PROPHETIC LAW REVIEW
Volume 5, Issue 1, June 2023

ITAR AND THE SECURITY EXCEPTION: LESSONS FOR DEVELOPING INDONESIAN DEFENSIVE SATELLITES

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Citation Guide:
Aris Rahmat Juliannoor and Sefriani, **'ITAR AND THE SECURITY EXCEPTION: LESSONS FOR DEVELOPING INDONESIAN DEFENSIVE SATELLITES'** [2023] 5 (1) Prophetic Law Review 1.

Received:
30 October 2022
Accepted:
12 April 2023
Published:
4 July 2023

DOI:
10.20885/PLR.vol5.iss1.art1

Abstract

Outer space technological development, pioneered by military superpowers including the USA, China, and Russia gives other countries a variety of technologies which they have chosen to use to strengthen their national defence. "The higher the demand, the more expensive it gets." A country is free to choose what technology to use, but the producer controls who can use their technology. Policies to limit or control space-technology is most clearly reflected by USA policy, named ITAR (International Trade in Arms Regulation), which enables the USA to choose who is able to avail themselves of space technology. A quasi-arbitrary policy like ITAR has harmed the spirit and the soul of international trade law which empowers the "free trade" market that is happening in today's world. Policy alike has made the US gripped other countries like Indonesia and made them 'dependence' on their sophisticated technology and deprived other state's sovereignty on their space technology, eventually. This study analysed this unprecedented subject through the lens of International Law, especially International Trade Law, encompassing related laws like GATT (General Agreement on Tariffs and Trades) and related precedents on WTO (World Trade Organization) DSB (Dispute Settlement Body) judicial decisions. The results of analysis through international law, assisted with dependence theory and world-system theory (1) categorize the related policy as a violation of GATT, specifically to Article XXI (b) point (ii) about security exception and (2) for the future of Indonesian outer space development, this country should utilize a security exception clause to release itself from the atrocities of ITAR policy or other similar policies.

Keywords: *Outer Space, Dependence, International Law, and Policy.*

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A. Introduction

In 1976, under the Gerald R. Ford administration, the United States (US) formulated a new policy, named International Security Assistance and Arms Export Control Act (AECA) which gave the president full authority on defence technology export activities.[3] AECA works as the main policy, although, within this policy existed a regulation that has become the main concern to other countries, namely International Trade in Arms Regulation (ITAR), a regulation that directly controls the traffic of defence articles that originated from the US. This regulation has listed different types of defence systems or articles through the United States Munitions List (USML) and one of them is satellite technology.[4]

The impetus for including satellite technology in this list was based on two grounds. The first ground was based on the historical cause which happened in 1990 when a series of launch failures occurred on China's soil between 1990 to 1998. The US administration at that time found that two companies that exported satellite technology to China had violated the US export regulations by transferring this technology without any authorization from the government.[5] Eventually, Storm Thurmond National Defence Authorization was initiated by the ruling administration in 1999 to include satellites in the list of defence articles to prevent any satellite applications without government supervision.[6] The second ground to this matter is that satellite technology has a dual function toward its application – civil and military application – therefore to protect this technology from being used by another country, primarily enemies of the US,[7] this supranational policy was made.

The development of space technology is now at an all-time pace; nations all over the world have been competing since Neil Armstrong landed on the moon surfaces, to make and/or launch their satellite into the atmosphere.[8] The US, as a prominent nation in space

[3] Arms Export Control as Amended Through P.L. 115–232 2018 1. Section 1 and 2.

[4] The International Traffic in Arms Regulations 2020 (Code of Federal regulations) 799. Sub-chapter M, Section 1 and 2 [ITAR].

[5] John Mintz, 'Firms Accused of Giving Space Technology to China' (*The Washington Post*, 2003) <https://www.washingtonpost.com/archive/politics/2003/01/01/firms-accused-of-giving-space-technology-to-china/1ed937d1-20e8-4762-a062-1f16ae2bda65/> accessed 20 October 2022.

[6] Eligar Sadeh, 'Reforming Export Controls of Space Technologies in the United States' 10 Astropolitics 93 104.

[7] History Captivating, *The Space Race: A Captivating Guide to the Cold War Competition Between the United States and Soviet Union to Reach the Moon* (Captivating History 2020).

[8] Paul Meyer, 'Diplomacy: The Missing Ingredient in Space Security' in Cassandra Steer and Matthew Hersch (eds), *War and Peace in Outer Space: Law, Policy, and Ethics* (1st edn, Oxford University

development and utilization, will foster this situation to benefit their nation from other nations' needs for space technologies. A supranational law like ITAR has arguably become a primary tool for this plan and works to limit other national space development efforts, with its political and administrative influence by the US government, it is likely to discriminatorily prevent several nations from using their space technologies.

International law bears the responsibility for protecting the development of nations,[9] especially in the field of international trade law, whereas, the liberation of the world market has been promoted and ensured, followed by the purpose of liberation, which is to formulate a better development than the pre-liberation era.[10] Protection evolved into normative substances arranged into the General Agreement for Trade and Tariffs (GATT), a regulation which regards to this discussion, works as a protector from discriminative behaviour of one nation to others.[11] While discrimination against other nations violates this law in general, there is some substance in GATT that allowed one nation, to some extent, to discriminate against another nation for having its commodity.

Permission to discriminate against other countries – related to this paper – can be found in Article XXI of the GATT, the Security Exception. This article enables parties to this treaty to make an exception in limiting their economic activities, based on the security interest of one's nation.[12] Reflected in ITAR, it appears this regulation was built upon security exception articles, as mentioned above, ITAR gives this authority to the US Government in limiting trade activities for military technology for certain countries listed in ITAR.

The scarcity of space technology in underdeveloped and developing nations gives the US a massive advantage. In addition, US popularities in accomplishing many space missions have stigmatized the US as 'Space tech. Genesis', which would make other nations use their technology in developing their space capabilities. Consider space missions which have been made by Indonesia – as a developing nation – approximately

Press 2020) <https://academic.oup.com/book/33444> accessed 21 November 2022. Dodik Setiawan Nur Heriyanto and Yaries Mahardika Putro, 'Challenges and Opportunities of the Establishment ASEAN Open Skies Policy' (2019) 6 (3) Padjajaran Journal Ilmu Hukum 466, 467.

[9] Asif H Qureshi, *The Americanisation of the World Trade Order* (1st edn, Routledge 2022) <https://www.taylorfrancis.com/books/9781003047575> accessed 20 November 2022.

[10] BC Nirmal, 'Globalization, International Human Rights Law and Current Economic Crisis' in BC Nirmal and Rajnish Kumar Singh (eds), *Contemporary Issues in International Law: Environment, International Trade, Information Technology and Legal Education* (Springer Singapore 2018) 197.

[11] The General Agreement on Tariffs and Trade 1994. Article I [GATT].

[12] The General Agreement on Tariffs and Trade 1994, Article XXI.

there are more than 10 satellites that originated from the US-based enterprises.[13] These numbers are relatively high and US popularities succeeded in inducing Indonesia in using their space technology.

Diplomatically, good relations shall be maintained between one nation to others. Nevertheless, the existing situation of political instability in today's world would potentially turn a friend into a foe. ITAR certification issuances which were originally based on the political and/or security interests of the US government situated developing nations like Indonesia in a danger. One false move from Indonesia on its foreign activity could lead to political turmoil with the US government, resulting in Indonesia being added to the list of forbidding nations to import or accept space technology from the US. Certainly, this outcome would be a disadvantage to Indonesia in years to come, especially to Indonesia's plan to make a defense satellite.

The existence of policies like ITAR and security exception clause, followed by the problem which occurred from those laws, have been cumbersome matters to the international community to this day. However, from what happened in this matter, Indonesia could and should take a lesson from it. In order to strengthen Indonesia' sovereignty in technological matters, especially on outer space technology, Indonesia's government could replicate ITAR-like policy to protect the development of defensive satellite which urgently needed in order to reinforce Indonesia's defensive and military forces.[14] Unlike ITAR, specific protection should be focused on foreign intervention based on internal policy like ITAR. The end-use of this replicated policy is to discriminate against specific outer space industries which based in countries that policy like ITAR existed.

Using discrimination to develop specific technology might bring several critics from other countries, especially to the countries which directly affected by it. Indeed, it will produce another problem, but if the replicated policy was made under the GATT' security exception clause and followed its rule of conduct, the validity of this replicated policy would not be questioned before the international law.

[13] T Priyanto, 'Perjalanan TELKOM Dalam Mengoperasikan Satelit Komunikasi Untuk Melayani Kepulauan Indonesia' (2005) 4 Online Journal of Space Communication1-2.

[14] Dodik Setiawan Nur Heriyanto, Yaries Mahardika Putro, and Haekal Al Asyari, 'Space Diplomacy as a Way to Face the Era of Space Commercialization in Indonesia' (2018) Seminar Nasional Kebijakan Penerbangan dan Antariksa III (SINAS KPA-III) 162. 162-165.

Based on the explanation above, this paper will gravities on two matters, first is to examine the validity of ITAR under international trade law and the second matter is to utilize a security exception clause to protect other nations – specifically Indonesia – from a foreign policy like ITAR or other similar policies.

B. Problem Formulations

Based on the above discussion, the authors of this article will focus on two problems: first, is ITAR under International Law, specifically International Trade law? Second, what kind of normative approach could be use in utilizing the Security Exception clause for Indonesia to protect its space development ?

C. Methodology

This research is applied a normative research methodology with analytical descriptive study because it tries to provide an in-depth explanation of a single phenomenon. This descriptive research aims to understand the phenomenon and provide a comprehensive explanation and solution of a phenomenon. In addition, this research is not intended to verify theory or falsify a theory but uses theory as a basis to explain phenomena. Data collection in this study was obtained from secondary data in the form of books, journals, articles in books, magazines, newspapers, government documents or published papers, the internet, archives and reports, previous survey results, and other references related to the research topic. The author uses qualitative analysis techniques. This technique emphasizes the author's interpretation of the sources of data obtained. The types of data that will be analysed in this study can be in the form of International Law, US foreign policy, and Indonesian government policies related to the international trade, especially on the development of space technology and statistics related to the use of satellites as a defence system.

D. Discussion and Results

Extraterritorial jurisdiction imposed by the US export control regime does not only control what other nations could or could not do but also control the commodity and/or technology that originated from the US. This characteristic becomes a problematic measure to both US and Non-US enterprises. US detailed control was construed on a perspective which there is no general freedom on export activity, therefore, a license to import or export commodities or technology from the US is considered a privilege that

could be deprived in case of non-compliance from other importing states and/or enterprise in fulfilling their responsibility within related applicable policy.[15]

This perspective gives a general sense to the application of ITAR, a policy that controls US defence technology from top to bottom, a detailed control that has to be known by all stakeholders who are active in space development activity. The validity of ITAR comes into question when it is brought before International Law, especially its just cause in controlling bolds and machines outside their territory and ITAR's arbitrary measure to choose nation which worth of their technology.

1. The Validity of ITAR Under International Law

a. ITAR Application: Authorize Button

ITAR as a regulation to control the trade of defence technology was made under the AECA provisions and administered by the Directorate of Defence Trade Control (DDTC).[16] As discussed above, within ITAR itself, existed USML which listed 20 types of defence articles and one of them is satellite technology.[17] To use or import satellite technology from the US, the importing enterprise/nation ought to get a license from the US government.[18] License to use defence article would be made in two kinds, permanent and temporary license.[19]

Importing which was accepted by the US Government to get this license would be responsible for disclosing their information regarding the technical data on the use of US defence articles.[20] This disclosure responsibility appeared due to the nature of this license, which gives the US government visibility toward its defense article utilization outside its territory. Visibility means control, and that is what the US desired when licensed its defense article to another nation. Ghosts of past failures let the US to go beyond its territorial wall to control the utilization of its defense article, excessively.[21]

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[15] Kai Uwe Schrogl and others, *Handbook of Space Security* (Kai-Uwe Schrogl and others eds, Springer New York 2015) 195.

[16] John R Liebman and Kevin J Lombardo, 'Digital Commons at Loyola Marymount A Guide to Export Controls for the Non-Specialist' (2006) 28 Loyola of Los Angeles International and Comparative Law Review 497, 501.

[17] ITAR (n 4). Chapter 121.

[18] Ian F Fergusson and Paul K Kerr, 'The U.S . Export Control System and the Export Control Reform Initiative' (Congressional Research Service 2020) <https://fas.org/sgp/crs/natsec/R41916.pdf>. 4.

[19] Ian F Fergusson and Paul K Kerr, chapters 123 and 125.

[20] As governed in Technical Assistance Agreement (TAA) and Manufacturing License Agreement (MLA), read Ian F Fergusson and Paul K Kerr, sub-chapter 120.21 – 120.22.

[21] Captivating (n 7).

Control is the best instrument to limit the abuse by another state in using US technology, however, if this instrument was used excessively, it would become an Intervention in one state's sovereignty. As happened in 2013, an aerospace-based company, Thales Alenia Space (TAS), was alleged to violate ITAR by the US State Department on TAS trade activity with China. The activity itself, consisting of satellite and satellite electronics payload export to China, which by US government considered a violation of ITAR.[22] How come a satellite which builds by TAS, a Franco-Italian aerospace company, is subject to ITAR regulation? As discussed above, the detailed-control characteristic of ITAR also controls the detailed components of defence articles that originated from the US.[23]

The US government not only controls satellites as a whole but also controls the data and electronic components of those satellites.[24] In this case, the US investigated the related activity between TAS and China. An investigation conducted by the US State Department found suspicious trade activity which included satellite electronic components export without any ITAR license to China. TAS claimed that its company had been using ITAR-Free components in conducting its trade with China. Further investigation led to the conclusion which informed that the responsibility to license those components was from a US Manufacturer, Aeroflex of Plainview (AoP) as a U.S. Person under ITAR regulation. TAS also explained that AoP is one of many US Astro-Preneur which have violated ITAR regulations by mislabelling their product as a commercial product rather than as a USML-listed product.[25]

Controls that embody the complexity and supranational jurisdiction are not only the matters which are shown by the application of ITAR. Discrimination also becomes an underlined problem with this regulation. In the TAS case, although the problem was circling to the inexistence of an ITAR license, the main problem, in this case, was a series of satellite components that were planned to be exported to China. Discrimination is an inseparable feature of ITAR regulation. Discrimination in accepting defense articles was deemed necessary when – alternatively – a foreign

[22] Peter B. de Selding, 'Thales Alenia Space: U.S. Suppliers at Fault in "ITAR-Free" Misnomer' (*Spacenews*, 2013) <https://spacenews.com/36706thales-alenia-space-us-suppliers-at-fault-in-itar-free-misnomer/> accessed 20 October 2022.

[23] ITAR (n 4), sub-chapter 121.1.

[24] ITAR (n 4), sub-chapter 121.1.

[25] Warren Ferster, 'U.S. Satellite Component Maker Fined $8 Million for ITAR Violations' (*Spacenews*, 2013) <https://spacenews.com/37071us-satellite-component-maker-fined-8-million-for-itar-violations/> accessed 21 October 2022.

country was: (1) sanctioned by United Nations Security Council (**UNSC**); (2) fully-supported terrorism activities; and (3) sanctioned and/or embargoed by the US government through US Foreign Policy.[26]

Related to this case, China was the destination country for TAS to export its satellite technology before the US government intervened in this activity. ITAR's disposition to the US is to secure so-called 'sensitive technology' from other states who, by US government appraisal, threaten their foreign interests, using the terms of 'threatening international peace and security. Prohibition to export defence articles in USML to certain states produces a policy of denial. US government has placed China and other certain countries on the list of prohibited states to accept any defence article, including its information, data, and/or technology, partially or entirely.[27] Although, a policy of denial also applied to certain countries that only prohibited specific matters. This kind of policy would allow any prohibited country to import some of the defence articles defined in the ITAR regulation itself.

b. GATT on ITAR: It Gets Political!

An exception to one international convention is a political measure that can be applied by state parties in order flexibly avoid a specific clause that gives a disadvantage to one country's interest. GATT as a covenant to regulate trade activity between the parties also has an exception to a specific matter such as security.[28] A security exception is one of two exceptions that can be employed by GATT parties to preclude their obligation under this covenant and restrict their trade activity.

i. Security Exception within GATT

The security exception clause extends freedom to parties invoking this clause regarding protecting its security interest. There are three freedoms which alternatively could be used by the parties of GATT such as: (1) freedom from disclosing certain information in regard to parties' essential security interest; (2) Freedom to act according toward its essential security interest without fulfilling certain obligations which stipulated under GATT; and (3) freedom to conduct

[26] ITAR (n 4) sub-chapter 126.1 (c).
[27] ITAR (n 4) sub-chapter 126.1 (d).
[28] GATT. Article XXI.

necessary measure in maintaining international peace and security which regulated by United Nations charter.[29]

The security exception acts on different aspects within the GATT. While other clauses were invoked for economic reasons, this special clause was based on non-economic reasons. GATT drafter at that time expected a real security interest' as a true reason behind the use of security exception[30] and would not be invoked to satisfy the party's commercial interest.[31] Since the establishment of this clause, there have been countries that have invoked the security exception clause to protect their security interests. Surely, avoidance of obligations would make GATT parties question the validity of security exceptions. The main concern of this clause was the definition of 'essential security interest' which was defined ambiguously. The panel also found it difficult to review the reasons for a country invoking this provision.[32]

Scholars have defined this clause as a 'self-judging' provision that gives any state who invokes it, the freedom to act according to its interest and provided this interest as an essential security interest, and other contracting parties could not construe such interest.[33] As problematic as it seems, however, the question of how valid the invocation of security exception does not indicate nor raised a compulsion for WTO to amend this clause, nevertheless it raises a strict obligation toward WTO or GATT parties to make a detailed reason in the invocation of security exception clause.[34]

The detailed reason mentioned above, obligated state who invoke this clause to recall the WTO's main principle. Related to this discussion, Most Favoured Nation (MFN) principle becomes an important principle to be reinforced with the use of security exception. Although the security exception

[29] GATT (n 28). Article XXI.

[30] Michael J Trebilcock and Joel Trachtman, *Advanced Introduction to International Trade Law* (2nd edn, Edward Elgar Publishing 2020) 231.

[31] World Trade Organisation, '"Guide to GATT Law and Practice – ANALYTICAL INDEX (ARTICLE XXI-Security Exception).', *WTO - Trade in Goods* (World Trade Organization 2009) <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art21_gatt47.pdfhttps://brill.com/view/book/edcoll/9789004180642/Bej.9789004145665.i-1228_036.xml>.

[32] Tsai Fang Chen, 'To Judge the "Self-Judging" Security Exception under the GATT 1994 - A Systematic Approach' (2017) 12 Asian Journal of WTO and International Health Law and Policy 311, 316.

[33] Tsai Fang Chen (n 32) 314.

[34] Sebastián Mantilla Blanco and Alexander Pehl, *National Security Exceptions in International Trade and Investment Agreements: Justiciability and Standards of Review* (Springer International Publishing 2020) <http://link.springer.com/10.1007/978-3-030-38125-7> accessed 20 November 2022,19.

clause makes invoking-state freed from GATT obligations, in its application, MFN also must be applied in the light of GATT's virtue to banish all discrimination between state parties.[35] MFN's existence as the base of Security Exception enforcement would decline the possibility of invoking-state in misusing this exception. The main principle, such as MFN would play an important role in straightening invoking-state applications of the related exception through the indiscriminate characteristic of the MFN principle.

The use of the security exception is ambiguous. Therefore, essential security interest reasoning shows a vague screen obscuring the true purpose of invoking the state in using this exception. In the case of Russia – Traffic in Transit, WTO's panel described a situation where one country could invoke a certain exception – in this case, article XI(b)(iii) – falls within the security exception clause is when a situation establishes or leads to an armed conflict between invoking-states and other states, rather than protectionism or political turmoil between states under the guise of an essential security issue.[36] Reflecting on security exception application to the case before, the presence of the MFN principle on its application would be a helpful ally to purify the invoking state's purpose through the nullification of discriminate characters within the security exception-based policy enforced by the invoking state.

Apart from the use of MFN in invoking a security exception, an invoking-country ought to meet the substantive and formal requirements for using the security exception. From the substantive requirement aspect, a country, invoking this clause is responsible to underlie the application of security exception with the real security interest, including a clear explanation about the basis of using security exception. An explanation could be delivered by emphasizing national or international obligations for use of related exceptions. Under GATT, the international obligation becomes an acceptable reason to use security exceptions – such as obligations stated under the UN Charter – while the national obligation could be accepted under certain conditions. These conditions are arranged in various means – as stipulated in the WTO panel, which informed that the state

[35] GATT (n 28) article 1 section I.

[36] World Trade Organisation, 'Russia - Measures Concerning Traffic in Transit' (World Trade Organization 2019) Report of the Panel (WT/DS512/R). paras. 7.81.

becomes the sole judge to the reason of security exception invocation,[37] However, in the light of invocation transparency, a real and true security interest which written on national regulation or policy could be the prove of invoking state on its necessity in invoking such an exception.

Supposing the invoking country has met the substantive requirement, the following step is to fulfil a formal requirement. The formal requirement could be fulfilled through a formal acknowledgment by invoking the state to contracting parties that such a measure would be made in the sole interest of the country's military and security interests. Such requirement is aligned with the Decision Concerning Article XXI of the General Agreement, which was adopted on 30 November 1982 by contracting parties. In this decision, the invoking country is obligated to consider other parties, especially parties who are directly affected by such trade measures.[38] Under GATT, a state is not legally bound to the obligation in acknowledging such measure, however, this acknowledgment is a form of good faith from the invoking state to contracting parties and acts as an obligation that has been stipulated in a form of the general principle of international law[39] which codified in Vienna Convention on Law of Treaties.[40]

ii. US Political Influence of ITAR

ITAR is the product of US Political interests in keeping its defense technology safe from its enemies. The tenet of national security which is adhered to by the US is the pre-emptive, measures where military or security initiative was waged before the real threat itself existed.[41] The pre-emptive approach by the US government was based on intelligent information regarding the related threats.[42] From the tenet to which the US government adheres in the security activity, one could be certain that characteristic of US foreign policy in which reflected by ITAR and other similar policies, which by its nature, was possessed by such measure.

[37] World Trade Organisation (n 31). 600-601.

[38] 'Decision Concerning Article XXI of the General Agreement' 1 <https://www.wto.org/gatt_docs/english/SULPDF/91000212.pdf>. article 2.

[39] World Trade Organisation (n 36). para. 7.132.

[40] Vienna Convention on The Law of Treaties 1969. Article 26 and 31(1).

[41] Karl P Mueller and others, *Striking First: Preemptive and Preventive Attack in U.S. National Security Policy* (RAND Corporation 2006). 3.

[42] Karl P Mueller and others (n 41) 11.

Satellites as a foremost technology, which is enlisted by the USML has a dual function that carries two advantages – civil and military – for the country who holeds it.[43] In an ever-changing situation of global arms development, such technology can be used to strengthen a country's military power or, for worse, applied to weapons of mass destruction.[44] The US government also underlined certain restrictions to be enforced on specific country that – by US government assessment – support a terrorist group.[45] Countries that supported this kind of activity are called 'Rogue States'. The infamous strike which is done by the US on a rogue state happened in 2003 in Iran. Iran, which become the base of two famous terrorist groups, Taliban and Al-Qaeda, was considered a rogue state by the US when the Iranian government allegedly owned weapons of mass destruction and supported the activity of the terrorist group.[46]

Rather than the deployment of military personelle to Iran, economic restrictions were deployed by the US government to Iranian economic activity. Until this day, the US government still assert the policy of denial to the Iranian government and related to ITAR enforcement, restricting the transfer of defense articles to this state.[47] Economic restriction as a means to protect US security interests is not a novel measure to be conducted. In the early cold war phase, the US used similar measures to topple the Soviets' power in using or owning nuclear-based armament.[48] The pre-emptive measure was proposed by various groups within the US government in a form of a nuclear strike which could end the development of Soviet nuclear weapons, however, as history shows, this measure has never happened, and the US preferably used economic restriction policy and create diplomatic alliances to weaken Soviet' development on nuclear capability.[49]

Conflict of the security interest was too thick within the international arena, even in US internal affairs related to ITAR application, political influence has become an occurring problem for US Astropreneurs and other countries that desire

[43] ITAR (n 4).
[44] Meyer (n 8) 289-290.
[45] ITAR (n 4). sub-chapter 126.1 (c).
[46] Mueller and others (n 41) 4.
[47] ITAR (n 4). sub-chapter 126.1 (d).
[48] Qureshi (n 9) 79-80.
[49] Mueller and others (n 41) 142.

to legally import satellite technology from the US.[50] ITAR's existence within the US export control regime has received a lot of criticism, either from stakeholders within the US or externally. Critics were asserted on ITAR procedure which considered complex and time-consuming when it comes to its implementation.[51] Procedural complexity which is shown by ITAR regulation gives disadvantages to the US in the space industry international competition. Other countries tend to choose an 'ITAR-free' industry – a slogan famously used by European space industries – to ease their way in importing or making a satellite.

The political interests that orbit ITAR bureaucracy in satellite trade activities is the main cause of this complexity. Political bureaucracy encompasses almost all the main actors in the US government, such as the President, the State Department, the Department of Commerce, and the Department of Defense. Political clout that existed within ITAR implementation established unstable and unpredictable policies.[52] Discussion on ITAR function in space activities was divided into two perspectives.

The first perspective, which is filled with national security sympathizers, considers that space technology is an important technology for reinforcing US security, thus, technology alike must be included in the armament export control regime. While another perspective has another opinion on the use of ITAR. The opposing perspective which is filled with commercialism supporters thinks that the commercialization of satellite technology can be used to indicate the strength of US leadership in commercial satellite market share. Eventually, with a strong driving factor caused by the influence of international politics and conflicts, the US has left ITAR on the arms export control regime, and security interest, once again, prevails.[53]

iii. ITAR under the GATT

Various influences from the external political arena have affected the policymaking activities related to the security interests of the US government. As

[50] Whitney Q Lohmeyer and others, 'The Global Impact of ITAR on the For-Profit and Non-Profit Space Communities' (International Astronautical Federation 2012) <http://www.iafastro.net/iac/paper/id/14466/summary/>.

[51] Whitney Q Lohmeyer and others (n 50).

[52] Eligar Sadeh, 'Viewpoint: Bureaucratic Politics and the Case of Satellite Export Controls' (2007) 5 Astropolitics 289.

[53] Eligar Sadeh, 'Viewpoint: Bureaucratic Politics and the Case of Satellite Export Controls'.

explained before, ITAR is one of the policies to protect US security interests, externally. Three conditions regulated by ITAR regulation, where the country is prohibited from accepting defense articles in certain conditions[54] – sanctioned by UNSC; considered a rogue state and embargoed by the US government – posit biased discrimination.

Sanctions by UNSC is an exception, but the two remaining conditions constituted political discrimination. As discussed before, an assessment of one country becoming a rogue state is only assessed by the security interests of the US and these assessments come from data that has been collected US government based on the information of US intelligence, which happened in the conflict between the US and Iran. This makes the validity of this information questionable. A similar question also arises under the last condition, where a state which sanctioned or embargoed by the US government.

When the measure of this 'necessary discrimination' is placed before the MFN principle which is applied in the invocation of security exception, these two conditions would naturally violate such principles. The violation of the MFN principle occurs when the discrimination is biased only to states who are 'considered' as rogue states – by one-sided assessment – and/or being unsupportive of US anti-terrorism efforts.[55] MFN principle as an embodiment of the non-discriminative principle in the WTO obligated to be applied in such invocation and works indiscriminately – even if the measure was planned to discriminate certain states to receive some products – toward other contracting parties or other countries in the world.

In ITAR regulation, the US government also has the authorization to change the terms provided by the ITAR.[56] Although an authorization to change the terms of one provision seems to be a usual legislative measure to be done by another country, if such a measure is assigned to a regulation like ITAR, it would raise the possibility of an arbitrary authorization by the US government to make an adjustment based on its political interest. Related to the matter already discussed above, a valid reason behind the application of security exception is

[54] ITAR (n 4), subchapter 121.1 (c).
[55] ITAR (n 4), sub-chapter 121.1 (c).
[56] ITAR (n 4) sub-chapter 126.2 and 126.3.

only for security reasons, specific to the matters of security that directly impacted to military aspect and/or a situation that led to an armed conflict.[57]

Substantively, terms established in ITAR possessed another violation of security exception. Each condition – UNSC sanction, Terrorism, and US Sanction –constitutes a policy of denial that has both alternative and cumulative nature in its enforcement. It is proven by the policy of denial enforcement, which varies based on a violation that listed countries have done[58], and from the security exception clause standpoint, ITAR encompasses three sub-paragraphs in Article XXI (b). Invocation to security exception clause, as the panel to the case of Russia – Transit traffic, explained that the security exception clause has to be invoked alternatively, especially for the invocation of article XXI (b). The chapeau of this section only works as an explanatory term for the subsequent paragraphs.[59]

Whilst both ITAR's existence and implication have never been brought to WTO dispute settlement bodies, its impact on global space industries raises problems and confusion for US and foreign space entrepreneur. Problems that are thickened by the political interest of the US government in the international arena make ITAR validity questioned by the economic community created by the WTO. A community that believed that only through economic means, could the development of all countries be nourished without any political tension and interest interfering with it.

2. Security Exception Invocation in Developing Indonesia Defense Satellites

Two can play that game. As hypocritical as it seems, ITAR is not only raising a problem for the economic community but also indirectly creating a 'blueprint' for a country that is intended to develop its space capability. Indonesia's long-running space development activity has come to a whole new level. Indonesia's space capabilities started in reverse sequences when compared to great nations like China, the US, and Russia. Those countries started their space development due to the tension of technological competition, which happened in the cold war era, and technology used in satellite deployment or space exploration become a prototype to the future military

[57] World Trade Organisation (n 36).
[58] ITAR (n 4), subchapter 121.1 (c).
[59] World Trade Organisation (n 36). paras. 7.65.

armament – [60] such as intercontinental ballistic missiles and integrated military communication system.[61]

Indonesia embarked on its space development for civilian purposes, this country has developed many satellites for various kinds of activities, such as telecommunication, banking, and broadcasting activity. Today's space capabilities have encompassed security and military purposes, especially on the capabilities of a satellite which by today's standard, have to possess a dual-use capability.[62] Indonesia, which is relatively new to the competition of space capabilities, does not own a satellite that has a defensive capability to enhance its military power. Since 2016, Indonesia only uses a leasing satellite from Avanti Corporation – a corporation based in England – as its defensive satellite. However, in 2018, Indonesia was in debt with Avanti caused of the default in the satellite leasing fee[63] This situation makes 123^{o} longitude orbit which given by the International Telecommunication Union to Indonesia is vacant until due time meets.[64]

The need for space capabilities in the security aspect has been obligated to the Indonesian Government through its Outer Space Regulation.[65] Responsibility to fill the vacant orbit could become the driving reason for Indonesia in making its defensive satellite and making enhancement to its military power. Since the satellite financing was conducted by the Indonesian Legislative and Executive body, a political interest would exist in this plan, and policy related to defensive satellite-making should secure Indonesia's position from the disadvantages which comes from another country's foreign policy.

Reflecting the needs of Indonesia for defensive satellites with the previous discussion on ITAR and Security Exception, Indonesia should propose a similar policy

[60] Neil DeGrasse Tyson and Avis Lang, *Accessory To War: The Unspoken Alliance between Astrophysics and The Military* (W W Norton & Company, Inc 2018) 389.

[61] Bleddyn E Bowen, *Original Sin: Power, Technology and War in Outer Space* (1st edn, Hurst & Company 2022).

[62] Totok Sudjatmiko, 'Keamanan Negara Dalam Kegiatan Antariksa Nasional: Perspektif Realis Ofensif' (2017) 9 Jurnal Global & Strategis 207.

[63] Ervina Anggraini, 'Lalai Bayar Sewa Orbit Satelit, Indonesia Di Denda 175M.' (*CNN Indonesia*, 2018) <https://www.cnnindonesia.com/teknologi/20180611092244-199-305126/lalai-bayar-sewa-orbit-satelit-indonesia-didenda-rp175-m> accessed 24 October 2022.

[64] Robertus Heru Triharjanto and others, 'Desain Awal Sistem Satelit Telekomunikasi Pertahanan Indonesia (Preliminary Design of Indonesian Military Telecomunication Satellite)' (2017) 14 Jurnal Teknologi Dirgantara 113.

[65] Law No. 21 of 2013 on Outer Space. Article 2 (h); other obligations was set in the Presidential Regulation No. 49 of 2015 on National Institute of Aeronautics and Space.

implemented under the rights of GATT contracting parties to invoke such exceptions. ITAR has raised a problem for international space industries and security exception also has become a cumbersome clause to use before GATT contracting parties, but Indonesia does not have to experience these problems, rather it must learn a lesson from these kinds of problems.

From the standpoint of technology sovereignty, a policy like ITAR would not give a disadvantage to one country if satellite technology imported only used for short-term activity, however, the long-term implication of this policy would make developing countries dependent on US satellite technology and indirectly makes a limitation for one country in conducting foreign activity on the international arena. Authorization, which is owned by the US in choosing whether one country should or should not enlist as the recipient of the denial policy makes other countries responsible for keeping good terms with the US government.[66] Due to the global tension between countries, this responsibility is very hard things to do, because the countries which depended on the US defense article are indirectly obligated to satisfy US political interests in the international arena. One small mistake could lead to political turmoil, which in this discussion, makes a dependent country be enlisted as a policy of denial recipient.

Before enforcing such a policy, Indonesia should draw a line where this policy is in accord with the MFN principle. It could be done by determining the terms within the proposed policy, especially when this policy would discriminate against several countries that own a complex and problematic policy like ITAR. Indonesia also needs to alternatively choose which rights within the security exception clause will be invoked. Regarding the development of space capabilities, Indonesia could invoke article XXI (b) (ii), which gives the rights to Indonesia such freedom (1) in developing defensive technology to enhance Indonesia's military powers and (2) to choose an ideal partner which does not excessively control and interfering Indonesia' development on defensive satellite.

A substantive and formal requirement which was explained before also has to be fulfilled by Indonesia. Substantive requirements already fulfilled by Indonesia through the responsibility in making outer space the aspect to enhance military powers raised by UU Antariksa. For the formal requirement, an acknowledgment that explained the

[66] Francesco Crespi and others, 'European Technological Sovereignty: An Emerging Framework for Policy Strategy' (2021) 56 Intereconomics 348 352-353.

urgent need for a defensive satellite could be conducted through the Indonesia Ministerial of Defence before GATT contracting parties. This acknowledgment would become the depiction of Indonesia's good faith in considering and notifying other contracting parties affected by this proposed policy. Eventually, this proposed policy would not implement smoothly and successfully if Indonesia's political stakeholders do not excessively commit to this political will[67] in developing Indonesia's defensive satellite or in developing Indonesia's outer space capabilities shortly.

E. Conclusion

Based on the results of the analysis carried out in this paper, it was found that the ITAR which is one of the US foreign policies in technology trade has a discriminatory nature in its use. This is due to the influence of US political power in the ITAR application bureaucracy which functions to determine which countries are entitled to get the technology. This determination is also based on US accusations against countries that sponsor terrorism activities and also countries that in international politics become rivals of the US. The nature of discrimination is based on the politicization of the US government in the international political arena based on several bases such as sanctions issued by the United Nations, terrorism, and internal sanctions from the US. From a de jure perspective, the ITAR is following the security exception provisions contained in the GATT, but there are clauses in the regulations which violated the treaty. The ITAR authorizes the US government that may or may not to grant licenses to certain countries based on US foreign policy and security interests. The ITAR policy is not following the provisions of the security exception because one of the important principles in the WTO, the MFN principle, which stipulates, that every provision in the GATT must be applied equally as a whole and without discrimination against some countries, is not implemented by the ITAR. These violations arise because, in the ITAR provisions, the US government can easily change the terms of the license for the export and/or import of satellite technology according to its political interests. The existence of this clause certainly causes the WTO's main goal to be violated.

Indonesia is obligated to take advantage as a member of the WTO. Regarding the achievement of technological sovereignty, especially in the development of defense

[67] Mark W McElroy Jr, *The Space Industry of the Future: Capitalism and Sustainability in Outer Space* (1st edn, Routledge 2022) <https://www.taylorfrancis.com/books/9781003268734> accessed 21 November 2022.

satellites, Indonesia can use the provisions of the Security Exception to limit the import of space technology from countries that have foreign trade policies such as the ITAR. Indonesia could use such a policy to determine the direction of its foreign trade policy and choose with whom Indonesia will cooperate in technology development, especially the development of defence satellite technology. Although this exception is very vulnerable to being used in trading activities, Indonesia can use this clause to base its use by fulfilling the formal and substantive requirements of the security exception provisions and implementing the obligation to notify about the existence of a restriction policy regarding trade that contains restrictions that could hinder the development of defense satellites in Indonesia and these restrictions must be enforced following the MFN principle. This proposed policy would be paralleled by an objective to uphold the value of accountability from the use of the security exception clause which can ensure the proper usage of this clause and also as a proactive measure from Indonesia to respond to foreign policies that could harm Indonesian development in achieving technological sovereignty.

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