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DDTC's Sue Gainor Sees Changes Coming in Enforcement Cases

Defense exporters should not expect future consent agreements with State's Directorate of Defense Trade Controls (DDTC) to look the same as past settlements, Sue Gainor, DDTC's director of compliance, told our sister publication, *The Export Practitioner*, in an exclusive interview. "It would not be prudent to conclude that the next consent agreement will focus on the same things the last consent agreement focused on," she said. Although it has been over a year since DDTC reached its last consent agreement, new cases could be coming soon, she indicated.

Editor's Note: The first part of this exclusive, two-part interview with Gainor was published in the July issue of *The Export Practitioner*. A free copy will be sent to WTTL subscribers on request.

Gainor, who has held the DDTC compliance post since November 2013, also addressed how the agency is working with the Bureau of Industry and Security (BIS) to handle compliance for items moved from the U.S. Munitions List (USML) to the Commerce Control List (CCL). "Our goal is to be sure that where there's an overlap, we're talking with them; and we're also talking with them on the more theoretical approaches to compliance," Gainor noted. Despite the transfer of thousands of licenses to the CCL from the USML, DDTC plans to add staff to the compliance office to assure that "higher fences" will be around the items that remain on the USML, she said.

DDTC is "revamping and retooling" the company visit program with a new focus on universities, she told *The Export Practitioner*. "We have actually hired somebody whose primary responsibility will be relaunching the company visit program. We've designed a more structured approach to how we select companies that we seek to visit," she said. As part of the new program, DDTC is taking a closer look at universities. "I wouldn't characterize it as needing more attention, as much as saying, we're not as familiar with what they do, and there's the potential that they're not as familiar with us," she said.

Expectations High for TPP Talks in Hawaii at End of July

The announcement that the U.S. will host a meeting of Trans-Pacific Partnership (TPP) trade ministers in Maui, Hawaii, July 24-27 has raised hopes that the session could

produce an agreement that will bring negotiations close to a conclusion, if not in July, shortly afterward. U.S. Trade Representative (USTR) Michael Froman will head to the meeting with fast-track trade promotion authority (TPA) in his pocket, while his counterparts will no longer be able to hide behind the lack of TPA to avoid making a deal.

Ahead of the meeting, Acting Deputy USTR Wendy Cutler flew to Japan July 7 for another round of bilateral talks with Japanese officials on market access and automotive trade. As with the other TPP partners, Tokyo has held back from making the painful concessions it needs to make to get into a TPP deal, and the latest talks will determine whether the government of Prime Minister Shinzo Abe is serious about entering into an agreement.

The endgame for TPP negotiations was also signaled by the visit to Washington July 6-8 of the secretary general of the Vietnamese Communist Party Nguyen Phu Trong. The Communist official, who is the de facto leader of the government, had a lengthy meeting with President Obama July 7, and the two governments issued a joint vision statement covering a wide range of bilateral issues, including TPP. In an appearance with Obama and in speeches at other venues in Washington, Trong gave few details on what Hanoi is willing to give in the negotiations.

In the vision statement, the two countries said they “expect to work in close coordination with the other negotiating parties to conclude the ambitious and comprehensive Trans-Pacific Partnership (TPP) agreement as soon as possible and to carry out whatever reforms may be necessary to meet the high standards of the TPP agreement, including as necessary with respect to commitments relating to the 1998 ILO [International Labor Organization] Declaration of Fundamental Principles and Rights at Work.”

During his appearance at the White House with Trong, Obama said the leaders discussed “the enormous potential of a high-standards trade agreement that raises labor standards, raises environmental standards, and could potentially create significant job growth and prosperity for both the Vietnamese and the American people.”

Trong’s statements didn’t satisfy Rep. Sander Levin (D-Mich.), ranking member of the House Ways and Means Committee. “Labor reform in Vietnam must mean more than lip service – it must mean concrete action that complies with basic international standards before, not after, an agreement,” he said in a statement. “It must be made clear during the General Secretary’s visit that TPP will require meaningful implementation of international standards so there’s a real right of assembly, including the right of workers to choose their representatives and their own organizations at all levels,” he added.

In the joint statement and in a speech to the Center for Strategic and International Studies (CSIS) July 8, Trong emphasized the geopolitical and defense relationship between Hanoi and Washington. While TPP will be a cornerstone for future bilateral relations, Trong made it clear that cooperation on defense and military aid will play a larger role, particularly in addressing Vietnam’s conflict with China over islands in the South China Sea and freedom of navigation in those waters.

At CSIS, Trong said human rights issues “should not be an obstacle to the growing momentum of bilateral ties.” Asked about the arrests of dissidents in Vietnam, he said those in jail were arrested “because they violated the law.” He said his country is amending its laws to increase human rights and freedom of expression, but “at the same

time, we must recognize that the rights of each individual be put in the context of the collective rights of the community,” which sounded like code for the Communist Party.

EU Parliament Insists on Retaining Rules Under TTIP Deal

The European Union’s (EU) Parliament adopted recommendations July 8 for what it expects to see in a final U.S.-EU Transatlantic Trade and Investment Partnership (TTIP) deal, insisting that many of the current EU rules and policies remain untouched by the agreement. Just as Congress laid out its trade negotiating wish list in the fast-track trade promotion authority (TPA) bill enacted June 29, the Parliament’s advice could become critical to a final deal because the Parliament, just like Congress, will have to approve implementation of any final accord under EU law.

“As parliamentarians, it is our democratic duty to shape this process. If it is to work for the benefit of the people, then it cannot be left in the hands of the negotiators alone,” said Bernd Lange, chairman of the Parliament’s international trade committee and a German member of the Socialist and Democrats Alliance, during the debate on the recommendations. “That is why we have drafted this resolution and spelt out the principles for the kind of trade agreement we want the Commission to conclude,” he added. The resolution was approved by a 436-241 vote, with 32 abstentions.

After the vote, EU Trade Commissioner Cecilia Malmstrom told the Parliament she welcomed the debate. “I hope the debate has also clarified some of the things TTIP will not do: TTIP will not in any way affect EU public services, nor will it in any way undermine the power of EU or national Parliaments. And it will certainly not undercut core EU legislation in areas such as food safety or environmental protection. These fears are unfounded. TTIP is about delivering quality jobs and high standards, and about building a partnership that allows Europe to be a shaper of globalization, not its passive observer.”

Among the 69 recommendations adopted, a key section continues to support creation of an investor-state dispute-settlement (ISDS) mechanism but with certain conditions. The Parliament wants ISDS to be “limited to post-establishment provisions and focus on national treatment, most-favoured nation, fair and equitable treatment and protection against direct and indirect expropriation,” with protections and definitions “drawn up in a precise legal manner” to protect the right to regulate in the public interest.

The lawmakers also call for ISDS to “ensure that foreign investors are treated in a non-discriminatory fashion, while benefitting from no greater rights than domestic investors.” They want to replace ISDS with a new system that “is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives.”

Malmstrom agreed that “the old system of investor-state dispute settlement should not and cannot be reproduced in TTIP.” She said Parliament’s call for a new system “must be heard, and it will be.” Malmstrom noted that she had proposed changes to the ISDS system in May. “I will now press ahead to flesh these out, and transform them into legal

proposals, so that these further reforms can be incorporated into Europe's proposals for TTIP," she promised. The Parliament resolution also calls for eliminating agriculture tariffs "while respecting that there are a number of sensitive agricultural and industrial products on both sides" that will need appropriate transitional periods and quotas and in a few cases their exclusion. The resolution also seeks inclusion of a "safeguard clause" that could be invoked when a rise in imports threatens to harm domestic production.

In the services section, the Parliament recognizes that the EU has "offensive issues" that are important to European industries. These include engineering, professional services, telecommunication, financial or transport services. It says TTIP provisions on services should include a "hybrid list approach" using a "positive lists" for market access where services open to foreign companies are explicitly mentioned and "new services are excluded."

It would allow flexibility to bring "services of general economic interest" back into public control while taking into account the emergence of new and innovative services and use a "negative list approach" for national treatment. Among the U.S. restrictions that it wants removed are the Jones Act, Foreign Dredging Act, the Federal Aviation Act and the U.S. Air Cabotage law plus capital restrictions on foreign ownership of airlines. The Parliament wants any deal to exclude services of general economic interest, including but not limited to water, health, social services, social security systems and education.

The Parliament also urges EU negotiators to specify that nothing in TTIP will prevent the EU or member states from subsidizing or providing financial support to cultural industries and cultural, educational, audiovisual and press services. In addition, it wants the deal to recognize "that, where the EU and the U.S. have very different rules, there will be no agreement, such as on public healthcare services, GMOs, the use of hormones in the bovine sector, REACH and its implementation, and the cloning of animals for farming purposes, and therefore not to negotiate on these issues."

Night-Vision Proposals May Be Sent Back to Drawing Board

BIS and DDTC officials will need lots of coffee and their reading glasses to get through the thousands of pages of comments they received from industry on proposed changes to USML Category XII (night vision) and CCL Category 6. The comments from dozens of trade groups, anonymous individuals, companies and universities, which were posted on their websites July 8, show the officials correctly anticipated that they would probably need to repropose the changes before going to a final rule (see **WTTL**, May 11, page 6).

The proposals were supposed to offer industry a "bright line" between military and commercial uses of thermal imaging products. The comments indicate that the line still isn't that clear.

The changes "constitute a technology dragnet that will be rife with unintended negative consequence and strategic damage to the United States," Princeton Instruments said in its comments to both BIS and State. "It will be tantamount to scientific book burning in its effects on the U.S. industrial base and on university research. And ultimately, it will have an opposite effect to what is intended on foreign availability," it argued. FLIR took issue with the use of technical parameters to distinguish between military and commercial applications. "There is a basic flaw with this proposed language in trying to

identify military parameters on items that are inherently dual-use. For example, infrared focal plane arrays (IRFPA) are typically designed to a general performance standard and it isn't until the IRFPA is installed into a higher-level system that the militarization occurs. The same IRFPA may be installed in a commercial thermography camera that is also installed into a thermal weapon sight," it wrote to DDTTC.

Other comments included hundreds of pages of catalogs and research papers purportedly showing that the proposals would define as USML products already in commercial use. The comments also identified websites for companies in China that offer many of the items that would remain on the USML and will send the products anywhere in the world overnight.

The comments addressed proposed Category XII(b)(3), which would control laser distance measuring devices with a laser output wavelength exceeding 1,000 nm. "Some of the devices in common commercial use exceed the wavelength threshold in the proposed listing. For example, the 3D laser scanner 'Surphaser Model 105HSX', marketed by a company in Redmond WA, has a laser output of 1550 nm," Boeing wrote. "Given the important role of laser rangefinders in commercial production processes, narrowly scoped controls that do not capture items in commercial use are critical," it added.

BAE Systems said "one cause of concern" is the use of "greater than" and "less than" but no mention of "equal to" for particular technical thresholds. "Neither the USML or CCL addresses 'equal to 640', and some of our FPAs [focal plane arrays] are at 640. This makes it unclear as to which regulation 640X480 microbolometer FPAs are controlled," it wrote. BAE said the language should be changed to include "equal to" in the regulation where it pertains. "If 'equal to' is added to the USML, then we can determine that the 640X480 FPAs will remain export-controlled by State; if 'equal to' is added to the CCL, then the 640X480 FPAs will move to Commerce," it noted.

Universities were also concerned about the proposals' effect on their research. The University of California (UC) expressed concerns over the classification of infrared sensors. "While we understand the value of night vision technology in defense applications, we believe that too many infrared sensors would be subject to ITAR control under the proposed regulations, which would greatly affect our academic pursuits and make it more difficult to use them in domestic research or to export to scientific installations outside the U.S., such as astronomical observatories. Some of these devices are already in use and currently EAR controlled," UC wrote to State.

Leaks of Draft Text Leave Services Talks Unfazed

The release of secret draft texts by Wikileaks of a Trade in International Services (TISA) agreement appear to have had no impact on the 13th round of negotiations held in Geneva the week of July 6 (see **WTTL**, July 6, page 7). The released texts showed negotiators are "taking a very workmanlike" approach to drafting an agreement, said one source close to the talks. The released texts also show what can be achieved when negotiations involve only countries that choose to participate, he added.

The latest session was billed as a "stocktaking" on the status of negotiations, with a focus on how to accelerate the talks toward a possible conclusion in 2016. While another round of formal talks is likely to be held in October or November, negotiators

anticipate more bilateral discussions on improving specific market access offers. Ahead of the meeting, the European Union issued a statement calling on all TISA participants to table complete market access offers by the end of the summer. “For the EU, trade in services is of strategic importance, the sector accounting for some three-quarters of EU gross domestic product (GDP) and of EU jobs,” it said. “Within the EU, cross-border trade in services accounts for around 30% of EU trade, and Foreign Direct Investment (FDI) in Services (to be covered by the scope of the future agreement) represents around 70% of the EU’s FDI flows and around 60% of our FDI stock,” it added.

Also discussed in Geneva were the treatment of domestic regulations and professional qualifications, as well as financial services and telecommunications. The talks also addressed the movement of natural persons under so-called Mode 4 for services, an issue that has become extremely sensitive for U.S. negotiators in the face of congressional concerns about any changes in immigration policies.

BIS Clarifies, Corrects New Satellite Controls

When BIS officials issued an interim final rule moving commercial satellites to the CCL from the USML in May 2014, they said they had a feeling that wouldn’t be the end of it. In the Federal Register July 13, that expectation came true with the publication of a final rule that includes several more pages of “clarifications and corrections.” This is second set of corrections made to satellites controls but may not be the last, as the agency “is still in the process of reviewing the comments received at that time and will address them through a subsequent rulemaking,” BIS says (see **WTTL**, Nov. 17, 2014, page 1).

For example, in response to public questions about microelectronic circuits and discrete components that are “specially designed” for defense articles controlled by USML Category XV, BIS adds new language under Export Control Classification Number (ECCN) 9A515.e.2 to clarify that these items “meet the scope of the introductory text of paragraph (e), have a total dose $\geq 5 \times 10^5$ Rads (Si) (5×10^3 Gy (Si)), and are not described in 9A515.d are also within the scope of ECCN 9A515.e.”

“Because of a mistake in the control parameter under paragraph (e) of ECCN 9A515, certain commodities that were intended to be classified in this ECCN inadvertently dropped to an EAR99 designation, which was contrary to the May 13 rule’s description of where the commodities formerly classified under USML Category XV would be classified on the CCL,” it notes.

In the final rule, BIS also identifies the first commodity specified under paragraph (y) of ECCN 9A515. “Specifically, discrete electronic ‘components’ not specified in 9A515.e have been identified in an interagency-cleared commodity classification (CCATS) pursuant to Section 748.3(e) as warranting control in 9A515.y.1,” it says.

In another case, it adds MOSFETS [metal–oxide–semiconductor field-effect transistors] to the parenthetical phrase that provides examples of microelectronic circuits in ECCN 9A515.d and “discrete electronic components” to the list of controlled items in ECCN 9A515.e. “The additional text will assist the public with self-classifying such items and avoid the submission of unneeded classification requests,” BIS notes. BIS also adds a

definition of “microcircuit” to ECCN 9A515. For the purposes of that entry, a ‘micro-circuit’ means “a device in which a number of passive or active elements are considered as indivisibly associated on or within a continuous structure to perform the function of a circuit,” BIS says.

Handelman Returns to Defense, Dearth to Be Acting DDTC Chief

Ken Handelman has left his post as deputy assistant secretary (DAS) of State for defense trade controls and returned to the Defense Department where he will become principal DAS in the international security affairs office, DDTC announced July 6. As of that date, Tony Dearth, who now serves as director of DDTC’s licensing office, will fill Handelman’s post as acting DAS. Dearth “will be supported in his acting role” by Lisa Aguirre, who is director of DDTC’s management office, the agency said.

Dearth has been at DDTC since 2003 and has headed the licensing office since November 2013. He came to State after retiring from the Air Force where he spent 21 years, including in posts in nuclear operations and control. Dearth graduated from the ROTC program at Kansas State University in 1984 with a B.S. in computer science, and earned his M.S. in systems management in 1987 from the University of Southern California.

Handelman was on a two-year temporary assignment to DDTC from Defense but his tour was not scheduled to end until the fall. No reason was given for his early departure and no permanent replacement has been named. Handelman served at the Pentagon from 1995 to 2013 before moving to State.

The change in DDTC’s leadership comes at a time when the agency’s workload is shrinking significantly due to export control reforms and the shift of thousands of licenses to the BIS (see **WTTL**, June 15, page 7). DDTC has also undergone reorganization to accommodate the shift in license applications with changes to the USML.

Handelman’s appointment to DDTC reflected the recent pattern of naming Defense officials to head the agency. In earlier years, the post had been filled by officials promoted from within State. As a result of this shift in personnel policy, DDTC has not been led by a person with regulatory experience or the ability to question the decisions of lower-level bureaucrats, industry sources say. Handelman came to DDTC after much of the technical work for transferring items from the USML to the Commerce Control List (CCL) has been done by his predecessor, Bob Kovac, but Handelman oversaw the publication of key proposals and final rules implementing the changes.

Destination Control Statements Need More Work, Industry Says

Manufacturers and shipping companies praised the effort of BIS and DDTC to harmonize the destination control statements (DCS) required under their respective regulations, but in comments the two agencies posted on their websites July 8, industry complained about the continuing divergences between the Export Administration Regulations (EAR) and International Traffic in Arms Regulations (ITAR). In particular, the comments raised concerns about which documents are required to carry the harmonized language. When

the two agencies proposed the harmonization of DCS wording in parallel Federal Register notices in May, they said they were looking to make the exporting process as seamless as possible for companies that are moving from DDTC to BIS jurisdiction (see **WTTL**, May 25, page 10). In its comments, Boeing applauded the ability to use the common DCS text on shipments containing items that fall under both regulations.

“However, requirements for placement of the DCS have not been harmonized and there is language in both proposals that requires further clarity,” it wrote. “For example, the DDTC proposal states that, ‘the bill of lading, air waybill, or other shipping document **and** the purchase documentation or invoice (emphasis added)’ must incorporate the DCS,” Boeing said. Instead of “invoice,” BIS uses the term “commercial invoice.” “For some exporters the term ‘invoice’ refers to the final billing document that moves electronically, whereas the ‘commercial invoice’ moves with the freight,” it noted.

Although the DCS text is now aligned, UPS expressed “significant concern” about the proposed ITAR requirement to place the text on the bill of lading and air waybill, which in certain instances is a label appended to the outside of a package. That “would likely have the unintended effect of signaling package contents to third parties, which is a security concern,” it wrote.

FedEx echoed that concern about DDTC’s additional document requirements. The proposal “not only does not remove the requirement to incorporate the DCS as an integral part of the air waybill, but it also has additional requirements to incorporate the country of ultimate destination, end-user, and license or other approval number or exemption citation applicable to each item contained in a shipment. This additional information is not required under the rule proposed by BIS,” the air carrier noted.

CompTIA, an industry trade association, quantified the burden of BIS’ additional requirement to apply the DCS language to “contractual documentation” without defining that term. The language “should be limited to documents that accompany the shipment,” it wrote. “One CompTIA member estimates that in its current state the proposed requirement would require amendments to more than 650,000 master agreements, statements of work and purchase orders,” the organization told BIS.

*** * * Briefs * * ***

EXPORT-IMPORT BANK: As Ex-Im supporters try to muster votes in Congress to renew bank’s now-expired charter, opponents say they are happy with its demise but are not sure it will stay dead. “I’d be happy with where it is now, which is dead, but it’s not buried,” Senate Banking Committee Chairman Richard Shelby (R-Ala.) told reporters July 8. “You know and I know that up here things that have been declared dead, pronounced dead, embalmed, but still come back to life,” he said. “There is a lot of money floating around Washington for the Export-Import Bank,” Shelby added (see **WTTL**, July 6, page 5).

EXPORT ENFORCEMENT: Nicholas Kaiga of Brussels and London was deported to Brussels July 7 after serving 27-month prison sentence for violating International Emergency Economic Powers Act (IEEPA). Kaiga attempted to export aluminum tubes controlled for nuclear non-proliferation purposes from company in Schaumburg, Ill., through Belgium, to company in Kuala Lumpur, Malaysia, without Commerce license. Court documents alleged Malaysian business was front company operated by individual in Iran. He pleaded guilty in December

2014 and was sentenced in March 2015. Kaiga originally was indicted by federal grand jury in October 2013 in Chicago U.S. District Court (see **WTTL**, Nov. 11, 2013, page 6).

MORE EXPORT ENFORCEMENT: Kamran Ashfaq Malik, owner of pizza shop in Upper Marlboro, Md., was sentenced to 24 months in prison June 29 in Greenbelt, Md., U.S. District Court for exporting semi-automatic rifles, parts and accessories, including .223 caliber bolt carriers, rounds of magazines, optical gun sight and LED rail mounted flashlight with laser, to Pakistan without licenses. Malik, who has second residence in Pakistan, pleaded guilty in March. Co-defendant and shop employee Waleed Aftab was sentenced to time served in March.

STILL MORE EXPORT ENFORCEMENT: Edwin N. Makasiar, registered nurse in Lombard, Ill., was sentenced June 30 in Chicago U.S. District court to five years in prison for exporting firearms, including Glock .40 caliber pistols, and 2,500 rounds of .223 caliber and 5.56 mm ammunition, to Philippines without State licenses. He also filed fraudulent police report in August 2012, "in which he falsely claimed that two Glock firearms had been stolen from the trunk of his car," Justice sentencing memo noted. He pleaded guilty in December 2014.

TRADE FIGURES: Merchandise exports in May fell 6.99% from year ago to \$127.7 billion, Commerce reported July 7. Services exports gained 1.5% to \$60.9 billion from May 2014. Goods imports dipped 5.1% from May 2014 to \$189.2 billion, as services imports gained 3.25% to \$41.2 billion. Biggest factors behind numbers are drop in oil prices, rise in dollar value.

CUBA: Add one more ship to busy Havana harbor. Carnival Corporation has received Treasury and Commerce approval to begin travel to Cuba, it announced July 7. Company "intends to take travelers to Cuba beginning in May 2016 via its newly launched fathom brand," it said. Itineraries "will strictly comply with U.S. Department of Treasury rules that allow licensed travel companies to transport approved travelers to Cuba to engage in activities that support the Cuban people," Carnival added.

OIL EXPORTS: Lifting crude oil export ban could raise price of crude oil in U.S. but lower consumer prices for gasoline, diesel and jet fuels, Frank Rusco, director of natural resources and environment at Government Accountability Office, testified July 8, citing GAO report from September 2014. Apparent counterintuitive result stems from fact that exports would raise domestic crude oil prices, such as for West Texas Intermediary, but lower international prices such as for Brent crude, on which gas prices are based, he told House Agriculture Committee. End of ban could raise domestic crude prices by \$2 to \$8, GAO found. "In our September 2014 report, we reported that according to the studies we reviewed and the stakeholders we interviewed, removing crude oil export restrictions would likely increase some domestic crude oil prices, but could decrease consumer fuel prices, although the extent of consumer fuel price changes are uncertain and may vary by region," Rusco said in his prepared testimony.

BALL BEARINGS: CIT Judge Jane Restani remanded to Commerce July 8 department's final decision in administrative review of antidumping order on ball bearings from Japan and United Kingdom (slip op. 15-72), agreeing with Timken's complaint that firm had not received adequate notice of need to make targeted dumping claims. "Even assuming that Commerce's implicit reasoning was that any targeted dumping analysis was subject to procedures surrounding the Nails test, and thus these reviews were treated similarly to other reviews subject to the Nails test, the court holds that this would be an abuse of discretion under the facts of this case," Restani wrote. "Although the statute gives Commerce discretion in determining whether to apply the A-T methodology, parties generally are entitled to notice as to how Commerce plans to conduct its targeted dumping inquiry...Timken lacked that notice, and the statute's use of the word 'may' does not deprive them of that right," she added.