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This article reviews international law developments in the field of aerospace and defense industries in 2015.¹

I. Developments in Cybersecurity and National Security

Over the past year, multiple geopolitical factors contributed to heightened cybersecurity and national security risks from private and state-sponsored threat actors. For example, in 2015 the world witnessed (a) increasing ISIS-inspired violence in the Middle East and the West; (b) Chinese island-building activity in the South China Sea; (c) competing priorities in the Syrian civil war; (d) competing interests in the controversial Iran Nuclear Deal; (e) Russian annexation of Crimea; (f) increased sectarian strife in Iraq, Afghanistan, Lebanon, and Libya; (g) strengthening of Al Qaeda in the Arabian peninsula; (h) escalating violence in Israel and the Palestinian territories; (i) rising security threats in Egypt, Turkey, and Pakistan; (j) political destabilization in Bangladesh, Myanmar, and Thailand; and (k) ongoing flare-ups with North Korea.² These developments, plus widely publicized infiltrations into government and private sector systems by financially

* R. Locke Bell of Jenner & Block LLP was the editor of the Aerospace and Defense Industries Committee's Year in Review for 2015, and he authored Section V on the New DOD Rule Minimizing Oversight of Indirect Offset Costs in FMS Transactions. Johnny Chaklader of Akin Gump Strauss Hauer & Feld LLP, authored Section I on Developments in Cybersecurity and National Security; Donna A. Dulo, Director of Advanced Computational Technologies and Professor of Computer Science at Sofia University, authored Section II on Recent Developments in Unmanned Aircraft (Drone) International Law; Priya Iyengar, a lawyer, academician, and member and visiting faculty at the Center for Air and Space Law, NALSAR University of Law, Hyderabad India, authored Section III on Globalization, Liberalization, and Privatization in the Aerospace Sector – Positive Wave in Indian Aviation Sector; and Kevin J. Lombardo and Jason M. Silverman of Dentons US LLP, authored Section IV on Sanctions Developments.

1. For developments in 2014, see William M. Pannier et al., *Aerospace and Defense Industries*, 48 INT'L LAW. 231 (2015). For developments in 2013, see William M. Pannier et al., *Aerospace and Defense Industries*, 48 ABA/SILYIR. 275 (2014).

2. *Global Conflict Tracker*, COUNCIL ON FOREIGN RELATIONS, [http://www.cfr.org/global/global-conflict-tracker/p32137#/?](http://www.cfr.org/global/global-conflict-tracker/p32137#/) (last updated Feb. 24, 2016) (with information on significant international security events in 2015).

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motivated threat actors and hacktivists,³ and terrorist reliance on encryption technology to evade authorities⁴ sparked intense concern about cybersecurity issues among U.S. government officials.

On September 29, 2015, Director of National Intelligence James R. Clapper informed the Senate Armed Services Committee that “for the third year in a row, cyber threats headed the list of threats reported in the annual National Intelligence Worldwide Threat Assessment.”⁵ Director Clapper added that President Obama directed him “to form a small center that will integrate cyber threat intelligence from across federal agencies, as do centers established over the years for counterterrorism, counter-proliferation, and counterintelligence.”⁶

On November 19, 2015, the U.S. Government Accountability Office (GAO) issued a critical infrastructure protection report that encouraged federal agencies to partner with the private sector to mitigate cybersecurity risk.⁷ The GAO report focused on the federal agencies that most closely interfaced with key sectors (i.e., Sector-Specific Agencies or “SSA”) including banking and financing institutions, telecommunications networks, and energy production and transmission facilities.⁸ The GAO report noted that although SSAs had taken steps to identify cyber-security threats, SSAs need to engage the private sector to monitor progress in addressing cybersecurity issues in an integrated fashion.⁹

On October 30, 2015, the Under Secretary of Defense for Acquisition, Technology, and Logistics, Frank Kendall issued the Department of Defense’s “Guidance on Cybersecurity Implementation in Acquisition Programs,”¹⁰ where the DOD noted that its systems and networks are “constantly under cyber attack.”¹¹ The nearly 200-page guidance document is intended to help acquisition program managers integrate the Cybersecurity Risk Management Framework (RMF) into all phases of the DOD acquisition lifecycle.¹² It includes detailed explanations of cybersecurity-related roles, responsibilities, and

3. See, e.g., *Decoding the Adversary*, 1 AT&T CYBERSECURITY INSIGHTS 1, 7-17 (2015), <http://www.business.att.com/content/src/csi/decodingtheadversary.pdf>; *Significant Cyber Incidents Since 2006*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, http://csis.org/files/publication/150714_Significant_Cyber_Events_List.pdf.

4. See, e.g., Sam Jones, *Rise of Encryption Tests Intelligence in Isis Fight*, FIN. TIMES (Nov. 18, 2015), <http://www.ft.com/intl/cms/s/0/21c36512-8e15-11e5-8be4-3506bf20cc2b.html>.

5. Cheryl Pellerin, *Defense, Intel Leaders: Cybersecurity Priorities are Defense, Deterrence*, DOD NEWS, DEFENSE MEDIA ACTIVITY (Sept. 29, 2015), <http://www.defense.gov/News-Article-View/Article/621018/defense-intel-leaders-cybersecurity-priorities-are-defense-deterrence>.

6. *Id.*

7. U. S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-79, COMMITTEE ON HOMELAND SECURITY, HOUSE OF REPRESENTATIVES: CRITICAL INFRASTRUCTURE PROTECTION (2015).

8. *Id.* at 3-4.

9. *Id.* at 10.

10. DEP’T OF DEF., VERSION 1.0, DoD PROGRAM MANAGER’S GUIDEBOOK FOR INTEGRATING THE CYBERSECURITY RISK MANAGEMENT FRAMEWORK INTO THE SYSTEM ACQUISITION LIFECYCLE (2015). This Guidance is based on DEP’T OF DEF., INSTRUCTION NO. 8510.01, RISK MANAGEMENT FRAMEWORK FOR DEP’T OF DEF. INFORMATION TECHNOLOGY (2014); DEP’T OF DEF., INSTRUCTION NO. 8500.01, CYBERSECURITY (2014); DEP’T OF DEF., INSTRUCTION NO. 5000.02, OPERATION OF THE DEFENSE ACQUISITION SYSTEM (2015). *Id.* at iii.

11. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 7, at iii.

12. *Id.*

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activities; template language for proposals and contracts; and descriptions of cybersecurity risk assessment processes.¹³

The October 2015 guidance follows the Pentagon's April 9, 2015, release of Better Buying Power 3.0.¹⁴ First launched in 2010, Better Buying Power (BBP) provides the defense community a set of fundamental acquisition principles and best practices designed to achieve affordable programs, control costs throughout the product lifecycle, motivate productivity and innovation, eliminate waste, and promote competition, among other goals.¹⁵ For the first time, version 3.0 identifies cybersecurity as a major goal by which the DOD will maintain technological superiority.¹⁶ Together, BBP 3.0 and the DOD's October 2015 guidance emphasize the deliberate interfacing of cybersecurity and cyber warfare considerations into information technology systems, weapons systems, and networks.

II. Recent Developments in Unmanned Aircraft (Drone) International Law¹⁷

The precipitous increase in the international use of unmanned aircraft in 2015 fueled significant progress in the development and establishment of international aviation law related to drones. Nations such as Japan, Canada, Australia, the United Kingdom, and South Africa led the international community in 2015 in one of the greatest expansions of drone law¹⁸ since the entrance of drones into the international skies. Areas of international drone law have expanded to include airspace integration, security, safety, information assurance and data security, as well as issues of autonomous flight, anti-collision systems, aerial functional operations, and aerial delivery services. In fact, the body of drone law has so greatly expanded internationally that entire legal practices are now focusing exclusively on drone law.

The use of unmanned aircraft has increased all across the international community. In addition to recreational and commercial uses, unmanned aircraft are being increasingly used internationally for humanitarian purposes such as for disaster relief, medical services such as carrying medical supplies and heart defibrillators to remote areas, food and water delivery, and as aerial network nodes for communication services. The possibilities are endless as organizations and entities find new uses for unmanned aerial systems, and as technologies emerge to fulfill those needs. As a result, the international legal community and national legislatures, as well as the International Civil Aviation Organization (ICAO),¹⁹ continue to struggle to keep up with the expanding uses and technologies of unmanned systems.

13. *Id.*

14. DEP'T OF DEF., BETTER BUYING POWER 3.0 (2015).

15. *See id.* at attachment 1.

16. *See id.* at attachment 2.

17. *See* William M. Pannier et al., *Aerospace and Defense Industries*, 48 INT'L LAW. 231, 231-36 (2015) (describing developments in 2014).

18. Unmanned Aircraft Law, which refer to the same body of law, are now considered as a subset or extension of aviation law. *See* DONNA A. DULO, UNMANNED AIRCRAFT IN THE NATIONAL AIRSPACE: CRITICAL ISSUES, TECHNOLOGY AND THE LAW (Donna A. Dulo, ed. 2015).

19. The ICAO and many members of the international community designate unmanned aircraft as "RPAS," Remotely Piloted Aircraft System. This term is synonymous to "UAS", Unmanned Aircraft System

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The following sections provide major regional and state-specific updates on the emerging international unmanned aircraft laws, frameworks, guidelines, and regulations for the 2015 year, focusing on the countries that are driving the development of such laws and regulations. The sections hone in on the critical developments that are helping to foster a more solidified body of international drone law, and that are driving the increased use of unmanned aircraft to new levels across the international airspace.

A. THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

The ICAO focused the past year on working with the international community on the development of frameworks and laws for the integration of unmanned aircraft into the national airspace. Several substantial updates in international drone law were established by ICAO, and several significant symposia²⁰ and meetings sponsored by ICAO to generate international awareness and consistency in unmanned aircraft laws and regulatory frameworks. The ICAO presented the “RPAS iKit” in 2015 to serve as a central repository for documents, plans, and programs related to unmanned aircraft implementation.²¹ This site provides a central repository for all ICAO unmanned aircraft documentation as well as that of many international partner countries.²² While currently sparse, the repository will hopefully expand over the next few years to form a formidable centralized library of international drone law documents.²³

The ICAO published a major document on unmanned systems in 2015, the “Manual of Remotely Piloted Aircraft Systems”²⁴ (hereinafter the “Manual”). The goal of ICAO in relation to unmanned systems, according to the document, is “to provide an international regulatory framework through Standards and Recommended Practices (SARPs), with supporting Procedures for Air Navigation Services (PANS) and guidance material, to underpin routine operation of RPAS throughout the world in a safe, harmonized and seamless manner comparable to that of manned operations.”²⁵

The Manual details the ICAO regulatory framework as well as areas of significant legal concern including aircraft registration and licensing, safety, certification and airworthiness approvals, operator competencies and licensing, detect and avoid issues, system operations as well as command, control, and communications.²⁶ There is a pervasive concern with safety throughout the Manual, as it states explicitly that “most importantly, introduction of remotely piloted aircraft into non-segregated airspace and at aerodromes should in no

or Unmanned Aerial System, or “UA”, Unmanned Aircraft. In general when the word “system” is used, it focuses on the aircraft and the ground station as a system rather than on just the aircraft.

20. A significant symposium sponsored by the ICAO was the Remotely Piloted Aircraft Systems Symposium at ICAO Headquarters in Montreal, 23-25 March, 2015. See International Civil Aviation Organization, Remotely Piloted Aircraft Systems (RPAS) (Mar. 23-25, 2015), <http://www.icao.int/Meetings/RPAS/Documents/RPAS.FINAL.WEB.pdf>.

21. See *RPAS iKit*, ICAO, <http://www.icao.int/Meetings/RPAS/Pages/RPAS-iKit.aspx>.

22. See *id.*

23. See *id.*

24. INTERNATIONAL CIVIL AVIATION ORGANIZATION, MANUAL ON REMOTELY PILOTED AIRCRAFT SYSTEMS, U.N. Doc. 10019 AN/507 (2015), https://www.eurocontrol.int/sites/default/files/doc_10019_manual_on_rpas.pdf.

25. *Id.* at v.

26. *Id.* at vii-ix.

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way increase safety risks to manned aircraft.”²⁷ The Manual can be seen as a significant publication in the evolution of international drone law.

The Manual, along with previously Amended Annexes 2, 7, and 13, constitute the main body of documents presented by the ICAO on unmanned aircraft use in the international airspace. The Annexes were amended over the course of the previous three years to map to the Chicago Convention to facilitate the use of unmanned aircraft in the international airspace.²⁸ Together, these documents form the seminal foundational set of unmanned aircraft international airspace documentation that can be used by nations in their development of laws and regulatory frameworks for the use of unmanned aircraft in their respective airspaces.²⁹

B. CANADA

Canada continued to be a world leader in unmanned aircraft law in 2015. In May of 2015, it proposed new regulations on small unmanned aircraft, weighing less than twenty-five kilograms and operated within line of sight, to help integrate them more effectively in the Canadian national airspace.³⁰ These proposed regulations focus on small, low-risk unmanned aircraft, to improve their use and to provide understandable and safe guidelines for users. Transport Canada will keep the Special Flight Operations Certificate for heavier more complex unmanned systems, but will ease the restrictions on lower risk lighter aircraft to ensure fairness and balance in unmanned aircraft integration.

The goal of the new regulations is safety and smooth unmanned aircraft integration with the international community. According to the proposal:

Transport Canada seeks a balanced approach to both safely integrate UAVs [unmanned air vehicles] into Canadian airspace and encourage innovation within this important new subsector of civil aviation. At the same time, it is important to recognize the unique risks UAVs and UAV users of varying degrees of aviation

27. *Id.* at v.

28. See INTERNATIONAL CIVIL AVIATION ORGANIZATION, RULES OF AIR, Annex 2 to the Convention on International Civil Aviation (July 2005) (providing the rules of aircraft including visual flight rules, instrument flight rules and general rules of aviation as well as standards and recommended practices which comply with Article 37 of the Chicago Convention of 1944); INTERNATIONAL CIVIL AVIATION ORGANIZATION, AIRCRAFT NATIONALITY AND REGISTRATION MARKS, Annex 7 to the Convention on International Civil Aviation (July 2003) (presenting the standards adopted by the ICAO as the minimum Standards for the display of marks to indicate appropriate nationality and registration which comply with Article 20 of the Chicago Convention of 1944); INTERNATIONAL CIVIL AVIATION ORGANIZATION, Aircraft Accident and Incident Investigation, Annex 13 to the Convention on International Civil Aviation (July 2001) (the standards adopted by the ICAO relating to the systematic investigation of aviation related accidents to comply with various articles of the Chicago Convention of 1944), <http://store1.icao.int/index.php/publications.html>.

29. See INTERNATIONAL CIVIL AVIATION ORGANIZATION, Manual on Remotely Piloted Aircraft Systems, U.N. Doc. 10019 AN/507 (2015), https://www.eurocontrol.int/sites/default/files/doc_10019_manual_on_rpas.pdf; see also INTERNATIONAL CIVIL AVIATION ORGANIZATION, Rules of Air, Annex 2 to the Convention on International Civil Aviation (July 2005); INTERNATIONAL CIVIL AVIATION ORGANIZATION, Aircraft Nationality and Registration Marks, Annex 7 to the Convention on International Civil Aviation (July 2003); INTERNATIONAL CIVIL AVIATION ORGANIZATION, Aircraft Accident and Incident Investigation, Annex 13 to the Convention on International Civil Aviation (July 2001), <http://store1.icao.int/index.php/publications.html>.

30. Notice of Proposed Amendment: Unmanned Air Vehicles, Records, Document and Information Management System # 10477932 (Can.).

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expertise, pose to other airspace users. Transport Canada must develop Canada's future regulatory framework to be risk-based, flexible, and consistent with international partners, where appropriate.³¹

The feedback gained from several meetings, symposia, and roundtables conducted by Transport Canada will be integrated into the proposed regulations, and a solidified set of regulations is set to be implemented in 2016.³²

Canada also expanded its safety initiatives in 2015 to help recreational unmanned systems operators operate their aircraft safely. Unmanned aircraft in Canada that weigh less than 35 kilogram and are operated for recreational use do not require government permission to operate. But Transport Canada was proactive in 2015 and developed comprehensive safety guidelines and materials to assist recreational pilots. These materials remind operators to follow general Canadian Aviation Regulations and to adhere to the Canadian Criminal Code with respect to issues of aerial trespass as well as issues of privacy.³³

C. AUSTRALIA

Australia, like Canada, led the international community in the integration of unmanned aircraft into its skies in 2015. Australia was the first country to regulate unmanned aircraft in the world with its Civil Aviation Safety Regulation, (CASR) Part 101.³⁴ In 2015, the Australian Civil Aviation Safety Authority (CASA) worked diligently to modernize CASR 101 into CASR 102, which is slated to be published in 2016. The Authority also developed a suite of advisory circulars, to be published in 2016 on various critical areas such as training and licensing, operations, airworthiness, manufacturing standards, safety management standards, and human performance guidelines.³⁵ One of the developments in 2015, interestingly, was to change formally the terms relating to unmanned aircraft from "drones" and "unmanned aircraft systems" to Remotely Piloted Aircraft (RPA) and Remotely Piloted Aircraft System (RPAS) to conform to the international community and ICAO terminology by 2016 with the implementation of the updated regulations.

D. THE UNITED KINGDOM

In 2015, the United Kingdom published its Sixth Edition of Unmanned Aircraft System Operations in UK Airspace – Guidance.³⁶ This expanded and updated comprehensive volume was completely revised and restructured from past editions. The Guidance now follows the Concept of Operations (ConOps) approach, similar to military operational

31. *Id.* at 1.

32. *Id.* at 7.

33. Press Release, Transport Canada Government of Canada, Transport Canada encourages new drone users to learn rules before flying (Dec. 11, 2015), available at <http://news.gc.ca/web/article-en.do?nid=1024519>.

34. *CASA and remotely piloted aircraft*, CIVIL AVIATION SAFETY AUTHORITY (Australian Government, Canberra, Austl. Cap. Terr.), last visited Feb. 18, 2016, <https://www.casa.gov.au/about-casa/standard-page/contact-casa>.

35. *Id.*

36. Unmanned Aircraft System Operations in UK Airspace – Guidance, 2015, Civil Aviation Publication 722, 2.

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systems documents, yet the document has all references to military unmanned aircraft systems operations removed in this edition. The document introduces the United Kingdom's "Unmanned Aircraft System Operating Safety Case" as well as the new "Approval Requirements Map." The 2015 edition also provides new additional means of legal compliance for operator proficiency.

The intent of the Guidance, developed by the United Kingdom's Civil Aviation Authority's Intelligence, Strategy, and Policy Division, is:

to assist those who are involved in the development of UAS to identify the route to certification, outline the methods by which permission for aerial work may be obtained, and ensure that the required standards and practices are met by all UAS operators . . . [and also] highlights the safety requirements that have to be met, in terms of airworthiness and operational standards, before a UAS is allowed to operate in the UK.³⁷

The Guidance is one of the most comprehensive unmanned aircraft guidance documents in the world, and includes all aspects of unmanned systems operations including communication, command and control, operations, certification, security, human factors, and airworthiness.

E. JAPAN

The Japanese Civil Aviation Bureau issued an amendment to the Aeronautics Act on September 11, 2015.³⁸ This amendment proposed new rules for the safe operation of unmanned aircraft and will be effective in early 2016.³⁹ The new rules prohibit the operation of unmanned aircraft over densely populated areas and near airports and mandates daytime line of sight operations unless specifically authorized by the Japanese Ministry of Land, Infrastructure, Transport and Tourism.

The new rules prohibit the operation of unmanned aircraft over event sites and forbid the dropping of objects from the aircraft over any site without specific authority. Unmanned aircraft, under the new rules, cannot carry hazardous materials or explosives, unless a special waiver is granted from the Ministry. But operational limitations of unmanned aircraft are eased in the new rules in the event of necessary emergency operations by public authorities. The Japanese safety rules of 2015 come with a penalty of up to 500,000 yen (approximately \$4,100) for each violation, directed at the operator of the unmanned aircraft.

³⁷. *Id.* at 12.

³⁸. Press Release, Japanese Ministry of Land, Infrastructure, Transport, & Tourism, Japan's safety rules on Unmanned Aircraft (UA), (Dec. 10, 2015), *available at* <http://www.mlit.go.jp/en/koku/uas.html>.

³⁹. *Id.*

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F. SOUTH AFRICA

South Africa had its unmanned aircraft regulations come into effect on July 1, 2015.⁴⁰ The Civil Aviation Regulations, Part 101, published by the South Africa Civil Aviation Authority, require that unmanned aircraft operators be licensed by the government, be at least eighteen years old, and hold a valid medical certificate.⁴¹ Additionally, the drone operator must be proficient in English at a proficiency level of four or higher and must hold a restricted certificate of proficiency in radiotelephony.⁴² These requirements are among the strictest in the international aviation community and set the standard for many countries.

The Part 101 regulations are also strict in many other legal aspects. For example, drones cannot be flown in swarms, cannot perform aerobatics, and cannot tow other drones. The use of public roads serving as runways is prohibited, except for civil authorities. Additionally, drones cannot be flown near nuclear power plants, police stations, prisons, crime scenes, courts, or near strategic government, civil, or military installations. The use of toy and model unmanned aircraft, as well as unmanned free balloons, is not covered in the Civil Aviation Regulations Part 101. But private use of toy and model aircraft are regulated by the South Africa Model Aircraft Association, which provides rules and guidance in its National Model Aircraft Code.⁴³ These rules are enforced by the South Africa Civil Aviation Authority.

G. CONCLUSION

The international community has seen significant advances in unmanned aircraft policies, procedures, laws, and regulations in 2015. Led by the ICAO and several proactive nations, international drone law emerged with major developments indicating that the international community is taking unmanned aircraft integration seriously with systematic regulatory development and guidance. With full international airspace integration just around the proverbial corner, national leaders in unmanned aircraft regulations such as South Africa, Japan, Canada, the United Kingdom, and Australia are paving the way to safer, more productive skies. Their leadership sets the standard for world-wide unmanned aircraft integration supporting safe, secure, reliable, and resilient international skies.

40. *Technical Guidance Material for RPAS Operations Advisory Circular*, SOUTH AFRICAN CIVIL AVIATION AUTHORITY (South African Government Midrand) June 19, 2015, at 1, <http://www.caa.co.za/RPAS%20TGM/TGM%20for%20RPAS%20operations.pdf>.

41. *Technical Guidance Material for Part 101 Personnel Licensing Advisory Circular*, SOUTH AFRICAN CIVIL AVIATION AUTHORITY (South African Government Midrand, S. Afr.) June 19, 2015, at 2-3, [http://www.caa.co.za/RPAS%20TGM/TGM%20for%20Personnel%20Licensing%20Part%20101%20\(Sub-part%203\).pdf](http://www.caa.co.za/RPAS%20TGM/TGM%20for%20Personnel%20Licensing%20Part%20101%20(Sub-part%203).pdf).

42. *Id.* at 3-5.

43. *National Model Aircraft Safety Code*, MODEL CODE (South African Model Aircraft Association Kempton Park, S. Afr.) June 2011, §2.1.

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**III. Globalization, Liberalization, and Privatization in the Aerospace Sector
– PositiveWave in Indian Aviation Sector**

Over the past century, aviation has connected people across the globe like they never have been before. This is best reflected in the words of Bill Gates: “The Wright Brothers created the single greatest cultural force since the invention of writing. The airplane became the first World Wide Web, bringing people, languages, ideas, and values together.”

Aviation made open skies and airfields connect governments, businessmen, and people from every nook and corner of the globe. Despite turbulent times, the UNWTO predicts that in 2015 international tourism will be a major contributor to global economy with a projected growth of three to four percent.⁴⁴

Trade and commerce are expanding across the globe, thanks to globalization, liberalization, and privatization. The World Tourist Organization’s vision forecasts the international arrivals to reach over 1.56 billion by 2020.⁴⁵

India is a notable part of this development surge in the air and space industry. India’s civil aviation industry is on a high-growth trajectory. India aims to “become the third-largest aviation market by 2020 and the largest by 2030.”⁴⁶ According to FICCI-KPMG Indian Aviation Report 2014, the development of air transportation services and socio-economic development are highly connected.⁴⁷

In the last decade, the Indian aviation sector has grown remarkably, with 159 million passengers travelling by air and aircraft transporting 2.19 million metric tons of cargo in 2013.⁴⁸ This significant growth in Indian Aviation Sector has been possible only due to globalization, liberalization, and privatization initiative by the Indian government. In modern times the aviation industry proliferation is the benchmark for a country’s development and growth and India is assuredly riding the upward growth curve.

The Ministry of Civil Aviation (MoCA) has already laid the road map for private participation in development of airports in India. The Planning Commission’s mandate to establish 500 greenfield airports by 2030 is another landmark move that will propel the Indian Aviation Industry.⁴⁹ Beginning this era, greenfield airports have been built in Hyderabad and Bangalore under PPP (Public Private Partnership), a development which is notable and praiseworthy.⁵⁰ The onset of globalization, privatization and liberalization catalyzed the growth in the Indian aviation industry with the Government keen to realize

44. *UNWTO Annual Report 2014*, ANNUAL REPORT (U.N. World Tourism Organization, Madrid, Spain) 2015, at 13, http://dtxq4w60xqp.cloudfront.net/sites/all/files/pdf/unwto_annual_report_2014.pdf.

45. *Tourism 2020 Vision*, U.N. WORLD TOURISM ORGANIZATION (Feb. 19, 2016, 1:55 PM), <http://www.unwto.org/facts/eng/vision.htm>.

46. Press release, *Indian Aviation Sector has the Potential to be Number One Globally by 2030, Says the Indian Aviation Report by FICCI-KPMG*, KPMG (Mar. 13, 2014), <https://www.kpmg.com/IN/en/Press%20Release/Press-Release-Indian-Aviation-Report.pdf>.

47. *Id.* at 2.

48. *Id.*

49. See Secretarial India Infrastructure Business Development Mission, March 25-30, 2012, 76 Fed. Reg. 80339 (Dec. 23, 2011).

50. *Model Concession Agreement for Greenfield Airports*, MODEL CONCESSION AGREEMENT (Planning Comm’n Gov’t of India), Dec. 9, 2014, at i, http://planningcommission.gov.in/sectors/ppp_report/1.Model%20Concession%20Agreement%20Overview/07-MCA-for-Greenfield-Airports.pdf.

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its full potential, raising foreign direct investment (FDI) limits to 100 percent in the aviation sector.⁵¹ This move has integrated the other auxiliary fields while giving a boost to business opportunities for Micro, Small & Medium Enterprises (MSMEs) as well as creating a conducive atmosphere for tourism and international trade growth.

Sidharth Birla, the immediate past President, Federation of Indian Chambers of Commerce and Industry (FICCI) said, “In view of the enormous growth prospectus of air traffic and substantial investment projections, Indian aviation market offers significant long term opportunities for global aviation players. Indian Government and industry are already working together closely.”⁵²

A developing country’s economy can be strengthened through integration with the global economy, and Aviation is a major growth engine for achieving an upward trajectory. The wave of globalization helped India to integrate internationally via the aviation sector as the country was already resolute with its vision to become the third largest aviation market by 2020 and to be the largest by 2030.⁵³

The Indian government has discerned the need for privatization of the aviation sector and the significant benefits that would be accrued from it. Investments to the tune of Rs. 40,000 Crores (Approximately US\$ 6048.692 million) are planned for upgrading and modernizing airports by partnering with private investors.⁵⁴ After amending the Airports Authority Act 1994 to invite private investors in 2003, the market was opened up in 2006 by allowing 100 percent FDI in the aviation sector, and since then there has been no looking back for India. Tremendous encouragement was extended for PPP mode to make India a global aviation hub.

Reputed aircraft industries Boeing and Airbus are positively extrapolating radiant growth in Indian aviation sector for the next decade. Dinesh Keskar, president of Boeing India and VP of Boeing International Trading noted that “India’s economy and the country’s potential for air travel growth—both for leisure and business—continues to be strong and we remain confident in the Indian commercial aerospace market.”⁵⁵

Indian civil aviation industry has begun a new era with “Low Cost Carriers (LCC), modern airports, Foreign Direct Investment (FDI) in domestic airlines, cutting edge Information Technology (IT)” and creating significant employment opportunities.⁵⁶

51. *Civil aviation sector: Easing FDI norms, gov’t raises investment limits to 100% from 74%*, THE INDIA TIMES: THE ECONOMIC TIMES, Nov. 15, 2015, http://articles.economictimes.indiatimes.com/2015-11-10/news/68165202_1_aviation-sector-aviation-space-easing-fdi.

52. Press release, *Indian Aviation Sector has the Potential to be Number One Globally by 2030, Says the Indian Aviation Report by FICCI-KPMG*, KPMG (Mar. 13, 2014), <https://www.kpmg.com/IN/en/Press%20Release/Press-Release-Indian-Aviation-Report.pdf>.

53. *Id.*

54. *Govt unveils Rs 40,000-cr facelift for airports*, THE INDIA TIMES: THE ECONOMIC TIMES, Dec. 11, 2004, http://articles.economictimes.indiatimes.com/2004-12-11/news/27385449_1_metro-airports-civil-aviation-hyderabad-and-bangalore.

55. *Boeing Forecasts Demand for 1,740 New Airplanes in India*, BOEING – NEWS RELEASES (Aug. 12, 2015), <http://www.boeing.co.in/news-and-media-room/news-releases/2015/august/boeing-forecasts-demand-for-1740-new-airplanes-in-india.page?>

56. Press release, *Indian Aviation Sector has the Potential to be Number One Globally by 2030, Says the Indian Aviation Report by FICCI-KPMG*, KPMG (Mar. 13, 2014), <https://www.kpmg.com/IN/en/Press%20Release/Press-Release-Indian-Aviation-Report.pdf>.

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“The Indian Civil Aviation industry is amongst the top 10 in the world with a size of around US\$ 16 billion.”⁵⁷

Indian Aviation industry dovetailed liberalization, privatization, and globalization efficaciously paving a way for increased global air connectivity, accessible and affordable air-travel, promoting infrastructural and tourism industries. There certainly are a few deterrents, including regulatory issues, shortage of capital, over-taxation, the most expensive Aviation Turbine Fuel (ATF), and the absence of local maintenance, repair and overhaul (MRO) facilities, political resistance, and governmental lethargy.

Nevertheless, it is not too tall an order to overcome these weaknesses, given India’s abilities and capacity. With the progressive policies and avant-garde technical and marketing expertise, the Indian vision of becoming the third largest aviation market by 2020 and the largest by 2030 does not appear to be a mirage, especially with the nation’s gross domestic product (GDP) poised to grow at nine percent in the coming years.⁵⁸

IV. Sanctions Developments

A. CUBA

In late 2014, President Barack Obama announced a major shift in the United States’ foreign policy towards Cuba involving moves to ease sanctions and normalize diplomatic relations. The President cited the failure of the current sanctions regime to promote democracy in Cuba and an absence of similar sanctions enacted by other countries. Following the announcement, the Department of the Treasury, Office of Foreign Assets Control (OFAC) and the Department of Commerce, Bureau of Industry and Security (BIS) issued two rounds of amendments to the Cuba Sanctions Regulations (31 C.F.R. Part 515) on January 16, 2015, and subsequently on September 21, 2015. These new rules, seeking to loosen the current U.S. sanctions against Cuba and Cuban nationals, have been coupled with the Administration’s steps to eliminate Cuba’s status as a state supporter of terrorism and to set up a U.S. embassy in Cuba.⁵⁹

President Obama’s updated policy expands U.S.-Cuba trade opportunities. As detailed more fully below, the new rules enhance opportunities for travel, commerce, and pro-democracy and humanitarian efforts in Cuba. Despite easing the comprehensive embargo against Cuba, the new rules clearly do not constitute a full suspension or lifting of the embargo. On the whole, the new rules will not significantly impact the ability of U.S. companies or their foreign subsidiaries to engage in business involving Cuba. One exception will be credit card companies and banks that will be able to open correspondent accounts in Cuban financial institutions. Instead of a comprehensive suspension of the embargo, the new rules take an incremental approach, authorizing specific categories of exports to Cuba and continuing to limit certain types of transactions with Cuba.

⁵⁷. *Id.*

⁵⁸. See Daniel Bases, *India Needs Sustained GDP Growth of 9-10 Percent: Jaitley*, REUTERS (Mar. 2, 2015, 6:33 PM), <http://www.reuters.com/article/us-india-economy-jaitley-idUSKBN0LY2MK20150302>.

⁵⁹. See Office of the White House Press Secretary, *Fact Sheet: Charting a New Course on Cuba*, THE WHITE HOUSE – STATEMENTS & RELEASES (Dec. 17, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/17/fact-sheet-charting-new-course-cuba>.

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Noteworthy changes to the Cuba Sanctions Regulations from OFAC and BIS are addressed in more detail below.

Expanded General Travel Licenses. Expanded general licenses will be issued for travelers in the twelve current categories of authorized travel, including individual travel, vessels, and carriers. Notably general tourist travel is not included as one of the authorized categories of travel. Essentially, the same types of travel to Cuba that are already permitted will be easier.

1. *Family visits*: expands general license to include visiting close relatives who are ordinarily resident in Cuba even if they are not nationals of Cuba and close relatives who are in Cuba under the second category below (official government business) or who are in Cuba for more than sixty days under the fifth category below (educational activities).⁶⁰

2. *Official business of the U.S. Government, foreign governments, and certain intergovernmental organizations*: expands general license to include, *inter alia*, employees, contractors, or grantees of a government or certain intergovernmental organizations; adds specific license for other case-by-case situations.⁶¹

3. *Journalistic activities*: expands general license beyond persons regularly employed as journalists or broadcast or technical personnel of a news reporting organization to include freelance journalists with a freelancing record and broadcast or technical personnel supporting such a freelance journalist with a record of broadcast or technical experience.⁶²

4. *Professional research and professional meetings*: expands general license by no longer requiring that the research by full-time professionals be non-commercial and academic provided that the research directly relates to the professional's background or expertise; expands general license for professional meetings by no longer requiring such meetings to be organized by certain categories of international professional organizations.⁶³

5. *Educational activities*: expands general license by removing some restrictions on qualifying undergraduate and graduate school studies and adding secondary school studies; expands general license to include "people-to-people" travel programs that provide for a full-time schedule of non-academic activities engaging with the Cuban people, supporting civil society, and promoting independence from Cuban authorities.⁶⁴

6. *Religious activities*: expands general license for religious travel to persons subject to U.S. jurisdiction even if not members or staff of religious organizations located in the U.S.⁶⁵

7. *Public performances, clinics, workshops, athletic and other competitions, and exhibitions*: establishes a general license for travel for activities which previously required OFAC's advance authorization.⁶⁶

8. *Support for the Cuban people*: establishes a general license for travel for activities of recognized human rights organizations and organizations promoting peaceful democratic transition, as well as activities to strengthen civil society in Cuba by individuals as well as

60. 31 C.F.R. § 515.561 (2015).

61. 31 C.F.R. § 515.562 (2015).

62. 31 C.F.R. § 515.563 (2015).

63. 31 C.F.R. § 515.564 (2016).

64. 31 C.F.R. § 515.565 (2015).

65. 31 C.F.R. § 515.566 (2015).

66. 31 C.F.R. § 515.567 (2016).

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non-governmental organizations. Previously, OFAC's advance authorization was required.⁶⁷

9. *Humanitarian projects*: establishes a general license for various types of humanitarian projects designed to benefit the Cuban people directly. Previously OFAC's advance authorization was required.⁶⁸

10. *Activities of private foundations, research institutes, and educational institutes*: establishes a general license for travel for activities that previously required OFAC's advance authorization.⁶⁹

11. *Travel-related transactions related to information and informational materials*: establishes a general license for travel for transactions that previously required OFAC's advance authorization.⁷⁰

12. *Certain marketing and other commercial activities*: expands general license to include travel relating to authorized commercial activities including, but not limited to, conducting market research, commercial marketing, and sales negotiation for BIS-licensed transactions.⁷¹

Limited Imports. As a complement to the easing on travel restrictions to Cuba, limited imports from Cuba will now be permitted. Authorized travelers returning to the U.S. from Cuba may import goods into the U.S. with a value of up to \$400 (with a special limit of \$100 value for alcohol and tobacco products).⁷²

Expanded Export License Exceptions. New and expanded Export Administration Regulations (EAR) license exceptions for private sector exports to Cuba will allow the export of building materials for private residential construction, goods for use by private sector Cuban entrepreneurs, and agricultural equipment. These changes, issued by BIS, have substantial potential to impact U.S. companies and their foreign subsidiaries. Now limited commercial transactions involving Cuba will be permitted where the amendments provide for a new license exception: Support for the Cuban People (SCP), which will now permit the export of several types of items to Cuban farmers and businesses, so long as those items are controlled only for anti-terrorism (AT) reasons or designated as "EAR99." Included as authorized items for export are:

- building materials for private sector use;
- goods used by entrepreneurs (BIS noted auto mechanics, barbers/hairstylists, and restaurateurs as examples of entrepreneurs);
- farming tools and equipment for private sector use;
- items that would improve communications in Cuba including Internet access, related infrastructure, and items used by news media (revisited below);
- certain items for human rights organizations and non-governmental organizations; and
- the temporary export of items for use by U.S. persons for certain types of professional research activities in Cuba.⁷³

67. 31 C.F.R. § 515.574 (2015).

68. 31 C.F.R. § 515.575 (2016).

69. 31 C.F.R. § 515.576 (2015).

70. 31 C.F.R. § 515.545 (2016).

71. 31 C.F.R. § 515.577 (2011).

72. 31 C.F.R. § 515.569 (2015); 31 C.F.R. § 515.560(c)(3) (2015).

73. 15 C.F.R. § 740.21 (2015).

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The EAR will also be amended to facilitate export of certain items relating to civil aviation and vessels, as well as the temporary sojourn in Cuba of certain vessels. License Exception Aircraft, Vessels, and Spacecraft (AVS), which allow export of equipment, spare parts for permanent use on a vessel or aircraft,” and ship and plane stores, will now be available for use to Cuba, provided any items exported are designated as EAR 99 or controlled only for AT reasons.⁷⁴ BIS:

will also now permit use of the exception for temporary sojourn in Cuba of cargo and commercial passenger vessels, as well as recreational vessels if used in connection with travel authorized by OFAC. In addition, BIS will now evaluate on a case-by-case basis license applications to Cuba relating to improving the safety of civil aviation, such as for aircraft parts and components relating to safety, weather observation stations, airport safety equipment, and commodities used for security screening of passengers. Until now, BIS has applied a policy of denial to such license applications.⁷⁵

Expanded authorization of the provision of telecommunication equipment, communication services, and application development. U.S. companies will be able to invest in infrastructure for commercial telephone and internet services in Cuba under a new EAR exception to export certain telecommunications equipment and communication services.⁷⁶ Specifically, OFAC authorized U.S. persons to enter into contracts for the provision of telecommunications services (such as telephone, internet connectivity, radio, and television) to Cubans, and authorized transactions incident to the establishment of telecommunication facilities — subject to notification to OFAC and semiannual reporting requirements.⁷⁷ Further, OFAC also authorized via a general license certain transactions related to internet communications (such as email, instant messaging, social networking, web browsing and hosting, and domain name registration).⁷⁸ Finally, OFAC authorized the provision of services related to communication devices, such as software design and information technology management services, where the export of the particular device is authorized by BIS or the device is a similar item not subject to the EAR, i.e., a foreign origin device.⁷⁹

Physical Presence In Cuba And Cuban Accounts Now Permitted for U.S. Companies. Persons subject to U.S. jurisdiction who are now authorized to engage in trade with Cuba will also now be able to establish a physical presence in Cuba and open bank accounts in Cuban banks.⁸⁰ Thus, persons who have been authorized under the revised CACR to trade with Cuba will also now be able to open an office, hire Cuban

74. US revises Cuba sanctions regulations to further normalize trade with Cuba, DENTONS (Sep. 24, 2015), <http://www.dentons.com/en/insights/alerts/2015/september/22/us-revises-cuba-sanctions-regulations-to-further-normalize-trade-with-cuba>.

75. *Id.*

76. 15 C.F.R. § 740.21(d) (2015).

77. Departments of Commerce and the Treasury Issue New Rules Easing Sanctions on Cuba, VINSON & ELKINS, (Jan. 16, 2015), <http://www.velaw.com/Insights/Departments-of-Commerce-and-the-Treasury-Issue-New-Rules-Easing-Sanctions-on-Cuba/>.

78. *Id.*

79. *Id.*

80. US revises Cuba sanctions regulations to further normalize trade with Cuba, *supra* note 74.

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nationals, and open a Cuban bank account.⁸¹ They will also be permitted to conduct marketing activities in connection with their presence in Cuba. Companies that may establish a physical presence in Cuba under this new rule include companies facilitating permitted exports (including certain consumer communications devices, construction supplies and equipment to the private sector, agricultural equipment to the private sector, and supplies, equipment, and tools for private sector entrepreneurs) as well as companies involved in mail, parcel and cargo transportation, telecommunications services (see above), news, travel services, and entities engaging in authorized educational and religious activities.⁸²

Easing of Sanctions on Transactions with Cuban Nationals. All persons subject to U.S. jurisdiction will now be permitted to provide goods and services to Cuban nationals located outside of Cuba, provided goods or services are not thereby exported to Cuba.⁸³ Under the revised CACR, banking institutions—whether or not subject to U.S. jurisdiction—will also be allowed to open, maintain, and close bank accounts for these Cuban nationals without risk of U.S. sanctions.⁸⁴ Cuban nationals outside of Cuba may now open bank accounts, banks can now close those accounts, and those financial institutions will be able to open correspondent accounts in Cuban financial institutions to facilitate authorized transactions.⁸⁵ Cuban nationals who are permanent residents of third countries are no longer blocked.

Expanded Authorization for Foreign Vessels Engaged In Humanitarian Trade. Foreign vessels engaging in humanitarian trade with Cuba will be able to enter U.S. ports immediately and not be subject to the 180-day waiting period under the current rules. BIS expanded preexisting license exceptions for Gift Parcels and Humanitarian Donations (GFT).⁸⁶ The expanded License Exception GFT now permits consolidated shipments of multiple gifts, which previously required individual licenses.⁸⁷

Expansion of Environmental Protection Exports. BIS solidified and promulgated its policy of approving licenses for the export and reexport of “items necessary for the environmental protection of U.S. and international air quality, waters and coastlines.”⁸⁸

B. IRAN

Beginning in 2014, the US government granted relief from certain Iran-related sanctions following adoption of the Joint Plan of Action (JPOA). This relief was extended in July 2015 after the P5+1 countries (China, France, Germany, Russia, the UK, and the US), on the one hand, and the Government of Iran, on the other, reached agreement on the Joint Comprehensive Plan of Action (JCPOA) with respect to Iran’s nuclear

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Megan Barnhill & Anita Esslinger, President Obama Announces Changes to US – Cuba Relations, BRYAN CAVE (Dec. 19, 2014), <https://www.bryancave.com/images/content/2/2/v2/2284/IRB-NO.-532.pdf>.

87. *Id.*

88. Departments of Commerce and the Treasury Issue New Rules Easing Sanctions on Cuba, *supra* note 77.

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activities.⁸⁹ The JCPOA set out certain milestones and key dates under which phased sanctions relief will occur. The first such date was July 15, 2015, or “Finalization Day,” when the JCPOA was adopted.⁹⁰ The next date was October 18, 2015, “Adoption Day,” which is the date that the JCPOA parties are required to begin preparing for Implementation Day.⁹¹ That is the future, yet-to-be-determined date that the IAEA certifies Iran’s compliance with the JCPOA’s nuclear related measures and the bulk of sanctions relief under the JCPOA will occur. While U.S. companies and their foreign subsidiaries will have to wait for further regulatory action before seeing significant change, the sanctions relief that was extended in 2015 affected restrictions that apply to foreign persons and companies.

The U.S. government maintains comprehensive sanctions against Iran that broadly prohibit U.S. persons, U.S. companies, and their foreign subsidiaries from engaging in most transactions with Iran.⁹² These sanctions includes a general prohibition on most exports of goods, services and technology, and most financial transactions. These are sometimes referred to as “primary sanctions.”

Beginning in 2010, the United States also began to impose sanctions on foreign financial institutions and other foreign entities that engaged in certain transactions with Iran. Some of these so-called “secondary sanctions” targeted foreign financial institutions that participated in specified types of transactions with entities that were subject to sanctions. Other secondary sanctions targeted foreign financial institutions that engaged in certain transactions relating to the Iranian rial or with Iran’s petrochemical, automotive, gold and precious metals, and crude oil industries. Foreign financial institutions that participated in sanctionable activity could be barred from participating in the U.S. financial system, blocked, or subjected to other penalties, following a finding by the Departments of Treasury or State.

The sanctions relief under the JPOA/JCPOA primarily involves certain of the secondary sanctions summarized above. OFAC has stated that it will not impose sanctions on foreign persons (other than those who are subsidiaries of U.S. companies) who participate in certain types of transactions after January 20, 2014 relating to Iran’s automobile industry, gold and other precious metals, and exports of petrochemicals and crude oil.⁹³ For the most part, the primary sanctions restricting the activity of U.S. persons have not been eased to date (the JPOA/JCPOA does establish a favorable licensing scheme under which U.S. persons may obtain permission to engage in certain transactions relating to civil aviation safety). Some easing of restrictions on foreign subsidiaries of U.S. persons is expected to occur at some point in the future, likely via a general license. However, the timing and scope of that general license was not clear as of the end of 2015.

89. President Obama directs key US agencies to prepare for sanctions waivers under the JCPOA, DENTONS (Oct. 21, 2015), <http://www.dentons.com/en/insights/alerts/2015/october/20/president-obama-directs-key-us-agencies-to-prepare-for-sanctions-waivers-under-the-jcpoa>.

90. *Id.*

91. *Id.*

92. 15 C.F.R. § 746.7 (2013).

93. Guidance Relating to the Continuation of Certain Temporary Sanctions Relief Pursuant to the JPOA Prior to Implementation of the JCPOA, U.S. DEPT. OF THE TREASURY AND DEPT. OF STATE (Aug. 7, 2015), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/guidance_ext_20150807.pdf.

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In addition, on Adoption Day, the Secretary of State issued contingent waivers affirming that, as of Implementation Day, the U.S. will waive the imposition of a number of mostly extraterritorial sanctions to the extent necessary to implement the JCPOA.⁹⁴ While these contingent waivers laid certain groundwork for sanctions relief to occur on Implementation Day, it did not affect the sanctions currently in place.

C. FURTHER EXPORT CONTROL DEVELOPMENTS IN 2015

While the prior two years saw a steady stream of changes to the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR) as part of export control reform, 2015 was relatively quiet in terms of both regulatory changes and enforcement actions. A number of proposed rules were released – notably, one that would change the definitions of defense services, technical data, and public domain,⁹⁵ and another that would revise USML Categories XIV (toxicological agents, including chemical agents, biological agents, and associated equipment) and XVIII (directed energy weapons).⁹⁶ One particularly notable change connected with Export Control Reform did take effect in 2015, however. USML Category XI (electronics) was revised on July 1, 2014 to cover, among other things, “[d]evelopmental electronic equipment or systems funded by the Department of Defense via contract or other funding authorization.”⁹⁷ The effective date of this provision was for contracts and funding authorizations dated July 1, 2015, or later.⁹⁸ The provision excludes from its scope electronic systems or equipment (a) in production, (b) determined to be subject to the EAR via a commodity jurisdiction determination, or (c) identified in the relevant DOD contract or other funding authorization as being developed for both civil and military applications. In effect, this new provision establishes a rebuttable presumption that electronic systems or equipment developed under DOD-funded vehicles after July 1, 2015 are ITAR-controlled.

V. New DOD Rule Minimizes Oversight of Indirect Offset Costs in FMS Transactions

On June 2, 2015, DOD issued an interim rule, effective that day that amended the Defense Federal Acquisition Regulation Supplement (DFARS) to relax the U.S. government’s review of indirect offset costs that contractors incur when selling to foreign governments through the Foreign Military Sales (FMS) program.⁹⁹ The new rule instructs contracting officers to accept all such indirect offset costs as reasonable on their

94. President Obama directs key US agencies to prepare for sanctions waivers under the JCPOA, *supra* note 89.

95. International Traffic in Arms, 80 Fed. 31525 (June 3, 2015).

96. Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Categories XIV and XVIII, Dept. of State (June 17, 2015), <https://www.federalregister.gov/articles/2015/06/17/2015-14472/amendment-to-the-international-traffic-in-arms-regulations-revision-of-us-munitions-list-categories>.

97. United States Munitions List, 80 Fed. Reg. 37544 (July 1, 2014).

98. *Id.*

99. Defense Acquisition Regulations System, 80 Fed. Reg. 31309 (June 2, 2015).

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face, obviating the need for a cost reasonableness analysis or the substantiating data that goes along with such an analysis.¹⁰⁰

Many governments require foreign defense contractors, as a condition of doing business, to agree to “offset” the value of a procurement by reinvesting some portion of the value of that procurement back into the domestic economy. Though these investments are often in direct support of the defense procurement — for example, by contracting with a domestic supplier for certain components — foreign governments are increasingly requiring “indirect offsets” that may be wholly unrelated to the underlying procurement, such as providing computer or language skills training to domestic workers. Though the United States has long disfavored procurement offsets,¹⁰¹ DOD recognizes a “recent and foreseeable trend of increasing numbers and complexity of indirect offsets” desired by foreign customers in the FMS program.¹⁰² As indirect offset arrangements became more complex, so did contracting officer’s attempts to determine if the amount of the costs involved were “reasonable” given the nature of the underlying contract. DOD, recognizing that offset arrangements are really between the foreign customer and the contractor, and recognizing that contracting officers often do not have the information necessary to negotiate the cost or price of an indirect offset, issued the interim rule to avoid such tricky situations.¹⁰³

Before the rule was issued, contracting officers reviewed indirect offset costs in FMS contracts as they did any other costs under FAR parts 15 and 31, determining the reasonableness of the costs based on whether or not they were of the nature and amount of those that would be incurred by a “prudent business person in the conduct of competitive business.”¹⁰⁴ Now, DFARS § 225.7303-2 specifies that “[a]ll offset costs that involve benefits provided by the U.S. defense contractor to the FMS customer that are unrelated to the item being purchased,” or indirect offset costs, “are deemed reasonable for purposes of FAR part 31 with no further analysis necessary on the part of the contracting officer.”¹⁰⁵ Now, instead of submitting large volumes of data and information to substantiate their indirect offset costs, contractors need only submit a signed offset agreement showing that the foreign government has made the indirect offset a condition of the FMS sale.¹⁰⁶

The interim rule only applies to indirect offsets, and contractors selling to foreign governments through the FMS program should be aware that contracting officers will continue to scrutinize the reasonableness of direct offset costs in accordance with FAR part 31. Furthermore, though the rule has been in effect since its issuance in June, DOD accepted public comments until August 2, 2015, and continues to consider the comments it receives, so the rule may change before it is finalized.

100. *Id.*

101. Nonetheless, the United States steers procurement value into domestic investments through vigilant enforcement of the Buy American Act. 41 U.S.C. §§ 8301-8305 (2011).

102. Defense Acquisition Regulations System, 80 Fed. Reg. 31310 (June 2, 2015).

103. Defense Acquisition Regulations System, 80 Fed. Reg. 31309 (June 2, 2015).

104. FAR 31.201-3 (1987).

105. DFARS 225.7303-2(a)(3)(iii) (2015); *see also* Defense Acquisition Regulations System, 80 Fed. Reg. 31310 (June 2, 2015).

106. *Id.*