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Recent ITAR Developments Affecting The Multinational Workforce

Introduction—Increasing attention—by regulatory agencies, the press, and those studying U.S. export control policies—is being given to policies and interpretations concerning the export and transfer of defense articles, e.g., hardware munitions, software, and technical information, and defense services to (1) foreign persons working in the U.S., and (2) third-country foreign citizens or nationals, and dual citizens or nationals employed by foreign entities, including foreign incorporated subsidiaries or affiliates of U.S. companies. By way of background, the Arms Export Control Act (AECA), 22 USCA §§ 2751–2796, authorizes the U.S. Department of State Directorate of Defense Trade Controls (DDTC) to control the export of defense articles. The AECA's mandate is implemented through the International Traffic in Arms Regulations (ITAR), 22 CFR §§ 120–130. Under the ITAR, any export, reexport or retransfer of ITAR-controlled defense articles or defense services to a “foreign person” or “national of a third country,” wherever located, is prohibited, absent DDTC authorization or an exemption. Such transfers are viewed as exports destined to that foreign person's countries of citizenship and/or nationality requiring an approval based on the citizenship or nationality of the individual, as opposed to that person's location or employer.

DDTC's export policies in this area cause unique ITAR compliance challenges for parties engaged in defense trade. A recent amendment to the ITAR, effective Dec. 19, 2007, however, has somewhat relieved the licensing burden on foreign parties with respect to their employees from North Atlantic Treaty Organization (NATO) members, the European Union (EU), Australia, Japan, New Zealand or Switzerland who

now, in many instances, can be covered and more easily authorized by DDTC licenses.

Basic Prohibitions—The definitions of defense service, export, reexport and retransfer in ITAR § 120 prohibit the transfer of ITAR-controlled articles to foreign persons without DDTC approval. These regulations can apply to foreign persons both in the U.S. and abroad.

ITAR §§ 123.1, 124.8(5) and 125.1(c) preclude any retransfer of defense articles or defense services pursuant to an approved technical assistance agreement (TAA), manufacturing licence agreement (MLA), or other DDTC license to third countries or citizens (or, it appears, “nationals of third countries”), unless authorized in the agreement or license granted by DDTC. Consequently, all non-U.S. persons, with certain exceptions provided under ITAR § 124.16, who are employed by a foreign party to a TAA or MLA must be authorized for access to defense articles or defense services exported to the foreign party, including those persons who reside within the country of the foreign party's location but who may have a different citizenship or nationality, or dual citizenship or nationality, from their country of residence.

One policy rationale underlying these export rules is to prevent the transfer of ITAR-controlled articles, technology, software and services to citizens or nationals of “proscribed” countries with which U.S. persons are prohibited from entering into defense trade under ITAR § 126.1 (e.g., People's Republic of China, Cuba, Iran, North Korea, Sudan, Syria or Venezuela). See DDTC's embargo reference chart at www.pmdtcc.state.gov/country.htm. Companies operating under a TAA or MLA cannot allow the transfer or disclosure of ITAR-controlled items to proscribed country citizens or nationals, or to such individuals in the U.S. considered foreign persons, and authorizations from DDTC for such disclosures are difficult, if not impossible, to obtain. Consequently, third-country foreign citizens or nationals cannot have access to ITAR-controlled defense articles or defense services unless specifically authorized by DDTC, and in no case can a proscribed country citizen or national be permitted access to such ITAR-controlled articles absent a waiver to the restriction on granting such authorizations. See, e.g., ITAR § 126.3.

Recent Amendment to the ITAR—On Dec. 19, 2007, DDTC issued in the *Federal Register* (72 Fed. Reg. 71785–87) new ITAR § 124.16 to authorize, with less specific licensing scrutiny, third-country and dual citizens or nationals *exclusively* of countries in NATO, the EU, Australia, Japan, New Zealand and Switzerland (NATO-plus countries) who would receive unclassified defense articles and ITAR-controlled technical data or defense services as employees of a party to a valid TAA or MLA. (The persons cannot hold citizenship or nationality from a country other than NATO-plus countries identified in the regulation.) These procedural changes also apply to employees of sub-licensees that are authorized under the TAA or MLA.

Retransfers may occur under this provision only if the third-country foreign or dual national or citizen is located completely within the physical territory of a NATO-plus country or the U.S. When submitting agreement transmittal requests, see ITAR § 124.12(c), exporters must list all relevant § 124.16 countries to be authorized for dual or third-country nationals or citizens. In the future, however, persons from these NATO-plus countries will no longer need to execute nondisclosure agreements (NDAs). Existing agreements must be amended to effectuate this change, and, on March 4, DDTC issued specific transmittal letter requirements for obtaining agreement or amendment authorizations pursuant to ITAR § 124.16 and updated its Guidelines for Preparing Agreements at www.pmdt.c.state.gov/dual_nationals.htm and www.pmdt.c.state.gov/licensing_guidance.htm.

Although this rule may improve the efficiency of authorizing access to ITAR-controlled articles or services for certain dual or third-country citizens or nationals, it will not change DDTC's general policy of denial for proscribed country citizens or nationals. Therefore, if a person is a citizen or national of a NATO-plus country, but also holds proscribed country citizenship or nationality, the person presumably will not be authorized by DDTC for access to ITAR-controlled articles under this process. In addition, dual or third-country citizens or nationals of non-proscribed countries not identified in § 124.16, such as India, South Korea, Russia, or numerous South American and Middle Eastern countries, among others, will not reap the benefits of this new provision even if they are NATO-plus country citizens or nationals as well. Furthermore, if authorized, such persons still may be required to execute an NDA before the foreign party is permitted to transfer ITAR-controlled defense articles, technical data or defense ser-

vices to them under the approved TAA or MLA. This amendment therefore retains basic ITAR compliance obligations discussed below.

Foreign Persons Working in the U.S.—The application of DDTC's export control rules to foreign persons working in the U.S., from a compliance perspective, is relatively straightforward: If an employee is a "U.S. person," including a naturalized U.S. citizen, U.S. permanent resident (e.g., green card holder), or lawful political asylee or refugee, that person may be transferred ITAR-controlled articles or services without DDTC authorization, no matter the country of origin or nationality of that person, except in instances in which classified defense articles are involved and that person does not qualify for an appropriate level of security clearance (as would typically be the case, for instance, for green card holders).

ITAR § 120.15 states that a U.S. person, either natural or corporate, means one "who is a lawfully permanent resident as defined by 8 U.S.C. § 1101(a)(20) or is a protected individual as defined by 8 U.S.C. § 1324b(a)(3)." Conversely, ITAR § 120.16 states that a foreign person, either natural or corporate, means one "who is not a lawfully permanent resident as defined by 8 U.S.C. § 1101(a)(20) or is not a protected individual as defined by 8 U.S.C. § 1324b(a)(3)."

By operation of these regulations and the applicable U.S. immigration statutes, a foreign person, for purposes of U.S. export control policy, is any person who is not a U.S. citizen, lawful permanent resident, political asylee, refugee or another member of a limited class of "protected individuals." U.S. persons cannot release or disclose ITAR-controlled defense articles or defense services, including technical data, to foreign persons employed in the U.S. without DDTC authorization. Thus, a U.S. company that deals in ITAR-controlled defense articles is obligated to determine whether any of its employees or subcontractors are foreign persons.

Identified foreign persons who are employed in the U.S. can receive ITAR-controlled defense articles or defense services only if they are covered by a DSP-5 authorization for foreign national employment. DDTC must approve a DSP-5 license before any foreign national is given access to ITAR-controlled technical data. (If a foreign person employed in the U.S. is to receive a defense service, e.g., training in the use of defense hardware, from the employer or another U.S. person, the technical assistance provided by the U.S. person to the foreign person employee may require a separate approval, e.g., a TAA, in addition to the DSP-5 approval for employ-

ment). The company must provide information about the foreign person for submission in the DSP-5 application, as well as require the foreign person to execute an NDA. DDTC guidance for completing DSP-5s for foreign national employment can be accessed at www.pmdtdc.state.gov/docs/Foreign_National_Employment.doc.

Foreign Persons, Third-Country Citizens and Nationals, and Dual Citizens and Nationals Employed by Entities Abroad—Unlike the rules for companies in the U.S., even if a person is a citizen or permanent resident of an authorized transfer territory, entities abroad should take reasonable efforts to evaluate personnel based on a consideration of all their relevant citizenships or nationalities. The most recent citizenship or nationality does not govern the analysis. In certain cases, this requirement may cause a foreign entity's citizen or permanent resident employees of an authorized transfer territory to be disqualified from having access to ITAR-controlled defense articles, technical data or defense services.

Many foreign entities, including U.S. subsidiaries, have entered into various contracts and subcontracts for which they have obtained certain ITAR-controlled defense articles, technical data and defense services pursuant to DDTC authorizations. These authorizations, and any limits thereto, often are provided in the form of TAAs, MLAs and other licenses. As foreign entities authorized by DDTC's licenses, they are subject to applicable ITAR export control provisions.

Noncompliance with these requirements can result in substantial consequences. A DDTC enforcement action against General Dynamics/General Motors (GD/GM) in November 2004 imposed a U.S. \$20 million penalty for the retransfer of ITAR-controlled technical data by the company to its dual national and third-country foreign national employees. The draft charging letter and consent agreement for the GD/GM case is available at www.pmdtdc.state.gov/ca_generalmotors.htm. DDTC found that GD/GM violated the ITAR because it transferred controlled technical data to non-U.S. persons, including those who were "proscribed national employees [that] were either citizens of or born in the following proscribed destinations: the People's Republic of China, Syria, Iran, and Afghanistan."

Meaning of Foreign National and Dual National—Although the ITAR provide a definition of a "foreign person" in the United States, they do not clearly address issues of third-country citizenship or nationality. In applying the prohibition on reexports and retransfers to citizens or nationals of a third country in

the context of TAAs or MLAs between U.S. and non-U.S. companies, DDTC has interpreted the ITAR as prohibiting transfers both to dual national employees and to third-country foreign national employees. Most notably, DDTC's guidelines for preparing agreements, available at www.pmdtdc.state.gov/ag_guidelines.htm, state that DDTC approval is required for reexports to third-country foreign national employees and dual national employees. Neither term is defined in the guidelines or in the ITAR.

For purposes of ITAR compliance, and because of its foreign policy making authority, DDTC has broad discretion in determining rules and guidelines concerning third-country foreign citizens or nationals and dual citizens or nationals who can and cannot have access to ITAR-controlled defense articles or defense services, including technical data.

Under both international and U.S. law, the legal meaning and concept of "nationality" can be broader than the definition of "citizenship." U.S. immigration laws define "national" as a "person owing permanent allegiance to a state," such as a permanent resident or citizen. See 8 USCA § 1101(a)(22). Pursuant to 8 USCA § 1408, however, it is possible to be a U.S. national without being a U.S. citizen. Therefore, DDTC will consider factors other than citizenship as relevant and potentially determinative of dual or foreign nationality. Persons subject to the ITAR—whether U.S. persons in the U.S. or foreign persons abroad with access to or custody over ITAR pursuant to a TAA- or MLA-controlled articles or technology—should therefore make reasonable inquiries, obtain information and manage employment decisions with sensitivity to citizenship and nationality factors. In the absence of more fulsome DDTC guidance, these factors potentially include circumstances such as all citizenships (e.g., by birth, blood or naturalization), foreign passports held (valid or expired), countries of permanent residence or domicile, and foreign military service, among others.

DDTC has declined to adopt various proposals by the Defense Trade Advisory Group that would interpret the term third-country national to include a person who is not a citizen of the TAA or MLA territory, or would establish that a person who is a citizen of the TAA or MLA territory is not considered a national of a third country unless the person also is a citizen of a proscribed country. Because of national security concerns relating to proscribed countries, DDTC has expressed the view that those persons seeking authorizations under the ITAR should consider all citizenships, nationalities

and countries of birth of foreign-party employees when requesting approval to permit such persons to access ITAR-controlled articles or services.

For example, the GD/GM draft charging letter indicated that, at least for persons from proscribed countries, the lack of current citizenship from a proscribed country does not prevent the person from being treated by DDTC as a dual national. DDTC apparently viewed Canadian citizens born in a proscribed country as dual nationals. This view from DDTC has been rather opaque to date. However, it appears to be reflected in the *Federal Register* notice promulgating ITAR § 124.16, in which DDTC states that for ITAR compliance purposes, “any individual from a country other than the country which is the foreign signatory to the TAA/MLA should be considered a third country national. A third country national may also be a dual national if he holds nationality from more than one country. In addition to citizenship, DDTC considers country of birth a factor in determining nationality.”

Furthermore, in a FAQ issued by DDTC regarding the Canadian exemption in ITAR § 126.5, a question inquires about the responsibility of exporters in the case of a Canadian dual national or permanent resident who also holds nationality from a country proscribed under ITAR § 126.1. DDTC responds that the ITAR exemption does not cover the situation posited, particularly for transfer of such an item to “a person with citizenship or nationality of a country to which U.S. defense exports are prohibited by law.” DDTC advises that if the “U.S. exporter knows or has reason to know that the export would result in a transfer or sale to the proscribed destination, then the exporter should not allow the export to proceed under the exemption” and should consult with DDTC. (This FAQ seems to treat citizenship and nationality as separate concepts, although they are equally disqualifying, but it is not clear when the prohibition applies.) Unfortunately, DDTC has provided no guidance to the defense industry on definitively determining citizenship or nationality, nor on whether any mitigating factors exist to disprove third-country ties, particularly any circumstances that might discount or remove proscribed country citizenship or nationality. This is an area in which guidance is sorely needed.

Nonetheless, in accordance with the formal guidance and informal statements issued by DDTC, to comply with the ITAR, dual national and third-country foreign national employees could be evaluated in the following contexts, although it must be noted that definitions or interpretations are not at all clear on the face of the ITAR,

are not necessarily uniformly understood or agreed to by industry, and have not been subject to judicial review.

Dual National: A person who is not a “U.S. person” and who is a citizen of one country, as well as a national or citizen of one or more countries, as evidenced by (a) currently holding a passport from or citizenship of a third country; (b) previously holding a passport from or citizenship in a third country; (c) being born in a third country; or (d) having other nationality ties, such as permanent residency or foreign military service, to a third country.

Third-Country Foreign National: A person who is not a “U.S. person” or a citizen of a TAA or MLA party country, but only a lawful permanent resident, temporary work visa holder or visitor to that country.

Basic ITAR Compliance Objectives—To remain compliant with DDTC’s export control rules, companies engaged in defense trade of ITAR-controlled items should, when feasible, establish an export control compliance screening program that accounts for citizenship and nationality, and, if in the U.S., simply confirm whether their employees are considered U.S. persons as defined by the ITAR. Obviously such procedures must be sensitive to, comport with, and carefully consider all laws or regulations relating to discrimination, human rights and personal privacy. Technology control plans and program export import control plans are useful tools to ensure that ITAR-controlled hardware, software, technical data and services will not be transferred to unauthorized foreign persons, dual nationals or third-country foreign nationals. As noted above, if such transfers are contemplated, the entities must request DDTC authorization to cover them by a TAA, MLA or DSP-5.

Although U.S. law generally prohibits unfair immigration-related and employment-related practices, certain exemptions, e.g., 8 USCA § 1324b(a)(2)(C) and 42 USCA § 2000e-2, should provide a basis for a U.S. company in the possession of ITAR-controlled defense articles to make certain inquiries of its employees for ITAR compliance purposes. If the company determines that an employee is not a U.S. person and may require access to ITAR-controlled defense articles or defense services, it may inquire further about more specific citizenship or nationality aspects of that employee. Any questionnaire or other screening mechanism for doing so, however, should be reviewed carefully by both export control and labor counsel, and may have to be fine-tuned based on factual circumstances.

Similarly, for ITAR compliance purposes, foreign persons subject to a TAA or MLA should solicit information from their personnel when making staffing and

licensing decisions. However, many countries such as Canada and the UK have enacted privacy and human rights legislation that restrict firms' ability to collect personal nationality data and make employment decisions based on them. Some countries, including Australia, have a lengthy exemption application process that must be pursued through state human rights tribunals. These local law requirements create challenging obligations for foreign entities. Nonetheless, DDTC expects all foreign entities to observe ITAR compliance responsibilities and not rely on local law restrictions to justify a position of noncompliance.

It should be noted that the Canadian Department of National Defense (DND) and other Canadian government agencies have agreed to restrict access to ITAR-controlled items by their employees who are issued a minimum SECRET-level security clearance (and will not grant clearances to personnel with ties to known terrorist groups or who maintain significant ties to proscribed countries). In exchange, DDTC has revised its export authorizations to permit Canadian citizen and dual national DND employees—provided that they hold a SECRET-level security clearance—access to ITAR defense articles and services without specific identification of individuals, countries of dual nationals and execution of NDAs. *This policy does not extend to private companies in Canada.*

Additionally, the U.S. State Department has articulated a policy whereby Australian nationals who have third-country nationality and work on cooperative projects with the U.S. Government or military projects with the Australian Department of Defence no longer need separate DDTC authorization if they (1) hold a valid security clearance issued by Australia's vetting service, (2) are not nationals of a country proscribed by ITAR

§ 126.1(a) and (3) have a valid need to know, unless specifically restricted by DDTC. DDTC's rules concerning dual nationals and third-country nationals with respect to Australia and the UK also could be clarified pursuant to bilateral cooperative defense treaties that have been signed with the U.S. and are in the process of being ratified by the U.S. Senate.

Despite these allowances and the adoption of ITAR § 124.16, DDTC's rules and policies for controlling transfers of technology to dual citizens or nationals and citizens or nationals of third countries are nebulously defined for the U.S. and foreign defense industry, and must be cobbled together from a mosaic of various notices, enforcement actions, guidance documents and statements by DDTC officials. Until DDTC publishes clearer and more complete guidance about citizenship and nationality factors, significant uncertainty will remain regarding the application of these rules, particularly to those countries that are not considered U.S. allies with strong export control policies. Therefore, Government contractors must proceed with caution when considering the state of ITAR compliance with these regulations and policies.



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