



AN IMPERFECT BALANCE:  
ITAR EXEMPTIONS, NATIONAL SECURITY,  
AND U.S. COMPETITIVENESS

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INTRODUCTION

In 2011, Ileana Ros-Lehtinen, Chairman of the House Foreign Affairs Committee, stated that “the main goal of export controls is to keep certain states or non-state actors from developing or acquiring military capabilities that could threaten important [national] U.S. security interests.”<sup>1</sup> By placing limitations on what technology and products leave the United States through a strict licensing regime, the United States can more effectively control these actors’ access to military equipment and technology.<sup>2</sup> The licensing regime that the United States uses to do this is the International Traffic in Arms Regulations (“ITAR”).<sup>3</sup> ITAR stipulates, among many other regulations, that the United States does not issue licenses for exporters to send military equipment and technology to Cuba, China, Iran, North Korea, and Syria, among others.<sup>4</sup> Additionally,

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<sup>1</sup> *Export Controls, Arms Sales, and Reform: Balancing U.S. Interests, Part 1: Hearing Before the H. Comm. on Foreign Affairs*, 112th Cong. 1 (2011) [hereinafter *Foreign Affairs Hearing*] (statement of Ileana Ros-Lehtinen, Chairman, H. Comm. on Foreign Affairs).

<sup>2</sup> See *id.* at 1–2.

<sup>3</sup> The International Traffic in Arms Regulations, 22 C.F.R. §§ 120-130 (2013).

<sup>4</sup> *Id.* § 126.1.

U.S. policymakers want to restrict the availability of certain defense-related items to several non-state actors, such as Hezbollah and Hamas.<sup>5</sup>

Even with strong export controls in place, unauthorized release of military technologies still occurs, which emphasizes the need for such controls in the first place. For example, at a House Foreign Affairs Committee hearing in 2011, Chairman Ros-Lehtinen detailed a significant compromise of military technology due to its unintended export during the raid on Osama bin Laden's Pakistan compound earlier that year.<sup>6</sup> During the raid, one of the helicopters that carried the Navy SEALs encountered difficulties and crashed in the compound.<sup>7</sup> Although the SEALs destroyed most of the helicopter to prevent technology leaks, enough of it survived the attempted demolition "to afford foreign entities significant insight into [U.S.] technology."<sup>8</sup> The U.S. government counted on the Pakistani government to assist with U.S. export control regulations to prevent the unauthorized disclosure of military technologies in the helicopter.<sup>9</sup> This specific desire to comply with U.S. export controls is not particularly controversial: most, if not all, Americans would agree that sensitive U.S. military technology left in Osama bin Laden's backyard should be immediately removed or destroyed. By having such regulations in place, the United States is not only able to ensure that sensitive military technologies are not leaked, but also is able to take remedial steps when accidents and spillage like this occur.

There is no doubt that export controls serve a very important function by preventing dangerous weapons from falling into the wrong hands and also are effective at protecting sensitive national security information. However, some export control situations involve controversial, anticompetitive, and—at times—laughable

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<sup>5</sup> *Foreign Affairs Hearing*, *supra* note 1, at 8 (statement of Brad Sherman, Member, H. Comm. on Foreign Affairs).

<sup>6</sup> *Id.* at 1–2 (statement of Ileana Ros-Lehtinen, Chairman, H. Comm. on Foreign Affairs).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.*

outcomes. For example, Zodiac Group is a company that manufactures equipment for military boats and planes.<sup>10</sup> When it attempted to sell a toilet for use in foreign military planes, the company discovered that the toilet would likely be on ITAR's list of items requiring an export license because it was built to military specifications and with a special design.<sup>11</sup>

These are just two examples that illustrate the effects of U.S. export controls. In the Osama bin Laden helicopter scenario, national security is clearly important and regulations should exist to prevent the acquisition of this technology by individuals or groups hostile to U.S. interests. In order for the government to prevent sensitive items and technology from leaving the country and ending up with the wrong states or groups, ITAR requires licenses to securely export and share certain defense articles and technology.<sup>12</sup> However, as with the Zodiac Group's toilet, ITAR becomes controversial when it prevents U.S. companies from seeking business opportunities abroad by selling products that do not pose a significant security threat to the United States.<sup>13</sup>

The State Department, which enforces ITAR, must balance these two competing interests: (1) national security and (2) the competitiveness and sustainability of U.S. businesses that sell defense

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<sup>10</sup> Clif Burns, *Toilet Training*, EXPORT LAW BLOG (May 23, 2007, 4:12 PM), <http://www.exportlawblog.com/archives/date/2007/05>.

<sup>11</sup> *Id.*

<sup>12</sup> *Foreign Affairs Hearing*, *supra* note 1, at 1. A "defense article" is considered anything listed under Part 121 of the ITAR (the U.S. Munitions List) and includes "technical data." 22 C.F.R. § 121.1(a). "Technical data" is defined as: "(1) Information, other than software as defined in § 120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation. (2) Classified information relating to defense articles and defense services; (3) Information covered by an invention secrecy order; (4) Software as defined in § 121.8(f) of this subchapter directly related to defense articles." 22 C.F.R. § 120.10(a).

<sup>13</sup> See, e.g., *Earthbound: Gravity Is Not the Main Obstacle for America's Space Business*. *Government Is*, ECONOMIST (Aug. 21, 2008) [hereinafter ECONOMIST], available at <http://www.economist.com/node/11965352>.

products in the global market.<sup>14</sup> One tool that the State Department has at its disposal to help balance ITAR's rival interests is the authority to grant exemptions.<sup>15</sup> As of 2013, the State Department granted exemptions to Australia, Canada, and the United Kingdom, loosening the licensing requirements for these three countries.<sup>16</sup> Consequently, U.S. companies now face fewer requirements and barriers when sending defense products to these countries.<sup>17</sup>

This Article analyzes whether the exemption model that the State Department engages in with Australia, Canada, and the United Kingdom strikes the right balance between national security and U.S. commercial competitiveness abroad. Part I of this Article addresses the origins and provisions of ITAR, including a discussion of the aforementioned competing interests. Part II of this Article addresses the State Department's authority to grant exemptions from ITAR, how that authority is currently used, and the future of that authority. Part II of this Article further analyzes whether these exemptions strike the right balance between national security and U.S. commercial interests. I conclude in Part III that while these exemptions do not achieve a true balance between these competing interests given the delicate nature of national security, the exemption model still provides welcome and valuable assistance that forms a step in the right direction.

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<sup>14</sup> See, e.g., *id.* See also *Foreign Affairs Hearing*, *supra* note 1, at 1 (saying that "United States policy, with respect to the export of sensitive technology, has long been to seek a balance between the U.S. economic interest in promoting exports, and our national security interest . . .").

<sup>15</sup> 22 U.S.C. § 2778(j) (2012). This authority was delegated to the State Department by Exec. Order No. 11,958, 42 Fed. Reg. 4311, 3 C.F.R. 1977 Comp., p. 79 (Jan. 18, 1977). Although President Obama's March 8, 2013, Executive Order supersedes and replaces Executive Order 11,958 of 1977, this new Executive Order primarily re-delegates many of the same authorities present in earlier executive orders. See Exec. Order No. 13,637, 78 Fed. Reg. 16,129 (Mar. 13, 2013).

<sup>16</sup> See 22 C.F.R. § 126.5 for Canadian exemptions, § 126.16 for Australian exemptions, and § 126.17 for the United Kingdom exemptions.

<sup>17</sup> See *Defense Trade Cooperation Treaties with the United Kingdom and Australia*, U.S. DEP'T OF STATE, [http://www.pmddtc.state.gov/treaties/documents/Defense\\_Trade\\_Treaties\\_Fact\\_Sheet.pdf](http://www.pmddtc.state.gov/treaties/documents/Defense_Trade_Treaties_Fact_Sheet.pdf) (last visited Oct. 13, 2013); *Exports to Canada: Guidance on ITAR Exemption Effective May 30, 2001*, U.S. DEP'T OF STATE, [http://www.pmddtc.state.gov/licensing/documents/exports\\_canada.pdf](http://www.pmddtc.state.gov/licensing/documents/exports_canada.pdf) (last visited Oct. 13, 2013).

## I. ITAR

### A. *What Is ITAR?*

In 1976, Congress enacted the Arms Export Control Act (“AECA”) in the midst of the Cold War as the result of years of evolution in U.S. export control law.<sup>18</sup> The purpose of the AECA is to prevent “the United States [from] be[ing] the arms merchant to the world, to discourage the international shipment of arms, and to promote regional disarmament.”<sup>19</sup> One method that lawmakers used to fulfill this purpose was to provide the President with the authority “to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services.”<sup>20</sup>

Pursuant to the AECA, the President also holds the statutory authority to create a list of defense-related items—the United States Munitions List (“USML”)—that fall under the purview of the AECA and need special licenses or permission to enter or leave the United States.<sup>21</sup> In preparing the USML, the President is required to take a variety of factors into account, including whether the munitions “would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.”<sup>22</sup> The stated purpose of this section is to further “world peace and the security and foreign policy of the United States.”<sup>23</sup>

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<sup>18</sup> See Jonathan Donald Westreich, *Regulatory Controls on United States Exports of Weapons and Weapons Technology: The Failure to Enforce the Arms Export Control Act*, 7 ADMIN. L.J. AM. U. 463, 467–70 (1993) (discussing the background that led to the creation of the Export Control Act of 1949).

<sup>19</sup> *Id.* at 503.

<sup>20</sup> 22 U.S.C. § 2778(a)(1).

<sup>21</sup> See *id.* § 2778(a).

<sup>22</sup> *Id.* § 2778(a)(2).

<sup>23</sup> *Id.* § 2778(a)(1).

ITAR is the set of federal regulations that implements the AECA.<sup>24</sup> The main purpose of ITAR is to ensure that “any person or company who intends to export or to temporarily import a defense article, defense service, or technical data must obtain prior approval from [the Directorate of Defense Trade Controls of the U.S. State Department].”<sup>25</sup>

ITAR offers definitions of important statutory terms such as “defense article,”<sup>26</sup> “export,”<sup>27</sup> “temporary import,”<sup>28</sup> “technical data,”<sup>29</sup> and “license.”<sup>30</sup> The regulations discuss how defense articles are added to the USML,<sup>31</sup> and also include the USML in order for persons to determine if the “defense article” they want to export or to import is contained on the list.<sup>32</sup> The USML covers a wide range of products and divides them into general categories, including, but not limited to, “Firearms, Close Assault Weapons and Combat Shotguns,” “Military Electronics,” and “Toxicological Agents, including Chemical Agents, Biological Agents, and Associated Equipment.”<sup>33</sup>

ITAR governs not only the international trade of actual products, but also the technical data associated with ITAR-controlled products.<sup>34</sup> Any information “required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles . . . [including] blueprints, drawings, photographs, plans, instructions or

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<sup>24</sup> See 22 C.F.R. § 120.1(a).

<sup>25</sup> *Licensing*, U.S. DEP’T OF STATE, DIRECTORATE OF DEFENSE TRADE CONTROLS, <http://www.pmddtc.state.gov/licensing/> (last visited Oct. 13, 2013). See also *Mission*, U.S. DEP’T OF STATE, DIRECTORATE OF DEFENSE TRADE CONTROLS, <http://www.pmddtc.state.gov> (last visited Oct. 13, 2013).

<sup>26</sup> 22 C.F.R. § 120.6.

<sup>27</sup> *Id.* § 120.17.

<sup>28</sup> *Id.* § 120.18.

<sup>29</sup> *Id.* § 120.10.

<sup>30</sup> *Id.* § 120.20.

<sup>31</sup> *Id.* §§ 120.2–120.3.

<sup>32</sup> 22 C.F.R. § 121.1(a).

<sup>33</sup> *Id.* § 121.1.

<sup>34</sup> The regulations define “defense article” as “any item or *technical data*” listed on the USML. *Id.* § 120.6 (emphasis added).

documentation”<sup>35</sup> and “[c]lassified information relating to defense articles and defense services”<sup>36</sup> also are subject to ITAR.<sup>37</sup>

ITAR prohibits the unlicensed or illegal transfer of these defense articles and pieces of information on the USML to “foreign persons,” defined as:

any natural person who is not a lawful permanent resident . . . [and] any foreign corporation, business association, partnership, trust, society or any other entity or group that is not incorporated or organized to do business in the United States, as well as international organizations, foreign governments and any agency or subdivision of foreign governments (e.g., diplomatic missions).<sup>38</sup>

No U.S. person<sup>39</sup> can export any defense article or data to foreign persons without a license.<sup>40</sup> The extensive definition of “export” includes sending items on the USML outside of the country as well as sharing technical data with foreign persons or governments.<sup>41</sup> For example, a professor at a U.S. university sharing restricted technical data with a foreign research assistant would fall under the purview of ITAR restrictions and requirements.<sup>42</sup>

ITAR regulates the registration process of anyone involved in the sale of defense articles and services,<sup>43</sup> as well as the licensing

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<sup>35</sup> *Id.* § 120.10(a)(1).

<sup>36</sup> *Id.* § 120.10(a)(2).

<sup>37</sup> *Id.* § 120.10(a)(3)–(4).

<sup>38</sup> 22 C.F.R. § 120.16.

<sup>39</sup> *Id.* § 120.15. (“*U.S. person* means a person (as defined in § 120.14 of this part) who is a lawful permanent resident as defined by 8 U.S.C. § 1101(a)(20) or who is a protected individual as defined by 8 U.S.C. § 1324b(a)(3). It also means any corporation, business association, partnership, society, trust, or any other entity, organization or group that is incorporated to do business in the United States. It also includes any governmental (federal, state or local) entity. It does not include any foreign person as defined in § 120.16 of this part.”).

<sup>40</sup> *Licensing*, *supra* note 25.

<sup>41</sup> 22 C.F.R. § 120.17(a)(1), (4)–(5).

<sup>42</sup> See Press Release, Dep’t of Justice, University Professor and Tennessee Company Charged with Arms Export Violations (May 20, 2008), available at [http://www.justice.gov/opa/pr/2008/May/08\\_nsd\\_449.html](http://www.justice.gov/opa/pr/2008/May/08_nsd_449.html).

<sup>43</sup> 22 C.F.R. § 122.1.

regime that all persons must go through in order to export or temporarily import defense articles.<sup>44</sup> This licensing process requires documents that, among other things, demonstrate the country of destination<sup>45</sup> and a certification in the “bill of lading, airway bill, or other shipping documents, and the invoice” stating that exported items cannot be sent to a different country.<sup>46</sup> Also required is a “nontransfer and use certificate,” in which the license applicant, the foreign consignee, and the foreign end-user agree that consignee and end-user “will not reexport, resell or otherwise dispose of the significant military equipment enumerated in the application outside the country named as the location of the foreign end-use or to any other person.”<sup>47</sup>

According to the defense industry, these regulations are “very cumbersome and restrictive.”<sup>48</sup> Testifying before the House Foreign Affairs Committee in 2011, Under Secretary for Arms Control and International Security Ellen Tauscher acknowledged the export licensing process includes “a myriad of paperwork requirements, which in the case of the State Department alone, could be any one of 13 different forms.”<sup>49</sup> In addition, the U.S. Department of Commerce’s Bureau of Industry and Security also plays a role in the licensing process by regulating the exportation of certain “dual-use” items.<sup>50</sup> According to a review commissioned by President Barack Obama to investigate the current export controls licensing system, the lists administered by the State Department and Commerce Department have “fundamentally different approaches to defining controlled products, [and are] administered by two different departments. This has caused significant ambiguity, confusion and

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<sup>44</sup> *Id.* § 123.1.

<sup>45</sup> *Id.* § 123.9(a).

<sup>46</sup> *Id.* § 123.9(b).

<sup>47</sup> *Id.* § 123.10(a).

<sup>48</sup> Lori Solberg, *New US ITAR Regulations Formulate Favored Defense Partners*, DEFENSE UPDATE (Feb. 21, 2012, 8:45 PM), [http://defense-update.com/20120221\\_itar\\_formulates\\_trusted\\_partners.html](http://defense-update.com/20120221_itar_formulates_trusted_partners.html).

<sup>49</sup> *Export Controls, Arms Sales, and Reform: Balancing U.S. Interests, Part 1: Hearing Before the H. Comm. on Foreign Affairs*, 112th Cong. 112–37 (2011) (statement of Ellen Tauscher, Under Sec’y, Arms Control and Int’l Sec., U.S. Dep’t of State).

<sup>50</sup> *Dual Use U.S. Export Controls and Licenses*, EXPORT.GOV (Sept. 15, 2013), [http://export.gov/exportbasics/eg\\_main\\_018783.asp](http://export.gov/exportbasics/eg_main_018783.asp).



jurisdictional disputes, delaying clear license determinations for months and, in some cases, years . . . .”<sup>51</sup> As one space industry source noted, “[t]he export licensing process is lengthy, unpredictable, and inefficient.”<sup>52</sup>

### B. *Debate over ITAR and Competing Interests*

A debate has developed regarding ITAR’s negative impact on U.S. competitiveness abroad because of its restrictions on U.S. exports.<sup>53</sup> Recognizing the debate and the difficulty of finding a balance between national security and industry competitiveness, one analyst notes that:

The [United States] leads the world in most technologies and some of these give it a military advantage. If export rules are too lax, foreign powers will be able to put American technology in their systems, or copy it. But if the rules are too tight, then it will stifle the industries that depend upon sales to create the next generation of technology. It is a difficult balance to strike and critics charge that America has erred on the side of stifling.<sup>54</sup>

Efforts to strike the right compromise between these two national interests have been the source of congressional hearings,<sup>55</sup> discussions by the executive branch,<sup>56</sup> and private sector publications

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<sup>51</sup> Press Release, White House, President Obama Lays the Foundation for a New Export Control System To Strengthen National Security and the Competitiveness of Key U.S. Manufacturing and Technology Sectors (Aug. 30, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/08/30/president-obama-lays-foundation-a-new-export-control-system-strengthen-n>.

<sup>52</sup> *ITAR and the U.S. Space Industry*, SPACE FOUND., [http://www.spacefoundation.org/docs/SpaceFoundation\\_ITAR.pdf](http://www.spacefoundation.org/docs/SpaceFoundation_ITAR.pdf) (last visited Sept. 26, 2013).

<sup>53</sup> E.g., Henry Kenyon, *Export Laws Hurt US Space Competitiveness, Lawmaker Says*, DEFENSE SYSTEMS (Mar. 12, 2012), <http://defensesystems.com/articles/2012/03/12/satellite-2012-outdated-export-laws-space-competition>.

<sup>54</sup> ECONOMIST, *supra* note 13.

<sup>55</sup> See *Foreign Affairs Hearing*, *supra* note 1.

<sup>56</sup> See *id.* at 10 (statement of Hon. Ellen Tauscher, Under Sec’y, Arms Control & Int’l Sec., U.S. Dep’t of State).

and events.<sup>57</sup> This task is complex and there is no easy solution.<sup>58</sup> However, as discussed below, the State Department has used the exemption model to bring some balance between these two interests.<sup>59</sup>

C. *ITAR's Detrimental Effect on U.S. Economic Interests and Global Competitiveness*

It is clear that ITAR has had a negative effect on the competitiveness of U.S. companies and entrepreneurs that make defense articles and related items.<sup>60</sup> The recent decline in the space industry is an excellent example.<sup>61</sup> In the 1990s, the United States controlled over 80 percent of the worldwide satellite market<sup>62</sup> and the overall U.S. market share of the space industry was 73 percent.<sup>63</sup> In recent years these numbers have declined to 50 percent<sup>64</sup> and 25

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<sup>57</sup> See, e.g., *Competing for Space: Satellite Export Policy and U.S. National Security*, AEROSPACE INDUS. ASS'N (Jan. 2012) [hereinafter AEROSPACE INDUS. ASS'N], available at <http://www.aia-aerospace.org/assets/CompetingForSpaceReport.pdf>.

<sup>58</sup> See ECONOMIST, *supra* note 13 (“It is a difficult balance to strike . . .”).

<sup>59</sup> See *infra* Section III: “The Right Balance?”

<sup>60</sup> See, e.g., ECONOMIST, *supra* note 13.

<sup>61</sup> See Kenyon, *supra* note 53. It should be noted that the State Department currently is in the process of transferring control of many U.S. satellites to the Department of Commerce. See Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV and Definition of “Defense Service,” 78 Fed. Reg. 31,444 (May 24, 2013). This comes as a result of the National Defense Authorization Act for Fiscal Year 2013, which “effectively returned to the President the authority to determine which regulations govern the export of satellites and related articles. With this authority, and pursuant to the President’s Export Control Reform effort,” the State Department has proposed revisions to the relevant USML category (“Spacecraft Systems and Related Articles”). 78 Fed. Reg. 31,444. This will place certain satellites that “no longer warrant USML control” under the jurisdiction of the Department of Commerce and its regulations. Export Administration Regulations (EAR): Control of Spacecraft Systems and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 78 Fed. Reg. 31,431 (May 24, 2013).

<sup>62</sup> ECONOMIST, *supra* note 13.

<sup>63</sup> Kenyon, *supra* note 53.

<sup>64</sup> ECONOMIST, *supra* note 13.

percent,<sup>65</sup> respectively. The space industry has lost approximately \$21 billion during these years and “literally thousands of jobs . . . .”<sup>66</sup>

Many attribute this decline to Congress’s transfer of control of the international trade of satellites from a more lenient regime at the U.S. Department of Commerce to the State Department and ITAR.<sup>67</sup> This move was motivated by concerns over the disclosure of satellite information to China.<sup>68</sup> Unsurprisingly, there is a category in the USML for “Spacecraft Systems and Associated Equipment,” which includes various satellites.<sup>69</sup>

ITAR’s restrictions have made maintaining U.S. dominance in the space industry difficult: not only has Congress passed more stringent ITAR prohibitions regarding space articles since the 1990s, but the statutory text may have been interpreted even more broadly than Congress intended.<sup>70</sup> For example, satellite parts currently are covered by ITAR, which means that a satellite stand that is “indistinguishable from a common coffee table” requires ITAR compliance before it may be exported.<sup>71</sup>

While the intent of these measures is to prevent widespread access to defense articles, there is evidence that the restrictions are encouraging innovation and production of these articles in competing markets abroad.<sup>72</sup> Former Defense Secretary Robert Gates explained the results:

Multinational companies can move production offshore, eroding our defense industrial base, undermining our control

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<sup>65</sup> AEROSPACE INDUS. ASS’N, *supra* note 57, at 2.

<sup>66</sup> Steven Brotherton, *Fall Ushers in Football and (Hopefully) Space Export Control Reform*, FRAGOMEN CONTROLS OBSERVATIONS & UPDATES BLOG (Aug. 17, 2012), <http://www.fragomen.com/exportcontrolsupdates/?entry=72>.

<sup>67</sup> See ECONOMIST, *supra* note 13.

<sup>68</sup> See AEROSPACE INDUS. ASS’N, *supra* note 57, at 2.

<sup>69</sup> The United States Munitions List, 22 C.F.R. § 121.1, Category XV—Spacecraft Systems and Associated Equipment (2003). As discussed *supra* in note 61, the State Department is in the process of transferring jurisdiction over certain satellites to the Department of Commerce. 78 Fed. Reg. 31,444.

<sup>70</sup> See ECONOMIST, *supra* note 13.

<sup>71</sup> *Id.*

<sup>72</sup> See *id.*

regimes in the process, not to mention losing American jobs. Some European satellite manufacturers even market their products as being not subject to U.S. export controls, thus drawing overseas not only potential customers, but some of the best scientists and engineers as well.<sup>73</sup>

Placing satellites on the USML has not prevented other countries from gaining the technology; it has *encouraged* them to find satellites from other sources and create them on their own.<sup>74</sup> For example, Thales Alenia is a European satellite producer that has greatly benefitted from ITAR, significantly increasing its market share since the late 1990s.<sup>75</sup> The company can offer satellites that are free of U.S. parts or articles, and, therefore, “ITAR-free.”<sup>76</sup> It recently built a satellite for China, which launched in 2012.<sup>77</sup> ITAR was modified to include satellites specifically to prevent such an acquisition by China<sup>78</sup> and yet the restrictions have encouraged foreign companies to fill the void.<sup>79</sup> The consequence of these restrictions is that the United States has lost jobs and market share.<sup>80</sup> Certain satellites currently are being transferred from ITAR back to the Department of Commerce’s jurisdiction.<sup>81</sup> While industry members applaud this move,<sup>82</sup> it is unclear how the U.S. space industry will perform in the future.

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<sup>73</sup> AEROSPACE INDUS. ASS’N, *supra* note 57, at 3.

<sup>74</sup> ECONOMIST, *supra* note 13.

<sup>75</sup> *Id.*

<sup>76</sup> Stephen Clark, *Chinese Rocket Lifts Off with Communications Satellite*, SPACEFLIGHT NOW (Mar. 31, 2012), <http://www.spaceflightnow.com/news/n1203/31longmarch/>.

<sup>77</sup> *Id.*

<sup>78</sup> ECONOMIST, *supra* note 13.

<sup>79</sup> Clark, *supra* note 76.

<sup>80</sup> AEROSPACE INDUS. ASS’N, *supra* note 57, at 3.

<sup>81</sup> *See supra* text accompanying note 61.

<sup>82</sup> *E.g.*, Press Release, Satellite Industry Association, The Satellite Industry Association Files Comments Supporting Draft Rules to Reform Satellite Export Controls (July 11, 2013), *available at* [http://www.sia.org/wp-content/uploads/2013/07/SIA\\_Press\\_Release\\_on\\_Filing\\_ECR\\_Comments\\_2013\\_07\\_11.pdf](http://www.sia.org/wp-content/uploads/2013/07/SIA_Press_Release_on_Filing_ECR_Comments_2013_07_11.pdf).

#### D. *ITAR Protects U.S. National Security Interests*

Balanced against these economic costs, ITAR and other export controls protect national security by preventing terrorist groups and rogue states from having access to weapons, defense items, and associated technology.<sup>83</sup> Corollary to this are additional, specific U.S. national security interests, such as “maintaining a military advantage over potential adversaries, and denying the spread of technologies that could be used in developing weapons of mass destruction.”<sup>84</sup> When ITAR and other export controls were created in the middle of the Cold War, the adversary was a nation-state, and efforts to keep defense articles from reaching the Soviet Union seemed less complicated.<sup>85</sup> However, today, the United States faces much more difficult challenges in preventing terrorists or states with creative “back door [missile] acquisitions,” or “elicit front companies” funded by either of these groups from acquiring weapons.<sup>86</sup> The globalization of today’s economy means that parts for defense articles come from a number of countries, which makes regulating the products more difficult.<sup>87</sup>

While it is often easy to criticize ITAR and other export control regulations for sometimes seemingly arbitrary and overly inclusive product regulations, the best argument in favor of a strong ITAR is that “it takes only one key piece of cutting edge technology slipping through the cracks to seriously compromise our security.”<sup>88</sup>

## II. THE STATE DEPARTMENT AND ITAR EXEMPTIONS

While these competing interests seem irreconcilable,<sup>89</sup> the State Department may have a partial solution in permitting ITAR exceptions for certain countries. Before explaining the mechanics of exemptions, it is important to give an overview of the State

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<sup>83</sup> See *Foreign Affairs Hearing*, *supra* note 1, at 1.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 10 (statement of Hon. Ellen Tauscher, Under Sec’y, Arms Control & Int’l Sec., U.S. Dep’t of State).

<sup>86</sup> *Id.*

<sup>87</sup> See *id.*

<sup>88</sup> *Id.* at 8 (statement of Brad Sherman, Member, H. Comm. on Foreign Affairs).

<sup>89</sup> See *ECONOMIST*, *supra* note 13 (“It is a difficult balance to strike . . .”).

Department's authority to give country-specific exemptions and how it uses this authority.

A. *The State Department's ITAR Country Exemption Authority*

President Ford officially delegated the authority to enforce ITAR to the State Department by an executive order.<sup>90</sup> Included in this delegated authority is the President's ability to grant ITAR exemptions to specific countries as codified by the AECA.<sup>91</sup> This exemption authority can be exercised only through a bilateral agreement with a foreign country.<sup>92</sup> Australia, Canada, and the United Kingdom are the only three exceptions to this requirement, which means that these three countries do not need to reach a bilateral agreement with the United States in order to receive an ITAR exemption.<sup>93</sup> Canada is specifically listed as an exception in the statute,<sup>94</sup> while the United Kingdom and Australia are eligible for exception from the bilateral agreement requirement because of defense trade cooperation treaties ("DTCT") between each of these countries and the United States.<sup>95</sup> Agreeing to a DTCT does not mean that U.S. persons can send any and all defense articles to that country: items such as "complete rocket systems,"<sup>96</sup> "biological agents,"<sup>97</sup> and "defense articles and defense services specific to the design and testing of nuclear weapons,"<sup>98</sup> are excluded from the scope of DTCTs.

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<sup>90</sup> This authority was delegated to the State Department by Exec. Order No. 11,958, 42 Fed. Reg. 4311, 3 C.F.R. 1977 Comp., p. 79 (Jan. 18, 1977). Although President Obama's March 8, 2013, Executive Order supersedes and replaces Executive Order 11,958 of 1977, this new Executive Order primarily re-delegates many of the same authorities present in earlier executive orders. *See* Exec. Order No. 13,637, 78 Fed. Reg. 16,129 (Mar. 13, 2013).

<sup>91</sup> 22 U.S.C. § 2778(j).

<sup>92</sup> *Id.* § 2778(j)(1).

<sup>93</sup> Australia's exemption is provided for in 22 U.S.C. § 2778(j)(1)(C)(i)(II), Canada's exemption is found in 22 U.S.C. § 2778(j)(1)(B), and the UK's exemption is found in 22 U.S.C. § 2778(j)(1)(C)(i)(I).

<sup>94</sup> 22 U.S.C. § 2778(j)(1)(B).

<sup>95</sup> *Id.* § 2778(j)(1)(C)(i).

<sup>96</sup> *Id.* § 2778(j)(1)(C)(ii)(I).

<sup>97</sup> *Id.* § 2778(j)(1)(C)(ii)(IV).

<sup>98</sup> *Id.* § 2778(j)(1)(C)(ii)(V).

### B. Exemption for Canada

The AECA statutory provision regarding Canada says that no bilateral agreement is necessary in order for the State Department to grant Canada an exemption.<sup>99</sup> The State Department exercised this option, giving Canada a new ITAR exemption in 2001.<sup>100</sup> The United States and Canada engaged in significant negotiations in order for each to modify its export controls and comply with the other's requirements.<sup>101</sup> Canada, for example, has incorporated all of the items in the USML into its own export control list.<sup>102</sup> Meanwhile, the United States has significantly expanded the scope of Canada's exemption by relaxing license standards and by listing specific governmental and private recipients of the exempt products.<sup>103</sup> The result is that many Canadian and American "defense articles"—which generally require an ITAR license—can be exported or temporarily imported between the two countries without the need of acquiring a license.<sup>104</sup>

The exemption for Canada, while providing for significantly more arms trade than with any other country, is not an absolute ITAR exemption; many defense articles listed in the USML, such as specific firearms and ammunition, aircraft items, certain chemical agents, and nuclear weapons, still require a license.<sup>105</sup>

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<sup>99</sup> *Id.* § 2778(j)(1)(B).

<sup>100</sup> Amendments to the International Traffic in Arms Regulations: Canadian Exemptions, 66 Fed. Reg. 10,575 (Feb. 16, 2001). Canada had previously received an ITAR exemption, but the U.S. revoked it in 1999 due to a number of concerns. Evelyn L. Ackah, *An Examination of ITAR: The Impact on Canadian Dual National Employees*, HUM. RESOURCES PROFS. MAG., June 2007, at 2, available at <http://spectrumhrlaw.com/assets/Uploads/Evelyn-publications/An-Examination-of-ITAR-The-Impact-on-Canadian-Dual-National-Employees.pdf>.

<sup>101</sup> Amendments to the International Traffic in Arms Regulation: Canadian Exemption, 66 Fed. Reg. at 10,575.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> 22 C.F.R. § 126.5.

<sup>105</sup> *Id.* § 126.5(b).

### C. Exemptions for Australia and the United Kingdom

Over the course of approximately a decade, the United States has negotiated agreements with the United Kingdom and Australia to create an ITAR exemption for both countries.<sup>106</sup> The most significant event leading to the exemptions occurred in 2007, when the United States signed a DTCT with both Australia<sup>107</sup> and the United Kingdom.<sup>108</sup> The stated purpose of the DTCT with each country is the same: “This Treaty provides a comprehensive framework for Exports and Transfers, without a license or other written authorization, of Defense Articles, whether classified or not, to the extent that such Exports and Transfers are in support of the activities identified . . . .”<sup>109</sup> These activities consist of combined operations and research, and situations in which one of the governments is the end user of the approved defense article.<sup>110</sup> The end users and purposes of the exempt articles are therefore not unlimited.

The U.S. Senate approved these treaties in 2010,<sup>111</sup> paving the path for ITAR exemptions to come a few years later. The UK’s ITAR

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<sup>106</sup> Lynn Van Buren & Linda Weinberg, *ITAR License Exemptions for UK and Australia Co-Opted by “Expedited” Licensing Process*, DLA PIPER RUDNICK GRAY CARY, <http://www.mondaq.com/unitedstates/x/29239/IT+Software/ITAR+License+Exemptions+for+UK+and+Australia+CoOpted+by+Expedited+Licensing+Process> (last updated Nov. 2, 2004).

<sup>107</sup> Treaty Between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, U.S.-Austl., Sept. 5, 2007, S. TREATY DOC. NO. 110-10 [hereinafter *Australia Treaty*], available at <http://www.foreign.senate.gov/download/?id=A19B4D81-8845-4F66-91A6-20D5768F1C7E>.

<sup>108</sup> Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation, U.S.-U.K., Jun. 21, 2007, S. TREATY DOC. No. 110-7 [hereinafter *UK Treaty*], available at [http://www.pmdt.state.gov/treaties/documents/UK\\_Treaty.pdf](http://www.pmdt.state.gov/treaties/documents/UK_Treaty.pdf).

<sup>109</sup> *Australia Treaty*, *supra* note 107, art. 2; *UK Treaty*, *supra* note 108, art. 2.

<sup>110</sup> See Press Release, U.S. Dep’t of State, Fact Sheet (Sept. 30, 2010), available at [http://www.pmdt.state.gov/treaties/documents/Defense\\_Trade\\_Treaties\\_Fact\\_Sheet.pdf](http://www.pmdt.state.gov/treaties/documents/Defense_Trade_Treaties_Fact_Sheet.pdf).

<sup>111</sup> *Id.*



exemption entered into force in 2012,<sup>112</sup> and the exemption for Australia entered into force in 2013.<sup>113</sup> There are relevant regulations governing both exemptions in the Code of Federal Regulations, through which the United States has streamlined ITAR requirements for the exchange of relevant products and ideas with the United Kingdom and Australia.<sup>114</sup> The exemptions provide mechanisms for businesses and end users to become part of an “approved community” to trade some articles without a license.<sup>115</sup> In practice, this means that companies can be registered with the State Department and thus be eligible to trade certain products without a license.<sup>116</sup> However, the export, under both DTCTs, “must be for an end-use specified in the [DTCT] between the United States and . . .” the United Kingdom<sup>117</sup> or Australia.<sup>118</sup> For example, an approved end-use in the DTCT for the United Kingdom and Australia is “cooperative security and defense research, development, production, and [certain identified] support programs . . . .”<sup>119</sup> Furthermore, there are items excluded from the DTCTs that cannot be traded under either exemption.<sup>120</sup> For example, the AECA specifically prohibits exempting a number of defense articles such as

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<sup>112</sup> Announcement of Entry Into Force of the Defense Trade Cooperation Treaty Between the United States and the United Kingdom, 77 Fed. Reg. 33,089 (June 5, 2012).

<sup>113</sup> Implementation of the Defense Trade Cooperation Treaty Between the United States and Australia; Announcement of Effective Date for Regulations, 78 Fed. Reg. 32,362 (May 30, 2013).

<sup>114</sup> For the UK exemption, these are located at International Traffic in Arms Regulations, 22 C.F.R. § 126.17 (2012). For the Australia Exemption, these are located at International Traffic in Arms Regulations, 22 C.F.R. § 126.16 (2013).

<sup>115</sup> Edward J. Krauland et al., *US-UK Defense Trade Treaty Implemented in ITAR, Will Soon Lift Certain Licensing Requirements For US Exporters*, STEPTOE & JOHNSON LLP, Mar. 26, 2012, available at <http://www.steptoec.com/publications-newsletter-485.html>.

<sup>116</sup> *How Does the UK Exemption Work*, U.S. DEP'T OF STATE, DIRECTORATE OF DEF. TRADE CONTROLS, <http://www.pmdt.state.gov/faqs/treaties.html#1> (last updated Mar. 14, 2013).

<sup>117</sup> 22 C.F.R. § 126.17(a)(3)(iv).

<sup>118</sup> *Id.* § 126.16(a)(3)(iv).

<sup>119</sup> Australia Treaty, *supra* note 107, art. 3(1)(b); UK Treaty, *supra* note 108, art. 3(1)(b), cited in *Senate Ratifies Defense Trade Cooperation Treaties with the United Kingdom and Australia*, COVINGTON & BURLING LLP 3 (Oct. 8, 2010), available at <http://www.cov.com/publications> (keyword: senate; date: 10/10).

<sup>120</sup> See 22 C.F.R. §§ 126.16(a)(3)(v), 126.17(a)(3)(v).

“biological agents” through DTCTs.<sup>121</sup> Based on these limitations, any concerns that the DTCTs will completely liberalize the arms trade between these countries are mistaken.

*D. The State Department’s Future Use of This Authority*

Other than the exemptions for Canada, the United Kingdom, and Australia, there is no indication of negotiations to provide an exemption for any other country. Canada, the United Kingdom, and Australia share a special ideological relationship with the United States.<sup>122</sup> The United States does have other ideological allies such as members of the North Atlantic Treaty Organization, Japan, New Zealand, and South Korea,<sup>123</sup> but whether the United States has considered or would find it desirable to invite any of these to such negotiations is unclear. The difficulty of extending these negotiations to other countries is that the export controls of the treaty partner must comply with ITAR.<sup>124</sup> There are significant concerns that terrorists or rogue states could acquire these defense articles from other countries—even those friendly to the United States—that import these goods but do not have the same strict export controls as the United States.<sup>125</sup> It is therefore unclear how the State Department will use its exemption authority in the future.

III. THE RIGHT BALANCE?

As discussed in Parts I and II, there is a significant debate on the subject of export controls’ protection of national security vis-à-vis the restrictions they place on the ability of U.S. companies to sell their products abroad.<sup>126</sup> While the exemption model presents a less

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<sup>121</sup> *Id.* § 2778(j)(1)(C)(ii)(IV).

<sup>122</sup> Maj. Matthew D. Burris, *Tilting at Windmills? The Counterposing Policy Interests Driving The U.S. Commercial Satellite Export Control Reform Debate*, 66 A.F. L. REV. 255, 289-90 (2010).

<sup>123</sup> *Id.* at 290.

<sup>124</sup> *Id.* (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-02-63, DEFENSE TRADE: LESSONS TO BE LEARNED FOR THE COUNTRY EXPORT EXEMPTION 3 (2002)).

<sup>125</sup> *Id.* at 289 (citing *The Export Administration Act: A Review of Outstanding Policy Considerations, Hearing Before the H. Subcomm. on Terrorism, Nonproliferation and Trade of the H. Comm. on Foreign Affairs*, 111th Cong. 6 (2009)).

<sup>126</sup> See *supra* Section I.B: “Debate over ITAR and Competing Interests.”

than optimal solution to the problem, these exemptions are one way for the United States to find some balance between competing interests.

A. *National Security*

Despite the fact that ITAR exemptions loosen restrictions on export controls, the United States has taken steps to ensure protection of national security. First, the United States has carefully selected a limited number of countries to receive exemptions. Canada, the United Kingdom, and Australia are allies of the United States, and they share security ideologies.<sup>127</sup> With a small number of countries, it is much easier to ensure that the regulations are being followed both by the United States and the other countries.<sup>128</sup> Second, there are still restrictions on what can be traded without a license, an approved list of recipients of the goods, and limitations on what can be done with the defense articles after arriving in that country.<sup>129</sup>

Through these measures, the United States has taken adequate steps to ensure that national security is protected even with exemptions in place. While these exemption measures do not strengthen national security efforts, national security does not appear to be compromised. But would that still be true if the United States decided to extend exemptions to more countries?<sup>130</sup>

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<sup>127</sup> See Burris, *supra* note 122, at 290.

<sup>128</sup> The fact that countries' export control laws are not as strict as U.S. law is listed as a reason why, at the time of writing, only Canada had been given an ITAR exemption. *Id.* (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-63, DEFENSE TRADE: LESSONS TO BE LEARNED FOR THE COUNTRY EXPORT EXEMPTION 3 (2002)).

<sup>129</sup> See, e.g., UK Treaty, *supra* note 108, arts. 2–6, 9.

<sup>130</sup> See *infra* Section III.C: "Do the Exemptions Find the Right Balance?" Concerns over other countries' export control laws have been stated as a reason why only Canada, at the time of writing, had been granted an exemption. Burris, *supra* note 122, at 290 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-63, DEFENSE TRADE: LESSONS TO BE LEARNED FOR THE COUNTRY EXPORT EXEMPTION 3 (2002)).

### B. *Economic Interests*

Loosening the restrictions of ITAR has been welcomed by U.S. industries because it provides them with additional opportunities to sell their defense products with less bureaucracy.<sup>131</sup> However, the benefits of ITAR exemptions to economic interests and the competitiveness of U.S. industries are only marginally useful. First, despite the welcome changes, the exemptions only exist for three countries. While these countries should provide significant opportunities for U.S. defense articles, unless the number of exemptions increases and includes other significant defense markets, there might not be a large enough benefit for many U.S. industries to prevent further loss of market share and competitiveness.

Second, there are still significant restrictions on the international trade of defense articles. The items can only be exported for approved purposes<sup>132</sup> and, as mentioned earlier, not all defense products can be exported.<sup>133</sup> While these ITAR exemptions are helpful for U.S. industries, it is likely these industries will want additional exemptions for other countries and continued loosening of certain restrictions in order to remain competitive in the global defense market.

### C. *Do the Exemptions Find the Right Balance?*

ITAR exemptions have not struck a true balance between economic interests and national security. The ITAR exemption model protects national security, but U.S. industries might only be marginally benefitted because of legitimate security concerns. However, is this model the right path for export control law to find an optimal balance between national security and industry interests? Perhaps, but any additional use of exemptions will likely encounter significant challenges.

The most logical way to help U.S. industries through the ITAR exemption model is to extend exemptions to additional

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<sup>131</sup> See Krauland et al., *supra* note 115.

<sup>132</sup> See, e.g., UK Treaty, *supra* note 108, art. 3.

<sup>133</sup> See, e.g., *id.* art. 3(1)-(2).

countries.<sup>134</sup> By expanding the network of ITAR exemptions, however, the United States might find it difficult to ensure that each partner is abiding by the agreement or treaty.<sup>135</sup> If the expansion of the number of exemptions led to diluted compliance, U.S. national security would suffer because products would be more likely to fall into the wrong hands.<sup>136</sup> It is through countries with weaker export control systems in place that terrorists and rogue states can acquire the weapons and technology they desire, an obviously undesirable result for the United States.<sup>137</sup>

In these situations, there appears to be no true balance that ITAR exemptions can strike.<sup>138</sup> Either national security is compromised or economic interests suffer, and whichever is the priority for lawmakers at any given time when ITAR is modified will win at the end of the day. It is therefore difficult to find a solution to this conundrum, whether through ITAR exemptions or other options.<sup>139</sup> Despite the unlikelihood of any method finding a true balance, the exemption model may potentially become an effective tool of finding some balance. The model can become increasingly successful in finding a useful balance if the United States slowly expands the network of exempt countries, is careful about which countries it chooses to give exemptions, and is strict about ensuring that the international treaties and agreements are closely followed.<sup>140</sup>

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<sup>134</sup> See Burris, *supra* note 122, at 289-90 (discussing why Canada, at the time, was the only country with an ITAR exemption: "This begs the question: why is Canada the only U.S. ally afforded such an exemption?").

<sup>135</sup> See *id.* at 290 (saying that additional allies "have not been exempted from the ITAR because of the AECA requirement that their respective export control regimes be brought in line with the ITAR") (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-63, DEFENSE TRADE: LESSONS TO BE LEARNED FOR THE COUNTRY EXPORT EXEMPTION 3 (2002)).

<sup>136</sup> See *id.* at 289-90 (citations omitted).

<sup>137</sup> See *id.* (citations omitted).

<sup>138</sup> As stated in the *The Economist*, "[i]t is a difficult balance to strike . . ." *ECONOMIST*, *supra* note 13.

<sup>139</sup> See *id.*

<sup>140</sup> See generally Burris, *supra* note 122, at 289-90 (discussing concerns that violations will occur through countries whose export control laws are weaker than U.S. law, which also has been given as an explanation for, at the time of writing, the fact that only one country (Canada) had an exemption) (citations omitted).

## IV. CONCLUSION

The State Department finds itself in a challenging position in administering ITAR: it has an obligation to protect U.S. national security while at the same time trying to appease commercial industries inasmuch as doing so does not compromise national security.<sup>141</sup> The ITAR exemptions are a step in the right direction, but do not achieve the necessary balance themselves. They are still restrictive of a number of products, and must be in order to protect national security. Only three countries have an exemption, while future similar treaties with new countries are not certain to come to fruition. Although it appears that no perfect balance exists when national security is at stake,<sup>142</sup> the exemption model presents one key possible solution to balancing these competing interests, whereby, time will determine its success.



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<sup>141</sup> ECONOMIST, *supra* note 13 (“[i]t is a difficult balance to strike . . .”).

<sup>142</sup> *Id.* (“There can be a trade-off between trade and security . . .”).