

Defense Trade Advisory Group Plenary Minutes  
Friday, December 4, 2009

DTAG Chairman William Schneider called the meeting to order at 1:00 PM. He welcomed everyone to the meeting and announced that Assistant Secretary Andrew Shapiro would address the afternoon session. Dr. Schneider said it should be an interesting meeting, the first one at which the State Department's senior leadership has asked the DTAG to look at export reform including options outside the existing statutes. The invitation to consider new approaches to export controls was a result of technology advancements and defense supply chain issues, both important to national security.

Chairman Schneider introduced Assistant Secretary Shapiro, commenting how fortunate the group was to have him speak and noting his impressive résumé and experience working on the Hill as then- Senator Clinton's staff member, making him knowledgeable on export control matters.

**[Presentation by Assistant Security for Political Military Affairs Andrew Shapiro](#)** (click here to view presentation)

Assistant Secretary Shapiro thanked Chairman Schneider, Vice Chairman Sam Sevier, and the DTAG members for their hard work and invaluable service to the Department. He was familiar with the work of the advisory groups from his prior experience at the Department of Justice and assured the DTAG that its recommendations were valued, and that a robust partnership between the State Department and industry was needed on defense trade issues. The U.S. must retain its strategic edge and protect the best technologies from falling in to the wrong hands. The State Department sought the right balance, favoring legitimate trade and protecting U.S. national security interests. Defense trade is an essential diplomatic tool. President Obama is committed to export reform with a goal to ensure U.S. national security in a way that compliments both national security and economic interests.

The State Department is committed to consultations with Congress on export reform and the DTAG is making important contributions. Broader reform does not preclude near-term changes or fine tuning of the existing export control system. The many changes that have been implemented since 2007 have already helped, including dramatic reductions in the export license processing times, now down to two weeks in 2009. The U.S. – United Kingdom and the U.S. – Australia Defense

Trade Cooperation treaties are critical elements and a priority for the U.S., which seeks more effective development of next generation technologies. The Administration has engaged the Senate Foreign Relations Committee and has no illusions about the challenges involved. The ultimate goal is to increase U.S. national security and Assistant Secretary Shapiro expressed his confidence that the DTAG's expertise would assist this effort.

### **Comments by Dr. William Schneider, Chairman, DTAG**

Chairman Schneider thanked Assistant Secretary Shapiro for his comments. Dr. Schneider said it was necessary to consider ways of modernizing the existing current system but at end of the day, statutory changes were needed to effect real change.

Chairman Schneider made a few observations on how military capabilities were created and sustained. Export controls are needed to capture trends as a way to security national security interests. Ten years ago the Department of Defense (DOD) had commissioned a study on the effects of globalization on arms control, and the Defense Science Board (DSB) was asked to identify emerging problems as the defense industry moved from the industrial age technologies to information age technologies. The studies concluded that many cutting edge technologies were not being developed or produced in the U.S. and DOD had to plan accordingly. Increasingly the performance of defense systems was driven by software, not hardware, changes. Advances in algorithms had to be understood and incorporated into export controls as such innovations were occurring outside the U.S. The DTAG's guidance was needed to help address these issues.

DTAG Vice Chairman Sam Sevier introduced Mr. Tom White, who would lead a discussion on the future of export controls. Vice Chairman Sevier acknowledged the direction by President Obama to the National Security Council and the National Economic Council to address national security, foreign policy and trade policy objectives to be understood as a whole rather than as separate parts. He stated that U.S. national security and foreign policy were well served by the present system but that a myopic approach to some export and import control issues had resulted in unintended consequences impacting the defense industrial base and U.S. trade and that Secretary Gates was aware of that on the impact.

Having spent five years on the NATO Industrial Group, Vice Chairman Sevier noted that NATO nations did not share the same industrial equitation for

defense procurement. In the U.S. the DOD is the primary defense market with allies the secondary market and all others the tertiary market. Foreign nations had a different perspective than the U.S. – the rest of the world is the primary market and the European Union (EU) is the secondary market, the reverse of the U.S. philosophy. Thus, with their need to export and given the extra-territorial nature of the U.S. defense export control process, the ITAR has become a four letter word to those whose philosophy differs and their focus on “don’t buy American”, especially at the supply chain level, which is effectively killing it. The Department of Commerce controlled Commercial-Off-The-Shelf (COTS) software and systems are needed to support the DOD products and insufficient attention has been paid to this fact, as commercial companies are increasingly hesitant to engage in DOD work, further eroding DOD capabilities and the supply chain.

Vice Chairman Sevier made the point that “technology” is a process, not a thing. End-items are the things that the technology process makes. He said that the process applies yesterday’s knowledge and toolkit, today’s materials and produces tomorrow’s products. That is how technology develops and it is technology only when it applied. When the U.S. loses market opportunities, it loses technology development opportunities. If the export control process restricts U.S. industry from markets, the result is a loss of an opportunity to row “technology development” and that opportunity goes elsewhere. The U.S. machine tool business went out of business; the market did not go away, but the buyers did. Defense Secretary Gates now faces a situation on where his military supply chain is somewhere outside the U.S. Increasingly, with defense items integrating commercial software, components, subsystems and materials, the U.S. is losing control of defense products and the technology process because of the manner in which the U.S. seeks to regulate them. Creative companies are cautious to engage as DOD suppliers because the relationship may taint their products and impede their global efforts.

**Presentation by Mr. Tom White, DTAG Member - “21<sup>st</sup> Century Export Control System”** (click here to view presentation)

Vice Chairman Sevier turned the podium over to Mr. White, DTAG Working Group Chairman, for his presentation of “21st Century Export Control System”. Mr. White summarized the DTAG overall vision in that the ideas in the presentation were in part without reference to existing laws and regulations and designed to elicit new ideas. Mr. White noted that while national security is paramount, the world has changed and the current licensing system works but at a

cost of handling more than 80,000 licenses requests annually, a better system must evolve.

The briefing slides presented a number of suggestions developed by the DTAG Working Group, following by more definitive suggestions that could be considered as starting points to achieve a new system. The audience was asked to direct questions to the presenter and to participate in an active dialog.

One recommendation was to establish a single point of entry with the U.S. Government, similar to the system in the United Kingdom, while recognizing that different agencies will review different controlled products. From a compliance perspective, it would be enhanced if firms could approach the export control process via single agency rather than having to work with eight or more agencies that currently administer pieces of export compliance. It would not be a single agency for assuming total responsibility for all export controls but having one entry point would greatly simplify the process for exporters, especially small business.

Another suggestion was to transition from an expanding list of commodities to a dynamic system based on national security concerns, with senior level U.S. Government review for unilaterally controlled items.

Transitioning to a trust-based system with industry would create a U.S. Government and industry partnership with an understanding of how to manage pre-approved configurations approved for export. To highlight this point, Mr. White used the example of an aircraft program authorized for export by the U.S. Government and Congress that would offer a lifecycle authorization for parts, data and maintenance services, eliminating the requirement for additional licenses.

Regardless of recent U.S. Government and DTAG efforts to review the ITAR and U.S. Munitions List (USML), nothing comes off the list and only new items added. This concern was coupled with a point made earlier in the meeting that many new programs were not constructed of predominantly "military" materials and subsystems, but rather grew out of open architecture and COTS developments and since list based controls are utilized, perhaps a move towards a system similar to the Commerce Control List (CCL) with tier groups for individual countries. A new export control system should understand what is controlled, and why and how, and can it even be controlled. Vice Chairman Sevier commented that unilateral U.S. controls should be a conscious effort that had senior level insight and took into consideration the national health such as industrial base and

trade. An example used was rad hard chips in that they are difficult to control and perhaps should not be controlled if the preceding review points were applied.

Several from the audience requested copies of the DTAG presentations and Mr. Sevier indicated the presentation would be posted on the DDTC website.

Mr. Sevier continued that industrial policy and trade policy are not issues the DOD technology review community is involved in. Reform was needed in the areas of license provisos and technology release reviews which are not done by special boards and bodies with the DOD, with only a view to national security. Such action drive small companies out of business who do not understand DOD technology release system.

Chairman Schneider noted that this situation has perverse consequences, such as when foreign policy is subjugated to technical security, in essence setting defense industrial limits and impacting foreign policy such as the U.K. arrangements. Treaty support is a constructive path around this obstacle.

A non-DTAG attendee who spoke on behalf of the Foreign Users Group, indicated that the U.S. sells systems that receive all necessary government approvals yet more approvals are required during the system lifecycle. The participant spoke on the Canadian F-18 modernization program and how many more approvals were needed beyond the initial U.S. Government approval for the aircraft. However, the participant noted that she met with DDTC officials on the CF-18 modernization issue, which included over 100 separate transactions, and had successful discussions in reducing or combining many of the transactions. The recommendation was that allied customer countries needed a license-free life-cycle authorization.

Another non-DTAG attendee said the U.S. should get away from “stuff” and commercial commodities, and address capabilities, which involves intellectual property. Commodities become weapons systems after application of certain technologies.

Mr. White said there were diagrams explaining the gray area between commercial commodities and applying defense technology and making an item military. He said his presentation focused on capability, not origin or design or modified for.

Mr. Dennis Burnett, DTAG member, urged that the issue be discussed in terms of security of supply, which is the route that the European nations have taken. He cautioned that Europe is building a wall against U.S. defense exports by insisting on ITAR-free supply chains.

Vice Chairman Sevier said it was not about losing base overseas, it was about losing the industrial base within the U.S.

Ms. Joyce Remington, DTAG member, said reducing the amount of U.S. regulated items on a platform would help the U.S. suppliers.

Chairman Schneider offered that a better way to control export is by controlling re-transfer. Protecting equipment from unauthorized re-transfer and use was the issue. Provisions for industrial security (GSOMIA) are contracted for protection between governments. Arms transfers arrangements are handled by State while GSOMIA by DOD, but why not try leveraging GSOMIA by partnering the two Departments?

Mr. Terry Otis, DTAG member, suggested more commonality in export controls would result in harmonizing the systems and offering better controls as well as business opportunities

Ms. Jahna Hartwig, DTAG member, noted the difficulties that export controls pose for academic research where the U.S. does not have the lead in all technologies. It is critical that U.S. institutions be able to work with others on research projects but this was difficult due to the level of bureaucracy. U.S. companies cannot respond fast enough on research projects, even when those projects are in support of U.S. Government programs.

A non-DTAG participant used the example that when Company X creates a product which has a specific military application, there needs to be agreement between DDTC and DOD that the product constitutes a uniquely military capability. The concern expressed was that the product or technology application may be adapted to other product areas and control of its application to all areas would be lost. DOD and industry should work together to identify requirements up-front and that would speed up the process.

Vice Chairman Sevier cited broad terms abound, like “nanotechnology”, that are used in many non-military applications today, many of which are very beneficial in civil applications. Another emerging term is “eco-technology”.

Rather than focus on control of such broad technology categories, better to focus on product capabilities. Need to understand what those terms mean and what types of controls need to be applied.

A non-DTAG participant said that controls are based on national disclosure policy so the control issues cannot always be worked from the bottom up.

Vice Chairman Sevier explained that the current National Disclosure Policy (NDP) process evolved from a purely classified release decision by the National Disclosure Policy Committee (NDPC) which requires an exception to the Policy (ENDP), to today's process of record keeping national security release decisions, which document the technology releases. The NDPC Record of Action that documents the initial decision becomes a "living" record which required an ENDP any time a change needs to be made to the hardware configuration or modification to the data released under that Record of Action. Insofar as using it for controlling products and data on security classification, it is not useful as many ITAR items will always be unclassified. The movement of 500 AIM-9 missiles is of significant national security and probably foreign policy concerns, but the end items will always need to be handled on a flight line somewhere around the world. Thus the NDP process is not a good single entry point for the U.S. export review and authorization (licensing) process.

A non-DTAG member of the public audience said that prior attempts to revise the USML to "higher walls around key items" had only resulted in "higher walls on everything." And to be successful in adding this issue, one must approach DOD, the 8,000 pound gorilla, in order to make changes.

Mr. White responded that DTAG had discussed this point and agreed that the inherent product capabilities were what should determine which items should be controlled and not just the origin of the design. He suggested a more defined list similar to the Department of Commerce's Commerce Control List (CCL) which is very specific as to the item and such specific parameters would help the supply chain issues.

Assistant Secretary Shapiro reaffirmed that Under Secretary Tauscher and Secretary Gates will work together to effect change through export reform. He said that a unique moment is at hand and need to take advantage of the Administration's willingness to address export reform. Chairman Schneider offered that bigger than DOD is Congress and the AECA. Assistant Secretary Shapiro responded that congressional consultations are ongoing but it was

incumbent upon the DTAG to prepare to support those efforts. The Congressional Committees are willing to discuss proposals that are well thought out.

Vice Chairman Sevier offered that it was not just the ITAR but the related compliance issues. And beyond the ITAR were DOC, ICE, DOS, OFAC, essentially seven departments under seven different Congressional Committees and each has unique compliance requirements tied to their legislation. The issues were much broader than just DDTC.

Ms. Andrea Dynes, a DTAG member, asked what would be an effective way to enhance national security because dealing with fragmented agencies is a resource-rich challenge. DDTC needs too many resources to handle the process. There is a need to rationalize the systems.

Mr. White said overall change is needed, through a team effort. Companies, large or small, spend lots of time doing licenses and compliance for the “Joel Johnson hydraulic hoses”. It was important to minimize U.S. controls on widely available items in order to maintain U.S. competitiveness. If an item is approved for one NATO country, why not for all NATO countries? A new system needs to consider the re-transfer issue whereby the U.S. should not control aircraft parts for the life of the aircraft. The ITAR label should be removed from those parts.

A non-DTAG public member commended the Political Military Bureau group now in place for reducing the timelines significantly. The Bureau deserves applause. He continued that the U.S. is not the only technical leader. U.S. companies need their own “embassies” in Washington to navigate through the export control system. And if it is that hard for U.S. companies, consider foreigners.

Mr. Burnett asked if a U.S. person assisting a foreign company to acquire a U.S. company is brokering. Assistant Secretary Shapiro said that brokering was on the agenda later in the afternoon and he would defer to those in the Department who are currently working the brokering issues and revised regulations. But in addition to those regulations, he said one must also consider the regulatory requirements for foreign agents when contacting the USG on behalf of foreign party clients.

Mr. Spence Armstrong, DTAG member, commented that the big vision saw a significant reduction in what is controlled under the ITAR, and transition to one organization as a single point of entry for license issues. Mr. Armstrong had



submitted a paper on this subject to the DTAG for consideration. There was additional discussion of government resources spent on jurisdiction, licensing issues and unintended consequences for the U.S. industrial base, and factors that caused the U.S. domestic industry to be left out of international competitions.

DTAG member Lawrence Keane commented that the current user pay system is wrong and that the activity should be funded with appropriated funds. A non-DTAG participant followed up commenting on the enormous amount of resources used to identify jurisdiction, and to redirect that energy on compliance and provisos. Another non-DTAG participant said they recycled metal, and the price of metal is in the garbage can. Domestic mills stopped buying last fall. Why? Federal Register Notice regarding DFARS and now U.S. steel mills could not compete. Need to make sure domestic industry does not get left out.

A non-DTAG member from the U.S. Navy International Programs Office (Navy IPO) raised concerns about the proper handling of the formal foreign exchange program with military personnel who are assigned to DOD billets. She said it requires that the Navy issue exemptions for those foreign military officers. Those individuals are not here to buy or market, but to engage in a partnership with the U.S., and sometimes they need to interface with contractors. As a result, she was supportive of the idea for a new exemption addressing these types of government-to-government programs.

Mr. White said another item to consider is eliminating the DSP-83 Non Transfer and Use Certificate, which results in significant levels of effort to execute and causes delayed meetings, at times in support of the U.S. services. The process uses up industry resources, making them fly around the world trying to get signatures. Some countries will not sign. Mr. Kovac stated the issue of the DSP83 is a statutory, not a regulatory, issue.

Mr. White said the issue of unnecessary staffing by DOS needs to be addressed. The DDTC staff can make many of decisions internally and further staffing not required. Another issue was to establish an industry/USG dialog on the DTAG definitions discussed at the last Plenary in April 2009. Also need to amend the definition of Significant Military Equipment (SME) because of the implications tied to SME. An example is that Congress must be notified for one single grenade because it is SME, and that needs to change. A Sunset Rule should be adopted with regular reviews of items under control to determine if those items still being on the USML. An example provided pointed out that only drones were controlled under the ITAR, not Unmanned Aerial Vehicles. The life cycle

authorization concept was emphasized in that one an item was approved for export to a party, export approval should be included for spares and life cycle support through the life of the system.

A non-DTAG participant suggested that State consider a bundled approach for sales and expand the user community of those who bought the systems, letting that community have spares without further licensing. An example was offered on the C-130 aircraft was sold to Canada but spare parts cannot be shipped without a license.

Mr. Burnett recommended that the Congressional Notification threshold be raised as the current threshold represents one day's production for many defense companies.

Mr. White commented that the Working Group also recommended for condition the need for updated Congressional Notification thresholds, re-notification criteria and eliminations of double notifications. On re-notification, after the initial notification is made to Congress, after the original value is reached, Congress must again be notified in increments of ten percent so that industry must return to Congress for each ten percent thereafter on the program. That does not make sense. A solution would be to go back for notification when the stated threshold will again be reached. Also, the notification value includes buying and importing into the U.S. which really should not be part of the notification. On the F-35 program notifications, for example, some areas are being notified twice depending on who was doing the work and where.

Mr. White continued with his presentation commentary and said that on the JSF Program, DDTC wrote some guidance which was helpful, along the lines of a Global Project license. The JSF Program also highlighted some other areas that needed work, such as eliminating the signature requirements for Agreements. Currently, a change in scope, a company name change, or similar, requires a new amendment each time and all parties must sign again. There must be an easier way, such as a onetime agreement signature and amendments do not need to be signed except in certain circumstances. The Working Group had also recommended the elimination of the requirements to identify citizens who originated from another country. This generated discussion since it is a significant "human rights" issue for the European Union, Canada and Australia.

Assistant Secretary Shapiro said that the U.S. allies have complained, and want resolution on, on the dual/third country national issue, and he understood the

importance of the issue. A non-DTAG participant commented that on the dual national issue, where one is born is an issue with the U.S. system. Country of birth is not necessarily by election and should not be a determining factor. Canada has ongoing human rights complaints. Canada manages nationality by demonstration of loyalty.

A non-DTAG participant from Navy IPO said that the Navy has expectations that the foreign party assumes obligations under the DDTC Agreements. With regard to third country transfers and GSOMIAs with governments, those third country nationals are not covered under the GSOMIA.

A non-DTAG participant from the Aerospace Industrial Association (AIA) addressed Assistant Secretary Shapiro and indicated that AIA is in “violent agreement” that the export system can be improved. He recommended including DOD and other U.S. agencies of the export compliance system in the discussion of export reform, where the tendency was often to say it was not a particular agency’s problem. The system works for profit but at the same time works for the U.S. customer. Input from government agencies is important insofar as how it affects them. The system must work for U.S. customer and all its customers, domestic and foreign.

Assistant Secretary Shapiro said that Secretary Gates supports involving DOD and he would take back the many great suggestions. Also, other State Bureaus and U.S. Government agencies are involved in the nationality issue as well, working towards a common and rationale position.

A non-DTAG participant stressed that resources are needed for many of the proposed and ongoing changes. Looking at the electronic licensing system, for instance, the function is not adequately resourced. Assistant Secretary Shapiro agreed and noted that Congress wants it done right but must provide adequate resources to State. The best possible case on this issue must be made to Congress.

Mr. Dale Rill, DTAG member, underscored that a bad actor does not care if license is required from Commerce or State. What is needed is to identify today’s threat and then tie it to what should be controlled and how it is authorized for export. Those who follow the system but encounter delays or denials will get the technology or product elsewhere, consequently hurting our industrial base.

Vice Chair Sevier brought up the role of the DOD Executive Committees (EXCOMs); these are outside of DDTC’s licensing process but add time and

requirements. Companies must get approvals from the EXCOMs before submitting a license, adding another layer of complexity and time, with little recourse for action. This is out DDTC's area of control but needs to be considered. A non-DTAG participant, who chairs the AIA Export Controls Working Group, said that her AIA group prepared a point paper on that subject, covering the Tri Service Review, NDP, and other DOD reviews. DOD should coordinate with State on resolving this.

Assistant Secretary Shapiro congratulated everyone for hard work by all, lively discussion and good input, and stay tuned for more.

Following a brief break, Chairman Schneider brought the meeting to order and reviewed the remaining items on the agenda. The next DTAG presenter was Ms. Christine McGinn who chaired the DTAG working group commenting on the 22 C.F.R. 126.4 draft regulations on shipments by or for the U.S. Government.

**Presentation by Ms. Christine McGinn, DTAG Member, "Sec. 126.4. Shipments by or for United States Government agencies."**

(Click here to view presentation.)

Ms. McGinn commented that the draft regulation offered dramatic changes and the working group was very pleased with the overall effort. The comments are primarily clarifications which are presented in a line-in/line-out format on the draft regulation. Some of the general changes included replacing the term "transferred" or "provided" with "exported" as the latter defined term in the ITAR.

A non-DTAG Navy participant said that proposed changes to Section 126.4(a) concerned the Navy because that is how the Navy negotiates Memoranda of Understanding and other documents with foreign parties. Under the current language, the Navy engages with foreign parties, programs give briefings to foreign countries, and other foreign assistance activity occurs. With that exemption language gone, how could DOD engage in that activity other than through issuing individual letters of autorotation for each transaction. Ms. McGinn responded that it was an internal U.S.G. issue. The DTAG addressed the industry issues. Ms. Remington concurred with Ms. McGinn's position and suggested an internal U.S. Government dialog to address the Service issues.

A non-DTAG participant said with regard to completing an Electronic Export Information (EEI) filing, Section 123.22(b) (3) states that an EEI is not required for technical data and defense services and could be fixed by adding

“when required.” A request to file electronically could be done by industry if industry files for the government. Ms. McGinn said it was a good observation and the annotated draft will be revised to reflect that. Another issue is Section 126.4(b) (4) (ii) stating that freight forwarders will be registered with DDTC. Will DDTC publish a list of registered freight forwarders?

A non-DTAG participant from Army Night Vision Labs said the Army wants to retain the Government Bill of Lading (GBL) because there are things the government does that do not involve industry. And the USG does not use EEI. An example is exporting an article for repairs. She also said Section 126.4(a) is used by Army regularly in its international arrangements. Terms such as “leased” and “loaned” also need to be revisited.

This raised questions and discussions about whether and when a U.S. Government official acting in an official capacity is subject to the TIAR. Under Section 126.4 there is increased focus on industry but the proposed language limits the U.S. Government’s authority to only that which is stated in Section 126.4(a) which is the only subsection which authorizes the U.S. Government department or agency to import or export directly for its own benefit – not when U.S. industry exports or imports on behalf of for that agency or department. A recommendation was made that Section 126.4(b) be amended to state that a contract with the U.S. Government is sufficient to use an exemption.

There was a question from the floor about how to send in comments to DTAG regarding the changes. Chairman Schneider commented that there was not sufficient time at the Plenary to discuss all changes, to send written comments to the relevant DTAG committee for consideration for their rewrite. The comments must be received by DTAG by December 11 as that was the date for DTAG to finalize its input to State. The audience was reminded that Section 126.4 and Part 129 being discussed would eventually be issued under a Federal Register Notice for official comment and offer another opportunity for public comment. The internal dialog between the departments should continue.

A non-DTAG participant observed that the proposed draft regulations would not support exports to Afghanistan to U.S. forces, and from the U.S. forces to coalition partners. That chain would not work because the items cannot be released to a foreign person since the regulations would limit the items to USG use only.

Another question from a non-DTAG audience participant regarding foreign assistance and security assistance inquired if a DOD contract covers ties between contactor and subcontractors. The DTAG Working Group suggested that DDTC include a footnote or explanation of what constitutes “foreign assistance authorized by law.” Additionally, cross-servicing agreements need defining in Part 120 or a footnote within Section 126.4(g).

Ms. McGinn explained that the presentation was renumbered and now the discussion was focused on (e) – and the renumbering was done by the DTAG as additional entries added – the DTAG asked that the term “cooperative project agreement” be defined. And perhaps should be reworded so as to not limit DHS or NASA work.

The Navy expressed liability concerns with such rewording. The export reform efforts were positive but on behalf of the Services, it seemed confusing and removed some existing Service authorities

A non-DTAG participant inquired as to why technical data was removed from that subsection. Ms. McGinn responded that because when conducting repairs, the intent is not to export technical data. If the intent is to provide technical data, then that would be another section. Repair in this section means a technician travels to the product and repairs it and does not need to export technical data to do it because the technician is performing a service. Mr. William Wade, a DTAG member, observed that Section 120.9 states that defense service includes technical data so that entry would need to be revisited.

Ms. McGinn said the proposed regulations under “(n)” states freight forwarders must be registered. Will that create a new registration category? That needs to be addressed.

Mr. Wade said the draft regulations could end up being more work for Navy IPO as no one wants a “Lt. Smith” granting a written authorization. At which DOD level will authorizations be granted? If high level needed, it could be faster to obtain a license.

A non-DTAG audience member was concerned that international agreements under the Space Act may not be covered under AECA and hence, would not qualify for the exemptions. They also raised the question of how to rewrite these exemptions and address exports to prohibited countries when the U.S. and its coalition partners are engaged in conflicts within those regions? A follow on comments by a NASA representative said that the data transferred is not NASA

data – it is Boeing or Lockheed Martin data under intellectual property arrangements. And transfers are not limited to GBL.

DDTC Managing Director Robert Kovac said it would be necessary to obtain the DTAG position first on all these questions and then to get the U.S. Government position. He expressed his appreciation to the government speakers' for their input. And because the draft regulations will be published as a proposed rule, the public will have another opportunity to comment as well.

Chairman Schneider said comments regarding this section should be sent directly to Christine McGinn at [Christine.mcginn@cobham.com](mailto:Christine.mcginn@cobham.com) . (Comments were due by December 11, 2009.)

**Presentation by Mr. Dennis Burnett, DTAG Member, “Brokering”**  
(Click here to view presentation.)

Mr. Dennis Burnett, DTAG Part 129 Working Group chairman, presented a briefing on DDTC's proposed change to the brokering regulations. The deliverable product totaled 37 pages of line-in and line-out comments on the draft brokering regulations and was too large to review at the Plenary in that format. Therefore, Mr. Burnett gave a high-level presentation that addressed two aspects of the brokering language: (1) the structure and logic of the regulations and, (2) a series of examples with corresponding draft text that would highlight the need for specific changes.

To start the discussion, Mr. Burnett began with the “Decision Tree” and suggested re-organizing the regulations to flow better, such as placing “Policy on Embargoes” after “Procedures for Obtaining Prior Approval”. The DTAG also suggested keeping registration requirements for brokers in the existing Part 122, preferably using only one registrant “form”, the DS-2032, which may need to be revised. He also suggested that Part 129.2(c) be moved and included as a new Part 129.3, which would create a better flow.

Mr. Burnett discussed several examples of what the DTAG considered to be or not be brokering; these examples were contained in the summary presentation. One example was that providing translation services was not brokering, but that other regulations may apply regarding foreign access to technical data if the translation included controlled data.

A non-DTAG participant suggested changing Section 129.2(b) from “directly facilitates” to “materially facilitates” to which Mr. Burnett agreed that it was an improvement. Mr. Burnett continued that to “interact” in identifying potential players was not brokering. Mr. Burnett lead a discussion of what constituted brokering, arguing that a party acting for its own and if a company is part of a larger group of family of companies, its actions should not be considered brokering. In addition, simply “acting as a finder of potential” suppliers” should not be considered brokering.

Another example discussed was commercial satellites (COMSATS) and that although USML, the sale is treated commercially internationally. Lawyers or intermediaries put together deals as a consortium for the sale of the satellite and for the leasing activities thereafter (for transponder and support services). Yet COMSATS are clearly under the AECA and are USML articles. Can COMSATS be exempted from brokering because they are so unique with various intermediary parties engaged? And could those parties be exempted because they are integral and directly involved in the transaction, such as lawyers.

A non-DTAG participant commented that if lawyers were directly involved and therefore captured as brokers, their attorney-client privilege relationship would prevent them from providing some of the reporting information required of brokers and the company would need to file the report the brokering.

Mr. Burnett continued that another example is a German company selling German made aircraft with U.S. components who hire a Pakistani located in Pakistan to market the aircraft to the Pakistani Air Force. Since the sale is contingent upon USG approval and some sort of licensing authority required, the activity is not brokering and the Pakistani should not need to register. The USG makes the final decision on whether or not the sale goes through. Brokering should not cover transactions otherwise covered by other approvals. Germany selling Star fighter aircraft with U.S. components would require retransfer authority so why is a brokering approval required?

Another example discussed was the view that under a warehouse and distribution agreement, the party would not be acting as a broker.

A non-DTAG audience member commented that extraterritoriality was a matter of the AECA and it would be helpful if DDTC could address the national security and foreign policy objectives of applying brokering registration to foreign persons when the activity involved would be licensed. Since the transfer of ITAR



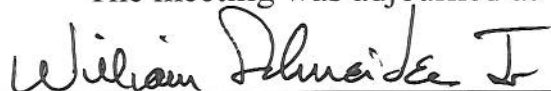
controlled articles, services or technical data is covered by an export license, what is the national security benefit being achieved via licensing brokers? Brokering should cover transactions that are not otherwise covered. He also suggested that DTAG should ask State what is the national security justification on extraterritoriality.

Mr. Otis referred to a historical issue related to extraterritoriality regarding electronic sales over the internet and that anyone could buy defense articles. This was a DTAG issue about four years ago and a "Note" was inserted in the in the current draft brokering regulations about this issue. Expectations are that this issue that will be addressed in more detail at a later date.


**Closing Remarks by Chairman Schneider**

Chairman Schneider expressed his appreciation to the DTAG member and their hard work, and to the audience for attending and engaging in a constructive dialog. He requested that public comments should be sent to the DTAG Recorder, Mr. Otis as well as to the individual committee chairs who presented that day. He mentioned that Mr. Shapiro was testifying on Dec. 8 before Congress, and then the DTAG would have a better idea on how to proceed. He reminded everyone that in sending information, the DTAG could not accept any information with legends of a propriety or confidential nature.

The meeting was adjourned at 4:25 PM.

  
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William Schneider, Jr.  
Chairman  
Defense Trade Advisory Group

30 JAN 2010  
Date

  
\_\_\_\_\_  
Robert S. Kovac  
Designated Federal Officer  
Defense Trade Advisory Group

2 Feb 10  
Date