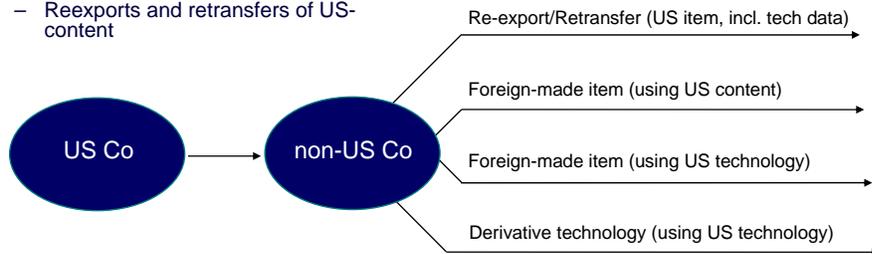
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- The application of US export controls depends on:
 - WHERE: Place of export?
 - Every person in United States, including a European national or European company, is subject to US export controls
 - WHO: Nationality of the exporter?
 - A US national or a US company is subject to US export controls, even when all export activities occur outside United States
 - May also be subject to the local country's export controls
 - WHAT: Origin of the goods and/or technology being exported?
 - US-origin items remain subject to US controls even after they leave the United States and even after incorporation into a European product
 - May also be subject to the local country's export controls

Contamination Problem: US Extraterritorial Controls on US-Origin Articles and Tech Data

ITAR

- ITAR governs:
 - All exports from the United States
 - Reexports and retransfers of US-content



- Excluded:
 - public domain, basic marketing information, general system descriptions
 - US-components in non-US made article to NATO+

Scope of the ITAR: Retransfer Controls

ITAR

- Retransfer Control Statement
 - § 123.9 Retransfer/Reexport. Control statement on all invoices:
 - “These commodities are authorized by the US Government for export only to [country of ultimate destination] for use by [end-user]. They may not be transferred, transshipped on a non-continuous voyage, or otherwise be disposed of in any other country, either in their original form *or after being incorporated into other end-items*, without the prior written approval of the US Department of State.”
- DDTC approval required to:
 - Transfer non-US products containing US content

Scope of the ITAR: Retransfer Controls – 124.8(5)

ITAR

- Required Provision in a Technical Assistance Agreement
 - The technical data or defense service exported from the United States in furtherance of this agreement and any defense article which may be produced or manufactured from such technical data or defense service may not be transferred to a person in a third country or to a national of a third country except as specifically authorized in this agreement unless the prior written approval of the Department of State has been obtained.
- DDTC approval required to:
 - Retransfer of technical data received under a TAA
 - Transfer of items produced with the technical data received under a TAA

Discussion outline

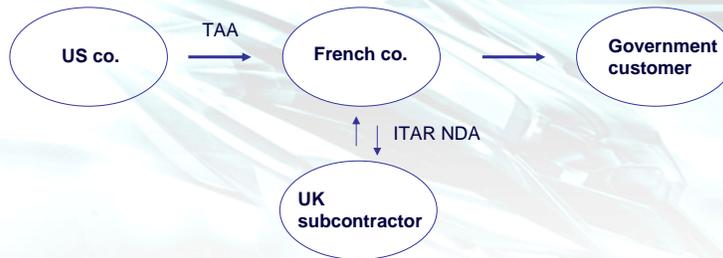
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Contamination example

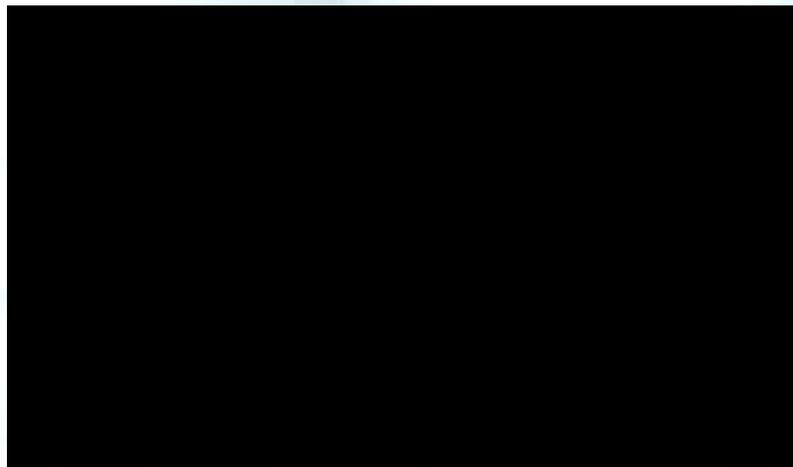
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UK company receives technical data from a French company that signed the TAA. Is the UK business contaminated with the ITAR?



Contamination example

ITAR



What Constitutes a Re-export or Retransfer of Technical Data?

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- Sending or taking **technical data** to another country or to another non-US person
 - Includes
 - Sending technical data recorded or stored in any physical form
 - Sending via fax or email
 - Access via servers or websites
 - Telephone calls
- Disclosing technical data, including visual or oral access to technical data, to a dual national or third country national (DN/TCN)
 - This is called a **deemed re-export**

What Is a Deemed Re-export?

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- Employment of DN/TCN
 - Facility visit by DN/TCN
 - Other interchanges with DN/TCN
 - Release of **technical data** to a **DN/TCN** is “deemed” to be an export to the foreign person’s “**home country**” on the assumption that the foreign person may return to their home country and disclose the technology.
-  **Deemed Re-export**

Employment of DN/TCNs

- Access to manufacturing facility
- Access to technical documents
- Access to engineering database and other stored data
- Discussions and meetings with other employees



Some examples of technical data accessible by employees

- Engineering database
 - Bill of materials
 - Manufacturing process steps for costing
 - Drawings
 - Instructions for production
 - Work breakdown schedule
 - Materials list
 - Testing procedure
- Application database
 - Customer requirements and interface data
 - Customer system operation data
 - Technical comparison of products or competitors

Is Access to Data an Export?

- 2004 Consent Decree (State) – General Dynamics and GM agreed to US\$20 million in civil penalties and remedial compliance measures
 - Foreign persons had computer access to databases and servers containing technical data related to ITAR-controlled light-armored vehicles at GM
 - Reliability and maintainability data
 - Engineering drawings and manufacturing information
 - Foreign person status was not checked prior to access
 - Proposed charges were based on disclosing or transferring controlled technical data to foreign persons without authorization (ITAR Section 127.1)
- Is access a violation of the ITAR (or EAR) or is an actual transfer required?

Facility Visits by DN/TCNs

- Observation of defense article at different points of production
- Observation of manufacturing process
- Observation of manufacturing equipment
- Technical presentation
- Discussion



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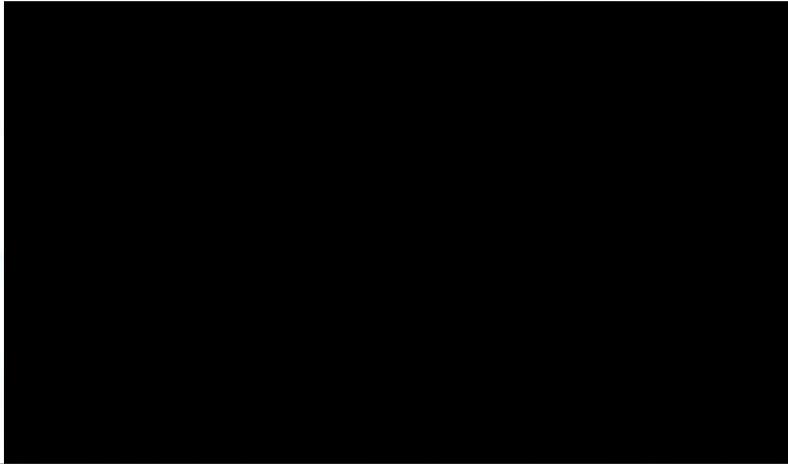
Implement Procedures to Identify and Contain ITAR Content

- Require that customers, vendors and partners advise you of any information that they deem to be ITAR-controlled technical data
- Mark and limit (physical and virtual) access to ITAR-controlled technical data
- Maintain separation between ITAR-controlled products and other products
- If possible, establish segregated area for ITAR-controlled products
- Establish procedures concerning assignment to ITAR-controlled product production and to screen visitors
- Train employees to recognize ITAR-controlled data and products and to handle them accordingly
- In the US, we call this a “Technology Control Plan”

Commodity Jurisdiction: Ferry Boat Radar Example

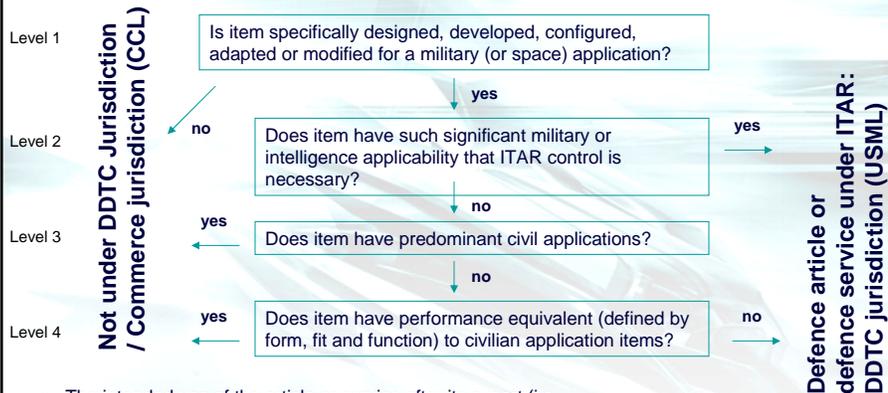
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Radar is 20+ year old design, but was originally sold to the US military. Now, it is sold for civilian applications. If the radar system will be used by UK company on a civilian ferry boat, is it a defense article or dual use?



Decision Diagram for Commerce vs State (DDTC) Jurisdiction

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- The intended use of the article or service after its export (i.e., for a military or civilian purpose) is not determinative

Commodity Jurisdiction: Challenge the US Party

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- Procurement: Is the item procured from the US actually a defense article?
- A CJ request may be submitted when doubt exists as to whether an article or service actually is (or should be) under State Jurisdiction
- When should a CJ be filed?
 - Not inherently military item
 - Same type of item is widely available in commercial markets
- A non-US company may submit a CJ request to DDTC (if the US supplier will not do it)

Problem with US Supplier's Incorrect Export Jurisdiction Determination

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- A US supplier that exports a dual-use item as a defense articles creates unnecessary ITAR contamination
- A US supplier that exports a defense article as a dual-use item is creating a future problem for non-US customer
 - When the mistake is realized,
 - supply will be interrupted
 - current inventory may be constructively seized
- UK company must be vigilant in policing the content and data that it receives from the US
 - Implement a Technology Control Plan
 - Train employees on the ITAR

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The four singularities

- Single Control List
- Single Primary Enforcement Coordination Agency
- Single Information Technology (IT) System
- Single Licensing Agency

“build higher walls around the export of our most sensitive items while allowing the export of less critical ones under less restrictive conditions”



Export Controls Reform Timeline

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- 3Q2009
 - Export controls reform commenced by jointly chaired National Security Council and National Economic Counsel committee
 - Address the “pink elephant” – US export controls are Cold War relic created in 1970s
- 4Q2009
 - Development of short-,mid- and long-term objectives
 - Export controls reform task force formed (interagency)
- 2Q2010
 - White House announces export controls reform
- On-going
 - Phase I: Immediate improvements and Create the Framework
 - Common terminology
 - USML Cat. VII review (positive list and move balance to CCL or EAR99)

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Immediate Improvements: Encryption Export Controls Overhaul

ITAR

- Company registration requirement
 - To use License Exception ENC or self-classification
- Self-classification permitted for most encryption products
 - Immediate export upon self-classification
 - Replaces 30-day waiting requirement for a technical review
 - Simplified annual reporting requirement
 - Replaces semi-annual reporting requirement
- Encryption one-time review available for more sensitive encryption products
 - Semi-annual reporting
- Removes items previously described as “Ancillary” cryptography products from Category 5, Part 2 of the CCL
 - Such items were previously classified as 5x992
- Encryption technology eligible for License Exception ENC to many destinations

Amended by 75 Fed. Reg. 36482 (June 25, 2010)

Immediate Improvements: Employment of Dual and Third-Country Nationals

ITAR

- Section 126.18. Authorizes foreign licensees, sublicensees and end-users to release ITAR-controlled technical data to dual and third country national employees
 - The exemption provided in § 124.16 cannot be implemented because of applicable domestic laws
 - Limited to approved scope and to countries of party and end-user
 - Regular, full-time employees only
 - Compliance responsibility shifts to foreign party by requiring security screening, monitoring and recordkeeping to prevent diversion to destinations, entities, or for purposes other than those authorized by the TAA or ITAR
- State Department recognized that its prior policy burdened foreign parties and raised human rights implications with primary US allies

Immediate Improvements: Employment of Dual and Third-Country Nationals

ITAR

- Procedure requirement satisfied by security clearance or technology security/clearance plan
 - Process to screen its employees and to have executed a NDA that provides assurances that the employee will not transfer any defense articles to persons or entities unless specifically authorized by the consignee or end-user
 - Process to screen its employees for substantive contacts with restricted or prohibited countries listed in § 126.1
 - Substantive contacts include regular travel to such countries, recent or continuing contact with agents, brokers, and nationals of such countries, continued demonstrated allegiance to such countries, maintenance of business relationships with persons from such countries, maintenance of a residence in such countries, receiving salary or other continuing monetary compensation from such countries, or acts otherwise indicating a risk of diversion
 - Process to maintain records of such screening for five years

Immediate Improvements: Changes to Definition of Defense Services (Proposed Rule)

ITAR

- Current definition of “defense service”
 - The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles
- Proposed definition of “defense service”
 - The furnishing of assistance (including training) using other than public domain data to foreign persons (see § 120.16 of this subchapter), whether in the United States or abroad, in the design, development, engineering, manufacture, production, assembly, testing, intermediate or depot level repair or maintenance (see § 120.38 of this subchapter), modification, demilitarization, destruction, or processing of defense articles (see § 120.6 of this subchapter)
 - Greater flexibility for collaborative R&D and fundamental research
 - Proposed rule falls short by not excluding other information which is not ITAR-controlled technical data
 - general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities
 - basic marketing information on function or purpose or general system descriptions of defense articles
 - technology subject to the Export Administration Regulations

**Immediate Improvements:
Changes to Definition of Defense Services
(Proposed Rule) – cont.**

ITAR

- Proposed definition of defense service includes
 - Assistance for the *integration* of item controlled on USML or the CCL into an *end item* that is controlled as a defense article
 - End item (see §121.8(a)) is assembled article ready for intended use. Only ammunition, fuel or energy source is required to place in an operating state
 - Example: integration of IT and communication equipment into a military command center for a foreign military
 - IT and communication equipment comprised of dual-use off-the-shelf items
 - Total solution is a defense article – a military command center
 - Assistance in designing and integrating the command center is a defense service
 - “Integration” means the systems engineering design process of uniting two or more things in order to form, coordinate, or blend into a functioning or unified whole, including introduction of software to enable proper operation of the device
 - Includes determining where to install something (e.g., which requires changes or modifications to operate properly; not simply plug and play)
 - “Installation” means the act of putting something in its pre-determined place and does not require changes or modifications to the item in which it is being installed

**Immediate Improvements:
Changes to Definition of Defense Services
(Proposed Rule) – cont.**

ITAR

- Proposed definition of defense includes
 - Training or providing advice to foreign units and forces . . . in the employment of defense articles, whether or not use of technical data is transferred in the training or advice
 - Conducting direct combat operations for or providing intelligence services to a foreign person directly related to a defense article
 - Training or assistance must be related to a defense article
 - Not training of foreign forces in logistics, procurement, management

**Immediate Improvements:
Changes to Definition of Defense Services
(Proposed Rule) – cont.**

ITAR

- Proposed definition of defense excludes:
 - Training in the basic operation (functional level) or basic maintenance of a defense article
 - Organizational-level maintenance (or basic level maintenance) is defined as “the first level of maintenance performed by an end-user unit or organization ‘on-equipment’ (directly on the defense article or support equipment) assigned to the inventory of the end-user unit or organization . . . [consisting of] repair, inspecting, servicing, or calibration, testing, lubricating and adjusting equipment, as well as replacing minor parts, components, assemblies and line-replaceable spares or units.”
 - Mere employment of a US person by a foreign person
 - intended to “prevent the anomalous situation where foreign companies are reluctant to hire U.S. citizens for fear that such employment alone constitutes a defense service, even where no technical data would be transferred to the employer”

**Immediate Improvements:
Changes to Definition of Defense Services
(Proposed Rule) – cont.**

ITAR

- Proposed definition of defense excludes:
 - Testing, repair, or maintenance of dual-use item integrated or installed into a defense article
 - Repair of a dual-use item incorporated into a defense article is not a defense service if the assistance relates only to the dual-use item and not to the defense article into which the dual-use item is installed
 - By contrast, troubleshooting the problems related to the operation of the dual-use item as integrated into defense article would be defense service if it involved assisting to correct problems with the integrated solution
 - Providing law enforcement, physical security or personal protective training, advice, or services to or for a foreign person, using only public domain data
 - Providing assistance (including training) in medical, logistical (other than maintenance), or other administrative support services to or for a foreign person

Immediate Improvements: Parts and components exemption (draft)

ITAR

- Section 123.28. Exemption for the Export of Components and Spare Parts in Support of Previously Exported U.S. Origin End Items
 - To government end-users who were authorized by US to receive the end-item
 - DDTC envisions expanding in the future
 - Exporter must be original exporter of end-item
 - Must not upgrade capabilities of end-item
 - Normal quantities for repair or replacement
 - Value does not trigger congressional notification
- DDTC can revoke use, if not in compliance

Immediate Improvements: “See through” Rule Policy for Dual-use End-Item (draft)

ITAR

- Section 126.20. DDTC license not required for export and reexport of defense articles incorporated into commodities “subject to the EAR”
 - Conditions when incorporated in end-item
 - End-item must be rendered inoperable for intended operations by remove of defense article
 - No release of development or production technical data for defense article
 - End-item not for military application
 - Conditions when embedded in higher level item
 - Defense article is rendered inoperable by removal
 - Defense article may not be exported separately (not incorporated or embedded)
- See through rule vs. de minimis rule
 - See through = control end item at level of ITAR component
 - De minimis = end item controls apply, if sufficient US content

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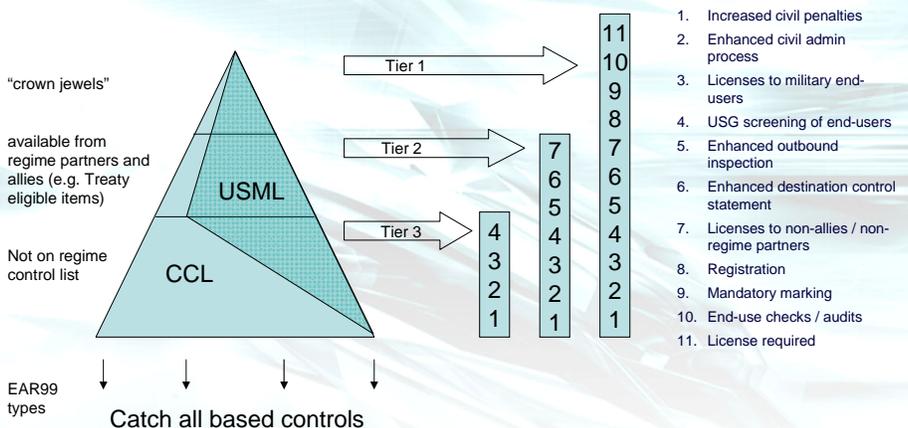
Phased Implementation

- Phase I: Create the Framework
 - Immediate reforms that do not require Congressional notification, new legislation or funding
 - Create the framework for reform (e.g., common terminology, model list)
- Phase II: Implement the framework through the current structure
 - Roll-out new framework within current agencies and legislation
 - Congressional notification will be required to remove munitions list controls or transfer items from the munitions list to the dual-use list
 - Additional funding will be required both for enhanced enforcement and the IT infrastructure
- Phase III: Merge and consolidate
 - completes the transition to the new U.S. export control system
 - Legislation would be required for this phase

Single control list

- Phase I
 - refine, understand, and harmonize definitions to end jurisdiction confusion between the two lists (in progress)
 - establishes new independent control criteria to be used to screen items for control into new tiered control list structure (land vehicle in progress)
 - three-tiered, “positive” list
- Phase II – restructure the two lists into identical tiered structures, apply criteria, remove unilateral controls as appropriate, and submit proposals multilaterally to add or remove controls
- Phase III – merge the two lists into a single list

Current control lists translated to proposed tiered list and controls



Tier Structure

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1. A Tier 1 control shall apply to:
 - a. A weapon of mass destruction (WMD);
 - b. A WMD-capable unmanned delivery system;
 - c. A plant, facility or item specially designed for producing, processing, or using:
 - (i) WMDs;
 - (ii) Special nuclear materials; or
 - (iii) WMD-capable unmanned delivery systems; or
 - d. An item almost exclusively available from the United States that provides a critical military or intelligence advantage.
2. A Tier 2 control shall apply to an item that is not in Tier 1, is almost exclusively available from Regime Partners or Adherents and:
 - a. Provides a substantial military or intelligence advantage; or
 - b. Makes a substantial contribution to the indigenous development, production, use, or enhancement of a Tier 1 or Tier 2 item.
3. A Tier 3 control shall apply to an item not in Tiers 1 or 2 that:
 - a. Provides a significant military or intelligence advantage;
 - b. Makes a significant contribution to the indigenous development, production, use, or enhancement of a Tier 1, 2, or 3 item; or
 - c. Other items controlled for national security, foreign policy, or human rights reasons.

USML Cat. VII – Tanks and Other Military Vehicles

ITAR

- (a) End items, systems, accessories, attachments, equipment, parts, and components.
 - (1) Armed, armored, or specialized vehicles, and other military equipment as follows:
 - (Tier 1) Vehicles "specially designed" for . . .
 - (Tier 2) Vehicles capable of or with any of the following . . .
 - (Tier 3) Vehicles not specified in Tier 2.
 - (2) Components, parts, assemblies, and associated equipment for the end item vehicles controlled by this Category as follows:
 - . . .
 - (Tier 2) Hot section parts or components "specially designed" for gas turbine engines
 - . . .
- (b) [reserved - Test, Inspection, and Production Equipment]
- (c) Materials
- (d) Software
- (e) Technology
- (f) Defense Services
- (g) [reserved - Manufacturing and Production Authorizations]

Final Thoughts



- Will export controls reform really happen?
 - Prior administrations announced reforms, but did not follow-up
 - Creating a positive tiered list is more difficult than anticipated
- Will it be easier to export from the US and reexport?
 - Maybe, but that is not the purpose of reform. Objective is to strengthen national security through enhanced control of the right items.

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Squire, Sanders & Dempsey (US) LLP
1201 Pennsylvania Avenue, N.W.
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+1.202.626.6234
george.grammas@ssd.com