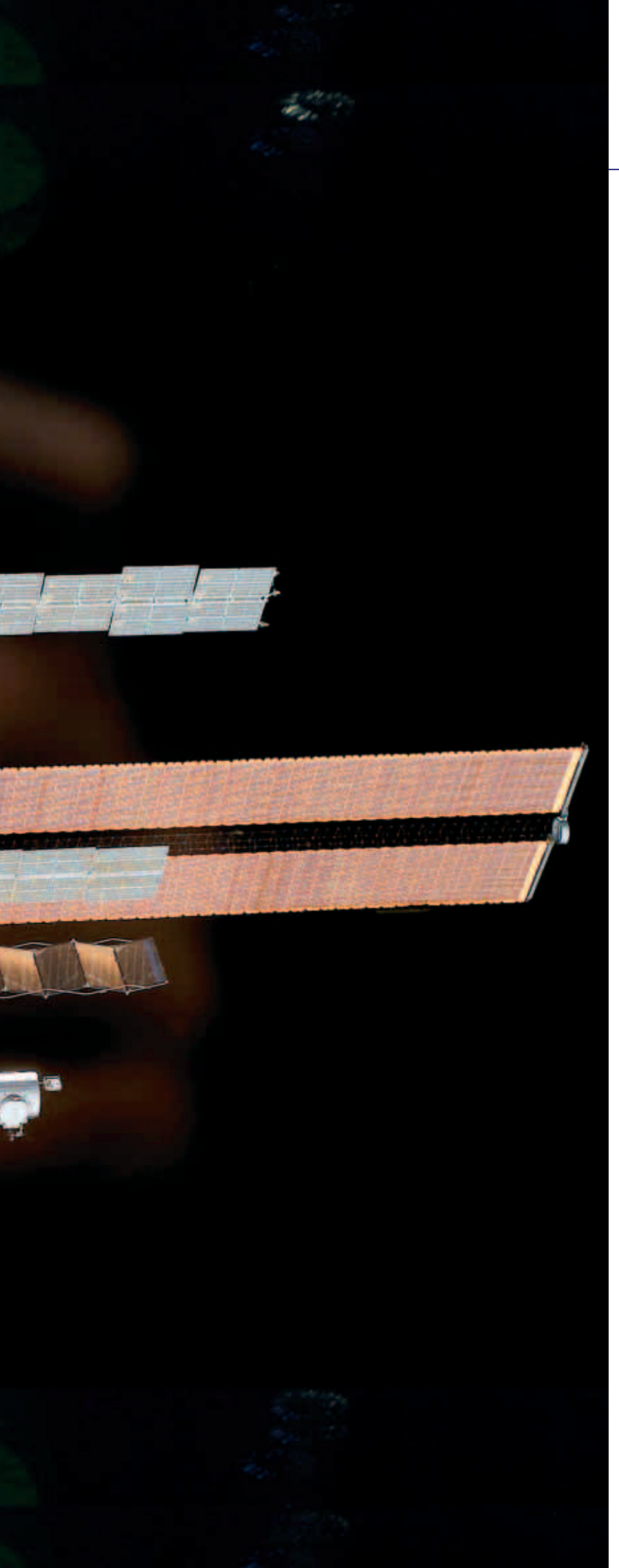
ESA's Cooperation with International Partners

– Export-Control Issues

The current in-orbit configuration of the International Space Station



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Since ESA's creation, international cooperation has been essential to the European space effort. Without the Agency's strong commitment to join forces with its international partners, many of the ambitious projects being achieved today would not have been possible. When entering into a cooperative project, many legal issues have to be taken into account, one of the more thorny ones being export control. Though many rules and regulations with regard to export-control issues exist in public international law, these have experienced some diverging interpretations and different developments in the course of transcription into national rules. The direct addressee of the classical export-control rules is industry and not ESA as an intergovernmental organisation. Given the Agency's mandate to improve the worldwide competitiveness of European industry, ESA's functioning, and structure, these issues are nonetheless of great importance.

Applicable Law and Regulations

Situation in the ESA Member States

Because 13 of ESA's 15 Member States are also Members of the European Union, it should be emphasised that, since 1994, dual-use exports have been subject to rules established by the European Community (EC), as part of its jurisdiction over the common commercial policy pursuant to Article 113 of the EC Treaty. These rules were replaced on 22 June

Crew members onboard the International Space Station on 23 April 2004, photographed in the ISS's 'Destiny' laboratory. In the front row are astronaut C. Michael Foale (left), Expedition-8 commander and NASA ISS science officer and cosmonaut Alexander Y. Kaleri, flight engineer. In the back row (left to right) are cosmonaut Gennady I. Padalka, Expedition-9 commander; astronaut Edward M. (Mike) Fincke, NASA ISS science officer and flight engineer, and the Dutch ESA astronaut Andre Kuipers. Cosmonauts Kaleri and Padalka represent Russia's Federal Space Agency

2000 by Council Regulation 1334/2000, which set up an expanded EC regime for the control of exports of dual-use items and technologies.

Through the latter rules, a list of dual-use items has been established for which an authorisation for export is required from the relevant authorities in the EC Member State concerned. Therefore, national laws and regulations implementing such rules have been somewhat harmonised through this common list. The latter is drawn up in conformity with the obligations and commitments accepted by the EC Member States participating in the different existing international regimes, such as the Wassenaar Arrangements. However, States are also authorised to control items in addition to those contained in the above-mentioned list for security and defence purposes.

It is therefore up to the industrial entity under contract with ESA for the development or production (in the framework of a particular ESA programme or activity) of data and goods included in national export-control lists and intended for export outside the territory of the Member State concerned, to make all necessary arrangements for obtaining appropriate authorisations at national level, and subsequently abiding by all conditions prescribed in such authorisations.

ESA's rules and procedures related to export control

The starting point for ESA's rules and procedures with regard to export-control issues can be found in Article XI.5(j) of the ESA Convention. This provides that Council shall adopt, by a two-thirds majority of all Member States, rules under which authorisation will be given, bearing in mind the peaceful purposes of ESA, for the transfer outside the territories of the Member States of technology and products developed through the activities of ESA or with its assistance.

This basic provision is implemented by Chapter IV of the Rules on Information, Data and Intellectual Property, adopted by Council on 19 December 2001 (Rules). With a view to promoting the maximum exploitation of ownership rights, these Rules draw a clear distinction between technology and products that are owned by ESA, on the one hand, and those that are owned by Contractors, on the other. The transfer of technology or products owned by ESA requires the authorisation of the Agency's Technology and Product Transfer Board (ATB), whereas the transfer of technology or products owned by Contractors only needs to be recommended by the ATB. The ATB's authorisation or recommendation, which is not a substitute for the national-level authorisation process but rather an additional step, is not necessary when the transfer of technology or products is made pursuant to a cooperative agreement between ESA and a government agency of

The Russian Soyuz launcher that carried ESA astronaut Pedro Duque to the ISS on the 'Cervantes' mission in October 2003

the country of destination. In such cases, it is assumed that the ESA Council, when approving the cooperative agreement, has given an overall authorisation for the transfer of data and goods in accordance with the relevant provisions of the agreement.

In the first case – when the technology or products are owned by ESA – authorisation by a two-thirds majority of the Member States or Participating States is required. In the second – when the technology or products are owned by a Contractor – a transfer shall not be deemed to be recommended if more than one third of Member States have expressed an adverse opinion on the proposed transfer. In the case of a transfer requested by a Contractor, a Member State or an invited Participating State which is not represented at the meeting, that State shall be considered as approving the transfer.

In considering its authorisations and recommendations, the ATB takes several factors into account, including:

– the objectives of the ESA Convention and, in particular, the exclusively peaceful purposes aspect
– the competitiveness of European industry and, particularly in the case of Contractor proposals, that of the Contractor
– compliance with export controls in force in the Member States and, in particular, in the Member State under the jurisdiction of which the proposed transfer would be effected
– any reciprocity for ESA and the Member States which may be appropriate
– any requirements on re-exports; and
– any relevant technology-transferagreements.

In any case, it is important to note that ESA's rules do not prejudice the fact that export control is a national competence, governed by the national laws and regulations of the Member States and, in a number of instances, subject to those international agreements by which the Member States are bound.

Export Control in the Context of Cooperative Projects

Standard clauses

ESA has concluded numerous agreements with partners, other than agencies of its own Member States, for the purpose of carrying out activities cooperatively or on a reimbursable basis, within the framework of its programmes. The most complex cooperative framework established through a series of agreements, at various levels and of various natures, is the one set up originally in September 1988, and expanded in January 1998, for executing the International Space Station (ISS) Programme, involving the 15 Partner States and their 5 Cooperating Agencies. The ISS negotiations provided the occasion to develop a comprehensive

clause on the exchange of technical data and goods, which has since regularly served as a model for agreements covering other fields of space exploration.

The ISS Partner States have agreed that: (a) each Partner's obligation to transfer technical data and goods to another Partner is confined to the data and goods necessary to fulfil the furnishing Partner's responsibilities under the applicable agreement; (b) everything must be done to facilitate transfers at every level, for example between industrial entities being contractors or sub-contractors of the cooperating agencies; and (c) to prevent unauthorised transfers to third parties, special steps must be taken to protect data and goods marked as requiring protection for proprietary-rights, export-control or confidentiality purposes. These steps take the form of a marking procedure pursuant to which the furnishing party identifies explicitly with an appropriate stamp the set of data or the goods to be protected. Such marking should trigger the application of protective measures once the data or goods arrive at the premises of the receiving party, so as to avoid unauthorised re-transfer to a third party. It is generally understood that unmarked technical data and goods received by any Partner can be freely used for any purpose.

Practical issues associated with exchanges of technical data and goods

With more than 15 years of experience in the application of technical data or goods clauses, ESA has gained first-hand experience in a number of issues, as illustrated below. Firstly, it may happen that a Partner proceeds abusively with the marking of data and goods otherwise freely available, thus hampering the efforts of the receiving Partner, because of the burden imposed by applicable protective measures, to disseminate such data or goods to all officials, contractors and sub-contractors involved in the project. This issue, referred to as 'over-marking', was discussed at length when Russia joined the partnership in the mid-1990s. That discussion led to the inclusion of the following sentence in the relevant Article:

"The transfer of technical data for the purposes of discharging the Partners' responsibilities with regard to interfacing, integration and safety shall normally be made without the restrictions set forth in this paragraph."

This sentence is more an encouragement to avoid over-marking than an outright prohibition of it.

Another problem is the potential for the extra-territorial application of the laws of a furnishing Partner State, and more probably of the relevant laws and regulations of the United States, to technical data and goods already transferred to another country. Normally, one would expect the export-control laws of the receiving country to be the only applicable legal basis for seeking remedies whenever there would be a breach of the conditions of the transfer, e.g. in case of an irregular re-transfer to a third party. However, the laws and regulations of the United States continue to apply to the technical data and goods transferred abroad, and all corresponding remedies and sanctions may come into play. This may result in certain conflicting requirements being imposed on the receiving party, i.e. conditions under United States laws and regulations that would be at variance with requirements applicable under the national law of the receiving country. It also results in formal requests being sent periodically by the US authorities to their partners to proceed with inspections 'in-situ', i.e. in the receiving country, of the conditions under which transferred data and goods are stored and used, something that may not be acceptable for policy or legal reasons.

There is also a possibility, which has materialised in the past in at least one instance, that a party receiving unmarked technical data produced by a Cooperating Agency proceeds with the 'marking' of that set of data upon receipt, thus legally limiting the furnishing party in its ability to freely transfer the data it has generated to anyone. This may also look rather abusive, although this limitation on re-transfer would be difficult to actually enforce in the State of the Partner having generated the data in the first place.

It is important to emphasise that the part of the relevant provisions referring to the direct transfer between the parties provides that such provisions do not require a party to transfer any technical data and goods in contravention of its national laws and regulations. In other words, for the direct transfer between the Cooperating Agencies, a State should not invoke the blanket application of laws and regulations pertaining to export control when proceeding with a transfer, but rather only invoke actual contraventions under its legal system, such as a regulation that would prohibit the transfer of nuclear material or military equipment. However, considering that the activities of the cooperation are carried out by the Partners primarily through numerous contractors and sub-contractors, it may be difficult to determine whether or not the interactions between contractors of different Partners in a given case constitute or generate a 'direct transfer' between two partners, the latter transfer being expressly excluded from the application of the bulk of export-control regulations, as explained above. Industrial entities involved in the transfer generally adopt a very cautious approach, to avoid any possibility of being fined for a contravention of export-control laws, and they generally require that all procedural aspects of export-control dealings, e.g. the conclusion of Technical Assistance Agreements (see below), are completed before being involved in any transfer. This not only defeats the purpose of the provisions included in agreements for facilitating direct transfers between the parties to the cooperation, but it adds significant delays, costs, and frustrations.

Since the original ISS agreements could not, for obvious reasons, have envisaged all possible utilisation scenarios, it is necessary to rely on additional agreements to spell out Partners' commitments to one another for each specific project. For utilisation activities, ESA and NASA conclude agreements in the simplified form of an exchange of letters. Even with a text in simplified form, negotiations on an exchange of letters generally take months, and such a time scale will on occasion be incompatible with technical imperatives and deadlines to be met in

various projects. In some cases, the whole process has led to unaccustomed delays, pushing up costs for all interested parties. Again, a cooperating agency is under no obligation to transfer technical data or goods for a specific project until such time as a proper agreement has been concluded.

For the sake of completeness, it is worth mentioning that the ISS Code of Conduct for the Space Station crew contains provisions that oblige astronauts to protect goods and data generated by experiments conducted onboard the Station when they have received instructions to mark them. The situation in which astronauts from several nations find themselves together onboard the ISS is, therefore, treated like an export situation. This shows just how much care the ISS Partners have taken regarding the protection of sensitive data and goods.

Cooperation with the United States: Technical Assistance Agreements

Export control is a particularly sensitive topic in the USA and this is mirrored in the extensive 'International Traffic in Arms Regulations (ITAR)'. These regulations require that TAAs be in place for the export of defence articles or the performance of a defence service by a US national to or for a foreign national. TAAs need to be approved by the US State Department and usually make their way through that Department before they are even sent to the International Partner in a draft version. Any amendment has to follow the same procedure, which makes the process rather burdensome. Consequently, it seems that many times convictions and principles are sacrificed for the sake of simply advancing a given project.

TAAs compulsorily need to contain a set of required clauses, such as:

"This Agreement is subject to all United States laws and regulations relating to exports and to all administrative acts of the US Government pursuant to such laws and regulations."

and

"This TAA is an independent agreement between the Parties, the terms of which will prevail, notwithstanding any conflict or inconsistency that may be contained in other agreements between the Parties on the subject matter. The Parties agree to comply with all applicable sections of the International Traffic in Arms Regulations (ITAR) of the US Department of State."

Given ESA's status as an international organisation that enjoys certain privileges and immunities in the United States, this wording is highly inappropriate, since it seems to imply ESA's acceptance of and submission to acts of the US Administration.

Nonetheless, ESA is still recurrently asked to sign such TAAs. Such requests usually come either directly from US industry or from NASA's Jet Propulsion Laboratory, the legal status of which is not clear. For direct contacts with NASA itself, a TAA is not necessary, since it is able to transfer agency-to-agency information without a TAA by invoking an ITAR exception. Since ESA's international partner and direct counterpart is NASA, the easiest solution might therefore be to channel any export that might involve US export-control uncertainties through NASA itself. Another possible solution could be an exemption from licensing requirements in the framework of any cooperation between ESA and NASA.

Conclusion

A good understanding of the various export-control issues facing ESA in the context of the execution of those programmes carried out in cooperation with International Partners seems to be a pre-requisite for any player involved in such activities at every level on the European side. Failure to address these issues properly, and in a timely fashion, will add costs and delays, something that could develop into a programme manager's worst nightmare!

The most compelling task ahead for ESA in following up on its existing commitments with regard to export-control matters is to develop detailed internal procedures and install appropriate mechanisms, possibly modelled on those used by the International Partners, for providing adequate protection to marked technical data and goods received pursuant to relevant clauses in cooperation agreements. This exercise, which is bound to have significant budgetary implications, would be somewhat related, although not necessarily exactly similar in every respect, to the on-going effort for implementing the various aspects of the recently-concluded Security Agreement pertaining to classified information. This is a necessary step for implementing in concrete terms existing ESA rules obliging staff members to protect the confidentiality or sensitive nature of information, and the integrity of goods, that they may receive in the course of their work.

Finally, since ESA is directly affected by the application of the export-control regulations of its Partners in the course of the various ongoing cooperative projects, it is normal that the Agency should monitor closely the development and implementation of those regulations – together with its own contractors – whenever an ESA project is involved, and should act as a lobbyist for defending European interests in that field with its Partners. This is particularly important at a time when NASA is working closely with the US State Department in trying to change the current process for issuing export-control authorisations for space-related material in the USA.