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Author: Ms. Brenna Gautam

Space Generation Advisory Council (SGAC), United States, bmg81@georgetown.edu

COOPERATION IN THE FINAL FRONTIER: RECONCILING EXPORT CONTROL SYSTEMS WITH COOPERATIVE OBLIGATIONS UNDER OUTER SPACE TREATIES

Abstract

Among other obligations, States party to the legally binding 1967 Outer Space Treaty (OST) have agreed to “conduct all their activities in outer space with due regard for the corresponding interests of other States” and to “be guided by the principle of cooperation and mutual assistance” in such activities. Given these affirmative obligations to carry out the exploration and use of outer space with regard to international cooperation, regulatory constraints on the sharing of items and data with international partners in outer space—constraints largely derived from domestic export control regimes—seem to exist in tension with the international law requirements.

This apparent tension raises two questions: to what extent do domestic laws governing export control systems risk conflicting with the system of international laws governing cooperative outer space activities, and how is the potential for such conflicts avoided? In the outer space field—wherein a large portion of the technology and research employed are classified as dual-use under prevailing export control systems—how do States comply with mandates relating to international cooperation, knowledge sharing, and other related principles derived from outer space treaty law?

This paper argues that while a conflict between the underlying policy objectives of the two systems exists, the language of OST cooperative mandates are broad enough that domestic export control regulations do not run afoul of the mandates, and that States further mitigate the risk of conflict through their unique regulatory approaches to exports of space-related items and technology.

In making this argument, the paper explores the methods through which the export control systems of the United States and Europe, two key regional actors in outer space, fulfill nonproliferation functions while still complying with cooperative obligations under the OST and other treaty authorities through regulatory approaches to export control provisions covering outer space technologies and research. The analysis examines the following factors for the United States and Europe, respectively: (1) allowances for cooperative outer space research through deemed exports or intangible technology transfer provisions; and (2) accommodations for international transfers of outer space-related items.

Following the case study, the paper concludes by assessing potential benefits and limitations of the U.S. and European approaches and offers insight into the relevance of both approaches for the entry of new entities, including private sector actors, into the space-capable field.