

The Revised Arms Export Control Regulations

The Department of State recently published the first overall revision of the International Traffic in Arms Regulations (ITAR) since 1969.¹ Although the new ITAR, which govern exports of munitions from the United States, do not contain sweeping changes, they reflect recent trends in the munitions control area and provide an appropriate occasion for a review of this corner of our nation's export control system.²

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1. Revision of the International Traffic in Arms Regulations, 49 Fed. Reg. 47,682 (1984) (eff. Jan. 1, 1985; to be codified at 22 C.F.R. pts. 121-130) (hereinafter, "ITAR § ____"; the ITAR as they existed immediately prior to the effective date of the revision will be cited as "22 C.F.R. § ____ (1984)"); *see also* 49 Fed. Reg. 48,536 (1984) (technical corrections); 50 Fed. Reg. 12,787 (1985) (technical corrections). A proposed revision of the ITAR had been published for public comment in December 1980, 45 Fed. Reg. 83,970 (1980), and the availability for public review and comment of a subsequent draft had been announced in August 1984. 49 Fed. Reg. 34,240 (1984).

2. Generally, the ITAR apply to items "deemed to be inherently military in character." ITAR § 120.3. Items that do not meet this test, but that have potential for military (as well as civilian) use are controlled by the U.S. Department of Commerce under the Export Administration Act of 1979, 50 U.S.C. App. §§ 2401-2420 (1982); *see also* Exec. Order No. 12,470, 49 Fed. Reg. 13,099 (1984), and the Export Administration Regulations. 15 C.F.R. pts. 368-399 (1984). Such items are customarily referred to as "dual use" items. Except in the case of certain nuclear end uses, *see* 15 C.F.R. pt. 378 (1984), it is the inherent capabilities and design of an item, rather than the end use to which a particular shipment will be put, that determines whether the item falls under the ITAR or the Export Administration Regulations. Nuclear reactors, nuclear fuel, and other nuclear-related materials are controlled by the Nuclear Regulatory Commission under the Atomic Energy Act of 1954. 42 U.S.C. §§ 2011-2296 (1982); *see also* 10 C.F.R. pt. 110 (1984). For a listing of other United States export control regimes. *See* 15 C.F.R. § 370.10 (1984).

I. General

The ITAR are issued under the authority of sections 38³ and 39⁴ of the Arms Export Control Act (the Act), which were enacted in 1976.⁵ Section 38 authorizes the President “to control the import and the export of defense articles and defense services” and to designate as the Munitions List “those items which shall be considered as defense articles and defense services.”⁶ Manufacturers, exporters, and importers of defense articles or defense services are required to register with the United States Government and to secure licenses for any such exports or imports.⁷

The President has delegated his export control functions under section 38 to the Secretary of State and his import functions to the Secretary of the Treasury.⁸ Within the State Department, the ITAR are administered by the Office of Munitions Control (the OMC).⁹ Violation of the Act can result in imprisonment,¹⁰ criminal fines,¹¹ and a variety of administrative sanctions.¹²

Both the new ITAR and its predecessor consist of the Munitions List,¹³ which is an enumeration of the specific goods and technical data subject to the regulations, and regulatory requirements for registration and licensing.¹⁴ A final portion of the ITAR governs the reporting to the State Department of fees, commissions, and political contributions paid in connection with arms sales abroad.¹⁵

In general, licenses for the shipment to communist countries of goods or data on the Munitions List will be denied.¹⁶ The People’s Republic of China

3. 22 U.S.C. § 2778 (1982).

4. 22 U.S.C. § 2779 (1982).

5. International Security Assistance and Arms Export Control Act of 1976, § 212(a)(1), Pub. L. No. 94-329, 90 Stat. 744, June 30, 1976 (enacting section 38); *id.*, § 604(b), 90 Stat. 767 (enacting section 39). Section 38 is the successor to section 414 of the Mutual Security Act of 1954. Act of August 26, 1954, ch. 937, § 414, 68 Stat. 848, Aug. 26, 1954, *repealed by* International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 212(b)(1), 90 Stat. 745.

6. 22 U.S.C. § 2778 (1982).

7. 22 U.S.C. § 2778(b) (1982).

8. Exec. Order No. 11,958, § 1(l), 3 C.F.R. 79 (1978), *reprinted at* 22 U.S.C. § 2751 note (1982).

9. 35 Fed. Reg. 5422 (1970).

10. 22 U.S.C. § 2778(c) (1982) (2-year term); *see also* 18 U.S.C. § 1001 (1982) (false statements to federal agencies).

11. 22 U.S.C. § 2778(c) (1982) (\$100,000); *see also* 18 U.S.C. § 1001 (1982) (false statements to federal agencies).

12. ITAR §§ 127.1-127.9; *see also* 22 U.S.C. § 401 (1982) (forfeiture of articles attempted to be exported unlawfully and conveyances used in furtherance of such attempts). The administrative procedures to be followed when a civil penalty is sought under part 127 of the ITAR are set forth in part 128. ITAR §§ 128.1-128.17.

13. ITAR §§ 121.1-121.15; 22 C.F.R. §§ 121.01-121.22 (1984).

14. ITAR §§ 120.1-120.24, 122.1-128.17; 22 C.F.R. §§ 122.01-128.17 (1984).

15. ITAR §§ 130.1-130.17; 22 C.F.R. §§ 130.01-130.33 (1984); *see also* 22 U.S.C. § 2779 (1982).

16. ITAR § 126.1(a); 22 C.F.R. § 126.01 (1984).

was deleted from the list of such countries in 1981.¹⁷ A general denial policy also may be applied from time to time with respect to other countries "with respect to which the United States maintains an arms embargo" or to whom "an export would not . . . be in furtherance of world peace and the security and foreign policy of the United States."¹⁸

II. Essential Aspects

A. DEFINITIONS

"Defense articles" are the items set forth in the Munitions List.¹⁹ "Defense services" include the furnishing of assistance to foreigners in the "design, engineering, development, production, processing, manufacture, use, operation, overhaul, repair, maintenance, modification, or reconstruction of defense articles," and the furnishing to foreigners of any technical data, whether in the United States or abroad.²⁰ "Technical data" includes not only classified information relating to defense articles and defense services,²¹ but also "[i]nformation which is directly related to the design, engineering, development, production, processing, manufacture, use, operation, overhaul, repair, maintenance, modification, or reconstruction of defense articles. This includes, for example, information in the form of blueprints, drawings, photographs, plans, instructions, computer software and documentation."²²

Another important definition is that of "export."²³ In addition to its usual meaning, this term includes transactions in which no national borders are crossed. For example, disclosure of technical data to a foreigner²⁴ constitutes an export even if both the transmitter and the recipient of the data are located in the United States.²⁵ Indeed, in the view of the OMC,²⁶ the new ITAR make even the legal transfer of title to technical data to a foreigner an export, regardless of whether the data itself is transferred.²⁷ Whether this and other technical data restrictions would run afoul of the first amendment is an open question, to say the least.²⁸

17. 46 Fed. Reg. 60,821 (1981).

18. ITAR § 126.1(a); *see* 22 C.F.R. § 126.01 (1984).

19. ITAR § 120.7; 22 C.F.R. §§ 121.01-121.22 (1984); *see also* 22 U.S.C. § 2794(3), (7) (1982).

20. ITAR § 120.8. "Defense services" were not defined in the superseded ITAR, though the phrase had become part of the Act in 1976. *See* 22 U.S.C. § 2794(4), (5), (7) (1982).

21. ITAR § 120.21(a); 22 C.F.R. § 125.01(c) (1984).

22. ITAR § 120.21(b); *see also* 22 C.F.R. § 125.01(a) (1984) (former definition).

23. ITAR § 120.10; *see also* 22 C.F.R. § 121.19 (1984) (former definition).

24. ITAR § 120.10(d); 22 C.F.R. § 125.03 (1984).

25. *Id.*

26. Telephone conference with Joseph P. Smaldone, Chief, Arms Licensing Division, OMC, Dec. 5, 1984.

27. ITAR § 120.10(d).

28. *See, e.g.,* United States v. Edler Indus., Inc., 579 F.2d 516 (9th Cir. 1979); *The*

“Export” also includes transferring registration or control of an aircraft, ship, or satellite on the Munitions List to a foreigner,²⁹ regardless of where the item is located and regardless of whether it is physically exported from the United States.³⁰ In addition, if such an item is located in the United States and not registered here, registering the item in a foreign country constitutes an export to that country.³¹

B. THE MUNITIONS LIST

The Munitions List’s twenty categories include such specific listings as firearms,³² artillery,³³ ammunition,³⁴ launch vehicles and missiles,³⁵ bombs,³⁶ rockets,³⁷ torpedoes,³⁸ mines,³⁹ explosives,⁴⁰ naval vessels,⁴¹ tanks and military vehicles,⁴² aircraft and space craft,⁴³ training equipment,⁴⁴ protective equipment,⁴⁵ “military and space electronics,”⁴⁶ range finder, optical and guidance equipment,⁴⁷ “auxiliary military equipment,”⁴⁸ toxicological items,⁴⁹ nuclear weapons design and test equipment,⁵⁰ any articles or data that are “classified” for national security reasons,⁵¹ technical data,⁵² defense services,⁵³ submarines and related

Government’s Classification of Private Ideas: Hearings Before a Subcomm. of the House Comm. on Government Operations, 96th Cong., 2d Sess. 268–84 (1980) (Dept. of Justice memorandum expressing concerns about constitutionality of ITAR technical data restrictions) [hereinafter cited as *Hearings*]; H.R. Rep. No. 1540, 96th Cong., 2d Sess. 119 (1980); Greenstein, *National Security Controls on Scientific Information*, 23 *JURIMETRICS J.* 50, 76–86 (1982).

29. See *supra* note 24.

30. ITAR §§ 120.10(b), 123.8; 22 C.F.R. § 123.08(a) (1984).

31. ITAR § 123.8; 22 C.F.R. § 123.08(b) (1984).

32. ITAR § 121.1, categ. I; see also ITAR § 121.9.

33. ITAR § 121.1, categ. II.

34. *Id.*, categ. III; see also ITAR § 121.6.

35. ITAR § 121.1, categ. IV(b)–(d), (h); see also ITAR §§ 121.5, 121.11.

36. ITAR § 121.1, categ. IV(a), (c), (h); see also ITAR §§ 121.5, 121.11.

37. ITAR § 121.1, categ. IV(a), (c), (h); see also ITAR §§ 121.5, 121.11.

38. ITAR § 121.1, categ. IV(a), (c), (h); see also ITAR §§ 121.5, 121.11.

39. ITAR § 121.1, categ. IV(a), (c), (h); see also ITAR §§ 121.5, 121.11.

40. ITAR § 121.1, categ. V; see also ITAR §§ 121.12–121.14.

41. ITAR § 121.1, categ. VI; see also ITAR § 121.15.

42. ITAR § 121.1, categ. VII; see also ITAR § 121.4.

43. ITAR § 121.1, categ. VIII; see also ITAR § 121.3.

44. ITAR § 121.1, categ. IX.

45. *Id.*, categ. X.

46. *Id.*, categ. XI.

47. *Id.*, categ. XII.

48. *Id.*, categ. XIII.

49. *Id.*, categ. XIV; see also ITAR § 121.7.

50. ITAR § 121.1, categ. XVI.

51. *Id.*, categ. XVII.

52. *Id.*, categ. XVIII.

53. *Id.*, categ. XIX.

equipment,⁵⁴ and “miscellaneous articles.”⁵⁵ The list itself is followed by thirteen interpretations,⁵⁶ which “have the same force as if they were a part of the . . . category to which they refer.”⁵⁷ These interpretations elaborate on the listings, set forth exceptions thereto, and further specify listings that otherwise might be viewed as unduly vague.⁵⁸

C. REGISTRATION

Anyone in the business of exporting defense articles or providing defense services, and any manufacturer of defense articles (whether or not he exports them) must register with the OMC.⁵⁹ Persons who produce nothing subject to the ITAR aside from unclassified technical data are not required to register.⁶⁰ At the option of the registrant, the period of registration may range from one to five years;⁶¹ a sliding scale of registration fees is roughly proportionate to the length of time selected.⁶²

D. PROPOSALS

The ITAR define “significant military equipment” as “articles . . . for which special export controls are warranted because of their capacity for substantial military utility or capability.”⁶³ All classified defense articles and the Munitions List articles preceded by an asterisk are defined as significant military equipment.⁶⁴

54. *Id.*, categ. XX.

55. ITAR § 121.1, categ. XXI. A group of items (e.g., bayonets, submarine nets, military oxygen masks, and certain military trainer aircraft) were removed from the Munitions List by the new ITAR and now are subject to the jurisdiction of the Department of Commerce (under the Export Administration Regulations, 15 C.F.R. pts. 368–399 (1984)). 50 Fed. Reg. 3740 (1985).

56. ITAR §§ 121.3–121.15; 22 C.F.R. §§ 121.02–121.16 (1984).

57. ITAR § 121.2. The superseded ITAR had no counterpart to this provision.

58. Section 38 authorizes the President to designate “those *items* which shall be considered as defense articles and defense services for the purposes of this section.” 22 U.S.C. § 2778(a)(1) (1982) (emphasis supplied). In *United States v. Zheng*, 590 F. Supp. 274 (D.N.J. 1984), the former Munitions List designation, 22 C.F.R. § 121.01, categ. XI(a) (1984), of “[e]lectronic equipment . . . including but not limited to the following items: (1) . . . active and passive countermeasures, counter-countermeasures” was held insufficiently specific to constitute an “item.” *Id.* at 282. Although the revised ITAR attempt to address the particular situation dealt with in the *Zheng* case by controlling “active and passive countermeasures and counter-countermeasures *equipment*,” ITAR § 121.1, categ. XI(a)(1) (emphasis supplied), there may be other Munitions List entries that are subject to challenge on this ground.

59. ITAR § 122.1(a); 22 C.F.R. § 122.01(a)–(b) (1984).

60. ITAR § 122.1(b)(2); 22 C.F.R. § 122.01(d)(1) (1984).

61. ITAR § 122.2(a); 22 C.F.R. § 122.02(a) (1984).

62. ITAR § 122.2(a); 22 C.F.R. § 122.02(a) (1984).

63. ITAR § 120.19(a); see 22 C.F.R. § 121.03 (1984).

64. ITAR § 120.19(b), (c); see 22 C.F.R. § 121.03 (1984). The term “significant military

Proposals or presentations for the possible sale of significant military equipment to countries other than Australia, Japan, New Zealand, or a member of the North Atlantic Treaty Organization⁶⁵ must be approved by the OMC before the proposal or presentation is made if the proposed sale would be for \$14 million or more, would be for the use of the military of a foreign country, and would involve the export of any defense article.⁶⁶ Prior OMC approval is not required for most advertising, "preliminary discussions to ascertain market potential; or merely calling attention to the fact that a company manufactures a particular item."⁶⁷ A failure to seek such prior approval may lead to rejection of an export license for a sale that results.⁶⁸

III. Licensing of Defense Articles

A. GENERAL

1. *Unclassified Defense Articles*

Licenses for the export of "unclassified" defense articles are governed by part 123 of the ITAR.⁶⁹ Licenses for the export of "classified" defense articles and of technical data are governed by part 125.⁷⁰ The OMC strongly prefers—and may require—that a license applicant be a United States citizen, national, or permanent resident.⁷¹ The proposed revision of the ITAR that was published in 1980 would have made the "U.S. person" criterion mandatory,⁷² but this standard was not included in the final version.

An application must be accompanied by evidence of the purchaser's identity.⁷³ The foreign consignee must execute a "nontransfer and use certificate" (Form DSP-83) if he is purchasing "significant" military equip-

equipment" is treated by the OMC as equivalent to the term "major defense equipment" appearing in, and defined in section 47(6), 22 U.S.C. § 2794(6) (1982), of the Act. ITAR § 120.19(d).

65. The current members of NATO are Belgium, Canada, Denmark, France, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, the United States, and West Germany.

66. ITAR § 126.8(a), (g). The superseded ITAR did not exclude any countries from this requirement. 22 C.F.R. § 123.16(a) (1984).

67. ITAR § 126.8(b); accord 22 C.F.R. § 123.16(b) (1984).

68. ITAR § 126.8(e); 22 C.F.R. § 123.16(e). Failure to secure prior approval also subjects one to the full range of penalties under the Act. See *supra* notes 10–12, and accompanying text.

69. ITAR §§ 123.1–123.27; 22 C.F.R. §§ 123.01–123.56 (1984).

70. ITAR §§ 125.1–125.10; 22 C.F.R. §§ 125.01–125.24 (1984). "Classified" goods and data are those protected from public disclosure by Executive Order 12,356, 3 C.F.R. 166 (1983), reprinted at 50 U.S.C. § 401 note (1982), or "other legal authority." ITAR § 125.3(a); see also 22 C.F.R. § 125.02 (1984).

71. ITAR § 123.1(b). The superseded ITAR contained no provision regarding the citizenship or nationality of the applicant. See 22 C.F.R. § 123.50 (1984).

72. 45 Fed. Reg. 83,980 (1980) (to be codified at 22 C.F.R. § 123.30) (proposed Dec. 19, 1980).

73. ITAR § 123.1(c).

ment (as defined in section 120.19 of the ITAR), and may be required by the OMC to provide such a statement for the export of other defense articles or defense services as well.⁷⁴ The OMC also may require that the purchaser's government undertake "not to authorize the reexport, resale, or other disposition of the defense articles or defense services . . . without ensuring that the prior written consent of the U.S. Government has been obtained."⁷⁵

Exports of defense articles or defense services under a contract for more than \$50 million, and of "significant" military equipment under a contract in excess of \$14 million, are subject to congressional review.⁷⁶ Although the Act provides for a two-House veto of such sales (by concurrent resolution),⁷⁷ the new ITAR, taking cognizance of the Supreme Court's decisions in *Immigration and Naturalization Service v. Chadha*,⁷⁸ and *United States Senate v. FTC*,⁷⁹ treat the requirement only as a "report and wait" provision (i.e., if the Congress does not forbid the export by statute within thirty days, the license may be issued).⁸⁰

2. Classified Defense Articles

Requests to export classified defense articles "must contain full details of the proposed transaction."⁸¹ Both the foreign consignee and its government must execute a nontransfer and use certificate, though the OMC may waive this requirement if relations between the United States and the purchaser's country are sufficiently close.⁸² Applications to export classified defense articles must be made by United States nationals.⁸³ When a license for the export of classified defense articles is issued by the OMC, it is not sent to the applicant, but to the Department of Defense; the applicant receives only a copy for its information.⁸⁴ This is because the shipment of the goods is made by the Department of Defense rather than the private licensee.⁸⁵

74. ITAR § 123.10(a)-(c); 22 C.F.R. § 123.10(d) (1984).

75. ITAR § 123.10(d); 22 C.F.R. § 123.10(e) (1984).

76. ITAR § 123.10(e).

77. 22 U.S.C. § 2776(c) (1982).

78. 462 U.S. 919 (1983) (one-House veto unconstitutional).

79. 463 U.S. 1216 (1983), *aff'g mem.* Consumers Union of the U.S., Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (two-House veto unconstitutional).

80. ITAR § 123.10(e).

81. ITAR § 125.3(a); 22 C.F.R. § 125.05(a) (1984).

82. ITAR § 125.3(a). The superseded ITAR required such a filing only where the defense articles were "significant combat equipment." 22 C.F.R. §§ 121.03, 125.21 (1984); *see supra* note 64.

83. ITAR § 125.8. *Cf.* ITAR § 123.1(b), which contains a discretionary requirement that an applicant be a "U.S. person," a term that includes permanent residents of the U.S. as well as U.S. citizens and nationals. The superseded ITAR required that applicants wishing to export classified defense articles be "persons in the United States," 22 C.F.R. § 125.20(a) (1984); theoretically, this permitted applications to be filed by foreign nationals, so long as they were physically present in the United States.

84. ITAR § 125.10; 22 C.F.R. § 125.24 (1984).

85. *See id.*

B. TECHNICAL DATA

By far the most controversial aspect of the ITAR has been the controls imposed upon exports⁸⁶ of unclassified⁸⁷ "technical data." Academics,⁸⁸ criminal defendants,⁸⁹ and even the Department of Justice⁹⁰ have suggested that one or more aspects of the superseded ITAR's technical data controls violated the first amendment. Among the charges leveled by opponents of these controls were that they were unconstitutional to the extent they controlled the export of data not directly related to items on the Munitions List,⁹¹ and that they were unconstitutional as applied to speech not connected with an actual or proposed commercial transaction.⁹² The new ITAR attempt to meet several of these objections.

The superseded ITAR's broad definition of "technical data" included "[a]ny unclassified information *that can be used, or be adapted for use*, in the design, production, manufacture, repair, overhaul, processing, engineering, development, operation, maintenance, or reconstruction of" of items on the Munitions List.⁹³ Also within the definition was "any technology which advances the state-of-the-art [sic] or establishes a new art in an area of significant military applicability in the United States."⁹⁴ The old definition excluded published information that was generally available to the public,⁹⁵ but did not except information that was only indirectly related to Munitions List items or information that was communicated in a non-commercial or academic setting.

In 1979, the Court of Appeals for the Ninth Circuit ruled that in order to preserve the constitutionality of the technical data provisions of the ITAR, the definition would be interpreted to apply only to "technical data *significantly and directly related to specific articles* on the Munitions List."⁹⁶ And,

86. See *supra* text accompanying notes 23–31.

87. Classified technical data, see *supra* note 70, generally are subject to the same restrictions and procedures as classified items on the Munitions List. ITAR pt. 125; 22 C.F.R. pt. 125 (1984).

88. See, e.g., Cheh, *Government Control of Private Ideas—Striking a Balance Between Scientific Freedom and National Security*, 23 JURIMETRICS J. 1, 3, 10 (1982); Greenstein, *supra* note 28, at 50–52 nn. 5–6.

89. E.g., *United States v. Edler Indus., Inc.*, 579 F.2d 516 (9th Cir. 1979); *United States v. Van Hee*, 531 F.2d 352 (6th Cir. 1976).

90. *Hearings*, *supra* note 28, at 268–84.

91. *Edler Industries*, 579 F.2d at 519–21; Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to William B. Robinson, Office of Munitions Control, U.S. Department of State (July 1, 1981), at 13 [hereinafter cited as Olson Letter].

92. Olson Letter, *supra* note 91, at 9–14; Greenstein, *supra* note 28, at 78.

93. 22 C.F.R. § 125.01 (1984) (emphasis supplied).

94. 22 C.F.R. § 125.01 (1984) (footnote omitted). "The initial burden of determining whether the technology in question [came within the definition was] upon the U.S. party or applicant in consultation with the cognizant agency of the U.S. Armed Forces." *Id.* at n. 1.

95. 22 C.F.R. § 125.11(a)(1) (1984).

96. *Edler Industries*, 579 F.2d at 521 (emphasis supplied).

on numerous occasions in the late 1970s and early 1980s, the federal government and the academic community clashed over the former's right to control the dissemination of technical information.⁹⁷

The new ITAR impose four significant new limitations on the previous control of technical data. First, following the rule set forth in *Edler*,⁹⁸ the new definition of technical data covers only unclassified information "directly related to" defense articles.⁹⁹ Second, the catchall provision regarding new developments is limited to "information which advances the state of the art of articles on the U.S. Munitions List."¹⁰⁰ This change should reduce the possibility that the catchall provision would be found unconstitutionally vague.¹⁰¹ Third, the new ITAR's definition of technical data "does not include information concerning general scientific, mathematical or engineering principles."¹⁰² Finally, a limited class of disclosures by academic institutions to foreigners has been exempted from the licensing requirements of the ITAR.¹⁰³ These concessions should narrow the range of first amendment and "academic freedom" issues surrounding the ITAR's technical data controls, but substantial tension probably will continue to exist in this area.

The new ITAR also clarify the status of software. The superseded ITAR made no express mention of software, though the definition of "technical data" was broad enough to include software.¹⁰⁴ The December 1980 proposal provided that software for equipment or systems on the Munitions List be considered as a part of that equipment or system.¹⁰⁵ This apparently would have been the case whether the software were shipped alone or as part of the system or equipment. The final version, however, provides that

97. See, e.g., Cheh, *supra* note 88, at nn. 11-14, 61-65 and accompanying text; Letter from Presidents of Cornell University, Massachusetts Institute of Technology, California Institute of Technology, University of California, and Stanford University to Secretaries of Commerce, State, and Defense (Feb. 27, 1981), reprinted in 2 NATIONAL ACADEMY OF SCIENCES, SCIENTIFIC COMMUNICATION AND NATIONAL SECURITY 51 (1982); Wallerstein, *Scientific Communication and National Security in 1984*, 224 SCIENCE 460 (1984).

98. *Edler Industries*, 579 F.2d at 521. *Edler* required that data be "significantly" as well as "directly" related to Munitions List items. *Id.*

99. ITAR § 120.21(c). This is said to reflect "the actual practice" of the OMC. 49 Fed. Reg. 47,682 (1984).

100. ITAR § 120.21(c).

101. See, e.g., *Winters v. New York*, 333 U.S. 507 (1948); *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926).

102. ITAR § 120.21(c) (emphasis supplied).

103. ITAR § 125.4(b)(10). The disclosure must be made (1) in the United States (2) to a "bona fide and full time regular" employee whose permanent abode while so employed is in the United States (3) who is not a national of one of the communist countries listed in section 126.1 of the ITAR, see *supra* text accompanying notes 16-18, and (4) who has been advised in writing that he or she may not transfer the data to other foreigners without the approval of the OMC. *Id.*

104. 22 C.F.R. § 125.01 (1984).

105. 45 Fed. Reg. 83,974 (1980) (to be codified at 22 C.F.R. § 121.26(e)) (proposed Dec. 19, 1980).

when software is exported alone, it is to be treated as technical data unless it is "specifically enumerated" as *software* on the Munitions List.¹⁰⁶

Unless exempted by section 125.1(a) or section 125.4 of the ITAR, unclassified technical data may not be exported¹⁰⁷ without a license from the OMC.¹⁰⁸ The exemptions include information in the public domain,¹⁰⁹ technical data in furtherance of an OMC-approved manufacturing license or technical assistance agreement,¹¹⁰ data disclosed pursuant to a Defense Department request¹¹¹ or a contract with a U.S. Government agency,¹¹² technical data "in the form of operations, maintenance, and training . . . relating to a defense article lawfully exported or authorized for export to the same recipient,"¹¹³ technical data sent by a U.S. corporation to its U.S. person-employee overseas,¹¹⁴ certain disclosures by U.S. academic institutions to foreign person-employees in the United States,¹¹⁵ and data approved by the U.S. Government for public release, even if it has not been published.¹¹⁶

C. MANUFACTURING LICENSE AGREEMENTS AND TECHNICAL ASSISTANCE AGREEMENTS

Before entering into an agreement to furnish certain defense services¹¹⁷ abroad (or to a foreign person in the United States), the U.S. provider of such services must secure the approval of the OMC.¹¹⁸ The OMC's approval of the agreement generally will authorize the export of the services "without further licensing."¹¹⁹ Agreements for the performance of defense services

106. ITAR § 121.8(f).

107. See *supra* text accompanying notes 23–31.

108. ITAR § 125.2. Classified technical data is excepted from the licensing requirement only where an exception *expressly* so provides. ITAR § 125.4(a).

109. ITAR §§ 120.18, 125.1(a).

110. ITAR § 125.4(b)(1); see *infra* text accompanying notes 117–124.

111. ITAR § 125.4(b)(1).

112. ITAR § 125.4(b)(3).

113. ITAR § 125.4(b)(5).

114. ITAR § 125.4(b)(9). This exemption does not apply where the data is to be used for foreign production purposes or technical assistance, see ITAR § 125.1(b) and *infra* text accompanying notes 117–124, where the data is to be used abroad by anyone other than a U.S. person, or where the U.S. person is employed by a foreign subsidiary rather than the U.S. corporation. ITAR § 125.4(b)(9). This exemption also is available where the overseas recipient is a U.S. Government employee. *Id.*

115. ITAR § 125.4(b)(10). See *supra* note 103 and accompanying text.

116. ITAR § 125.4(b)(13). *Cf.* ITAR § 125.1(a), which exempts information that has in fact been made available to the public. The full list of exemptions appears at ITAR §§ 125.4(b) and 125.5.

117. Those described in section 120.8(a) of the ITAR.

118. ITAR § 124.1(a); 22 C.F.R. §§ 124.01–124.20 (1984). Such agreements "are generally characterized" as manufacturing license agreements (defined in ITAR § 120.14) or technical assistance agreements (defined in ITAR § 120.20). ITAR § 124.1(a); 22 C.F.R. §§ 124.01–124.20 (1984).

119. ITAR § 124.1(a); 22 C.F.R. §§ 124.01–124.20 (1984).

must be approved in advance by the OMC even if all of the technical data to be disclosed is exempt from the licensing requirements of part 125 of the ITAR.¹²⁰ This provision alters the previous practice of the OMC, which had been to apply the prior clearance requirement only where the technical data to be disclosed required a license under part 125.¹²¹ Where a defense article has been exported lawfully, "the provision of training only in the basic operation and maintenance" of the article will not require authorization under section 124.1.¹²²

The regulations set forth in some detail the information and clauses required in agreements subject to part 124.¹²³ In addition, the foreign party to an agreement covered by part 124 must execute a nontransfer and use certificate.¹²⁴

D. POLITICAL CONTRIBUTIONS, FEES, AND COMMISSIONS

In the mid-1970s, a series of scandals involving foreign payments by United States corporations generated a vigorous debate about whether such conduct should be prohibited.¹²⁵ A statute of general applicability covering foreign payments was enacted in 1977,¹²⁶ but during the previous year, while the debate had raged inconclusively in the Congress, a provision dealing only with payments in connection with arms sales had become section 39 of the Act.¹²⁷

Section 39 directs the Secretary of State to require reporting of "political contributions, gifts, commissions and fees paid, or offered or agreed to be paid," in connection with sales of defense articles or defense services.¹²⁸ In addition, the President is authorized to "prohibit, limit, or prescribe condi-

120. ITAR § 124.1(a); 22 C.F.R. §§ 124.01-124.20 (1984).

121. See 49 Fed. Reg. 47,683 (1984).

122. ITAR § 124.2(a). The furnishing of technical data "in the form of operations, maintenance, and training information" for such an article also is exempt from the general technical data licensing requirements of the ITAR. ITAR § 125.4(b)(5).

123. ITAR §§ 124.7-124.10.

124. ITAR § 124.11.

125. See, e.g., *Prohibiting Bribes to Foreign Officials: Hearing on S. 3133, S. 3379, and S. 3418 Before the Sen. Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. (1976); 42 Fed. Reg. 4854 (1977) (to be codified at 17 C.F.R. pt. 240) (proposed Jan. 26, 1977); Stevenson, *The SEC and Foreign Bribery*, 32 Bus. Law. 53 (1976).

126. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, tit. I, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78q(b)(2), 78dd-1, 78dd-2 (1982)).

127. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 604(b), 90 Stat. 767 (codified at 22 U.S.C. § 2779 (1982)).

128. 22 U.S.C. § 2779(a) (1982). In 1981, the Senate passed a bill repealing the reporting requirements of section 39, see S. Rep. No. 83, 97th Cong., 1st Sess. 28 (1981) ("The purpose of this section has been met by the more comprehensive Foreign Corrupt Practices Act of 1977"), but the provision was dropped in conference. H.R. Rep. No. 413, 97th Cong., 1st Sess. 59 (1981) (conference rep.).

tions with respect to such contributions, gifts, commissions and fees."¹²⁹ The President has not invoked his power to restrict payments, but the ITAR do require that any substantial payments of the types in question be reported to the OMC where the value of the export is \$250,000 or more.¹³⁰

Each applicant¹³¹ or, in the case of foreign military sales contracts, each supplier¹³² must inform the OMC whether the reporting entity or its vendors have paid, offered to pay, or agreed to pay political contributions¹³³ amounting to \$5000 or more, or fees or commissions¹³⁴ amounting to \$100,000 or more.¹³⁵ Excluded from the definition of "fee or commission" are a "normal salary (excluding contingent compensation) established at an annual rate and paid to a regular employee,"¹³⁶ general advertising or promotional expenses "not directed to any particular sale or purchaser,"¹³⁷ and payments made solely for the purchase of "technical, operational or advisory services, which payments are not disproportionate in amount with the value of the specific goods or services actually furnished."¹³⁸ All reportable payments made in connection with a sale, whether made by an applicant, supplier, vendor, or an agent of one of the foregoing, must be included in the calculation,¹³⁹ and applicants/suppliers are required to update the information on file with the OMC as changing or newly discovered circumstances may require.¹⁴⁰ Vendors are required to report to applicants or suppliers all political contributions, fees, and commissions paid,¹⁴¹ and any recipient of a fee or commission must provide the paying applicant, supplier, or vendor with information regarding payments that the recipient has made to others.¹⁴²

129. 22 U.S.C. § 2779(b) (1982). Section 39 also prohibits the inclusion of certain contributions, fees, and commissions in foreign military sales procurement contracts, 22 U.S.C. § 2779(c) (1982), and makes information reported to the Secretary of State available to congressional committees (and subcommittees) and, in certain instances, to other federal agencies. 22 U.S.C. § 2779(d) (1982); *see also* ITAR § 130.17. The ITAR reserve the State Department's right, presumably granted under treaties or other statutes, to disclose reported information to foreign governments. ITAR § 130.17(c); 22 C.F.R. § 130.33(b)(2) (1984).

130. ITAR §§ 130.1–130.17. Under the superseded ITAR, the threshold amount was \$100,000. 22 C.F.R. §§ 130.01–130.33 (1984).

131. ITAR § 130.2.

132. ITAR § 130.7.

133. ITAR § 130.6.

134. ITAR § 130.5.

135. ITAR § 130.9(a), (b).

136. ITAR § 130.5(a)(2).

137. ITAR § 130.5(a)(3).

138. ITAR § 130.5(a)(4).

139. ITAR § 130.9(c).

140. ITAR §§ 130.9(d), 130.11.

141. ITAR § 130.12.

142. ITAR § 130.13.

IV. Conclusion

The new ITAR, like their predecessors, are uncomplicated on their face¹⁴³ but leave many issues—particularly in the technical data area—lurking just below the surface. As enforcement becomes more vigorous and the penalties sought more severe, disagreements about the application of the ITAR will continue to abound both in and out of the courtroom.

143. *Cf.* the extraordinarily complex Export Administration Regulations. 15 C.F.R. pts. 368–399 (1984).

