

**U.S. DEPARTMENT OF STATE
DEFENSE TRADE ADVISORY GROUP
Minutes of the May 3, 2005, Plenary Session
Harry S. Truman Building
Washington, DC**

NOTE: Participants' remarks have been paraphrased.

Opening Remarks by William Schneider, Jr.

(**William Schneider, Jr.**, the Chairman of the Defense Trade Advisory Group (DTAG), convened the plenary session at 9:00 a.m., by welcoming everyone to the DTAG Spring plenary meeting.) There has been a delay in holding a plenary meeting due to an election taking place, and senior political appointments need to be confirmed. Thus, the DTAG is working with senior career staff at the Department of State. The DTAG has a basis for dialogue on certain candidate issues that will be addressed in a series of briefings. We welcome Greg Suchan as Acting Assistant Secretary and Michael Dixon as Acting Managing Director of Defense Trade Controls.

Opening Remarks by Michael T. Dixon

(**Michael T. Dixon**, the Executive Secretary of the DTAG, welcomed everyone, including the newest members of DTAG.) Acting Assistant Secretary Rose Likins is on official travel and is not able to attend this meeting; therefore, we have Acting Assistant Secretary Greg Suchan. This is an open session with unclassified materials. Today we have some members of the press present. The minutes of this meeting will be posted on the Directorate of Defense Trade Controls (DDTC) website, www.pmdtc.org.

We will hear from the DTAG working groups today who have identified certain issues for analysis and discussion, and which will serve as the basis for future recommendations. To be a DTAG product it has to be vetted by all the DTAG members. There is no requirement to reach consensus. We are open to hearing the dissenting point of view. Non-DTAG members are able to contribute their comments by sending an E-mail to Mary Sweeney at Sweeneymf@state.gov. These contributions will receive full deliberation by DTAG and comments may be reflected in reports by DTAG. DTAG is governed by its charter and examines licensing procedures in carrying out the Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR). With this plenary session, the

DTAG will embark on challenging and constructive work in considering the law administered by the government to regulate defense trade exports in the interests of national security and foreign policy. DDTC will have human resources in place to work with the DTAG. The Office of Defense Trade Controls Management (DTCM) will be available to assist the DTAG in its work. Nicholas Memos and Kristin Dowley, working through the Acting Director of DTCM, Angelo Chang, will be of primary assistance.

Greg Suchan: Remarks on Current Issues and DDTC's Activities

(**Greg Suchan**, the Deputy Assistant Secretary and Acting Assistant Secretary of the Bureau of Political-Military Affairs welcomed everyone.) It has been 18 months since the last DTAG meeting. Rose Likins, Acting Assistant Secretary, wanted this meeting to be held even though she was on travel so there would be forward momentum.

With regard to old business, NSPD-19 was a presidential interagency tasking to look at defense trade control policies. One year ago, the inter-agency completed the tasking, and State and Defense proposed 20 ideas. Last summer, the White House encountered resistance on the Hill and decided not to move forward. Thus, we have stood down awaiting new leadership such as Bob Joseph, who has recently had hearings on his appointment as Under Secretary for Arms Control and International Security. In addition, we don't have a new Assistant Secretary for the Bureau of Political-Military Affairs. When these principals are in place, they will decide what to do, and whether to add or delete from the work on NSPD-19. NSPD-19 is on the table but has not moved.

The negotiations for the ITAR licensing waiver regarding Australia was completed in December 2002, and regarding the United Kingdom in May 2003. However, both of these waivers need congressional action for implementation because of Section 38(j) of the AECA. There is congressional opposition against these agreements with the United Kingdom and Australia.

A year ago, everyone thought the European Union (EU) was going to lift its arms embargo against China in time for the EU-PRC summit in December 2004. To date, the EU has not lifted the embargo. This has been the target of an extensive U.S. diplomatic effort, and on April 26 Under Secretary for Political Affairs Burns initiated a Strategic Dialogue with the EU on East Asia. Chris Hill, Assistant Secretary of East Asian and Pacific Affairs, will be traveling to Brussels later this month to continue the Strategic Dialogue with the EU. Lifting the

embargo will raise obstacles to U.S. defense cooperation with Europe. If the embargo is lifted, there may be an effort to legislate and restrict U.S. and European cooperation.

Regarding what is happening in the Directorate of Defense Trade Controls, we are virtually at full staffing, but still need more hands. Each year there is an 8% increase in our license workload, which equates to 2 to 3 full-time employees. Currently, the State Department is under financial strain due to, among other things, rising fuel costs and the value of the dollar as compared with the euro and other currencies. We are looking to D-Trade to help deal with the expanding workload. Approximately 10% of license applications are being submitted through D-Trade at this time. An important milestone has been reached: The Directorate issued a license electronically for the first time on May 2nd. Using D-Trade will cut out “mailroom time” and improve licensing times because applicants don’t have to mail the application to the office, and with electronic issuance, DDTC does not have to mail the license back to the applicant. D-Trade is designed so one is unable to submit the application without certain required information, therefore eliminating the delay caused by returning to the applicant an incomplete application. Very soon, D-Trade will be expanded beyond DSP-5s, to include other kinds of applications. D-Trade will be going into the compliance part of doing business with the Directorate.

In the near term, there will be a Federal Register notice amending the ITAR on some “housing keeping” items. The notice will address the new threshold for Section 36 of the AECA notifications, reflect new titles for Category I and XVI, and nuclear radiation measuring devices will be under Category XVI rather than XIV. Also, section 126.5, the Canadian exemption, will be amended. MANPADS, and associated parts, components and technical data, will be excluded under section 126.5 and will require a license for export to Canada. The Canadian Government has been consulted and has no problem with this. More broadly, Canada was concerned that no one was using the Canadian exemption. In the past 18 months, \$900 million (aircraft parts accounts for more than 50% of this) has been exported using the Canadian exemption.

Remarks by DTAG Chairman William Schneider

State faces modernization issues. Military capabilities face non-military exports and the Department’s leadership will have to adopt policies and procedures to meet these objectives. The DTAG has four working groups on the topics of Brokering, chaired by Charles Jameson; the Commodity Jurisdiction process,

chaired by Giovanna Cinelli; Dual Nationals, chaired by Debi Davis; and ITAR Clarification, co-chaired by Marc Binder and Charles Graves. Today we have experts from DDTC, who will be exposed to the industry side of some of the issues in complying with the regulations. Also, the DTAG will try to see what the government is trying to achieve. The advisory committee is not an advocacy group, but assists government in helping with compliance with the regulations and implementation of the statute. The DTAG obtains solid information from industry's experience on these issues to better comply with the law and regulations.

Remarks by DTAG Vice -Chair Ramona Hazera

The DTAG has been very active in 2005. A host of issues have been identified by the DTAG. From these, the DTAG decided that the most pressing issues were brokering, the commodity jurisdiction process, dual nationals, and clarification of the ITAR. The working groups will be developing milestone charts. Some of the groups have conducted fact-finding meetings. We will work these issues. The work product will be reviewed and be considered for policy implications. Then a final product will be submitted to the Department of State.

Schneider: The DTAG working groups will address policy issues besides the regulatory issues. These issues may be presented to the new leadership.

Remarks by Regulatory/Technical Working Group Chairman Mike Richey

The DTAG has begun some very serious work. The members as experts in the field are in the process of understanding the national security and foreign policy implications of these issues. As a group the goal will be to provide sound advice and recommendations in light of the national security and foreign policy concerns while maintaining robust controls and minimizing the impact on the industry. Those in the audience who are not DTAG members can present comments for DTAG consideration. The working groups will have a disciplined work product and will present recommendations. The DTAG is staying with issues that are important to its members.

Schneider: In this process, we have to remember timeliness. Sometimes a short time line is requested by the Department.

Remarks by Brokering Working Group Chairman Charles Jameson

The brokering working group will address registration and licensing of brokers under Part 129 of the ITAR. The working group is comprised of David Ashby, Ginger Carney, Giovanna Cinelli, Rich Gogolkiewicz, Mona Hazera, David Isenberg, Chuck Jameson, Joel Johnson, Peter Jordan, Dennis Kennelly, John Liebman, Joe Mariani, Ed O'Connor, Terry Otis, Suzanne Palmer, Mike Richey, and Ken Williamson.

In 1997, the brokering regulations were implemented. The regulations and the legislation are limited with regard to guidance. Part 129 has numerous interpretations. The brokering regulation captures U.S. persons whether in the U.S. or overseas, foreign persons in the U.S. and foreign persons subject to U.S. jurisdiction wherever they are. Another interpretation of the brokering regulations is that there must be a nexus to the U.S., for example that there is a business in the U.S.

The working group plans to gain an understanding of the objectives of the U.S. Government in regulating brokers, and set an agenda to begin a constructive dialogue with the Department aimed at achieving those objectives while minimizing potential collateral damage to legitimate U.S. defense export initiatives. The working group gained some insight when some of the members met on April 25th with a few members of the Department to examine the intent of Part 129 of the ITAR. Subject discussed at the meeting included the definition of brokering and brokering activities, and the adjudication and licensing of registered brokers. DTAG will provide DDTC a list defining the spectrum of activities commonly performed by consultants and commissioned sales representatives. The list will range from routine business assistance activities to activities that are clearly brokering. DDTC will review the list and identify those activities that are determined to be routine business assistance and those that are brokering. DDTC will also consider whether entities registered as brokers need to obtain separate authorizations from DDTC, or whether their inclusion in a U.S. company's approved export license or agreement would be sufficient to satisfy Part 129's licensing requirement. DTAG intends to work with DDTC on brokering issues, including process standardization and consistency of interpretation.

Discussion: There is a need to define for brokering what is considered as routine business activities and brokering activities. State will be drawing the lines on those types of activities.

Jameson: The working group is examining what the law intended to capture with foreign persons overseas and what is not captured and maybe this has changed since 1997. Also, the extraterritoriality of U.S. innovation will be examined. Consultants brokering used aircraft sales will be reviewed. To judge whether an individual is a “broker,” the working group will be developing a list to decide where the line should be drawn.

Suchan: There was a question whether the topic of brokering is involved in bilateral discussions with other countries. The answer is no. The topic of brokering has been discussed within Wassenaar. Also, the U.S. has discussed brokering with the EU, which adopted a “common position” two years ago calling on EU Member States to adopt brokering laws and regulations (only about half have).

L/PM-Chip Brooks: The OSCE and OAS have sought guidance from State for brokering. Those organizations want to establish guidelines for brokering comparable to the U.S.

Jameson: The working group will develop a list as to what constitutes brokering activities. If industry would like to submit comments, they should be sent to the DTAG Executive Secretariat. Twenty activities will be identified as brokering. License applications have been returned without action because the foreign consignee may be a “broker.” Also, there are persons not on a license application because they do not receive technical data or hardware. The working group will provide recommendations by describing brokering activities versus a person’s title such as a “consultant,” in determining who is a “broker.” DTAG will not be lobbying the Hill to change the law.

Hazera: We really need to look at the role of the parties. From that you can decide what is a brokering activity and who is brokering within the scope of the regulation.

**Remarks by Commodity Jurisdiction Process Working Group Chair
Giovanna Cinelli**

The working groups have a theme of consistency in the interpretations from a regulatory and policy side. In this working group’s deliberations, there will be assistance from Denzil Tice and Mary Ann Rashid from the Office of Defense Trade Controls Policy.

The commodity jurisdiction (CJ) process determines how a product is classified and which agency [State or Commerce] has jurisdiction. Section 120.4 of the ITAR explains the process to obtain a commodity jurisdiction determination. Section 120.3 contains elements to be examined in the process. In gathering facts about the CJ process, examples of inconsistent interpretations by DDTC were found across industries. One objective of the working group, therefore, is to assess these inconsistencies and determine what changes to § 120.4 process or § 120.3 policies for determining defense articles can be suggested. The working group is reviewing the commodity jurisdiction guidelines, as made available on the DDTC website and as found in ITAR § 120.3.

The working group is seeking to obtain redacted copies of commodity jurisdiction cases from the Department and looks forward to discussing actual documents that demonstrate inconsistency with State. A request to the public was made, asking others to please submit any examples of CJ cases, for review by the working group. Once all the facts are gathered, the working group may draft or suggest ITAR amendments or proffer guideline revisions regarding the CJ process. On April 22nd the working group held a meeting. It focused on § 120.3 criteria. In the past, the standard was whether the item was inherently military in nature. Now a determining factor is whether the item has a predominant civil application. Also, the working group would like to clarify what documentation should be submitted with a commodity jurisdiction request. Sometimes, industry finds that after submitting the request, more information is sought by the U.S. Government. Having to supply more information at a later date affects the timeline of processing a commodity jurisdiction request. The working group is aware that there is a commodity jurisdiction electronic template developed for D-Trade. The working group would also like to review this template. Michael Dixon agreed to work with the group to demonstrate how the template works.

The members of the working group are: Giovanna Cinelli, Dan Cook, Debi Davis, Ken Holden, Beth Ann Johnson, Joel Johnson, Brad Lewis, John Liebman, Suzanne Palmer, Vicki Ralston, Jim Reed, Mike Richey, and Catherine Thornberry.

Suchan: Predominant civil use is the controlling standard. If an item is removed from the U.S. Munitions List, a section 38(f) of AECA notification must be submitted to the Hill. Modest changes have been made to the U.S. Munitions List. If a defense article is incorporated into a civil product, that product would be controlled by State rather than Commerce. Under section 38 of the AECA, the President determines what is covered by the U.S. Munitions List and that

determination does not change when the defense item is incorporated into a civilian item.

Discussion: There is evolution of defense technology to upgrade a platform using commercial products and a concern of the reach of the U.S. Munitions List commodity classification.

Cinelli: During our fact finding, there was an issue of design and development using COTS for a defense article. The concern is defense articles migrating to commercial applications.

Discussion: An example of the migration to commercial application is the C4ISR network in the civil telecommunications sector. Also laser communication in advance of civil requirements may in time transfer to the civil sector.

Cinelli: The working group will look at the NSC guidance on the commodity jurisdiction procedures.

Remarks by ITAR Clarification Working Group Co-Chairman Charles Graves

The members of the ITAR Clarification working group are: Charles Graves, Marc Binder, Joel Johnson, Paula McDowell, Vicki Ralston, Richard Sandifer, Ray Thorkildsen, and Marlene Tarbell.

The objective of the working group is, first, to offer assistance to DDTC in any current efforts to amend and/or clarify ITAR provisions and, second, to identify other areas or language within the ITAR that, as published, would benefit from clarification, as the current language may be ambiguous, contradictory, or difficult for the exporter to fully understand and therefore comply with the requirement. The benefits of ITAR clarification are to enhance general compliance and reduce potential violations by improving the export community's understanding of the requirements. Another benefit is to eliminate the need for DDTC to repeatedly respond to requests for clarification of certain ITAR clauses. Also beneficial will be providing a focal point with DTAG to work with DDTC with any current or future efforts to amend and/or clarify ITAR provisions.

The working group has had preliminary discussions and a meeting to identify general issues and some specific examples of ambiguous ITAR language that would benefit from clarification, and agreed to objectives and initial tasks.

The next steps will include seeking assignment of a liaison from DDTC to work with the group. Also, the working group will identify areas in the ITAR that would benefit from clarification and solicit input from DTAG members on additional ITAR provisions considered ambiguous, confusing, or contradictory. Then the working group will analyze, organize, categorize, and prioritize the items and share the list with DDTC. The working group will work with DDTC to develop clarifications and identify the method to publish such clarifications, such as a “Frequently Asked Questions” document or guidelines such as the Agreement guidelines recently published, for general use by all exporters.

One example of the need for clarification is section 123.22(b)(3)(ii) regarding manufacturing license and technical assistance agreements that states, “Prior to the initial export of any technical data and defense services authorized in an agreement the U.S. agreement holder must electronically inform DDTC that exports have begun.” Another area for clarification is the definition of “defense services” which now account for more than half the value of exports. Demilitarization is mentioned regarding a defense service but not addressed for a defense article. Clarification of demilitarization of a defense article would be useful. The working group will look at the rule-making process and point out areas that are not clear so additional steps may be taken.

Remarks by Mike Richey for Dual National Working Group

Debi Davis is the Chair of the Dual National working group; however, she could not attend this meeting due to business commitments. The members of the Dual National working group are: Debi Davis, Ginger Carney, Peter Jordan, Paula McDowell, Laurie Chiperfield, Patrick Donovan, Bill Clements, Ken Holden, Stephanie Neuman, Ken Williamson, David Ashby, Suzanne Palmer, Brad Lewis, and George Grammas.

The working group will work on clarity in defining “dual citizen” and “dual national.” There is no definition in the ITAR for “dual citizen” or “dual national.” Manufacturing license agreements are globalized arrangements and deal with a multi-national work force. The working group plans to meet with the Office of Defense Trade Controls Policy and David Trimble regarding definitions and interpretations of a “foreign person,” “foreign national,” “dual national,” and “dual citizen.” The working group wants to help define the relevant terms and ensure consistency in use of terms for industry so compliance is enhanced. One committee goal is consistency in the regulatory implementation of the ITAR as it applies to dual citizens/nationals with manufacturing license agreements, technical

assistance agreements, licenses and exemptions. Another goal is to work with DDTC to review the current guidelines for technical assistance agreements and hiring of foreign persons.

The working group will look to laws of various countries that may not permit inquiries regarding citizenship/nationality. Another goal is to review the regulations of other jurisdictions and the ability to comply with both U.S. and other jurisdiction regulations. The working group will identify ways to meet national security and economic security objectives and provide recommendations to DDTC.

Schneider: Department of Defense analyzes dual national and dual citizenship in their security clearance process.

Rose Biancaniello: When DOD deals with classified information, in that world the person must be a U.S. citizen.

Discussion: Is there any effort by BIS, OFAC, and State to standardize “U.S. person,” “foreign person,” and deemed exports based on immigration laws?

Suchan: No. The Export Administration Regulations administered by Commerce are deemed appropriate for Commerce controls. State has separate legislation and regulations to apply to defense articles and defense services. Commerce did not coordinate its regulation change with the Bureau of Political-Military Affairs.

Schneider: State awaits the confirmation of senior political appointees maybe by mid June or July. We will have to see what their priorities are. The DTAG will review the four regulatory issues. We have also discussed other issues. One issue regarding policy and the regulatory function is the purpose to collect and publish data on defense trade regulatory practices and the type of commerce going on in the world regarding capital movements in the U.S. There are direct investors in the U.S. defense market and maybe direct investment in the European defense market. Today we face a multi-national supply chain and we need better data on these trends by the U.S. Government.

Discussion: Why can't the 655 report be available in a searchable database?

Dixon: Due to limited resources, the 655 is not in a searchable database. Resources are being devoted to DTAS rather than that database. The report is in

PDF format and you can convert it into a database. DDTC has limited information technology resources, and the office is dependent on outside sources for its information technology needs. Now with the implementation of the Automated Export System (AES) we have a better view of actual exports. The office is developing more specific commodity codes, which in time will make the report more informative.

Discussion: What about UK Foreign Secretary Jack Straw's proposal for a multilateral arms transfer treaty?

Suchan: The proposal is for a multilateral treaty regarding arms transfers of all kinds of conventional weapons. For this to be effective, it must include all significant arms exporters as a party to the treaty. One is skeptical that Russia and China would agree to such a treaty.

(**Chairman Schneider** adjourned the meeting at 11:30 a.m.)