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UNOLS Vessels and U.S. Exports Regulations: Seeking a Coherent Solution

Statement of the Problem

Some scientific equipment items used on University-National Oceanographic Laboratory System (UNOLS) vessels, namely the BGM-3 gravimeter, are designated as “defense articles” on the United States Munitions List (USML). The Department of State’s overbroad interpretation of its definitions for “export” and “United States” in the International Traffic in Arms Regulations (ITAR) requires written authorization before such scientific items can leave U.S. waters, which creates an administrative and financial burden on scientific research conducted by scientists on UNOLS vessels.

Background

UNOLS Equipment on the United States Munitions List

A gravimeter is an instrument used to measure the gravitational force of the earth. Gravimeters are pivotal in many fields of scientific study, such as seismology, mineral and energy exploration, and geophysics. Gravimeters have been used for scientific research for over fifty years without regulation by the U.S. government. In the 1990s the U.S. Naval Oceanographic Office (NAVOCEANO) initiated a gravimeter-sharing program with the U.S. academic community. The program allowed more research vessels to utilize the technology, leading to an expansion of the scientific community’s research capabilities. Likewise, in 2006, with funding from the National Science Foundation (NSF), UNOLS acquired gravimeters and spare parts from Fugro-Robertson, Inc., a commercial survey company. Since 2007, UNOLS has operated its own gravimeter sharing program, using gravimeters and spare parts acquired with NSF funding or donated by the U.S. Navy. Only as recently at the summer of 2012 have UNOLS administrators become aware that export licenses must be obtained from the Department

of State for the gravimeters, which are permanently fixed to the federally funded oceanographic scientific research vessels, to leave U.S. waters. To understand how gravimeters used on UNOLS vessels may be considered an export under the federal export regulations, it is important to understand how exports are regulated in the United States.

International Traffic in Arms Regulations (ITAR)

The USML is a list of defense articles and services, over which the President has the power to control exports and imports.¹ In 1977, President Ford issued Executive Order 11958, which delegated to the Department of State the authority to regulate items on the USML.² Following the Executive Order, the ITAR were promulgated by the Department of State and are currently administered by the Directorate of Defense Trade Controls (DDTC).³ Importantly, the ITAR requires “[a]ny person who engages in the United States in the business of manufacturing or exporting defense articles” to register with the DDTC, including manufacturers who do not export and those who have only exported once.⁴ Furthermore, the ITAR also require exporters of “defense articles” to apply for a license to export.⁵ It is important to understand the meanings of relevant key words in the ITAR to understand how the regulations affect UNOLS vessels. For the purposes of UNOLS, the two relevant ITAR definitions of “export” are “[s]ending or taking a defense article out of the United States in any manner . . . ; or [t]ransferring registration, control or ownership to a foreign person of any aircraft, vessel, or satellite covered by the U.S. Munitions List, whether in the United States or abroad.”⁶ The ITAR definition of “United States” includes “any territory or possession over which the United States exercises any power of

¹ 22 C.F.R. § 121.1 (2012).

² 42 F.R. 4311 (1977); 22 C.F.R. § 120.1 (2012).

³ 22 C.F.R. § 120.1 (2012).

⁴ 22 C.F.R. § 121.1(a) (2012).

⁵ 22 C.F.R. §§ 125.1, 125.3, 125.7 (2012).

⁶ 22 C.F.R. § 120.17(a)(1)-(2) (2012).

administration, legislation, and jurisdiction.”⁷ According to the ITAR, a “defense article” is anything on the USML, a detailed and complex list, which covers seventeen pages and includes twenty-one categories.⁸

Export Administration Regulations (EAR)

The Export Administration Regulations (EAR) were promulgated to implement the Export Administration Act of 1979 (EAA) and are administered by the Department of Commerce, Bureau of Industry and Security (BIS).⁹ The EAA is not permanent legislation, but when it lapses, the President issues an executive order under the International Emergency Economic Powers Act to authorize continued enforcement of the EAR.¹⁰ BIS controls the export and import of items on the Commerce Control List (CCL).¹¹ Unlike items on the USML under ITAR, under the EAR, items on the CCL may not require export licenses, depending on the item, its use, and its destination country.¹² The EAR defines “export” as “an actual shipment or transmission of items out of the United States.”¹³ “United States” is defined as “the 50 States, including offshore areas within their jurisdiction pursuant to section 3 of the Submerged Lands Act, the District of Columbia, Puerto Rico, and all territories, dependencies, and possessions of the United States, including foreign trade zones . . . and also including the outer continental shelf”¹⁴ The EAR also define “effective control”: “[y]ou maintain effective control over an item

⁷ 22 C.F.R. § 120.13 (2012).

⁸ 22 C.F.R. § 120.6 (2012); 22 C.F.R. § 121.1 (2012).

⁹ 15 C.F.R. §§ 730.1, 730.2 (2012).

¹⁰ 15 C.F.R. § 730.2 (2012).

¹¹ 15 C.F.R. § 772.1 (2012).

¹² 15 C.F.R. § 730.7 (2012).

¹³ 15 C.F.R. § 772.1 (2012).

¹⁴ 15 C.F.R. § 772.1 (2012) (internal citations omitted).

when you either retain physical possession of the item, or secure the item in such an environment as a hotel safe, a bonded warehouse, or a locked or guarded exhibition facility.”¹⁵

Fundamental Research

National Security Decision Directive (NSDD)-189 defined fundamental research as “basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons.”¹⁶ Federal support for fundamental research has existed since 1985, when John J. Young, Jr., Undersecretary of Defense under President Reagan, issued NSDD-189. The federal policy in support of fundamental research continued after September 11, 2001 when Condoleezza Rice, as the Assistant to the President for National Security Affairs, wrote to Dr. Harold Brown, Co-Chairman of the Center for Strategic & International Studies: “[T]his Administration will review and update as appropriate the export control policies that affect basic research in the United States. In the interim, the policy on the transfer of scientific information set forth in NSDD-189 shall remain in effect, and we will ensure that this policy is followed.”

The ITAR were amended to include a fundamental research exemption in March of 2002:

(10) Port Directors of U.S. Customs and Border Protection shall permit, without a license, the permanent export, and temporary export and return to the United States, by accredited U.S. institutions of higher learning of articles fabricated only for fundamental research purposes otherwise controlled by Category XV (a) or (e) in § 121.1 of this subchapter when all of the following conditions are met:

(i) The export is to an accredited institution of higher learning, a governmental research center or an established government funded private research center located within countries of the North Atlantic Treaty Organization (NATO) or countries which have been designated in accordance with section 517 of the Foreign Assistance Act of 1961 as a major non-NATO ally (and as defined further in section 644(q) of that Act) for purposes of

¹⁵ 15 C.F.R. § 772.1 (2012).

¹⁶ NSDD-189 (Sept. 21, 1985).

that Act and the Arms Export Control Act, or countries that are members of the European Space Agency or the European Union and involves exclusively nationals of such countries;

(ii) All of the information about the article(s), including its design, and all of the resulting information obtained through fundamental research involving the article will be published and shared broadly within the scientific community, and is not restricted for proprietary reasons or specific U.S. Government access and dissemination controls or other restrictions accepted by the institution or its researchers on publication of scientific and technical information resulting from the project or activity (See § 120.11139 of this subchapter); and

(iii) If the article(s) is for permanent export, the platform or system in which the article(s) may be incorporated must be a satellite covered by §125.4(d)(1)(iii) of this subchapter and be exclusively concerned with fundamental research and only be launched into space from countries and by nationals of countries identified in this section.¹⁷

Category XV is titled “Spacecraft Systems and Associated Equipment,” and therefore, the fundamental research exemption only applies to certain satellites and their “components, parts, accessories, attachments and equipment.”¹⁸

The EAR also have an exemption for fundamental research, which is more simple and far-reaching and exempts a broader spectrum of scientific research than its counterpart in the ITAR.¹⁹ Fundamental Research includes “basic and applied research in science and engineering, where the resulting information is ordinarily published and shared broadly within the scientific community.”²⁰ The EAR also define “university based research” as “[r]esearch conducted by scientists, engineers, or students at a university. . . .” and “university” as “any accredited institution of higher education located in the United States.”²¹

Ocean and Coastal Law

UNOLS vessels are “oceanographic research vessels” as determined by the Oceanographic Research Vessels Act (ORVA),²² which requires the Secretary of Transportation to find that the vessel

¹⁷ 67 FR 15099; 22 C.F.R. § 123.16(10) (2012).

¹⁸ 22 C.F.R. § 121.1(Category XV)(a) and (e) (2012).

¹⁹ 15 C.F.R. § 734.8(a) (2012).

²⁰ 15 C.F.R. § 734.8(a) (2012).

²¹ 15 C.F.R. § 734.8(a) (2012).

²² 46 C.F.R. §188.10-53.

“is being employed only in instruction in oceanography or limnology, or both, or only in oceanographic or limnological research, including those studies about the sea such as seismic gravity meter, and magnetic exploration and other marine geophysical or geological surveys, atmospheric research, and biological research.” According to United States common law, “a vessel is deemed part of the territory of the country to which she belongs.”²³ Unless a treaty states otherwise or the port city or state asserts its jurisdiction, the laws of the flag state apply to the people on its vessels, and the flag state has jurisdiction over the people and their actions on board.²⁴ Assertion of jurisdiction by the flag state depends on the type of crime committed on the vessel; anything that disturbs the peace of the port state or city is subject to its jurisdiction.²⁵

In the international legal community, the United Nations Convention on the Law of the Sea (UNCLOS) governs jurisdiction over vessels at sea, and the laws of the flag state apply to the people on board its flag ships.²⁶ However, research vessels must have the consent of the coastal State in order to conduct marine scientific research within 200 nautical miles.²⁷ Coastal States can also adopt laws or regulations relating to innocent passage or marine scientific research within 12 nautical miles.²⁸ And, within 200 nautical miles, the coastal State can board, inspect, arrest, or institute judicial proceedings as necessary to make sure the vessel complies with the terms of the Convention.²⁹ Although coastal States must consent to marine scientific research in the exclusive economic zone and the contiguous zone, UNCLOS Article 246 states that coastal States should consent to such research as long as it is conducted

²³ United States v. Rodgers, 14 S. Ct. 109, 115 (1893).

²⁴ See United States v. Flores, 53 S. Ct. 580, 586 (1933).

²⁵ See Mali v. Keeper of the Common Jail, 7 S. Ct. 385, 387 (1887).

²⁶ United Nations Convention on the Law of the Sea art. 94, 97, Dec. 10, 1982, 1833 U.N.T.S. 3, 397 (1983).

²⁷ *Id.* at art. 245, 246.

²⁸ *Id.* at art. 21.

²⁹ *Id.* at art. 73.

for “peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind.”

Proposed Solution

UNOLS vessels are subject to the ITAR and the EAR because they carry scientific equipment that is listed on the USML or the CCL off of U.S. soil and out of U.S. waters to perform “fundamental”³⁰ scientific research. The Secretary of Transportation has designated UNOLS vessels “oceanographic research vessels” and thus their purpose is only to perform scientific instruction or research.³¹ Even though the definitions of the “United States” in both the ITAR and the EAR extend to “possessions of the United States”³² and “possessions over which the United States exercises any power over administration, legislation, and jurisdiction,”³³ and the United States retains control over the people, items, and activities onboard a UNOLS vessel,³⁴ agency interpretations of the ITAR and the EAR designate scientific equipment onboard UNOLS vessels exports subject to licensing requirements. Likewise, while both the ITAR and the EAR contain licensing exemptions for fundamental research, neither the Department of State nor the Department of Commerce has applied this exemption to UNOLS vessels.³⁵

Scientific equipment on board UNOLS vessels that falls under the USML or the CCL is fixed to the vessel itself, remains under the control of U.S. citizens, and can be kept safe from citizens of foreign countries who may board the vessel under the authority of UNCLOS Article 73. Even though a UNOLS vessel operates beyond U.S. boundaries, it may only become subject to foreign jurisdiction when

³⁰ NSDD-189 (Sept. 21, 1985).

³¹ 46 C.F.R. §188.10-53.

³² 15 C.F.R. § 772.1 (2012).

³³ 22 C.F.R. § 120.13 (2012).

³⁴ *See supra* “Ocean and Coastal Law.”

³⁵ 22 C.F.R. § 123.16(10) (2012); 15 C.F.R. § 734.8(a) (2012).

conducting research within 200 nautical miles of a coastal State.³⁶ In the event of a boarding by a foreign citizen, scientific equipment that is considered “defense articles” under ITAR can be kept or moved to a secure area of the ship, maintaining “effective control” as defined by the EAR.³⁷ Fixed to the vessel and secure under “effective control,” defense articles on UNOLS vessels are not exports because they never leave the United States.³⁸

UNOLS vessels are “oceanographic research vessels” as defined in the ORVA.³⁹ Even if the scientific equipment is considered an “export,” the work done on UNOLS vessels is “fundamental research” as defined by NSDD-189, EAR, and ITAR except that it does not pertain to commercial satellites.⁴⁰

Goal

UNOLS seeks determination by the Departments of State and Commerce that scientific equipment fixed to U.S. flagships engaged in federally sponsored fundamental research is not an export and is exempt from the licensing requirements of ITAR and EAR.

³⁶ United Nations Convention on the Law of the Sea art. 73.

³⁷ 15 C.F.R. § 772.1 (2012).

³⁸ 22 C.F.R. § 120.13 (2012); 15 C.F.R. § 772.1 (2012).

³⁹ 46 C.F.R. § 188.10-53.

⁴⁰ See NSDD-189; 15 C.F.R. § 734(8)(a); 22 C.F.R. § 123.16(10) (2012).