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RESULTS.

## **International Traffic in Arms Regulations (ITAR) SEMINAR 1 – January 5, 2012**

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Glusman Shem-Tov Chowers Broid & Co.

# Introduction

## INTRODUCTION

- Brief introduction to the ITAR and look at why the ITAR is important for Israeli companies
- Look at some ITAR rules that are important for Israeli companies
- Look at some common mistakes



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# WHAT IS THE ITAR?

## WHAT IS THE ITAR?

- INTERNATIONAL TRAFFIC IN ARMS REGULATIONS
- ARMS EXPORT CONTROL ACT 1976
- Controls export/temporary import of **Defense Articles** listed on the United States Munitions List (USML)
- Including related **Technical Data** and **Defense Services**
- Items solely/predominantly intended for military use
- Administered by Department of Defense Trade Control (DDTC)

## WHAT IS THE ITAR?

- **Technical Data**
- Non-Public domain
- Information
- Required for design, development, production, manufacture, assembly, operation, maintenance, repair, testing or modification of defense articles.
- Classified Information related to defense articles and defense services
- Does not include general scientific, mathematical or engineering principals commonly taught in schools, colleges, universities.

# WHAT IS THE ITAR?

## Defense Service

- Providing assistance to foreign persons in the design, development, engineering, manufacture, production, assembly, operation, maintenance, repair, testing, modification, demilitarization, destruction, processing or use of defense articles.
- Can include applying public domain data

# WHAT IS THE ITAR?

## Export

- Provision of Defense Articles, Technical Data, Defense Services to non-U.S. parties by any means.
- Even within the U.S.

# WHAT IS THE ITAR?

## ITAR Licenses

- DSP 5 – Permanent Export of unclassified defense articles and technical data
- DSP 73 – Temporary Export of unclassified defense articles and technical data
- DSP 85 – Permanent/Temporary export/temporary import of classified defense articles and technical data
- DSP 61 – Temporary Import of unclassified defense articles

# WHAT IS THE ITAR?

## ITAR Agreements

- Technical Assistance Agreement (TAA) – technical data and defense services – not including manufacturing know how.
- Manufacturing License Agreement (MLA) – technical data and defense services including manufacturing know how.
- Non-Disclosure Agreement (NDA) – Not to be confused with commercial NDA
- Warehouse Distribution Agreement (WDA) – export of defense articles for retransfer to defined territory, customer and end-use.



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# **Why is ITAR Important for Israeli Defense Contractors?**

# Why is ITAR Important for Israeli Defense Contractors?

1. Size of the Customer - U.S. dwarfs all other customers.

GSSCIB

# Why is ITAR Important for Israeli Defense Contractors?

## 2. Nature of the Product

- Unique customer specifications
- Complex systems
- Compatibility with other parts and systems

Fewer opportunities to take part without receiving technical information and parts from the customer

# Why is ITAR Important for Israeli Defense Contractors?

## 3. Consequences of Non-Compliance

- Debarment
- Heavy fines (Civil and Criminal)
- Blue Lantern – Watch List
- DDTC Audit
- Criminal convictions (imprisonment)

DDTC can effectively close the door to the most lucrative territory.



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# **Examples of DDTC Prosecutions vs Non-U.S. Companies**

# Why is ITAR Important for Israeli Defense Contractors?

Examples of DDTTC Prosecutions vs Non-U.S. Companies

## 1. Qioptic S.a.r.l (Luxembourg)

- Unauthorized re-export of night vision equipment to Singapore, China, Iran, Israel, Russia
- Committed prior to Qioptic purchasing division of Thales France (Due Diligence Issues)
- Deliberate disregard of ITAR by Thales France
- US\$25,000,000 fine
- No debarment, due to Qioptic's actions following acquisition (VDs, cooperation with DDTTC investigation, etc.)

# Why is ITAR Important for Israeli Defense Contractors?

Examples of DDTC Prosections vs Non-U.S. Companies

## 2. BAE Systems PLC

- Breach of various ITAR brokering regulations
- False statements regarding commission payments on export applications
- US\$400,000,000 criminal fine
- US\$79,000,000 civil fine
- Continued policy of denial of certain BAE subsidiaries

# Why is ITAR Important for Israeli Defense Contractors?

Examples of DDTC Prosecutions vs Non-U.S. Companies

## 3. Kam-Tech Systems Ltd. and David Menashe

- Made false statements to U.S. Bureau of Customs and Border Protection and Homeland Security.
- Sent AIM-9 Missile Seeker Section worth \$19,600 to U.S. for transshipment to China. Labeled package “Samples for Evaluation” with \$245 value
- Pleaded guilty
- Debarred since 2004



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# **How Can Knowledge and Compliance with ITAR Help Your Business?**

# How Can Knowledge and Compliance with ITAR Help Your Business?

1. Avoids unintentional violations and exposure to DDTC action.
2. Gives potential U.S. partners/suppliers/customers confidence
3. Efficiency in obtaining the correct export licenses.
4. Better for your work force. Harder to work with “fear of the unknown”.



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**RELEVANT COMPLIANCE ISSUES FOR  
ISRAELIS**

## ■ Dual/Third Country Nationals

- Special restrictions apply to Dual/Third Country Nationals
- Definition includes country of birth
- Major issue for immigrant countries

GTSOCPB

## ■ Dual/Third Country Nationals

**Since August 15, 2011** (Date ITAR Amendment of MAY 16, 2011 came into effect)

- Self-vetting (Only for Unclassified)
- DDTTC to approve named nations (As per pre 15.8.2011)
- DDTTC to approve specific persons.

## ■ Dual/Third Country Nationals

### Self-vetting

- Employer determines whether or not an employee poses a “risk of diversion”
- Nationality not necessarily a factor
- Only for unclassified information and articles
- TAA/MLA requires specific language – existing agreements must be amended

## ■ Dual/Third Country Nationals

### Screening of Employees

- Local national security clearance – sufficient

**REMEMBER** – only for Unclassified U.S.  
information/articles

Or

- Technical Control Plan that includes measures for screening candidates and employees for substantive contacts with individuals that pose a risk of diversion

## ■ Dual/Third Country Nationals

### Screening – What to Look For:

- DDTC provides detailed Guidance:
  - Foreign government/military officials, Agents, Proxies
  - Business contacts
  - Family/Friendships
  - Continuing connections/loyalties to third country
  - Frequent travel
  - Maintaining residence in a third country
- Must keep records for 5 years and show to DDTC if required

## ■ Dual/Third Country Nationals

### Screening – How to Look:

How much of an intrusion into privacy?

DDTC Guidance is less clear

GSSOEB

## ■ Dual/Third Country Nationals

### Screening – How to Look:

- No definitive method
- At employer's discretion
- Remain within confines of local laws

## ■ Dual/Third Country Nationals

### US and UK Exchange of Letters:

- (i) Verification of identity
- (ii) Nationality and immigration status to be verified
- (iii) Verification of employment; academic history (minimum of past 3 years).
- (iv) Check on unspent convictions

U.K. national laws to prevail

## ■ Dual/Third Country Nationals

### Israeli Law - Privacy

- Privacy = basic right under Israeli law
- Privacy may only be violated on consent of employee and when the consent is freely provided.
- Freely provided consent – only on full disclosure of all relevant facts, with free will and without duress.
- Consent required for each and every violation of privacy
- Criminal record – Only obtainable by individual concerned.

## ■ Dual/Third Country Nationals

### Israeli Law – Privacy

- Private parties must not disclose another's personal details without consent.
- Records to DDTTC would require specific consent at relevant time.
- Records containing personal details on any magnetic or optical device for computerized processing is a data base that must be registered

# Dual/Third Country Nationals

## Israeli Law - Privacy

- 7.0 חוק יסוד: כבוד האדם וחירותו - "כל אדם זכאי לפרטיות ולצנעת חייו"
- ס' 1 + 3 לחוק הגנת הפרטיות, תשמ"א – 1981 : "לא יפגע אדם בפרטיות של זולתו ללא הסכמתו", "הסכמה – הסכמה מדעת, במפורש או מכללא".
- פס"ד איסקוב - : שני תנאים: (1) הסכמה מפורשת ומרצון חופשי – לא בכפייה או בהעדר בחירה אמיתית; (2) הסכמה מדעת - מבוססת על גילוי מוחלט ושקיפות מלאה מצד המעסיק"
- ס' 12(א) לחוק המרשם הפלילי ותקנות השבים – "מי שהשיג או דרש מן המרשם, במישרין או בעקיפין, מידע שאינו זכאי לקבלו לשם העסקה או לשם קבלת החלטה בעניין האדם שהמידע נוגע לו, דינו – מאסר שנתיים; לעניין זה, לא יראו מי שעשה כאמור כזכאי לקבל מידע מן המרשם, בשל כך בלבד שהאדם שהמידע נוגע לו הסכים למסירת המידע."

# Dual/Third Country Nationals

## Israeli Law - Privacy

- ס' 7 לחוק הגנת הפרטיות, תשמ"א – 1981: "מאגר מידע" - אוסף נתוני מידע, המוחזק באמצעי מגנטי או אופטי והמיועד לעיבוד ממוחשב..."
- "מידע רגיש" – נתונים על אישיותו של אדם, צנעת אישותו, מצב בריאותו, מצבו הכלכלי, דעותיו ואמונתו;
- ס' 8 לחוק הגנת הפרטיות: "בעל מאגר מידע חייב ברישום בפנקס ועל בעל המאגר לרשמו אם נתקיים בו אחד מאלה: (2) יש במאגר מידע רגיש (3) המאגר כולל מידע על אנשים והמידע לא נמסר על ידיהם, מטעמם או בהסכמתם למאגר זה".
- ס' 13 לחוק הגנת הפרטיות: "כל אדם זכאי לעיין בעצמו... במידע שעליו המוחזק במאגר מידע".

# ■ Dual/Third Country Nationals

## Israeli Law

### 2. Discrimination (Most relevant for previous rule)

- Different treatment of employees on basis of nationality
- Can be justified where necessitated by the character or nature of the assignment or post
- Where customer requires and customer's requirement is reasonable.

## Dual/Third Country Nationals

### Discrimination

- סע' 2 לחוק שוויון הזדמנויות בעבודה: "לא יפלה מעביד בין עובדיו או בין דורשי עבודה מחמת... גזעם, דתם, לאומיותם, ארץ מוצאם..."
- פס"ד תפקיד פלוס - "תנאי של שירות צבאי או לאומי, כאשר אין הדבר מתחייב מאופי התפקיד, מהווה עבירה על החוק, בהיותו אפליה עקיפה של קבוצות שונות באוכלוסיה, כגון ערבים (אפליה מטעמי לאום) או חרדים (אפליה מטעמי דת)".
- פרשת רכבת ישראל - תנאי הסף הנדרשים מתצפיתנים נגועים באפליה. לא הוכח כי הקריטריונים החדשים מתחייבים מאופי התפקיד... נמצא כי ישנו חשש לאפליית מועמדים שלא שירתו בצבא".

## Dual/Third Country Nationals

### Discrimination

- סעיף 2(ג) לחוק שוויון הזדמנויות בעבודה: "אין רואים הפליה לפי סעיף זה כאשר היא מתחייבת מאופיים או ממהותם של התפקיד או המשרה".
- פס"ד ודיע חורי נ' אמנון מסילות: "הנתבעת הוכיחה כי... על פי מהותו של התפקיד ודרישת לקוחותיה, היה על המועמד להיות יוצא צבא – וכי לכן הציבה דרישה זו בפני שירות התעסוקה. דרישה זו, לטעמנו, ובנסיבות המיוחדות במקרה דנן, היא דרישה סבירה והגיונית."
- פס"ד פלוני נ' מדינת ישראל: "לשם מניעת פגיעה בביטחון המדינה, יש לענייני בטחון המדינה נפקות לא רק כחלק מן הדין בשלב הקבלה לעבודה... אלא אף כחלק מן ההוראות השונות האחרות לגבי העברה מתפקיד לתפקיד גם לאחר הקבלה לעבודה..."

## ■ Dual/Third Country Nationals

### ITAR in the Courts

- ITAR has not yet been tested in the Israeli courts as a reason that justifies discrimination or invasion of privacy.
- Can ITAR be seen to be justified request of customer?
- Would Israeli courts put commercial interests before basic principles of human rights first set out in Basic Laws?

# ■ Dual/Third Country Nationals

## Recommendations

### Privacy:

- Explain fully reasons for the screening
- Refusal to participate should not influence the decision to employ or affect career progress
- Refusal to participate may justify non-assignment of ITAR work
- Any updated screening/requests for records from DDTTC will require new consent
- Avoid maintaining the records of screening in electronic form.
- If DDTTC request to see records of screening – obtain consent of each affected individual. If consent is not provided, discuss with DDTTC in order to keep compliance within the confines of Israeli law.

# ■ Dual/Third Country Nationals

## Recommendations

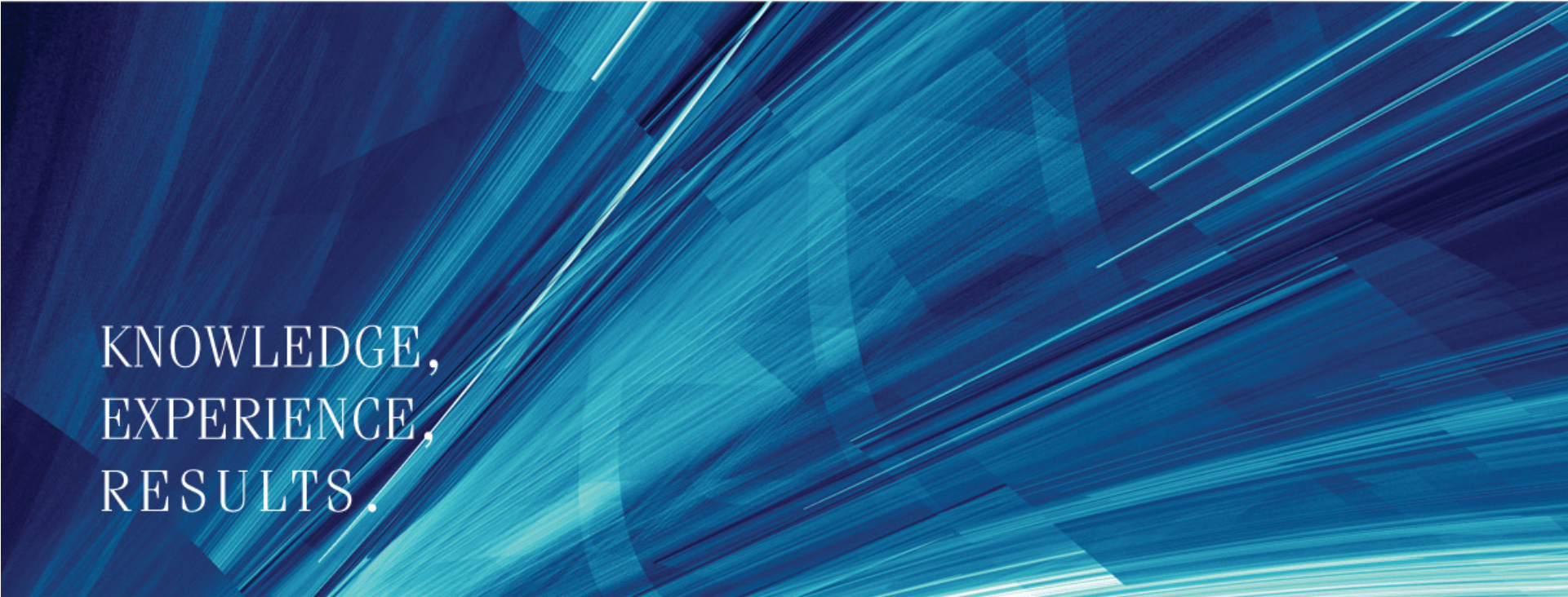
### Discrimination:

- Avoid using Option 2 unless absolutely required (e.g. Classified program)
- Nationality should not influence decision whether or not to employ;
- Nationality should not influence career
- Nationality may be a factor in the selection of programs

# ■ Dual/Third Country Nationals

## Suggestions for Screening

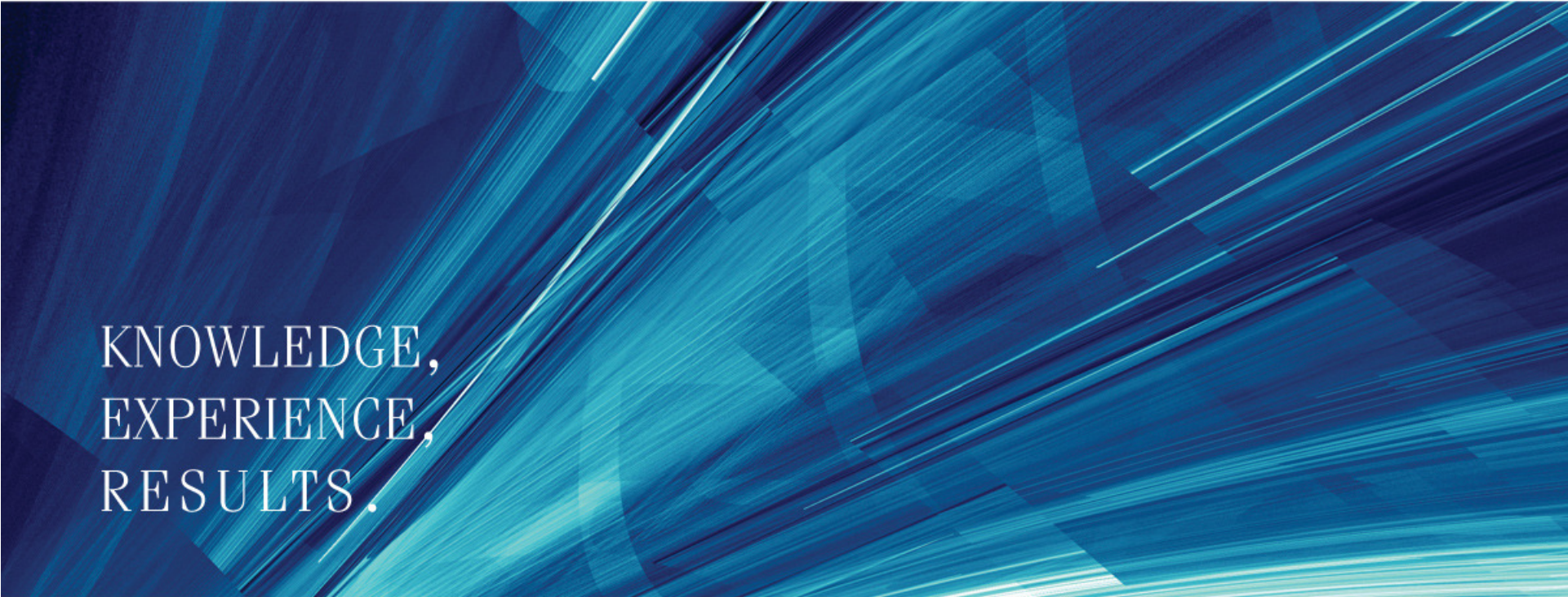
- Look for holes in CVs (past three years).
- Check up all references
- All employees/candidates to provide copies of:
  - Passport (all that they may have)
  - Israel I.D.
  - Reference of trustworthiness from a respected source who knows them at least 3 years (former employer/lawyers/Rabbis/Priest)
- All employees/candidates to answer a questionnaire similar to DDTC questionnaire.
- Only delve further if a trust issue arises and if there is consent. Then look at other possible documents and evidence that may be appropriate to request.
- Trust issues may justify rejection (cannot merely be employee refused to be screened)



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**Thank you for your time**

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