U.S. DEPARTMENT OF STATE
DEFENSE TRADE ADVISORY GROUP
Minutes of the March 21, 2007, Plenary Session
Harry S. Truman Building
Washington, DC

NOTE: Participants' remarks have been paraphrased.

Opening Remarks by Acting Director of the Office of Defense Trade Controls Management, Patricia Slygh

Mrs. Slygh convened the plenary session at 9:03 a.m., by welcoming everyone and introducing the speakers seated on the stage.

Opening Remarks by DTAG Chairman William Schneider

Welcomed everyone to the Spring plenary session. Expressed appreciation for all the on-going work of the Defense Trade Advisory Group (DTAG).

Opening Remarks by Managing Director and DTAG Executive Secretary, Robert W. Maggi

Mr. Maggi thanked everyone for attending and commented on the great attendance.

Remarks on PM Bureau's Activities by Acting Assistant Secretary for Political Military Affairs, Stephen Mull

Acting A/S Mull spoke about the central mission of defense trade. The DTAG working groups are charting the next steps. Brokering is a great concern and we want to make it user friendly as possible while observing and enforcing the law. We look forward to hearing your ideas on speeding up the commodity jurisdiction process, clarifying offshore procurement, and dealing with our trading partners with dual nationals. DAS Suchan has been working to move forward the policy on radiation-hardened chips.

On a policy level, the bureau is focused on building a better security environment in the Arabian Gulf region. The Gulf Cooperation Council (GCC) is comprised of six countries that want to increase their defense relationship with the United States, through training, the sale of weapons systems, and better

interoperability. In recent weeks, the Norwegian government has launched an effort to ban the production and transport of cluster munitions because of the weapon's potential risk to civilians. The U.S. is working to move discussion of this issue back to the UN's Convention on Certain Conventional Weapons (CCW). DoD and its partners try to minimize the humanitarian harm resulting from the use of cluster munitions, while not compromising our ability to defend ourselves. MANPADs are the single most worrisome threat to our civil aviation security. The Department of State is the lead among the interagency to develop a policy to control these systems. PM Bureau has been working on a new framework for India to be a strategic partner.

Remarks on DDTC's Activities and Updates by Deputy Assistant Secretary for Defense Trade, Gregory Suchan

For the past 72 years, defense trade has been the domain of the Department of State due to the important foreign policy dimension. For many governments, the main benefit from a strong national security relationship with the United States is access to U. S. defense technologies. This is true with our established allies (note the issue technology transfer to the United Kingdom for the Joint Strike Fighter) and with our more recent partners, such as India, with which we have begun periodic videoconferences with the Indian Ministry of Defense. Indeed, defense trade is at the center of many foreign policy issues. So far, we have been successful in persuading the European Union not to end the arms embargo with China. Another example: a resolution on an international Arms Trade Treaty (ATT) passed the United Nations General Assembly, 147 to 1. The United States was the sole "no" vote on the resolution. The United States does not oppose an ATT because of our leading role in arms exports but because we do not believe other governments (including those that sell weapons to Iran and Sudan) would agree to any real restraints on their arms transfers, and a weak ATT would only legitimize their bad arms transfer decisions.

Another constituency is the U.S. Congress. For the past 14 months, we have been working on changing the limits for radiation-hardened chips. PM has been dealing with other governments like Australia for an expedited licensing process. We have been working with Japan on technical cooperation on missile defense. Currently, PM is engaged in negotiations with Canada's national defense on dual nationals. Controls on defense trade change. The Libyan arms embargo was amended to allow non-lethal defense articles to be licensed. Additionally, there will be a *Federal Register* notice published regarding a change in policy for

Vietnam. (The notice was published on April 3, 2007 at 72 Federal Register 15830.)

Remarks by Managing Director for Defense Trade Controls, Robert W. Maggi

There is an imbalance between DDTC's resources and its requirements. Four years ago, D-Trade was started. The goal was in 2007 to have 45% of the cases to be sent in electronically. This past week 75% of the cases were submitted electronically. On a monthly basis, DDTC places on the Web site its report card on license processing times.

We have about 1,000 paper cases. If a license application is submitted via D-Trade, it is better for industry because the electronic cases do not sit on a shelf and it is easier to track a case. The savings by not being in the paper world is about 30 days from the front end after the application is signed to the back end. After an agreement arrives in the office, that case is reviewed in one week. DDTC works on about 5,000 cases at any one time. In time, there will be an electronic form for agreements, commodity jurisdiction determinations, and registration submissions. In a year, about 80,000 cases are submitted. The returned without action rate is about 22%. I encourage you to raise your level of quality assurance regarding the license applications submitted. The Office of Defense Trade Control Licensing does not just review license applications. It develops defense trade policy, executes a robust enforcement program and works extensively with other executive departments as well as the legislative branch.

Questions and Comments from the Audience

EDO stated that when a case is submitted via D-Trade the turn around time is about one week. Mr. Maggi explained that 15 minutes after an application is submitted it is accepted or rejected by the server. This week there were 380 rejections out of a total 1,700 applications. There was question about the business rule with D-Trade to use the name of the company that is registered. It was explained that DDTC needs for accountability purposes to know who we are dealing with and that name is matched up with the registration data. DDTC plans to launch DTRADE II Phase 1 in April 2007. This upgrade will allow the licensing officer to move cases more efficiently.

Remarks by DTAG Chairman William Schneider

DTAG will be looking over the horizon and at the policy of the DTAG charter. Some issues to consider with DDTC are advance technologies with defense applications that significantly impact munitions. DTAG could help the Department with the policy issue regarding unmanned aerial vehicles (UAVs). Also bio-technologies and nanotechnologies in the civil sector will have a profound impact on defense applications. It is important to get ahead of the public policy controls that impact military applications. There has been great cooperation between the DDTC staff and the DTAG members regarding the working group issues.

Remarks by DTAG Vice-Chair Giovanna Cinelli

The standing working groups have made progress regarding the International Traffic in Arms Regulations (ITAR) updates, commodity jurisdiction process, dual nationals, and brokering.

Remarks by ITAR Updates Working Group Co-Chairman Charles Graves

(The working group members are Charles Graves, Marc Binder, Dennis Burnett, Andrea Dynes, Ramona Hazera, Gregory Hill, Eric Hirschhorn, Eric Newsom, Joel Johnson, Victoria Ralston, Joyce Remington, and Catherine Thornberry.)

The ITAR Updates Working Group has developed a procedure for suggestions to update the ITAR. We will work with four clauses at a time. A template will be populated with the clauses. Two clauses will be put forward to DDTC for consideration. After receiving a response from DDTC, the remaining two clauses will be forwarded. While DDTC considers the second set, DTAG will select four more candidate clauses.

(Candidate Clause No. 1) On March 15th, DTAG forwarded 22 CFR §120.11 (Public Domain) to DDTC.

(Candidate Clause No. 2) With regard to 22 CFR §25.4(b)(9) (Exemption for technical data sent by a U.S. corporation to a U.S. employee or to a U.S. Government agency overseas), the working group has completed its second pass analysis and is working on the final formatting and editing.

(Candidate Clause No. 3) The second pass analysis is underway for 22 CFR §126.4 (Shipment by or for U.S. Government agencies).

(Candidate Clause No. 4) The first pass analysis has been completed for 22 CFR §123.3 (Temporary import licenses).

Remarks by Special Advisor to the Deputy Assistant Secretary for Defense Trade Controls Peter Berry

The ITAR Updates Working Group will be an on-going working group. The working group has developed a methodology and a template to present candidate ITAR clauses to DDTC. With regard to 22 CFR §123.22, an agreement holder must report the export to DDTC. Prior to the export is the time to report to DDTC. Currently, an exporter is unable to electronically report the export to DDTC. Therefore, the exporter should maintain records about the export.

Regarding offshore procurement arrangements pursuant to 22 CFR §124.13, a contract does not have to be submitted with the export application. An approved export license application will allow the technical data to be exported and then a contract is able to be finalized.

Questions from the Audience

There was a question about the status of the new form DS-4701 to report exports of technical data and defense services to DDTC. The Office of Defense Trade Controls Compliance responded that form is still in process.

Another question was whether the public would be able to review DTAG suggested candidate ITAR clauses. Vice-Chair Cinelli responded that after the public sees the candidate clauses they are able to send any comments directly to the DTAG. Mr. Maggi stated that the public is always able to directly contact DDTC about any ITAR clauses the DTAG is considering.

Remarks by Commodity Jurisdiction Working Group Chair Giovanna Cinelli

(The commodity jurisdiction working group members are: Giovanna M. Cinelli, Debi Davis, Mark Esper, Ramona Hazera, Greg Hill, Eric Hirschorn, Joel L. Johnson, W. Brad Lewis, John R. Liebman, Christine McGinn, Daniel B. Poneman, D. Michael Richey, James W. Reed, and Catherine E. Thornberry.)

The working group has been working with Ann Ganzer, Director, Office of Defense Trade Controls Policy, in her capacity as an ex officio member of DTAG, on this issue. The commodity jurisdiction process is key to export licensing. The working group outlined its issues with the commodity jurisdiction process. On December 5th, a report was prepared with line-by-line revisions to the form and guidelines.

The working group believes options should be built into the commodity jurisdiction process. There seems to be an orientation of the form toward enforcement and compliance activities. Also, the form is tailored to focus on hardware and needs to cover technical data and defense services. Further, the time to complete the form is understated. The working group is concerned why certain information is relevant to commodity jurisdiction determinations, such as previous commodity jurisdiction determinations, previous CCATS/ECCN, and voluntary disclosures. A modification is suggested for 22 CFR §120.3 to include that end-use is not dispositive. Also, consider the insertion of defining terms or adjectives to better frame when modifications, changes, or adaptations create defense articles.

Questions from the Audience

There was a question about publishing the commodity jurisdiction determination. Ms. Cinelli said the form has a block for a sanitized version of the commodity jurisdiction request that is submitted.

Another question was when a small company was not willing to submit a commodity jurisdiction request, is there a mechanism for another party to submit the request. There is a mechanism for the prime or first tier subcontractor to submit the request.

Remarks by Director of Office of Defense Trade Controls Policy Ann Ganzer

With regard to who is able to submit a commodity jurisdiction request, others are able to submit but DDTC wants authorization from the manufacturer when someone is submitting the request. The DTAG pointed out that end-use is not a factor in a CJ determination, but Ms. Ganzer pointed out that it is important when reviewing a commodity jurisdiction request to know what the product is designed and used for to determine whether there are predominant civil applications. DDTC is looking at minor modifications to the form prior to its introduction for use. Once we gain experience with it there may be more significant changes to the form down the road, and changes suggested by the

DTAG working group and accepted by DDTC would be added at that time. The DTAG working group and DDTC will review the instructions and changes may be made for clarification. There was also mention of a decrease in the median processing time from 169 to 94 days, however still not quite at the goal of 60 days indicated in guidelines established by the NSC.

Remarks by Dual-Nationals Working Group Chair Debi Davis

(The working group is comprised of Debi Davis, Christine McGinn, Dennis Burnett, Ginger Carney, Greg Hill, Ramona Hazera, Ken Williamson, Peter Lichtenbaum, Peter Jordan, and Brad Lewis.)

One year ago, the working group proposed a solution to the dual-national issue and it was not accepted because DDTC believed it did not adequately address security concerns.

Section 124.8(5) of the ITAR prohibits the transfer of technical data to a "national of a third country" unless prior approval has been granted by the Department of State. There is a lack of definition for citizen, national, country of origin, and nationality. Also, regulations in some countries prohibit asking certain information about nationality.

The working group first recommends the ITAR define "nationality." Secondly, there should be guidance issued on what is expected and how to handle dual-nationals. Also, the agreement guidelines mention employment of foreign nationals. The working group suggests that there be steps provided for a person who renounces his nationality.

Remarks by Director of Office of Defense Trade Controls Licensing Sue Clark

DDTC regards the country of birth as a critical factor in determining nationality. DTAG suggests that nationality should be based on citizenship alone as the determining factor for export controls. Therefore, all exceptions for dual nationals born in a 22 CFR §126.1 country must be submitted to DTCL for consideration. An exception request will be considered. DDTC will continue to review DTAG's most recent position regarding the meaning of "national."

Remarks by Brokering Working Group Chairman Charles Jameson

(The working group is comprised of David Ashby, Ginger Carney, Giovanna Cinelli, Mark Esper, Ramona Hazera, Charles Jameson, Joel Johnson, Peter Jordan, Joe Mariani, Ed O'Connor, Terry Otis, Mike Richey, and Ken Williamson.)

For the past two years, the working group has been working on the issue of overseas consultants and representatives. The DTAG is concerned that the new brokering regulations may cause overseas representatives to forego work for U.S. companies, thereby impacting their ability to compete successfully for international business opportunities.

DTAG is encouraging the Department to ensure the new brokering regulations is written to mitigate any unintended consequences to U.S. industry. DTAG recommends that the new regulations be published as a proposed rule with a formal comment period and a grace period prior to implementation.

Remarks by Director of Office of Defense Trade Controls Compliance David Trimble

DDTC plans to rewrite the entire part on brokering. The basis for the changes are ten years of experience implementing the regulations, international experiences with the United Nations and European Union, and other countries adopting brokering regulations. DDTC will take seriously the suggestion to publish a proposed rule.

DDTC proposes to change the definition of "broker" and "brokering activities" by combining both definitions into one definition of "brokering activities." Also, DDTC will be clarifying "foreign defense article." The *Federal Register* notice will include some scenarios when a person is not a "broker." Sections 129.3 and 129.4 of the ITAR will be clarified when the scope reaches foreign persons overseas and otherwise subject to the jurisdiction of the United States when the foreign person is brokering a U.S. defense article. Section 129.4 of the ITAR will be clarified that a broker is required to register separately from an exporter or manufacturer. The rule will be changed to require either an exemption or a license. Prior notifications will be eliminated. All the exemptions will be listed together.

Significant military equipment (SME) and non-SME for countries that are a member of NATO, Australia, New Zealand, or Japan will be exempt from obtaining prior written approval for a brokering activity unless prior approval is required pursuant to 22 CFR §129.7. A brokering activity involving countries that are not a member of NATO, Australia, New Zealand, or Japan will require prior written approval.

If a marketing representative is listed on the marketing license and is registered, then no separate authorization will be required. Another regulation change will be for a representative under contract to a U.S. company to apply for a broad brokering authorization for four years specifying the foreign countries and the commodities. Also, there will be a brokering license form.

Questions and Comments from the Audience

There was a question as to whether the new brokering license form will be available through D-Trade. DDTC responded that form will be available via D-Trade. Another question was how many brokers are registered? DDTC stated at one point in time 500 were registered. Out of those 500, approximately 150-200 were foreign registrants. An attendee mentioned that requiring a broad pre-marketing agent authorization may result in retaliation from their own government.

Closing Remarks

DTAG Vice-Chair Cinelli announced there will be two new working groups formed this year: 1) formulation of an internal compliance program; and 2) loaned foreign employees to U.S. companies that have foreign ownership. Mr. Maggi adjourned the meeting at 12:13 p.m.

Attachments:

1. ITAR Updates Working Group presentation handout
2. Commodity Jurisdiction Working Group presentation handout
3. Dual Nationals Working Group presentation handout
4. Brokering Working Group presentation handout

DTAG

Report of the ITAR Updates Working Group
21 March 2007

Procedure adopted for selection, analysis and presentation of candidate ITAR clauses to DDTC:

- Select and work on clauses four at a time, analyze for possible interpretations, rank in presentation order
- Populate template with each; put first two forward to DDTC for consideration
- Following DDTC response, put remaining two clauses forward
- While DDTC considers second set, select four more candidates
- Repeat process

DTAG

Report of the ITAR Updates Working Group
21 March 2007

Current four candidates, ranked, are:

- Para 120.11 (Public domain) Status: ***Submitted to DDTC 15 March***
- Para 125.4(b)(9) (Exemption for technical data sent by a U.S. corporation to a U.S. employee or to a U.S. Government agency overseas) Status: ***Second pass analysis complete, final formatting and editing underway***
- Para 126.4 (Shipment by or for U.S. Government agencies) Status: ***Second pass analysis underway***
- Para 123.3 (Temporary import licenses) Status: ***First pass analysis complete***

DTAG

Report of the ITAR Updates Working Group
21 March 2007

ITAR Updates Working Group members as of 15 March:

- Dennis Burnett
- Andrea Dynes
- Ramona Hazera
- Gregory Hill
- Eric Hirschhorn
- Eric Newsom
- Joel Johnson
- Victoria Ralston
- Joyce Remington
- Catherine Thornberry
- Marc Binder (co-chair)
- Charles Graves (co-chair)

DEFENSE TRADE ADVISORY GROUP
PLENARY SESSION

March 21, 2007

9:00 to 12:00

CJ Working Group Report

CJ WORKING GROUP

MEMBER	COMPANY
Giovanna M. Cinelli, Chair	Patton Boggs LLP
Debi Davis	Goodrich Company
Mark Esper	AIA
Ramona Hazera	The Boeing Company
Greg Hill	Northrop Grumman Corporation
Eric Hirschorn	Winston & Strawn
Beth Ann Johnson	Northrop Grumman Corporation
Joel L. Johnson	The Teal Group
W. Brad Lewis	Trade Compliance Associates LLC
John R. Liebman	McKenna Long & Aldridge LLP
Christine McGinn	IBM
Daniel B. Poneman	The Scowcroft Group
D. Michael Richey	Lockheed Martin Corporation
James W. Reed	Rhoads & Reed
Catherine E. Thornberry	Export Procedures Company

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SCOPE

- Working Group reviewed, discussed and outlined issues
- Presented initial summary of activities and observations to State at April 21, 2007 and September 21, 2006 DTAG Plenary meetings
- Examined:
  - Electronic CJ submission
  - Potential § 120.3 modifications

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MEMBERSHIP AND TIMELINES

- Increased membership in Working Group demonstrated the interest and importance of the topic
- Met with State designated officials and working group members between September 2006 and March 2007 to advise of status of Working Group comments/observations

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CJ WORKING GROUP

- General observations expressed to State:
  - Form should be tailored to meet the elements of § 120.4 or the goal of jurisdictional determinations
  - Form and process require additional flexibility to address a variety of scenarios where a CJ may be sought
    - technical data
    - defense services

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OBSERVATIONS

- General observations expressed to State:
  - Impact on time required to complete CJ submissions
  - Form and process seek compliance and enforcement (including licensing history) information

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INTERACTIONS WITH STATE

- State advised Working Group that the Department seeks as much information "up front" for the process to run smoothly
- Discussion of why certain information is relevant to CJ determinations:
  - Previous CJs
  - Previous CCATS/ECCN decisions
  - "Knowledge" of prior classifications
  - Voluntary disclosures

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PRELIMINARY RECOMMENDATIONS

- Potential § 120.3 Revisions
  - Address inconsistencies within the policy for designating defense articles. Use § 120.3 as written: end-use is not dispositive
  - Consider the insertion of defining terms or adjectives to better frame when modifications, changes or adaptations create defense articles

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DTAG Dual-Nationals Working Group (DNWG) Task Force

March 21, 2007

DTAG Plenary

Dual National Working Group DNWG - Members

- Debi Davis – Chair
- Christine McGinn - IBM
- Dennis Burnett - EADS
- Ginger Carney - NCOIC
- Greg Hill – Northrop Grumman
- Mona Hazera - Boeing
- Ken Williamson – Lockheed Martin
- Peter Lichtenbaum – BAE
- Peter Jordan – United Technologies
- Brad Lewis – Trade Compliance Associates

Issue Identified by DNWG

- Per ITAR § 124.8(5)) a foreign licensee may not release Technical Data and Defense Services to **"national of a third country,"** unless approved
- **"National of a third country"** is not defined within the ITAR
  - ITAR uses national, nationality, foreign national, dual national or citizen
  - Agreements Guidelines use the terms "citizen" and "national" interchangeably and make reference to "country of origin,"
  - Recent provisos require the replacement of the term "citizen/citizenship" with "national/nationality" and referenced "**country of origin**" as a separate concept from "nationality."
- Inquiring or sharing information on the "nationality" and/or "country of origin" of non-US employees is restricted under some national laws.
- DTAG is working to develop and communicate a consistent understanding of the definition and implementation guidance that will assist in ensuring compliance

Steps Forward

- DNWG has identified two key areas where we are focusing our efforts:
  - **Regulatory changes and licensing/compliance guidance:**
- **Regulatory Changes.** Recommendations for regulatory (ITAR) changes to address issues such as definitions and consistency of terms;
- **Guidance** Guidance on how to implement these recommendations to include Agreements, Licenses, what to do with past licenses, what questions need to be asked, and what to do when you legally can not ask such questions, etc…
  - DNWG has also suggested some specific steps that could help (Next slide)

Additional Steps

- DNWG believes the following steps should also be taken:
  - Revision of Agreements Guidelines
  - Revision to Supplementary Instructions/Guidelines for Completing Applications for Foreign National Employment in the United States
  - Scenarios and FAQs should be prepared to provide industry with guidance and examples
    - Including how to address issues when contrary to local law; and how to document when someone no longer has nationality of a country
  - Sample NDAs should be prepared and posted to website to reflect proper terminology
  - Guidelines and scenarios for the new agreements with Canada and Australia regarding Dual Nationals should be established
  - DDTC workshop or training on Nationality issues overall and how to treat Dual Nationals.

BROKERING WORKING GROUP REPORT

DTAG Plenary Meeting
March 21, 2007

WORKING GROUP MEMBERS

David Ashby
Ginger Carney
Giovanna Cinelli
Mark Esper
Mona Hazera
Charles Jameson (Chair)
Joel Johnson
Peter Jordan
Joe Mariani
Ed O'Connor
Terry Otis
Mike Richey
Ken Williamson

ISSUE AND STATUS

- For the past two years, DTAG has been engaged in a dialog with DDTC aimed at:
  - Gaining an understanding of the Department's objectives in revising the ITAR's regulations pertaining to brokering,
  - Advising DDTC of potential unintended consequences of the revised regulations, and
  - Encouraging DDTC to adopt policies, procedures and processes that will mitigate the impact of the revised regulations on legitimate U.S. industry export activities.

- DTAG appreciates the opportunity to have had such an extensive dialog with DDTC on this important subject.
- DTAG encourages the Department to ensure that the new brokering regulations are written and implemented in a manner that will mitigate any unintended consequences to U.S. industry while strengthening protection against entities and activities deemed harmful to U.S. national security and foreign policy interests.

- DTAG encourages DDTC to adopt specific policies, procedures and practices aimed at achieving this result.
- DTAG recommends DDTC authorize:
  - A formal comment period prior to publication of the new regulations, and
  - A grace period prior to implementation.