

# Aerospace and Defense Industries

HARTMANN YOUNG, PETRA A. VORWIG, MICHAEL M. LIEBERMAN, WENDIE L. WIGGINTON, MICHAEL P. HOUSE, WILLIAM R. BLACK, MARK J. NACKMAN, BRENDA C. SWICK, AND C. SCOTT MARAVILLA\*

## I. Commercial Satellite Export Controls

### A. EXPORT CONTROLS AND COMMERCIAL SATELLITES

Commercial satellites and their components are designated as “munitions,” and governed by the International Traffic in Arms Regulations (ITAR), which are administered by the U.S. Department of State.<sup>1</sup> This designation, mandated by the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, reversed a previous policy of treating satellites as dual-use items under the jurisdiction of the Department of Commerce, and created the only category of articles that the President cannot remove from the United States Munitions List (USML).<sup>2</sup> As military items on the USML,<sup>3</sup> any export of commercial satellites, even if shipped overseas exclusively for launch, requires a license from the State Department’s Directorate of Defense Trade Controls (DDTC). Even though the DDTC has granted these licenses, treating commercial satellites as military goods places significant restrictions on where commercial satellites can be exported and how they are controlled post-shipment.

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\* Hartmann Young, of Perkins Coie LLP was editor of the Aerospace and Defense Industries Committee’s Year in Review for 2009. Petra A. Vorwig and Michael M. Lieberman of Steptoe & Johnson LLP authored the first section of this article. Wendie L. Wigginton of Lockheed Martin Corporation authored Section II on the Weapons Acquisition Reform Act of 2009. Michael P. House of Perkins Coie LLP authored Section III on the Commerce Department’s Simplification of Export Controls on Encryption Items. William R. Black, BAE Systems Land & Armaments, authored Section IV on the BIS and OFAC Settlement with DHL. Mark J. Nackman of Alliant Techsystems (ATK) authored Section V on the Final Specialty Metals Rule issued by the Defense Department. Brenda C. Swick authored Section VI. She is a partner with McCarthy Tétrault and former legal counsel with the Canadian International Trade Tribunal. C. Scott Maravilla of the Federal Aviation Administration authored Section VII on the WTO ruling on Airbus Subsidies. The views of each author are not attributable to their law firms or government agencies.

1. 22 C.F.R. §§ 120-30 (2009).

2. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261 (1998).

3. Arms Export Control Act of 1976, § 38(a)(1), 22 U.S.C. § 2778(a)(1) (Supp. III 1994).

These increased burdens have had a severe impact on the domestic satellite industry's competitiveness.<sup>4</sup> Many manufacturers claim that the time required to obtain a license reduces their ability to compete for foreign contracts, while some foreign manufacturers design-out U.S.-originating parts altogether in order to avoid the restrictions on ITAR-governed components, even after exportation.<sup>5</sup> Although all actors involved recognize the need to maintain targeted controls on sensitive technologies, the damage to the space industrial base and U.S. competitiveness has been a serious concern for the business community and public officials alike.<sup>6</sup>

#### B. REFORMING COMMERCIAL SATELLITE EXPORTS

The Obama administration and the U.S. Congress proposed major reforms of U.S. export control laws in 2009. These developments portend the liberalization of commercial satellite technology export restrictions, and suggest long-anticipated opportunities for the U.S. commercial satellite industry. In August 2009, President Obama ordered a review of the U.S. export control regime, citing the need to move beyond the Cold War-era status quo and update the system to "address the threats we face today and the changing economic and technological landscape."<sup>7</sup> The review is expected to produce recommendations that will be put into effect through executive orders. Both Secretary of Defense Robert Gates and Under-Secretary of State for Arms Control and International Security Ellen Tauscher support this initiative.<sup>8</sup> Although the Administration had not previously taken a formal position on the commercial satellite issue,<sup>9</sup> Under-Secretary Tauscher stated that she would consider transferring jurisdiction of exports of commercial communications satellites to the Department of Commerce through the Commerce Control List, even if the ITAR continued to cover launch technology.<sup>10</sup>

In addition to altering the regulatory landscape, the Administration's review will inform development of export control legislation by the House Foreign Affairs Committee (Committee). Under Chairman Howard Berman, the Committee began the process of overhauling the Export Administration Act, which governs dual-use export controls.<sup>11</sup> The Committee's completed bill is expected in early 2010. But efforts to overhaul the Export

4. See, e.g., Letter from Patricia Cooper, President, Satellite Industry Association, to Howard Berman, Congressman (June 8, 2009), available at [http://www.sia.org/news\\_events/Letters/SIA\\_HR\\_2410.pdf](http://www.sia.org/news_events/Letters/SIA_HR_2410.pdf).

5. *Space Security 2007*, SPACESECURITY.ORG, Aug. 2007, at 81, <http://www.spacesecurity.org/SSI2007.pdf>.

6. CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, BRIEFING OF THE WORKING GROUP ON THE HEALTH OF THE U.S. SPACE INDUSTRIAL BASE AND THE IMPACT OF EXPORT CONTROLS 26 (2008) (discussing harm to space industrial base resulting from current restrictions on satellite technology), available at [http://csis.org/files/media/csis/pubs/021908\\_csis\\_spaceindustryitar\\_final.pdf](http://csis.org/files/media/csis/pubs/021908_csis_spaceindustryitar_final.pdf) [hereinafter CSIS REPORT]; See also NATIONAL ACADEMY OF SCIENCES, BEYOND FORTRESS AMERICA: NATIONAL SECURITY CONTROLS ON SCIENCE AND TECHNOLOGY IN A GLOBALIZED WORLD (2009) (noting harm to U.S. industrial base, and harm to national security caused by unfamiliarity with other countries' satellite programs).

7. Press Release, The White House, Statement of the Press Secretary (Aug. 13, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Statement-of-the-Pres-Secretary](http://www.whitehouse.gov/the_press_office/Statement-of-the-Pres-Secretary).

8. Amy Klamper, *Official Reaffirms White House Support for ITAR Reform*, SPACE NEWS, Sep. 14, 2009, <http://www.spacenews.com/policy/official-reaffirms-itar-reform.html>.

9. U.S. Dept. of State, Defense Trade Advisory Group Plenary Minutes 2 (Apr. 7, 2009), available at [http://www.pmddtc.state.gov/DTAG/documents/plenary\\_minutes\\_04\\_09.pdf](http://www.pmddtc.state.gov/DTAG/documents/plenary_minutes_04_09.pdf).

10. *Senate Foreign Relations Committee Votes to Confirm Tauscher*, INSIDE U.S. TRADE, June 19, 2009.

11. See generally Berman Staff Developing 'Flexible' EAA Bill, INSIDE U.S. TRADE, Oct. 9, 2009 (the EAA last expired in 2001, but remains operational under Executive Order 13222 (Aug. 17, 2001)).

Administration Act (EAA) since it first expired in 1989,<sup>12</sup> or even to reform specific elements of it,<sup>13</sup> have persistently failed. Thus, William A. Reinsch, the former Under-Secretary for Export Administration at the Commerce Department, stated that “[e]xport control reviews are frequently announced, occasionally begun, and never completed.”<sup>14</sup> But reforms may now be possible with a presidential mandate to review the regime, new chairmen on key committees, support in the Departments of Defense and State, a more flexible legislative approach by Congress, and increased recognition of the costs of the status quo.

### C. SATELLITE EXPORT DEVELOPMENTS IN 2009

#### 1. *Assessment of Potential Risks of Removing Satellites from the USML*

The 2010 National Defense Authorization Act, signed by President Obama on October 21, 2009, required the Secretary of State and the Secretary of Defense to evaluate the national security risks of removing satellites and components from the USML.<sup>15</sup> Their assessment, due 180 days after enactment of the Act, must: (1) consider the extent to which foreign countries limit space-related technologies for national security reasons; (2) offer recommendations on the technologies that should remain on or be removed from the USML; (3) ascertain the safeguards necessary to prevent the proliferation or diversion of such technologies and verify end uses and end users; (4) recommend ways to minimize the risks that space-related exports could pose to U.S. national security; and (5) suggest improvements to the licensing processes.<sup>16</sup> As the conference report stated:

While clearly the conferees want to protect national security interests, it is also in the national security interest of the United States to maintain a robust satellite industrial base . . . satellite manufacturers in other countries have used the USML status as a competitive tool against U.S. satellite manufacturers and U.S. satellite manufacturers have been hampered in their manufacturing and marketing efforts as a result of the

12. See Omnibus Export Administration Act of 1995, H.R. 361, 104th Cong. (2nd Sess. 1996); Export Administration Act of 1999, S. 1712, 106th Cong. (2nd Sess. 1999) (passed by the Senate Banking Committee); Export Administration Act of 2001, S. 149, 107th Cong. (1st Sess. 2001) (passed by the House International Relations Committee and full Senate); Export Administration Act of 2003, H.R. 55, 108th Cong. (1st Sess. 2003) (no action taken); see also Ian F. Fergusson, *The Export Administration Act: Evolution, Provisions, and Debate*, CONG. RES. SERVICE, Aug. 14, 2009, at 3, available at <http://www.fas.org/sgp/crs/secretcy/RL31832.pdf>.

13. See, e.g., Export Administration Renewal Act of 2005, H.R. 4572, 109th Cong. (1st Sess. 2005) (no action taken); see also Export Enforcement Act, S. 2000, 110th Cong. (1st Sess. 2007) (reported out of the Senate Banking Committee). The only notable law affecting export controls enacted was the International Emergency Economic Powers Enhancement Act of 2007, which increased penalties for violations of the Export Administration Regulations or regulations promulgated by the Office of Foreign Assets Control. Pub. L. No. 110-96 (Oct. 16, 2007). In the current Congress, a targeted bill, the Export Control Improvements Act was introduced in July 2009 focusing on enforcement, integrating export control data into the general export tracking system and diversion control. H.R. 3515.

14. William Matthews, *Obama Orders Broad Review of Export-Control Regs*, DEFENSE NEWS, Aug. 14, 2009, <http://www.defensenews.com/story.php?i=4236446>.

15. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-084, § 1235, at 357-58 (2009).

16. *Id.*

USML status. The conferees hope that this risk assessment and report will serve as the basis for future discussion about possible revisions to U.S. export policy.<sup>17</sup>

## 2. *Authorization to Remove Satellites from USML*

The most far-reaching change Congress is considering is contained in Section 826 of the Foreign Relations Authorization Act for 2010 and 2011 (FRAA),<sup>18</sup> which authorizes the Administration to remove satellites and related components from the USML.<sup>19</sup> This bill passed the House and awaits action in the Senate. The Committee Report accompanying the bill provides that, within six months of the FRAA's enactment, the Secretary of State will submit a proposal describing plans and justifications for removing some satellite items and technologies from the USML.<sup>20</sup> The report also notes the "committee's expectation that, with the exception of those technologies deemed most militarily sensitive, most satellites and related components will be transferred to the licensing jurisdiction of the Commerce Control List."<sup>21</sup>

The bill contains a major exception because the authority granted cannot be used to allow satellite exports to China either for sale or for launch.<sup>22</sup> This limitation changes the focus of the USML review from an item's technical capability to the end-use country.<sup>23</sup> Because satellite purchases are often linked with the purchase of launch services, and because China is generally recognized as a reliable commercial launch provider,<sup>24</sup> the proposed exclusion could perpetuate the continued loss of global market share for U.S. satellite-related companies.

The FRAA also requires the President to "conduct a comprehensive and systematic review and assessment of the United States arms export controls system in the context of the national security interests and strategic foreign policy objectives of the United States."<sup>25</sup> The President must submit an unclassified report no later than eighteen months after the enactment of the legislation.<sup>26</sup>

In its report, the administration must assess the overall efficacy of the current arms export control system, and "determine the effects of export controls policies and the practices of the export control agencies on the United States defense industrial base and

17. H.R. Rep. 211-188, at 873 (Oct. 7, 2009) (Conf. Rep.).

18. Foreign Affairs Authorization Act, Fiscal Years 2010 and 2011, H.R. 2410, 111th Cong. § 826 (1st Sess. 2009).

19. *Id.* at § 826(a).

20. Foreign Relations Authorization Act, Fiscal Years 2010 and 2011, H.R. Rep. No. 111-136 at 157 (June 4, 2009) (according to 22 U.S.C. § 2778(f)(1), the removal of satellite items and technology must be notified to the foreign affairs committees of the House and Senate). Under section 38(f) of the Arms Export Control Act, the removal of such items must be notified to the foreign affairs committees of the House and Senate. See 22 U.S.C. § 2778(f)(1) (2009).

21. H.R. Rep. No. 111-136, at 157.

22. H.R. 2410 § 826(b). The same grant of authority, also containing the China exception, is part of a bill making other changes to the administration of the USML in Strengthening America's Satellite Industry Act, H.R. 3840, 111th Cong. (1st Sess. 2009).

23. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, *supra* note 2. See also *Foreign Affairs Eases Satellite Export Controls Except for China*, INSIDE U.S. TRADE, May 22, 2009.

24. See generally, e.g., CSIS REPORT, *supra* note 6.

25. H.R. 2410, § 803(a)(1).

26. *Id.* § 803(c).

United States employment in the industries affected by export controls.<sup>27</sup> Although not mentioning satellites explicitly, the required review is likely to include satellite exports given the impact of current export control policy on the satellite industry and its purported decline.

3. *Prohibition on Expending Appropriated Funds for Processing Commercial Satellite Export Licenses to China*

The State Department appropriations bill also contains a China-specific prohibition.<sup>28</sup> The bill prohibits any money appropriated for diplomatic or consular programs from being “obligated or expended for processing licenses for the export of satellites of United States origin (including commercial satellites and satellite components) to the People’s Republic of China”<sup>29</sup> unless the Committee on Appropriations is notified at least fifteen days in advance. Similar language has appeared annually since at least 1999, when the Strom Thurmond Act went into effect.<sup>30</sup> The Senate Appropriations Committee has characterized this language as simply continuing the embargo on satellites to China.<sup>31</sup>

4. *Space Posture Review Under the 2009 National Defense Authorization Act*

The legislative initiatives described above are developing at the same time that the Secretary of Defense and the Director of National Intelligence are completing a “space posture review” assessing the space policy and strategy of the United States. This review, mandated by the Duncan Hunter National Defense Authorization Act of 2009,<sup>32</sup> requires a comprehensive evaluation of U.S. national security policy and strategy in space, including an assessment of the relationship between U.S. export control policy and industrial base policy.

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27. *Id.* § 803(a)(2)(E).

28. Making Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999, H.R. Rep No. 105-825, at 43 (1998) (Conf. Rep.).

29. *Id.*

30. See, e.g., *Omnibus Appropriations Bill for Fiscal Year 1999*, Pub. L. No. 105-277 (1998), Conf. Rep. No. 105-825; *Consolidated Appropriations for Fiscal Year 2000*, Pub. L. No. 106-113 (1999), Conf. Rep. No. 106-479; *Department of Commerce and Related Agencies Appropriations Act, 2001*, Pub. L. No. 106-553 (2000), Conf. Rep. No. 106-1005; *Department of State and Related Agency Appropriations Act, 2002*, Pub. L. No. 107-77 (2001), Conf. Rep. No. 107-278; *Consolidated Appropriations Resolution, 2003*, Pub. L. No. 108-7 (2003), Conf. Rep. No. 108-10; *Consolidated Appropriations Bill for Fiscal Year 2004*, Pub. L. No. 108-199 (2003), Conf. Rep. No. 108-401; *Consolidated Appropriations Act, 2005*, Pub. L. No. 108-447 (2004), Conf. Rep. No. 108-792; *Science, State, Justice, Commerce, and Related Agencies Appropriation Act, 2006*, Pub. L. No. 109-108 (2005), Conf. Rep. No. 109-272; *Consolidated Appropriations Act, 2008*, Pub. L. No. 110-161 (2008); COMMITTEE ON APPROPRIATIONS, 110TH CONG., TEXT AND EXPLANATORY STATEMENT ON PUB. L. NO. 110-161 (Comm. Print 2008); *Omnibus Appropriations Act, 2009*, Pub. L. No. 111-8 at 2045, 2148 (2009).

31. Department of State, Foreign Operations, and Related Programs Appropriations Bill, 2010, S. Rep. No. 111-44, at 44 (2009).

32. Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 913 (2008).

### 5. *Satellite Licenses Granted in 2009*

DDTC granted licenses relating to at least twelve satellite transactions: two transfers of title, both to Canada for a total of five satellites; the design, manufacture and delivery of satellites to Japan, Spain, and the United Kingdom; six licenses for launches from Kazakhstan's Baikonur Cosmodrome of satellites produced by U.S. manufacturers or using U.S. technology; and commercial activities related to a satellite and ground network for Australia.<sup>33</sup>

Developments in 2009 have set the stage for a major reassessment of commercial satellite exports. The Administration and Congress appear prepared to accomplish a comprehensive reform of the nation's export control regime and liberalization of controls on satellite exports.

## II. The Weapons Acquisition Reform Act of 2009

The Weapons Acquisition Reform Act of 2009,<sup>34</sup> signed into law by President Obama on May 22, 2009, was designed to address several problems perceived to exist in the current weapons system acquisition process. The general purpose of the Act was to build more discipline, oversight, and transparency into the weapon acquisition planning and requirements process.

The Act addresses several areas, including: (1) U.S. Department of Defense's (DoD) reliance on unreasonable cost and schedule estimates; (2) DoD's insistence on unrealistic performance expectations; (3) the use of immature technologies that are often modified during development; and (4) the adoption of changes to program requirements, production quantities, and funding levels during ongoing programs.<sup>35</sup> In addressing these key areas, one of the largest changes derived from this legislation is the establishment of the Cost Assessment and Program Evaluation (CAPE) Office. Under Section 101, the CAPE will be controlled by a Senate-confirmed director in order to strengthen "oversight and accountability by appointing officials who will be charged with closely monitoring the weapons systems [purchased] in order to ensure that costs are controlled."<sup>36</sup>

Section 204 of the Act addresses overruns on research and development budgets that have plagued almost half of the DoD's Major Defense Acquisition Programs (MDAPs) since 2006.<sup>37</sup> On average, each of these ninety-five MDAPs exceeded their research and development budgets by an average of forty percent, and experienced schedule delays of up to two years.<sup>38</sup> Section 204 modifies the Nunn-McCurdy statute to terminate programs that experience critical cost growth beyond twenty-five percent of budget projections and that cannot be justified in a root cause analysis performed by DoD. More specifically, a program that meets this threshold must be terminated, unless the Milestone

33. U.S. Dep't of State, Notifications to the 111th Congress, [http://www.pmdtcc.state.gov/reports/congnotify\\_111.html](http://www.pmdtcc.state.gov/reports/congnotify_111.html) (last visited Jan. 19, 2010).

34. Weapons Systems Acquisition Reform Act of 2009, Pub. L. No. 111-23, § 204, 123 Stat. 1704 (2009).

35. 155 Cong. Rec. S5684 (daily ed. May 20, 2009) (statement of Sen. Levin).

36. President Barack Obama, Remarks by the President at Signing of the Weapons Systems Acquisition Reform Act (May 22, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-at-signing-of-the-Weapons-Systems-Acquisition-Reform-Act/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-signing-of-the-Weapons-Systems-Acquisition-Reform-Act/).

37. Weapons Systems Acquisition Reform Act of 2009 § 204.

38. Obama, *supra* note 36.

Decision Authority (MDA) submits documentation to the congressional defense committees that:

- a. identifies the root causes of the cost or schedule growth in accordance with applicable policies, procedures and guidance;
- b. identifies appropriate acquisition performance measures for the remainder of the development of the program; and
- c. includes one of the following:
  - (i) a written certification (with a supporting explanation) stating that
    - (I) the program is essential to national security;
    - (II) no alternatives will provide acceptable military capability at less cost;
    - (III) new estimates of the development cost or schedule, as appropriate, are reasonable; and
    - (IV) the management structure for the program is adequate to manage and control program development cost and schedule.<sup>39</sup>

Any program that goes through this review may be granted a waiver from termination. But even programs that receive waivers will lose their most recent milestone approval, and must be reevaluated.<sup>40</sup> Until the waiver is granted, contractors are limited in their ability to execute under these contracts unless the Pentagon's acquisition chief grants an exception to "allow the program to be restructured without unnecessarily wasting resources."<sup>41</sup>

Organizational conflict of interest concerns in the procurement community are also addressed. Within 270 days after the date of enactment, the Secretary of Defense must provide uniform guidance and tighten existing requirements for organizational conflicts of interest by contractors in major defense acquisition programs.<sup>42</sup> Under this provision, conflicts of interest should be avoided that arise as a result of: (1) lead systems integrator contracts (which will be prohibited beginning in 2010); (2) companies under existing contracts providing technical advice/assistance to the government in developing major weapons systems that also compete for prime contracts or major subcontracts within the same acquisition; (3) prime contractors awarding subcontracts for major subsystems (*i.e.*, software integration) to another of its divisions; and (4) contractors performing technical evaluations of a major defense acquisition program.<sup>43</sup>

President Obama indicated that the purpose behind the Act was to end "waste and inefficiency."<sup>44</sup> The changes made in the acquisition process are aimed at identifying problems with acquisitions before cost overruns, technical problems, or schedule delays threaten the viability of the program, and to ensure that "American taxpayers and the American military can get the best weapons at the lowest cost."<sup>45</sup> Only time will tell what benefits industry and government will derive in this attempt to improve the system of acquiring major weapons systems.

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39. Weapons Systems Acquisition Reform Act of 2009 § 204.

40. John T. Bennett, *Watered Down Reform*, DEFENSE NEWS, May 25, 2009, <http://www.defensenews.com/story.php?i=4106182>.

41. *Id.*

42. Weapon Systems Acquisition Reform Act of 2009 § 207.

43. *Id.*

44. Obama, *supra* note 36.

45. *Id.*

### III. Commerce Department “Simplifies” U.S. Export Controls on Encryption Items

The U.S. Department of Commerce Bureau of Industry and Security (BIS) in October 2009 completed its initial phase of simplifying U.S. export controls on “encryption items.” On October 15, 2009, BIS issued its final “Encryption Simplification Rule,” modifying and refining the regulatory regime that governs controls on hardware, software, and technical data that use encryption technology.<sup>46</sup> Although the changes provide welcomed relief for U.S. exporters in some respects, the regulations fall short of any significant restructuring of the regulatory regime on encryption that has been in place for nearly a decade.

BIS’s October 15, 2009 rule finalizes, and slightly expands on an interim revision published in October, 2008.<sup>47</sup> In particular, BIS has resolved certain inconsistencies in the interim rule that had been identified in public comments since the 2008 publication. In general, however, the encryption simplification regulations, even as finalized, do not fully address U.S. exporters’ demands for greater simplification and reduction of licensing and reporting requirements, especially with regard to the still highly regulated range of components and technology that contain publicly available source code or open cryptographic interfaces that BIS continues to control as encryption items.

One of the most significant aspects of the encryption simplification rule is the creation of a new category of products that perform “ancillary cryptography.” Items in this new category are generally exempted from review and reporting requirements. Examples of commodities and software listed by BIS as performing “ancillary cryptography” include items that are specially designed and limited to “business process modeling and automation (e.g., supply chain management, inventory, scheduling and delivery); industrial, manufacturing or mechanical systems (including robotics, other factory or heavy equipment, and facilities systems controllers, such as fire alarms and HVAC); and automotive, aviation and other transportation systems.”<sup>48</sup> The term “transportation systems” was further revised in the October 2009 notice to clarify that it does not include any Automatic Identification Systems (AIS)/Vessel Traffic Service (VTS).<sup>49</sup> BIS explicitly provided that secure AIS/VTS and their maritime applications are not considered “ancillary cryptography.”<sup>50</sup>

The new BIS regulations also eliminate review and reporting requirements for certain products using short-range wireless encryption technology and certain wireless “personal area network” items that implement published or commercial cryptographic standards.<sup>51</sup> In addition, BIS has raised the thresholds that allow some network infrastructure equipment to be exported under unrestricted License Exception ENC.<sup>52</sup>

46. Encryption Simplification Rule, 74 Fed. Reg. 52880 (Oct. 15, 2009) (to be codified at 15 C.F.R. pts. 730, -34, -38, -40, -42, -44, -72, -74).

47. Encryption Simplification Rule, 73 Fed. Reg. 57495-01 (Oct. 3, 2008) (to be codified at 15 C.F.R. pts. 732, -34, -38, -40, -42, -44, -46, -48, -50, -62, -70, -72, -74).

48. 15 C.F.R. § 772.1 (2009).

49. *Id.*

50. *Id.*

51. 15 C.F.R. § 740.17(b)(4) (2009).

52. *Id.* § 740.17(b)(2)(i).



Another significant area of simplification concerns the EAR provisions that apply to commodities and software that employ weak cryptography (defined under the new regulations as using “symmetric algorithms with key lengths not exceeding 80 bits; asymmetric algorithms with key lengths not exceeding 1024 bits; and elliptic curve algorithms with key lengths not exceeding 160 bits”).<sup>53</sup> Exporters of these products may now immediately ship to most destinations, without a mandatory waiting period, after filing the required review request with BIS.<sup>54</sup> Software products designed to protect against malicious computer damage, such as viruses, where the use of cryptography is limited to authentication, digital signature, or the decryption of data or files, are now decontrolled and may be freely exported under EAR 99 without a license.<sup>55</sup>

Revisions to BIS’s encryption controls also substantially change the treatment of “mass market” encryption commodities and software. Mass market commodities and software that employ an encryption key length of up to, and including, 64 bits for the symmetric algorithm are now generally classified under ECCN 5D992, without prior review by BIS.<sup>56</sup> The previous notification to BIS that was required under EAR 742.15(b) for these products has been removed.<sup>57</sup> For mass market commodities and software that employ a key length greater than 64 bits for the symmetric algorithm, exporters previously were able to self-classify certain types of these products under ECCN 5A992 or 5D992 and export then under NLR (no license required) pending a thirty day BIS review.<sup>58</sup> Under the new regulations, an exporter must register its review request with BIS while the product is temporarily classified under ECCN 5A002 or 5D002, which in turn requires application of License Exception ENC in order to export to a limited group of “license-free” countries (“Supplement No. 3” countries) immediately after BIS registration.<sup>59</sup> After a thirty-day period following registration, the exporter may ship to most destinations outside of the countries listed in Supplement No. 3 without a license, unless the destination or individual recipient requires a license for anti-terrorism reasons under BIS’s separate AT controls. After BIS completes its review and confirms “mass market” treatment, the product is classified under ECCN 5A992.c. or 5D992.c. (rather than 5A002 or 5D002), and exports may continue on an NLR basis.<sup>60</sup>

The EAR contains criteria for determining whether commodities and software containing encryption technology is considered “mass market.” Under these provisions, these commodities or software must meet the following criteria: (a) generally available to the public by being sold, without restriction, from stock at retail selling points; (b) cryptographic functionality not easily changed by the user; (c) designed for installation by the user without further substantial support by the supplier; and (d) when necessary, details of the items to be provided, upon request, to the appropriate authority in the exporter’s

53. *Id.* § 740.17(b)(1)(ii)(A) (2009).

54. *Id.* § 740.17(b)(1).

55. Encryption Simplification Rule, 73 Fed. Reg. 57502 (Oct. 3, 2008) (to be codified at 15 C.F.R. pt. 742.15).

56. *Id.*

57. *Id.*

58. *Id.*

59. See 15 C.F.R. § 740.17(b)(1)(i).

60. See 15 C.F.R. § 742.15(b)(2) (2009); 73 Fed. Reg. 57499-57500 (Oct. 3, 2008) (to be codified at 15 C.F.R. pts. 740, 742).

country in order to ascertain compliance with conditions described in paragraphs (a) through (c).<sup>61</sup>

Notwithstanding the intended simplifications in the BIS interim rule issued in October 2008 and the further corrections and refinements published on October 15, 2009, many exporters will find that BIS's encryption controls still involve unnecessary complexity and burdensome registrations and paperwork. Most items controlled by BIS do not involve encryption for which exporters may self-classify and export without BIS pre-notification or pre-registration. Most commodities and software that contain encryption functions still must be pre-registered with BIS and specifically classified by BIS as either not requiring a license (as a "mass market" item) or as eligible for a license exception.

#### IV. BIS and OFAC Signal Continued Commitment to Enforcing Sanctions Laws in Settling with DHL

On August 6, 2009, the U.S. government announced an agreement with DHL to settle allegations that the company made hundreds of shipments to Iran, Sudan, and Syria, and failed to meet recordkeeping requirements in violation of U.S. export controls and sanctions laws. This case represents the largest joint settlement involving the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC)<sup>62</sup> and the U.S. Department of Commerce's Bureau of Industry and Security (BIS).<sup>63</sup> The settlement was reached after a five-year investigation, conducted with the U.S. Department of Homeland Security's Customs and Border Protection (CBP), which intercepted and reported many of the shipments.

U.S. law prohibits the export of most goods to Iran, Sudan, and Syria. OFAC alleged that between August 2002 and March 2007, DPWN Holdings (USA), Inc., formerly known as DHL Holdings (USA), Inc. and DHL Express (USA), Inc. (collectively DHL), made more than 300 shipments to Iran and Sudan in violation of the Iranian Transactions Regulations (ITR),<sup>64</sup> and Sudanese Sanctions Regulations (SSR),<sup>65</sup> respectively. In addition, OFAC alleged that between December 2002 and April 2006, DHL failed to maintain required records with respect to numerous other shipments to Iran, in violation of the Reporting, Procedures, and Penalties Regulations (RPPR).<sup>66</sup>

61. 15 C.F.R. pt. 774, Supp. 1 at cat. 5, part II, note 3.

62. Press Release, Bureau of Industry and Security, U.S. Dep't of Commerce, DHL Signs \$9.44 Million Joint Settlement Agreement with BIS and OFAC (Aug. 6, 2009), *available at* [http://www.bis.doc.gov/news/2009/bis\\_press08062009.html](http://www.bis.doc.gov/news/2009/bis_press08062009.html). OFAC administers and enforces economic sanctions and embargoes that target certain countries, including Iran and Sudan. OFAC requires those engaging in transactions subject to OFAC regulations to maintain "a full and accurate record of each such transaction" and to make such record "available for examination for at least five years after the date of such transaction." Office of Foreign Assets Control, <http://www.treas.gov/offices/enforcement/ofac/> (last visited Jan. 7, 2010).

63. BIS administers exports from the United States of products, materials, technology, and software; and re-exports from abroad of such items, either as finished products or as content in a foreign produced item, provided that such content exceeds specified minimum levels. BIS, Guiding Principles of the Bureau of Industry & Security, <http://www.bis.doc.gov/about/bisguidingprinciples.htm> (last visited Jan. 7, 2010).

64. 31 C.F.R. pt. 560 (1997).

65. 31 C.F.R. pt. 538 (1998).

66. 31 C.F.R. pt. 501 (1997).

BIS alleged that on eight occasions between June 2004 and September 2004, DHL caused, aided, and abetted acts prohibited by the Export Administration Regulations (EAR),<sup>67</sup> when it transported items subject to the EAR from the United States to Syria. In addition, BIS alleged that, with regard to ninety exports between May 2004 and November 2004, DHL failed to retain air waybills and other export control documents required to be retained under Part 762 of the EAR.

DHL's violations were attributed, at least in part, to "pervasive compliance failures [which] allowed for numerous shipments to Iran and Sudan in apparent violation of Treasury and Commerce Department regulations."<sup>68</sup> Joint enforcement actions between BIS and OFAC "[signaled] the U.S. Government's commitment to ensuring that sanctions laws—including recordkeeping requirements—are followed carefully."<sup>69</sup>

DHL agreed to pay \$9,444,744 to settle the alleged violations. In addition, DHL agreed to hire a third-party consultant to conduct audits of DHL's compliance with the OFAC regulations and the EAR from 2007 through 2011. DHL's settlement with BIS and OFAC reflected a close and continuing collaboration between the two agencies to promote robust enforcement of U.S. export controls and sanctions laws. To avoid sanctions, companies would be well-advised to maintain robust compliance programs designed to prevent and detect possible violations of U.S. export controls and sanctions laws.

## V. Final Specialty Metals Rule

On July 29, 2009, the DoD issued a final rule concerning the U.S. Government acquisition of specialty metals.<sup>70</sup> This final rule incorporated recently enacted statutory restrictions into the Defense Federal Acquisition Regulation Supplement (DFARS).<sup>71</sup> As a result of DoD amending the DFARS, Aerospace and Defense contractors will begin to notice new clauses in their DoD prime and subcontracts dealing with specialty metals.<sup>72</sup>

In 1941, the U.S. Congress enacted domestic source restrictions through the 1941 Fifth Supplemental Department of Defense Appropriations Act in order to protect the U.S. industrial base.<sup>73</sup> These restrictions became known as the Berry Amendment, named after Representative E.Y. Berry.<sup>74</sup> In 1973, specialty metals were added to the Berry Amend-

67. 15 C.F.R. pts. 730-774 (1996).

68. Bureau of Industry and Security, *supra* note 62.

69. *Id.*

70. DFARS Restriction on Specialty Metals, 74 Fed. Reg. 37626 (July 29, 2009) (to be codified at 48 C.F.R. pts. 202, 212, 225, 252).

71. *See id.*; *see also* National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 842, 120 Stat. 2083 (2007); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, §§ 804, 884, 120 Stat. 3 (2008).

72. *See* DFARS Restriction on Acquisition of Specialty Metals, 74 Fed. Reg. 37626 (July 29, 2009) (codified at 48 C.F.R. § 252.225-7008); DFARS Restriction on Acquisition of Certain Articles Containing Specialty Metals, 74 Fed. Reg. 37626 (July 29, 2009) (codified at 48 C.F.R. § 252.225-7009); DFARS Commercial Derivative Military Article—Specialty Metals Compliance Certificate, 74 Fed. Reg. 37626 (July 29, 2009) (codified at 48 C.F.R. § 252.225-7010).

73. Valerie Bailey Grasso, *The Berry Amendment: Requiring Defense Procurement to Come from Domestic Sources*, CONG. RESEARCH SERV., Apr. 21, 2005, available at <http://www.fas.org/sgp/crs/natsec/RL31236.pdf> [hereinafter CRS, *The Berry Amendment*].

74. *See* Sean P. Bamford, *The Persistence of Time: A Brief History and Analysis of the Berry Amendment*, 32 PUB. CONT. L.J. 577, 582 (2003).

ment,<sup>75</sup> but Congress did not clarify the definition of specialty metals until 1976.<sup>76</sup> Specialty metals were again addressed in the 2007 and 2008 Defense Authorization Acts.<sup>77</sup> Eventually specialty metals were taken out of the Berry Amendment and placed in a separate section of Title 10 of the U.S. Code.<sup>78</sup>

The current definition of “specialty metal” essentially includes certain types of steel alloys with certain nickel or cobalt content, titanium and its alloys, and zirconium and its alloys.<sup>79</sup> Many key terms have also been defined in the new DFARS clauses to include “assembly,” “commercial derivative military article,” “commercially available off-the-shelf (COTS) items,” “component,” “electronic component,” “produce,” and “required form.”<sup>80</sup> In a DoD acquisition, if aircraft, missiles, space systems, ships, tanks, automotive parts, weapon systems, ammunition or any components thereof contain specialty metals, those metals are required to be melted or produced within the United States.<sup>81</sup> Acquisition of “a specialty metal (*e.g.*, raw stock, including bar, billet, slab, wire, plate, and sheet; castings; and forgings) as an end item” is further restricted, “unless the specialty metal is melted or produced in the United States.”<sup>82</sup>

A number of exceptions exist to these restrictions, including acquisitions outside the United States for combat operations, acquisitions for contingency operations, electronic components (unless domestic availability is deemed critical to national security), COTS items (with certain exceptions), items manufactured in certain qualifying countries, domestically non-available items, and specialty metals with *de minimis* percentages of non-compliant content.<sup>83</sup> A “one-time waiver” for acquisitions is also possible where “[f]inal acceptance takes place before September 2010;” the noncompliant specialty metals are “incorporated into items” made “in the [United States] prior to October 17, 2006;” or the contracting officer makes a written determination, and the determination is approved by the Under-Secretary of Defense for Acquisition, Technology and Logistics, and a subsequent public notice of the waiver is posted on the Federal Business Opportunities website ([www.FedBizOpps.gov](http://www.FedBizOpps.gov)).<sup>84</sup>

## VI. Foreign Bidders on Canadian Federal Contracts Lose the Protections of the Agreement on Internal Trade

In a surprising decision, the Supreme Court of Canada (SCC) held in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*<sup>85</sup> that an unsuccessful bidder on a procurement conducted by the Canadian federal government must be a “Canadian sup-

75. Defense Appropriation Act of 1973, Pub. L. No. 92-570, § 724, 86 Stat. 1184 (1972).

76. Defense Appropriation Act of 1976, Pub. L. No. 94-212, 90 Stat. 172 (1976).

77. National Defense Authorization Act for Fiscal Year 2007 § 842; National Defense Authorization Act for Fiscal Year 2008 §§ 804, 884.

78. 10 U.S.C. § 2533b (2006); see also *The Berry Amendment*, *supra* note 73, at 2-3.

79. 48 C.F.R. §§ 252.225-7008(a)(3), 252.225-7009(a)(12) (2009).

80. See *id.* § 252.225-7009.

81. 48 C.F.R. § 225.7003-2(a) (2009).

82. *Id.* § 225.7003-2(b).

83. *Id.* § 225.7003-3; see also *id.* § 252.225-7009(c).

84. *Id.* § 225.7003-4.

85. *Northrop Grumman Overseas Servs. Corp. v. Canada (Attorney General)*, [2009] 2009 S.C.C. 50 (Can.), available at <http://scc.lexum.umontreal.ca/en/2009/2009scc50/2009scc50.html>.

plier” in order to have standing to bring a complaint before the Canadian International Trade Tribunal (CITT) based on the Agreement on Internal Trade (AIT).

#### A. BACKGROUND: PROCUREMENT REVIEW IN CANADA

The NAFTA,<sup>86</sup> the World Trade Organization Agreement on Government Procurement (WTO-AGP)<sup>87</sup> and the AIT<sup>88</sup> (and now the Canada-Chile Free Trade Agreement (CCFTA)) each establish its own rules to provide suppliers equal opportunity to compete with Canadian suppliers for contracts involving designated classes of goods and services purchased by prescribed federal government departments, agencies, and Crown corporations. Each also imposes procedural disciplines aimed at promoting transparency, predictability, and competition in public sector procurements.

These agreements “require the signatories to maintain an independent bid challenge authority” to enforce the procurement obligations contained in these agreements.<sup>89</sup> The CITT is Canada’s bid challenge authority.<sup>90</sup> It was designated to handle complaints alleging breach of any of the agreements mentioned above. Its role is “to ensure that the procurements covered by NAFTA, the AIT, the AGP or the CCFTA are conducted in an open, fair and transparent manner and, wherever possible, in a way that maximizes competition.”<sup>91</sup> “On occasion, a potential supplier may have reason to believe that a contract has been or is about to be awarded improperly or illegally, or that . . . it has been in some way wrongfully denied a contract or an opportunity to compete for one.”<sup>92</sup> The CITT mechanism provides, at least until now, a one-stop “opportunity for redress for potential suppliers concerned about the propriety of the procurement process relating to contracts covered” under these agreements.<sup>93</sup>

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86. Under the NAFTA, Canada agreed to provide suppliers of the United States and Mexico equal opportunity to compete with Canadian suppliers for contracts involving designated classes of goods and services purchased by prescribed Canadian government departments, agencies and Crown corporations. CITT PUBLICATION: PROCUREMENT REVIEW PROCESS: A DESCRIPTIVE GUIDE 2009 ¶ 4 (2009), available at [http://www.citt.gc.ca/publicat/guide\\_e.asp](http://www.citt.gc.ca/publicat/guide_e.asp). “It guarantees national treatment and non-discrimination to goods originating in Canada, the United States and Mexico, and to the suppliers of such goods and service suppliers in these countries.” *Id.* ¶ 6. “It also imposes procedural disciplines aimed at promoting transparency, predictability and competition in public sector procurements.” *Id.*

87. Under the WTO-AGP, Canada “agreed to provide suppliers of the signatory countries equal opportunity to compete with Canadian suppliers for contracts involving [designated] classes of goods and services” purchased by specified Canadian government departments, agencies and Crown Corporations “with [a] value equal to or greater than certain monetary thresholds.” *Id.* ¶¶ 7-8. The AGP has its own set of disciplines for public procurements, not all of which mirror those contained in the AIT and NAFTA. *Id.* ¶ 8.

88. Under the AIT (an agreement among Canada and all its provinces and territories), Canada “agreed to provide . . . suppliers with equal access to federal government procurement for contracts for [designated] classes of goods and services” purchased by prescribed government departments and agencies and Crown corporations. *Id.* ¶ 2.

89. *Id.* ¶ 1.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

## B. SUPREME COURT OF CANADA DECISION

The Department of Public Works and Government Services Canada (PWGSC) issued a request for proposals for the procurement of military goods, in particular, thirty-six Advance MultiRole Infrared Sensor (AMIRS) targeting pods for the Department of National Defense's CF-18 Hornet aircraft, and thirteen years of in-service support for the pods.<sup>94</sup> Northrop Grumman Overseas Services Corporation (Northrop Grumman Overseas), a Delaware corporation wholly owned by Northrop Grumman Corporation, submitted a bid.<sup>95</sup> The contract was awarded to Lockheed Martin Corporation for USD 89,487,521 for the AMIRS pods and USD 50,357,649 for the in-service support.<sup>96</sup>

Northrop Grumman Overseas filed a complaint with the CITT alleging that PWGSC had failed to evaluate the bids properly, violating Article 506(6) of the AIT.<sup>97</sup> It alleged that PWGSC had "failed to evaluate bids [. . .] in accordance with the Evaluation Plan, which set out the procedures and methodology for evaluating bids, including the score to be awarded for different aspects of each bid."<sup>98</sup> Northrop Grumman Overseas "allege[d] that it was not awarded points to which it was entitled and that Lockheed was awarded points to which it was not entitled."<sup>99</sup> "In so doing," Northrop Grumman Overseas "argue[d] that [PWGSC] violated Article 506(6) of the AIT, which requires procurements covered by the AIT to clearly identify the criteria" by which bids will be evaluated.<sup>100</sup>

PWGSC challenged Northrop Grumman Overseas' standing to file a complaint based on a breach of the AIT on the grounds that it was not a Canadian supplier.<sup>101</sup> The issue of standing was appealed to the Supreme Court of Canada.<sup>102</sup>

Standing before the CITT for procurement complaints is governed by section 30.11(1) of the Canadian International Trade Tribunal Act (CITT Act), which provides that "a *potential supplier* may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a *designated contract* and request the Tribunal to conduct an inquiry into the complaint."<sup>103</sup> Northrop Grumman Overseas argued that the contract for the supply of targeting pods for the CF-18 aircraft plus in service support for thirteen years is a contract designated in Article 502 of the AIT.<sup>104</sup>

The SCC rejected Northrop Grumman Overseas' argument that "the only requirement for standing is to be a 'potential supplier' under a 'designated contract.'"<sup>105</sup> The SCC found that, in the case of the AIT, in order for the contract to be a designated contract,

94. 2009 S.C.C. 50, ¶ 2.

95. *Id.* ¶¶ 2, 4.

96. *Id.* ¶ 2.

97. *Id.* ¶ 3.

98. *Id.*

99. *Id.*

100. *Id.* ¶ 3.

101. *Id.* ¶ 5.

102. *Id.* ¶ 8.

103. *Id.* ¶ 13 (emphasis added).

104. *Id.* ¶ 14.

105. *Id.* Section 30.1 of the CITT Act defines a "potential supplier" as a "bidder or prospective bidder on a designated contract." *Id.* ¶ 16. A "designated contract" is defined as "a contract for the supply of goods or services" to a government institution and "that is designated or of a class of contracts designed by the regulations." *Id.* Section 3(1) of the CITT Regulations further provides that a "designated contract" is one described in the NAFTA, the WTO Agreement on Government Procurement, or the AIT and now the

the supplier must be a Canadian supplier in a procurement contract by a Canadian government or entity.<sup>106</sup> The Court held that only suppliers with an office in Canada qualify as Canadian suppliers. On the basis that Northrop Grumman Overseas did not have a place of business in Canada, the SCC found that it was not a Canadian supplier and not entitled to invoke the provisions of the AIT before the CITT, or anywhere else for that matter.<sup>107</sup>

The Supreme Court was influenced in interpreting the AIT and the CITT Act by what Canada had agreed to in the NAFTA and the WTO-AGP. In rejecting Northrop Grumman Overseas' argument that non-Canadian suppliers have standing to bring complaints based on the AIT, the Court noted that the contract for military goods at issue was not a designated contract under the NAFTA or the WTO-AGP because its subject matter did not fall within the scope of either of those trade agreements.<sup>108</sup> By contrast, it noted that AIT does apply to all procurements by PWGSC or DND and that the goods were not excluded from the AIT.<sup>109</sup> Had Northrop Grumman Overseas' argument prevailed, it would have gained rights under the AIT despite the U.S. government not being a party to the AIT and notwithstanding that this type of military equipment is specifically excluded from the scope of coverage under the NAFTA and WTO AGP. In the Court's view, allowing Northrop Grumman Overseas to do through the back door what it could not do through the front door would have undercut such an exclusion negotiated by the Government of Canada.<sup>110</sup> The Supreme Court of Canada has thus decided that the provinces and Canada, which negotiated the AIT to gain for their tax-paying citizens the benefits of competition in procurement, meant to have that benefit apply only to intra-Canadian competition.

This decision has far-reaching consequences for foreign bidders on Canadian federal government contracts:

1. A non-Canadian supplier whose contract is not covered by the NAFTA or the WTO Agreement on Government Procurement (WTO-AGP) procurement provisions has no recourse to the CITT, but only normal judicial review. Conversely, the supplier's Canadian competitors will have recourse under the AIT, the NAFTA, and the WTO-AGP, as well as normal judicial review.
2. If NAFTA and AGP are not excluded, that foreign supplier can go to the CITT, but can only invoke the protections of NAFTA and WTO-AGP and not those of the AIT.
3. If the goods are excluded from the scope of coverage under the NAFTA and WTO-AGP, the foreign supplier now only has recourse to the Federal Court by way of

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Canada-Chile Free Trade Agreement. In order to gain access to the CITT complaint procedure, the subject-matter of the procurement must be within the scope of one of the trade agreements. *Id.* ¶ 17.

106. *Id.* ¶ 34.

107. *Id.* ¶ 30.

108. *Id.* ¶ 32. For the DND, "the only procurements covered by the NAFTA are those for goods listed at its Annex 1001.1b-1," . . . "[a]nd the only procurement covered by the WTO-AGP are those listed in its Annex I." *Id.* ¶ 18. "Fire Control Systems" [were] not listed in either Annex 1001.1 b-1 or Annex 1 and therefore neither" . . . of these agreements applied to the procurement at issue. *Id.*

109. See Agreement on International Trade Annex 502.1A, July 18, 1994, available at [http://www.ait-aci.ca/en/ait/ait\\_en.pdf](http://www.ait-aci.ca/en/ait/ait_en.pdf).

110. 2009 S.C.C. 50, ¶¶ 41, 47.

judicial review of the contract award.<sup>111</sup> This recourse is limited, and the remedies are much more restrictive by comparison to that available through the CITT.

4. The consequence of limiting standing under the AIT to Canadian suppliers is a double bifurcation of the bid complaint system.
  - a. Canadian suppliers have standing to make AIT-related complaints to the CITT, but their non-Canadian competitors cannot.
  - b. Successful non-Canadian suppliers are now required to intervene to defend their awards in proceedings before the CITT, but would not have an equal right to pursue remedies before it if they were unsuccessful.
  - c. Such a bifurcated bid complaint system will result in conflicting decisions and increased costs.
5. The procurement obligations in the trade agreements now confer different rights. A non-Canadian supplier will no longer be able to rely on the protections afforded under the AIT, which are in certain aspects different and more demanding than those of the NAFTA or WTO-AGP.
6. The SCC decision may be seen as a “discriminatory measure” subject to challenge under the NAFTA and WTO Agreement on Procurement.

The only method of curing this discriminatory and bifurcated system of procurement review now in place is for Parliament to make clear that its intention is that all bidders should play by, and be protected by, the same rules. Meanwhile, non-Canadian bidders on Canadian federal government contracts, if they are not covered under the NAFTA or the WTO-AGP, ought to ensure that their bids are made through and fulfilled by their Canadian subsidiary or a Canadian entity with a place of business in Canada to take advantage of the fair bidding protections in the AIT and to have standing to complain about the award before the CITT.

## VII. WTO Rules Airbus Subsidies Illegal

The WTO ruled in a one thousand page confidential interim report circulated to U.S. and European Union (EU) trade ministers that the EU governments provided illegal subsidies to Airbus, a subsidiary of European Aeronautic Defence and Space Company (EADS), in the form of preferential government-backed loans for the A380 passenger aircraft.<sup>112</sup> These loans, according to the ruling, constituted illegal export subsidies in violation of the General Agreement on Tariffs and Trade (GATT).<sup>113</sup> The government-backed loans were colloquially known as “launch aid” in the EU.<sup>114</sup> The WTO also found that the Airbus A300, A310, A320, A330, and A340 aircraft benefitted from the subsidized loans.<sup>115</sup> The WTO ruling called for these loans to be repaid.<sup>116</sup> The United States also

111. Under both the NAFTA and WTO-AGP, military procurement is treated differently from many other categories of procurement. For the Department of National Defence, NAFTA covers only procurements for the goods listed at its Annex 1001.1 b-1. The WTO-AGP covers only procurements listed in its Annex I. In *Northrop Grumman Overseas*, the goods at issue, “Fire Control Systems,” were not listed in either Annex.

112. John W. Miller & Daniel Michaels, *WTO Ruling Calls Airbus Aid Illegal*, WALL ST. J., Sept. 6, 2009, at A8, available at <http://online.wsj.com/article/SB125206164068986193.html>.

113. *Id.*

114. Nicola Clark & Christopher Drew, *W.T.O. Says Aid to Airbus for A380 Was Illegal*, N.Y. TIMES, Sept. 4, 2009, at B1, available at <http://www.nytimes.com/2009/09/05/business/global/05wto.html>.

115. *Id.*



won on part of its claims against the EU for \$8 billion in research and development and facilities financing for the EU-based aircraft manufacturer.<sup>117</sup> But the EU contended that much of the United States' specific claims have been rejected by the WTO panel as "[r]eimburseable investment loans for the A380 were not judged to be prohibited in their totality."<sup>118</sup> The WTO's ruling did not apply to US\$4.1 billion in loans pledged by France, Germany, and the United Kingdom to Airbus to assist in the development of the A350 jet.<sup>119</sup>

The U.S. government brought the case in 2004 charging that the EU governments had provided US\$20 billion in allegedly illegal loans to develop advanced aircraft for the global market. The illegal loans are alleged to have been provided to Airbus from 1970 to 2004. The EU filed a counterclaim against the United States in the WTO alleging similar disparate treatment for the U.S.-based aircraft manufacturer Boeing. The EU alleged that Boeing received US\$24 billion in subsidies in the form of contracts with the U.S. military, and tax breaks from the State of Washington, where the aircraft manufacturer is based. The final report is set for release sometime in 2010.

The WTO's ruling is likely to have a substantial impact on Airbus' bid for the US\$35 billion contract with the U.S. Air Force to build its next generation of aerial refueling tankers.<sup>120</sup> A consortium of EADS and Northrop Grumman is bidding on the contract.<sup>121</sup> The ongoing competition between Airbus and Boeing for this large contract has been mired in controversy. Airbus won the bidding last year only to have its contract overturned by the Government Accountability Office.<sup>122</sup> The rebidding is expected to begin next year.<sup>123</sup> Either or both sides may appeal the final ruling within ninety days of its issuance.

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Peter Cohan, *WTO Airbus Ruling Could Tilt \$40 Billion Tanker Deal to Boeing*, DAILY FIN., Sept. 8, 2009, <http://www.dailyfinance.com/2009/09/08/wto-airbus-ruling-could-tilt-40-billion-tanker-deal-to-boeing/>.

121. *Id.*

122. *Id.*

123. *Id.*

