AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

111TH CONGRESS
2d Session

SENATE

EXEC. REPT.
111–5

DEFENSE TRADE COOPERATION TREATIES WITH THE UNITED KINGDOM AND AUSTRALIA

SEPTEMBER 24, 2010.—Ordered to be printed

Mr. KERRY, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Docs. 110–7 and 110–10]

The Committee on Foreign Relations, to which was referred the Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation, done at Washington and London on June 21 and 26, 2007 (Treaty Doc. 110–7, the "U.S.-UK Treaty") and the Treaty between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, done at Sydney, September 5, 2007 (Treaty Doc. 110–10, the "U.S.-Australia Treaty"), having considered the same, reports favorably thereon with conditions, understandings, and declarations as indicated in the resolutions of advice and consent for each treaty, and recommends that the Senate give its advice and consent to ratification thereof, as set forth in this report and the accompanying resolutions of advice and consent.

CONTENTS

		Page
I.	Purpose	2
II.	Background	2
III.	Discussion	4
IV.	Committee Action	15
V.	Committee Recommendations	16
VI.	Section-by-Section Analysis of Resolution of Advice and Consent to Ratification of the U.S.-UK Defense Trade Cooperation Treaty	17
VII.	Section-by-Section Analysis of Resolution of Advice and Consent to Ratification of the U.S.-Australia Defense Trade Cooperation Treaty	23
VIII.	Text of Resolutions of Advice and Consent to Ratification	28
IX.	Letter From Senators Levin and Warner	43
X.	Hearing on the Defense Trade Cooperation Treaties, December 10, 2009	47

89–115

I. Purpose

The purpose of these two treaties, along with an Implementing Arrangement to each treaty, both of which were also provided to the Senate, is to promote defense cooperation between the United States and its treaty partners by creating, for certain joint operations, programs and projects involving the United States and certain treaty partner governmental and agreed non-governmental entities, an exemption from certain provisions of the Arms Export Control Act (22 U.S.C. 2751 et seq.; hereinafter, "AECA") for agreed classified and unclassified exports of defense articles and defense services.

In his Letter of Transmittal of the U.S.-UK Treaty to the Senate, President George W. Bush stated that the treaty would "allow for greater cooperation between the United States and the United Kingdom, enhancing the operational capabilities and interoperability of the armed forces of both countries."

In an article-by-article analysis of the U.S.-UK Treaty prepared by the Department of State which was submitted to the Senate as part of the Letter of Transmittal of that treaty to the Senate, the State Department added that:

> it is in the mutual security and defense interests of the United States and the United Kingdom to improve the interoperability of their armed forces by facilitating the movement of defense articles in support of certain mutually agreed activities, while maintaining and ensuring proper safeguards against unauthorized release of the defense technology involved.

The Letter of Transmittal and article-by-article analysis for the U.S.-Australia Treaty included similar language.

II. Background

The United Kingdom and Australia are exceptionally close allies of the United States, with ties of history, culture, and national security interests that have led each country's armed forces to fight side by side with those of the United States in many conflicts over the last century. The economic and technological ties between the United States and these proposed treaty partners are also exceptionally close, and this extends to cooperative programs or projects to develop defense capabilities for use by both countries. When the United States, a treaty partner, and relevant defense contractors and suppliers are engaged in such a program or project, the need to process export license requests for the back-and-forth flow of components, supplies and technology can slow the pace of cooperation and impede the exchange of ideas and solutions to problems. Given that virtually all of the several thousand requests for arms export licenses to these two countries annually are granted, the defense establishments of the United States and its proposed treaty partners have long argued that a streamlined arms export process would be in the U.S. national interest.

Section 38(a) of the AECA authorizes the President to control the import and export of defense articles and services, and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. Further, the AECA authorizes the President to establish a United States Muni-

tions List (hereinafter, "USML"), which shall include those items that the President designates as defense articles and defense services. The President is further authorized to promulgate regulations for the import and export of such articles and services. The statutory authority to promulgate regulations with respect to exports was delegated to the Secretary of State by Executive Order 11958, as amended. The Secretary of State has implemented that authority through the International Traffic in Arms Regulations (22 Code of Federal Regulations, Subchapter M, Parts 120–130; hereinafter, "ITAR"). Pursuant to the ITAR, any person wanting to export a defense article or service included on the USML, unless the export qualifies for certain exemptions established within the ITAR, must obtain the approval of the State Department's Directorate of Defense Trade Controls, which administers the export control authority that has been delegated to the Secretary of State.

Under section 36(c) of the AECA, for a direct commercial sale from a U.S. private company over a certain threshold of value to the United Kingdom or Australia, Congress must be formally notified 15 calendar days before the executive branch may issue a license for such an export. Commercially licensed arms sales cases involving defense articles that are firearms controlled under Category I of the USML and valued at $1 million or more must also be formally notified to Congress for review 15 days prior to the license for export being approved. After having been notified, Congress has an opportunity enact a joint resolution blocking the executive branch from issuing the proposed license for export. Recognizing the difficulty that the Senate's rules of procedure present in passing such legislation in time to block issuance of the license, the AECA establishes expedited procedures for Senate consideration of a joint resolution to block the license.

Pursuant to section 3 of the AECA, nations and private entities acquiring defense articles and defense services from the United States must agree that they will secure approval from the United States before transferring or reselling any defense articles or defense services to any third-party or nation. To this end, the ITAR requires that, with certain limited exceptions, the Directorate of Defense Trade Controls must provide written approval to the ultimate end user of any exported defense article before that end user can resell, transfer, transship, or otherwise dispose of the defense article. With certain exceptions, section 3(d) of the AECA requires the President to notify Congress 15 days prior to approving transfers to the United Kingdom or Australia above thresholds of value similar to those established for the original sale.

In the Letter of Submittal from the Secretary of State to the President for the U.S.-UK Treaty, then-Secretary of State Condoleezza Rice wrote:

> For several years, the United States and the United Kingdom have sought to negotiate a legally binding agreement that would provide a mutually agreeable exemption for exports to the United Kingdom of defense articles controlled pursuant to the Arms Export Control Act (AECA) from some requirements, such as the licensing requirements, of Section 38 of the AECA and its implementing regulations, the International Traffic in Arms Regulations.

The Security Assistance Act of 2000 (Public Law 106–280) amended section 38 of the AECA to explicitly authorize the President to exempt a foreign country from the licensing requirements established under the AECA with respect to exports of defense items. The new subsection 38(j) of the AECA that P.L. 106–280 added required that to make use of this authority, the President must conclude a binding bilateral agreement with the foreign country that requires the foreign country, inter alia,—

> to establish an export control regime that is at least comparable to United States law, regulation and policy requiring—
>
> > (i) conditions on the handling of all United States-origin defense items exported to the foreign country, including prior written United States Government approval for any reexports to third countries; [and]
> >
> > (ii) end-use and retransfer control commitments, including securing binding end-use and retransfer control commitments from all end-users. with respect to such United States-origin defense items.

In 2003, the United States reached agreements with the United Kingdom and Australia to exempt certain unclassified exports of defense articles and defense services from export license requirements in the ITAR. Neither agreement met the standard set by subsection 38(j) of the AECA, however. The United Kingdom is inhibited both constitutionally and by virtue of its membership in the European Union from giving blanket assurances regarding reexports to third countries, and Australian law is not readily adapted to limits on the transfer of defense articles or defense services to companies within the country. The executive branch therefore sought legislation to permit the exemption agreements to enter into force. Such legislation was included as section 1059A in the Senate-passed version of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, but that provision was not included in the conference-reported version of the bill and did not become law.

It was in the context of this legislative frustration that, in 2007, the executive branch adopted a new approach for liberalizing defense trade with the United Kingdom and Australia. Instead of relying strictly upon the export control regimes of the United Kingdom and Australia, those countries would agree also to treat defense articles and defense services exported from the United States as classified information, so as to bring these defense articles and defense services under each country's information security laws and regulations. These bilateral agreements would take the form of treaties, moreover, which were deemed to be self-executing and would require action in the United States only by the Senate. While the treaties contained the basic framework of the proposed defense trade regime, many of the details of the regime were addressed in "Implementing Arrangements" separate from the treaties for which the executive branch opted not to seek the Senate's advice and consent.

III. Discussion

A detailed paragraph-by-paragraph analysis of the Treaties may be found in the Letters of Submittal from the Secretary of State to

the President, which is reprinted in full in Treaty Document 110–7 and 110–10. A summary of key provisions is set forth below.

Definitions

Article 1 of each treaty contains definitions of terms. The U.S.-Australia Treaty defines the word "Scope" (such capitalized words being terms of art in the treaties), which was omitted from the U.S.-UK Treaty, so the committee recommends that the resolution of advice and consent to the U.S.-UK Treaty include an understanding that defines Scope as in the U.S.-Australia Treaty.

The definition of "Territory of the United Kingdom" in the U.S.-UK Treaty includes not only England, Wales, Scotland and Northern Ireland, but also "any territory for whose international relations the United Kingdom is responsible in respect to which Her Majesty's Government gives notice to the United States Government that such territory shall be included within this definition for the purposes of this Treaty." The inclusion of such a territory in the Territory of the United Kingdom, or of an entity in such a territory in the "United Kingdom Community" (see below), for the purposes of the U.S.-UK Treaty could be problematic, given that responsibility for such a territory's international relations might not include complete control over that territory's classified information or arms export control regimes. Some British territories have been known as tax havens or as hubs for money laundering, and the committee sought assurances that there was no intent to include such territories in the U.S.-UK Treaty. The Department of State assured the committee, in an answer for the record, that: "The Official Secrets Act extends to any act done by any person in these territories as if it were done in the UK." (The committee's questions for the record and the executive branch's answers are appended to this Report.) The committee notes, moreover, that although the United States Government would not be able to object to including such territories in the U.S.-UK Treaty, it would be able to deny membership in the United Kingdom Community to any entity that prompted concern.

In light of these concerns, the committee recommends that the resolution of advice and consent to ratification of the U.S.-UK Treaty include a condition requiring prompt notification to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives of any addition of territories (or of discussions regarding such additions) to the Territory of the United Kingdom and consultation with the committees "before approving any addition to the United Kingdom Community of a non-governmental entity or facility outside the territory of England, Scotland, Wales, or Northern Ireland."

Approved Communities

Each treaty and its implementing arrangement provide for the establishment of an "Approved Community" of government entities, companies, and individuals in the treaty partner country and the United States that will be given clearance to work on projects and operations that involve license-free equipment and technology transfers between the two countries. Any U.S. company or other U.S. entity otherwise eligible to export U.S. defense articles and services can make use of the treaties. Treaty partner government

facilities and government personnel, agreed companies and individuals qualifying for inclusion in the Approved Community will not be required to obtain an export license from the U.S. State Department for most defense articles or items of defense technology on the USML. The members of the Approved Community of each treaty partner are not required to use the procedures established by the treaty, but should they choose not to do so, they must use (and abide by) the existing U.S. defense export licensing or sales procedures.

The implementing arrangements set out criteria for determining how private entities in each treaty partner country will qualify to become part of the treaty's Approved Community. While treaty partner entities are required to be accredited by that country to handle classified information, the criteria treat other matters—such as foreign ownership, control, and influence; previous convictions for violations of U.S. or treaty partner export laws; or other national security risks—as factors to be taken into consideration, rather than as absolute requirements.

The U.S. Government is empowered by Article 4, paragraph 2 of each treaty, however, to request the removal of any non-governmental treaty partner persons or entities included in the Approved Community, and such a request must be honored if the United States does not rescind the request after consultations with the treaty partner. This raises the question of when the United States will avail itself of that privilege. The committee recommends that each resolution of advice and consent to ratification contain a requirement that the United States invoke this provision if sanctions are in effect against a member of the treaty partner's Approved Community under either section 73(a)(2)(B) of the AECA (relating to illegal transfers of missile equipment or technology) or section 81 of the AECA (relating to contributions to a country's chemical or biological weapons programs). The committee further recommends that each resolution of advice and consent include requirements for notification and consultation with the Foreign Relations and Foreign Affairs Committees before the United States agrees to the initial or continued inclusion in a treaty partner's Approved Community of a nongovernmental entity if the Department of State is aware that the entity, or any one or more of its relevant senior officers or officials, has been convicted of violating a statute cited in paragraph 38(g)(1) of the AECA or is, or would be if that person were a United States person, (a) ineligible to contract with any agency of the U.S. Government; (b) ineligible to receive a license or other form of authorization to export from any agency of the U.S. Government; or (c) ineligible to receive a license or any form of authorization to import defense articles or defense services from any agency of the U.S. Government.

Article 5 of each treaty provides that the United States Community will consist, in part, of "[n]ongovernmental United States entities registered with the United States Government and eligible to export Defense Articles under United States law and regulation." The committee was particularly concerned to ensure that the United States will not simply assume that all entities registered with the government are in fact eligible to export. The committee recommends that the resolutions of advice and consent to ratification of the treaties contain a requirement that regulations: (a) limit

a person from being a member of the United States Community, pursuant to Article 5(2) of each treaty, if that person is generally ineligible to export pursuant to section 120.1(c) of the ITAR; and (b) require any nongovernmental entity that ceases to be included in the United States Community to comply with instructions from authorized United States Government officials and to open its records of transactions under the treaty to inspection by United States Government and, as appropriate, authorized treaty partner officials pursuant to Article 12 of each treaty. The committee recommends further that the resolutions require the President to certify that appropriate mechanisms have been established to identify, in connection with the process for determining whether a nongovernmental entity is in the United States Community pursuant to Article 5(2) of each treaty, persons who meet the criteria in section 38(g)(1) of the AECA (22 U.S.C. 2778(g)(1)); and the committee recommends that the implementing legislation include a provision making clear that the identification of persons who are indicted for, or convicted of, violations of the statutes listed in section 38(g)(1) of the AECA may be conducted regarding persons who export defense items under the treaties, even if such persons never seek an export license.

Treaty Scope Limited to Specific Activities

In addition to limiting license-free trade under the treaty to certain entities, the treaties only permit license-free trade that relates to certain activities. Defense articles and services will be able to be exported to a treaty partner's Approved Community, and exchanged within it, without U.S. export or re-transfer approvals, so as long as the exports are in support of:

- Combined military or counterterrorism operations;
- Agreed research, development, production and support programs or security and defense projects;
- Treaty partner government-only end-uses; or
- U.S. Government-only end-uses.

The United States and the proposed treaty partners have not finalized the lists of combined military or counter-terrorism operations that will be within the Scope of the treaty (Article 3(1)(a)), cooperative security and defense research, development, production, and support programs that will be within the Scope (Article 3(1)(b)), and which security and defense projects where the UK Government is the end-user will be within the Scope (Article 3(1)(c)). Lists of the unclassified operations, programs and projects will be published, so that U.S. arms exporters will be able to determine what proposed exports might be within the scope of each treaty.

Defense Articles and Services Exempted from the Treaty

In addition to limiting the treaties' scope to specific purposes, the treaties permit each party to exclude certain defense articles and defense services (including technical data) from license-free export and re-transfer pursuant to the treaties. Even if transactions involve members of an Approved Community and fall under the list of approved projects, export of such defense articles and defense

services would have to be done in accordance with existing U.S. export law and regulations.

The executive branch has stated that it will exempt from each treaty's coverage certain defense items related to U.S. nonproliferation obligations:

- Defense Articles listed in the Missile Technology Control Regime (MTCR) Annex (i.e., complete rocket systems, including ballistic missile systems, space launch vehicles, and sounding rockets, or complete unmanned aerial vehicle systems capable of delivering at least a 500 kilogram payload to a range of 300 kilometers, and associated production facilities, software, or technology for these systems; and Rocket stages, re-entry vehicles and equipment, solid or liquid propellant motors, guidance sets, thrust vector control systems, and associated production facilities, software and technology);
- Defense Articles listed in the Chemical Weapons Convention (CWC) Annex on Chemicals, the Convention on Biological and Toxin Weapons, and the Australia Group (AG) Common Control Lists (CCL); and
- USML Category XVI Defense Articles specific to design and testing of nuclear weapons.
- Other defense articles and defense services that the United States will exempt from the Scope of each treaty include USML items that the treaty partner does not control, as well as such technologies as:
  - Reduced observables and counter-low observables;
  - Electronic and optical countermeasures and counter-countermeasures;
  - Certain anti-tamper measures;
  - Defense articles specific to satellites, satellite payloads, and their specifically designed or modified components; and
  - Defense articles specific to Man Portable Air Defense Systems (MANPADs).

The committee believes that the nonproliferation exemptions from the Scope of the treaties are of particular importance, as they ensure that the treaties will not undermine U.S. compliance with agreements that are vital pillars of the international nonproliferation regime. In the committee's view, these exemptions should be governed by law, so that they cannot be rescinded without prior congressional authorization. The implementing legislation proposed by the committee contains a provision that would achieve this end. The committee also recommends that the implementing legislation require that the United States exempt from the Scope of the U.S.-UK Treaty those defense items that are on the USML, but are not controlled by the United Kingdom.

The committee understands the logic of allowing each Party to add items to, or subtract items from, the lists of items exempt from the Scope of each treaty. The technologies in question are extremely sensitive, however, and a decision to delete a technology from the list of items exempt from the Scope of a treaty could be profoundly important. The committee recommends, therefore, that each resolution of advice and consent to ratification include a con-

dition requiring 30 days' prior notice to the Foreign Relations and Foreign Affairs Committees of such an action.

Safeguarding U.S. Defense Items Exported under the Treaties

The treaties and their implementing arrangements safeguard against unauthorized transfers by prohibiting defense articles and defense services exported to the Approved Community in a treaty partner country from being re-exported or transferred outside of the Approved Community without the approval of both the U.S. and treaty partner governments. Rather than rely solely upon its export control laws, each treaty partner would classify all otherwise unclassified defense articles and defense services exported pursuant to the treaties, upon entering that country, as RESTRICTED-USML goods/information, a level of classification that is slightly below the U.S. level of CONFIDENTIAL. Both facilities and personnel receiving U.S. exports under this treaty will have to be vetted and cleared by both the treaty partner and U.S. governments to receive RESTRICTED goods or technology.

In the United Kingdom, for example, enforcement of these provisions will be the administrative responsibility of the Ministry of Defence, backed up by the authority of the British Official Secrets Act. All requests for Re-exports or Re-transfers will be reviewed by the Ministry of Defence. (Under the treaties and implementing arrangements, a "Re-transfer" is a transfer of a covered item from a member of the Approved Community to a non-member of the Approved Community within the territory of the treaty partner. A "Re-export" is the movement of a covered item by a member of the Approved Community to a location outside of the territory of the treaty partner or the United States.) Since all the defense articles provided under the treaty are classified, the Ministry of Defence will not provide permission for a Re-export or Re-transfer without obtaining U.S. Government authorization. Certain exceptions to the Re-export or Re-transfer restrictions are possible, but only if agreed to by the two governments and set out in the implementing arrangements. This can permit, for example, Re-export of items that are being used in support of the United Kingdom's Armed Forces overseas. Importantly, by classifying items exported under the treaty, the United Kingdom can bar Re-exports to the rest of the European Union unless the U.S. Government approves, without violating its obligations as a member of the European Union.

The treaties and their implementing arrangements further establish important requirements to aid enforcement of compliance. Each party to the treaties shall have the right to conduct end-use monitoring of exports or transfers conducted under it. A detailed process for recording the movement of defense articles under the provisions of the treaties is established, with Approved Community members required to retain such records (but not to transmit them to either government) for five years. And treaty partners will be required to obtain a signed statement from each non-governmental entity or facility in their Approved Community acknowledging some ten specific standards that it will be required to meet regarding U.S. defense articles and defense services received under the treaty. This requirement will serve both to inform Approved Community members of their obligations and to provide a written indi-

cation of their acceptance of such obligations, which may be used in any enforcement action.

Each party to the treaties will be obliged to investigate any suspected violations, inform the other party of the result of the investigations, and cooperate in enforcement efforts as appropriate. The committee recommends that the resolution of advice and consent to each treaty include an understanding, to be included in the instrument of ratification, that the words "as appropriate" in each implementing arrangement do not detract in any way from the treaty obligation to investigate suspected and reported violations and to inform the United States of the results of such investigations.

The parties to each treaty are to consult at least once a year on the co-operative aspects of export controls, and to review the operation of the treaty. Any disputes arising out of, or in connection with, the treaty are to be resolved on a bilateral basis between the parties and will not be referred to any court, tribunal, or third party.

Enforcement of Compliance with Treaty Obligations

The first line of defense in arms export control is the export licensing process, in which exporters register with the Department of State and then the Department (and, as appropriate, other departments or agencies) will review proposed exports; the second line of defense is the export process, in which the Department of Homeland Security (DHS) reviews exporters' documentation for arms exports. In both cases, agencies check names against data bases of ineligible persons. The treaties will eliminate the licensing process for qualifying exports, but DHS will still review shipping documentation to determine whether exports that are asserted to be license-free under the treaties are, in fact, in order. The committee took pains to ensure that DHS would have the needed personnel and information technology to process such exports effectively. The committee recommends that each resolution of advice and consent to ratification contain a requirement that the President certify that: (a) appropriate mechanisms have been established to verify that nongovernmental entities in the United States that export defense articles or defense services pursuant to the treaties are eligible to export them under United States law and regulation as required by Article 5(2) of the treaties; and (b) DHS personnel at U.S. ports have prompt access to a State Department database containing registered exporters, freight forwarders and consignees, and watch lists regarding U.S. companies, and are prepared to prevent attempts to export pursuant to the treaties by U.S. persons who are not eligible to export defense articles and defense services under U.S. law or regulation, even if such person has registered with the U.S. Government.

Much of the committee's examination of these treaties focused on the question of whether, without accompanying legislation, the executive branch would be able to effectively enforce compliance with the treaties. Violations of arms export controls are a fact of life, and it is reasonable to expect that there will be cases in which companies misuse the license exemptions provided by these treaties. Because the treaties supersede elements of the AECA, it was not at all clear whether section 38(a) of the AECA, on which the executive branch relies for authority to issue regulations, section 38(c),

which provides for criminal penalties for violations, and section 38(e), which provides for civil penalties, could be used in an enforcement action against an entity that had proceeded under one of the treaties instead of under the AECA. The executive branch argued initially that no authority other than that provided by the treaties themselves was required to issue regulations that would provide for such penalties. Later it adopted the view that the treaties would create a "safe harbor" from the AECA, that section 38(a) of the AECA could still be used (along with the treaties themselves) as authority to issue regulations, and that sections 38(c) and 38(e) would therefore remain applicable to persons who made use of the treaties but engaged in activities that violated the treaties and therefore brought their conduct back under the AECA. The executive branch provided several drafts of implementing regulations as it sought to meet concerns raised by the committee and by the Department of Justice, while avoiding the need for implementing legislation. At length, however, the executive branch agreed to support implementing legislation. The committee believes that the proposed legislation accompanying these treaties, by changing the law to accommodate these treaties and to provide for criminal and civil penalties for their violation, will remove any cause for question regarding the authority of the executive branch to prosecute violators of the treaties. It will also maintain certain AECA provisions that would otherwise have been superseded by the treaties, as noted elsewhere in this Report.

Self-execution and Interaction with Existing Law

Each treaty contains a statement in its preamble that says, "Understanding that the provisions of this Treaty are self-executing in the United States." The committee found this statement to be problematic on several grounds. Such a preambular declaration was unprecedented in U.S. treaties, and it purported to determine an issue that has traditionally been considered a subject for discussion, regarding each treaty, between the executive branch and the Senate. As explained above, moreover, it was substantively suspect in that it purported to rule out the use of legislation to make clear the federal government's authority to impose criminal or civil penalties for violations of the treaties, their implementing arrangements, and regulations issued to implement the treaties. The executive branch eventually concluded that these treaties are not self-executing and submitted the following answer for the record: "Notwithstanding the statement in the preamble of these Treaties, the Treaties are not self-executing. They will be implemented through legislation and regulations thereunder."

If the assertion of self-execution had been contained in the body of these treaties, the committee would have recommended that they be amended to delete that language. The assertion is made only in each treaty's preamble, however, and such language is not legally binding on the parties. It has not been the Senate's practice to amend preambular language in treaties, precisely because such language imposes no obligation on the United States. The committee recommends instead, therefore, that each resolution of advice and consent to ratification contain the following declaration: "This Treaty is not self-executing in the United States, notwithstanding the statement in the preamble to the contrary." This dec-

laration will make the Senate's position clear, in case there is any doubt. It will not affect the rights or obligations of our treaty partners.

The treaties will supersede elements of the AECA, however, and not all of those impacts were intended when the treaties were negotiated. Notably, there was no intent to override the ban on incentive payments in section 39A of the AECA. The committee recommends that the implementing legislation for these treaties amend that section of the AECA to include exports under the treaties.

The committee also recommends that the resolutions of advice and consent to ratification of these treaties include an understanding that conveys the interpretation of the United States that the treaty does not exempt any person or entity from any United States statutory and regulatory requirements, including any requirements of licensing or authorization, other than those included in the ITAR, as modified or amended. This is required to make clear the intent of the Parties that the treaties not supersede such other statutory or regulatory provisions as the requirement (flowing, at least in part, from section 38 of the AECA) for the Department of Justice's Bureau of Alcohol, Tobacco and Firearms to approve certain permanent imports of firearms for sale to private parties in the United States.

Private Rights and Intellectual Property Rights

The committee's proposed resolutions of advice and consent to ratification include a standard declaration that: "This Treaty does not confer private rights enforceable in United States courts." With regard to intellectual property rights, the proposed resolutions go on to state:

> No liability will be incurred by or attributed to the United States Government in connection with any possible infringement of privately owned patent or proprietary rights, either domestic or foreign, by reason of the United States Government's permitting Exports or Transfers or its approval of Re-exports or Re-transfers under the Treaty.

The latter language is expected also to be promulgated in amendments to section 126 of the ITAR. The committee recommends its inclusion in the resolutions of advice and consent to ratification so as to underscore that the Senate understands and accepts that ratification of the treaties will not result in the United States Government incurring any liability with respect to the intellectual property rights of persons whose rights may be infringed by the recipients of exports or transfers under the treaties.

At the same time, the treaty drafters took pains to address the issue of intellectual property rights under the treaties. Article 10 of each treaty states:

> (1) Nothing in this Treaty shall be construed as granting, implying, diminishing, or otherwise affecting rights to, or interest in, intellectual property or other proprietary information of the Parties or of persons or entities within the Approved Community pursuant to this Treaty.
>
> (2) Nothing in this Treaty shall affect any provisions for the protection of intellectual property and other proprietary infor-

mation that may be agreed between the Parties or the persons or entities referred to in paragraph (1).

The Department of State's article-by-article analysis of the treaties adds: "Accordingly, such persons or entities may agree between themselves on procedures to provide protections to intellectual property or other proprietary information, additional to the protections afforded to classified information."

In the committee's view, the treaties do not detract from the intellectual property rights of persons or entities that take necessary action to reinforce those rights when exporting a defense item under the treaties or when selling it to the United Kingdom or Australia under the Foreign Military Sales program. If a formal contract contains provisions protecting those rights (e.g., by barring the retransfer of a defense item to a competing private company), the treaties will not supersede that contract. Private entities should understand, however, that absent such contractual protection, they may have less visibility into the use or subsequent transfer of defense items sold under the treaties or sold to the United Kingdom or Australia under the Foreign Military Sales program. Companies bear the responsibility of establishing their intellectual property rights under such sales.

The committee recommends that the resolutions of advice and consent to ratification of the treaties contain a provision requiring the executive branch to analyze the implications of the treaties for the protection of intellectual property rights of United States persons, with particular attention to the effect of Article 3, paragraph 3 of the treaties, which allows the treaties to be applied to defense items that were exported under the Foreign Military Sales program. It recommends further than the President be required to report to Congress annually on any concerns relating to infringement of intellectual property rights that were raised to the President or an executive branch department or agency by Approved Community members, and developments regarding any concerns that were raised in previous years.

The Role of Congress

As noted above, under the AECA, Congress has the power to review proposed direct commercial sales valued over a certain threshold. Under the treaties, the U.S. Government must approve retransfers and re-exports outside of the Approved Communities; and the executive branch agreed to provide 15 days' prior notice of such approvals to Congress. But Congress might lose the legal right to review such transfers and to take action under expedited procedures to stop them before they are approved. This is because section 3 of the AECA, which establishes the role of Congress in the approval of re-exports, applies to defense articles or defense services either (a) sold or leased under the AECA, or (b) licensed or approved under section 38 of the AECA. At least under some legal theories of the effect of the treaties, such exports would not be under the AECA and the re-export provisions of section 3 of the AECA would therefore not apply to such defense items. The committee recommends that the implementing legislation for these treaties address this concern by specifically applying section 3(d)(3)(A) of the AECA to exports under the treaties. The committee recommends further that the implementing legislation in-

clude a provision mandating the prior notice that the executive branch had proposed regarding exports under the treaties that would otherwise fall within the purview of section 36 of the AECA.

A similar concern arises regarding the requirements for the executive branch to report to Congress on cases of discrimination against Americans on the basis of race, religion, national origin or sex in arms export activities (section 5(c) of the AECA) and on arms exports that might occur in the forthcoming year (section 25 of the AECA). The committee recommends that the implementing legislation for these treaties amend those sections to include exports pursuant to the treaties.

Amendments and Implementing Arrangements

Article 19 of each treaty states: "This Treaty may be amended by written agreement of the Parties." Any such amendment would need to be submitted to the Senate for advice and consent to ratification under Article II, Section 2, Clause 2 of the Constitution of the United State."

A more difficult question relates to the Implementing Arrangements that are authorized in Article 14 of each treaty. Paragraph 1 of Article 14 provides, in part: "The Implementing Arrangements may be amended or supplemented as mutually determined by the Parties." The executive branch did not submit the Implementing Arrangements to the Senate for its advice and consent. Rather, the executive branch provided the texts of the Implementing Arrangements to the Senate for its information only. Because changes to the Implementing Arrangements could have significant impacts on the nature and scope of the treaty regime, the committee believes that it would be inappropriate for such changes to be made without Congressional approval.

The committee recommends, therefore, that the implementing legislation for the treaties include a requirement that any amendment to either of the Implementing Arrangements for these treaties, other than an amendment that addresses an administrative or technical matter, may enter into effect only if the Congress adopts, and there is enacted, legislation approving the entry into effect of that amendment for the United States. The legislation that the committee proposes includes an illustrative list of provisions, any amendment to which would not be considered administrative or technical.

The committee further recommends that the implementing legislation include a requirement for notice to the Foreign Relations and Foreign Affairs Committees 15 days prior to the entry into effect of any amendment to one of the Implementing Arrangements that does not require legislative approval. The legislation recommended by the committee would permit the President to waive this requirement, and instead notify the committees within five days after an amendment came into effect, if the President determines and certifies to the committees that this is important to maintain the viability and effectiveness of the treaty.

Duration and Withdrawal

The treaties are each of unlimited duration. Each party has the right to withdraw from the treaty, however, after providing six

months' notice and consulting with the other party, if it believes that its national interests have been jeopardized.

IV. Committee Action

The U.S.-UK Treaty was signed on June 21 and 26, 2007, and was received in the Senate and referred to the Committee on Foreign Relations on September 20, 2007. The U.S.-Australia Treaty was signed on September 5, 2007, and was received in the Senate on December 3, 2007.

The committee held a public hearing on the treaties on May 21, 2008. Then-Senator Biden chaired the hearing. Testimony was received from the Honorable John C. Rood, Acting Under Secretary of State for Arms Control and International Security.

On July 3, 2008, Senators Biden and Lugar also submitted in writing questions for the record to the Honorable Michael B. Mukasey, Attorney General of the United States, and the Honorable Michael Chertoff, Secretary of Homeland Security.

In connection with the May 2008 hearing, the committee also received letters from the Honorable George W. Bush, President of the United States; the Right Honorable Gordon Brown, Prime Minister of the United Kingdom of Great Britain and Northern Ireland; the Honorable Dennis Richardson, Ambassador of Australia to the United States of America, accompanied by a letter from the Honorable Kevin Rudd, Prime Minister of Australia, to the Honorable Harry Reid, Majority Leader of the United States Senate; the Right Honorable Baroness Ann Taylor of Bolton, Minister of State for Defence Equipment and Support, United Kingdom of Great Britain and Northern Ireland; the Aerospace Industries Association; Robert J. Stevens, Chairman, President, and Chief Executive Officer of the Lockheed Martin Corporation; Ron Rittenmeyer, Chairman, President, and Chief Executive Officer, EDS; and Daryl G. Kimball, Executive Director, Arms Control Association, Dr. Ivan Oelrich, Vice President of Strategic Security, Federation of American Scientists, and Arthur Shulman, General Counsel, Wisconsin Project on Nuclear Arms Control, accompanied by a statement for the record by Matt Schroeder, Federation of American Scientists, Arthur Shulman and Matthew Godsey, Wisconsin Project on Nuclear Arms Control, and Jeff Abramson, Arms Control Association. The full record of the May 2008 hearing, including the answers to questions for the record as originally submitted and the letters submitted to the committee in connection with the hearing, is provided in S. Hrg. 110–651.

On August 27, 2008, Senators Biden and Lugar received a letter from Senator Carl Levin, Chairman of the Committee on Armed Services, and Senator John Warner expressing their strong support for the treaties. That letter is appended to this report.

On December 10, 2009, the committee held another public hearing on the treaty. Senator Kerry chaired the hearing. Testimony was received from the Honorable Andrew Shapiro, Assistant Secretary of State for Political-Military Affairs, and the Honorable James A. Baker, Associate Deputy Attorney General. Their statements for the record, the transcript of that hearing, and responses to questions for the record, including revisions by the State Department to certain responses submitted in connection with the May 2008 hearing, are appended to this report.

On December 17, 2009, Senator Lugar submitted questions for the record to the Honorable John Merton, Assistant Secretary of Homeland Security for Immigration and Customs Enforcement, and Mr. Jayson P. Ahern, Acting Commissioner for Customs and Border Protection. Those letters and their responses are also appended to this report.

On September 21, 2010, the committee considered the treaties and ordered them favorably reported by a voice vote, with a quorum present and without objection. The committee recommended a resolution of advice and consent to ratification for each treaty.

V. Committee Recommendations

The committee believes these treaties can make an important contribution to improving defense trade cooperation with the United Kingdom and Australia, and accordingly recommends that the Senate act promptly to give them its advice and consent. The committee recommends a resolution of advice and consent to the U.S.-UK Treaty that contains 9 conditions, 7 understandings, and 3 declarations. The committee recommends a resolution of advice and consent to the U.S.-Australia Treaty that contains 8 conditions, 6 understandings, and 3 declarations. The text of each recommended resolution is printed below, followed by a section-by-section analysis.

The committee further recommends implementing legislation for the two treaties. The report to accompany that legislation, S.3581, as amended, is a separate document from this Report.

In light of the purpose of these treaties to facilitate defense cooperation with two close U.S. allies, the United Kingdom and Australia, the committee regrets that approval of the treaties has required nearly three years from the date of their submission by the President. The committee values greatly the United States' strong partnership with the United Kingdom and Australia and the important contributions these countries have made to our shared security interests. The committee's delay in approving these treaties does not reflect any doubt on the committee's part about the value of maintaining and strengthening these important relationships.

Aspects of these treaties raised significant issues regarding the Senate's role in the treaty making process. Both treaties included a highly unusual preambular provision purporting to specify how their provisions would be implemented, enforced, and incorporated into U.S. law, prejudging decisions which the Senate has traditionally had a co-equal role with the executive branch in making. The treaties also allocated significant aspects of the treaty regime to "Implementing Arrangements" separate from the treaties which were not submitted for the Senate's advice and consent. The executive branch initially took the position that, once the treaties entered into force, these Implementing Arrangements could be amended—including in ways that would alter fundamental aspects of the treaty's regime—without the Senate's consent. Much of the committee's review of the treaties was devoted to considering these issues, and to crafting the provisions of the implementing legislation and resolutions of advice and consent necessary to resolve them appropriately.

The committee notes that regular executive branch consultation with the Senate during the process of negotiating treaties is essential to the effective exercise of the treaty power shared by the two branches. Had the executive branch consulted with the Senate during the course of the negotiation of these treaties, many of the issues that delayed their approval by the committee could have been anticipated and avoided.

VI. Section-by-Section Analysis of Resolution of Advice and Consent to Ratification of the U.S.-UK Defense Trade Cooperation Treaty

Condition (1). United States preparation for treaty implementation.

The committee recommends that the Senate condition its advice and consent to ratification on a requirement that the President take several steps prior to entry into force of the treaty.

At least 15 days prior to entry into force, the President must submit a report to Congress that: (1) describes steps taken to ensure that the executive branch and United States industry are prepared to comply with treaty requirements; (2) analyzes the implications of the treaty for the protection of intellectual property rights of United States persons; (3) explains what steps the United States Government is taking and will take to combat improper illegal intangible exports under the treaty; and (4) sets forth the issues to be addressed in the Management Plan called for by Section 12(3)(f) of the Implementing Arrangement and the procedures that are expected to be adopted in that Plan.

Prior to entry into force, the President must certify that changes to the ITAR have been published in the Federal Register pursuant to the AECA and that such changes would: (1) make clear the legal obligation for any person involved in an Export, Re-Export, Transfer, or Re-Transfer under the treaty (as those terms are defined in the treaty) to comply with all requirements in the revised ITAR; (2) make clear the legal obligation for Approved Community members to comply with United States Government instructions and requirements regarding U.S. Defense Articles (as the term is defined in the treaty) added to the list of exempt Defense Articles pursuant to Article 3(2) of the treaty; limit a person from being a member of the U.S. Community pursuant to Article 5(2) of the treaty, if that person is generally ineligible to export pursuant to 22 CFR, section 120.1(c); and (4) require any nongovernmental entity that ceases to be included in the United States Community to comply with instructions from authorized United States Government officials and to open its records of transactions under the treaty to inspection by United States Government, and as appropriate, authorized United Kingdom Government officials pursuant to Article 12 of the treaty.

Prior to entry into force, the President must also certify the following:

> (1) that appropriate mechanisms have been established to identify, in connection with the process for determining whether a nongovernmental entity is in the United States Community pursuant to Article 5(2) of the treaty, persons who meet the criteria in section 38(g)(1) of the AECA (22 U.S.C. 2778(g)(1)). Section 38(g)(1) of the AECA imposes an obligation

on the President to develop appropriate mechanisms to identify, in connection with the export licensing process under Section 38, persons who are the subject of an indictment, or have been convicted of a violation of, certain enumerated statutes;

(2) that appropriate mechanisms have been established to verify that nongovernmental entities in the United States that Export pursuant to the treaty are eligible to export Defense Articles under United States law and regulation as required by Article 5(2) of the treaty;

(3) that the Department of Homeland Security personnel at U.S. ports: (a) have prompt access to a State Department database containing registered exporters, freight forwarders and consignees, and watch lists regarding U.S. companies; and (b) are prepared to prevent attempts to export pursuant to the treaty by United States persons who are not eligible to export Defense Articles under United States law or regulation;

(4) that the Secretary of Defense has promulgated appropriate changes to the National Industrial Security Program Operating Manual and to Regulation DoD 5200.1–R, "Information Security Program," and has issued guidance to industry regarding marking and other treaty compliance requirements; and

(5) that a capability has been established to conduct post-shipment verification, end-use/end-user monitoring and related security audits for Exports under the treaty. This specific certification must also be accompanied by a report setting forth the legal authority, staffing and budget provided for such capability and additional executive branch or congressional action recommended to ensure effective implementation.

Condition 2. Treaty partner preparation for implementation.

Prior to entry into force of the treaty, the President must certify to Congress that the Government of the United Kingdom has promulgated all necessary regulatory changes, including: changes to export control regulations, changes to the United Kingdom Security Policy Framework and related security regulations for Government and United Kingdom Industry; and changes to the MOD classified Material Release Procedure.

Condition 3. Joint operations, programs, and projects.

The Secretary of State shall keep the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives informed of the lists of combined military and counter-terrorism operations, cooperative security and defense research, development, production, and support programs, and specific security and defense projects—i.e., the programs that define the scope of the treaty pursuant to Article 3(1). The Committee on Foreign Affairs is included because it, like the Committee on Foreign Relations, has jurisdiction over the AECA.

Condition 4. Exempted defense articles.

Condition 4(A) provides that the President may remove a Defense Article from the list Defense Articles exempt from the Scope of the treaty, if such removal is not barred by United States law,

30 days after the President informs the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives of such proposed removal. The 30-day notice period will give the committees time to discuss the proposed removal with the executive branch.

Under Condition 4(B), when a Defense Article is added to the list of Defense Articles exempt from the Scope of the treaty, the Secretary of State must provide a copy of the Federal Register Notice delineating the policies and procedures that will govern the control of such Defense Article, as well as an explanation of the reasons for adopting those policies and procedures, to the Committee on Foreign Relations and the Committee on Foreign Affairs within 5 days of the issuance of such Notice.

Condition 5. Changes to the definition of the territory of the United Kingdom.

Article 1(8) of the treaty allows the UK Government to add certain territories to the definition of "Territory of the United Kingdom" (i.e., beyond the usual "England and Wales, Scotland and Northern Ireland"), an option that is not found in the parallel treaty with Australia. Some British territories have histories as havens where arms brokers might engage in questionable practices (e.g., the Isle of Man, or the Turks and Caicos Islands), and there could be questions regarding the UK Government's ability to enforce export control and classified information laws in some of its territories. Condition (5)(A) therefore requires that the Secretary of State inform the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives within 15 days of either the initiation of consultations with the United Kingdom concerning the inclusion of any additional territory in the definition of "Territory of the United Kingdom" or the receipt through diplomatic channels of notice that a territory or group of territories has been added to the definition.

Under Condition 5(B), the Secretary of State must consult with the Committee on Foreign Relations and the Committee on Foreign Affairs before approving any addition to the United Kingdom Community of a non-governmental entity or facility outside the territory of England, Scotland, Wales, or Northern Ireland. Thus, if the UK "Territory" is enlarged, the committees will still be able to weigh in regarding persons in the added territory who might be proposed for membership in the Approved Community. All this is merely precautionary; the committee has no indication at this time that the UK Government intends to use the option to change the definition that Article 1(8) affords.

Condition 6. Approved Community membership.

Under Condition 6(A), if sanctions are in effect against a person in the United Kingdom Community pursuant to section 73(a)(2)(B) or section 81 of the AECA (22 U.S.C. 2797b(a)(2)(B) or 2798), the United States is required to raise the matter with the United Kingdom pursuant to Article 4(2) of the treaty and Section 7(9) of the Implementing Arrangement. These provisions relate to removal of an entity from the United Kingdom Approved Community when the requesting Party (either the United States or the United Kingdom) considers such removal to be in its national interests.

Condition 6(B) requires the Secretary of State to inform the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives at least five days before the United States Government agrees to the initial inclusion in the United Kingdom Community of a nongovernmental United Kingdom entity, if the Department of State is aware that the entity, or any of its relevant senior officers or officials (1) has been convicted of violating a statute enumerated in section 38(g)(1) of the AECA; or (2) is, or would be if that person were a United States person: (a) ineligible to contract with any agency of the U.S. Government; (b) ineligible to receive a license or other authorization to export from any agency of the U.S. Government; or (c) ineligible to receive a license or other authorization to import defense articles or defense services from any agency of the U.S. Government. The United States has the power to reject such a person as a member of the Approved Community, and prior notice will give the committees an opportunity to weigh in if the UK Government proposes to add such a person or if the State Department proposes to grant an exception to an otherwise ineligible person.

If the United States Government agrees to the continued inclusion in the United Kingdom Community of a nongovernmental United Kingdom entity, when the Department of State is aware that the entity, or any one or more of its relevant senior officers or officials, raises one or more of the concerns referred to in paragraph 6(B), the Secretary of State must inform and consult with the Committee on Foreign Relations and the Committee on Foreign Affairs not later than 5 days after such agreement.

Condition 7. Transition policies and procedures.

Article 3(3) of the treaty allows the UK Government to acquire Defense Articles from the U.S. Government through the Foreign Military Sales (FMS) program and then convert them to treaty-covered status. The means by which this would be done have not yet been determined, however, so this condition requires the President to report to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives on these new policies at least 15 days before they are adopted.

Similarly, the treaty and Implementing Arrangements allow for entities in an Approved Community to move from the requirements of United States Government defense export licenses or other authorizations issued under the ITAR to the processes established under the treaty. Fifteen days before formally establishing the procedures for members of the United Kingdom Community to transition to processes established under the treaty, the President must provide a report on such procedures to the Committee on Foreign Relations and the Committee on Foreign Affairs.

Condition 8. Congressional oversight.

To ensure Congress has the information necessary to fulfill its oversight responsibilities, the Secretary of State must inform the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives promptly of any report, consistent with Section 11(4)(b)(vi) of the Implementing Arrangement, of a material violation of treaty requirements or procedures by a member of the Approved Community. Further, the De-

partment of State must brief both committees regularly regarding issues raised in the Management Board called for in Section 12(3) of the Implementing Arrangement, and the resolution of such issues.

Condition 9. Annual report.

The President must submit a report to Congress by March 31, 2011, and annually thereafter, which covers all treaty activities during the previous calendar year.

Understanding 1. Meaning of the phrase "identified in."

The treaty makes occasional reference to matters "identified in" the Implementing Arrangement, where in fact the Implementing Arrangement merely says that the Management Plan will specify these matters. Understanding (1) is intended to make clear that the Senate was aware of, and did not object to, that disconnect.

Understanding 2. Meaning of the word "Scope."

This definition was included in the U.S.-Australia Treaty, but not in the U.S.-UK Treaty (apparently by accident).

Understanding 3. Cooperative programs with exempt and non-exempt defense articles.

This understanding makes clear the view of the United States that if a cooperative program is mutually determined, consistent with Section 2(2)(e) of the Implementing Arrangement, to be within the Scope of the treaty pursuant to Article 3(1)(b) of the treaty despite involving Defense Articles that are exempt from the Scope of the treaty pursuant to Article 3(2) of the treaty, the exempt Defense Articles shall remain exempt from the Scope of the treaty and the treaty shall apply only to non-exempt Defense Articles required for the program.

Understanding 4. Investigations and reports of alleged violations.

This understanding makes clear that Article 10(3)(f) does not detract in any way from the obligation in Article 13(3) of the treaty for each Party to "promptly investigate all suspected violations and reports of alleged violations of the procedures established pursuant to this treaty," and to "promptly inform the other Party of the results of such investigations."

Understanding 5. Exempt defense articles.

This understanding makes clear that if one Party to the treaty exempts a type of Defense Articles from the scope of the treaty pursuant to Article 3(2) of the treaty, then Defense Articles of that type will be treated as exempt by both Parties to the treaty.

Understanding 6. Intermediate consignees.

This understanding makes clear that any intermediate consignee of an Export from the United States under the treaty must be a member of the Approved Community or otherwise approved by the United States Government. Accordingly, third-country persons will not normally be responsible for transporting Exports under the treaty.

Understanding 7. Scope of treaty exemption

This understanding conveys the interpretation of the United States that the treaty does not exempt any person or entity from any United States statutory and regulatory requirements, including any requirements of licensing or authorization, other than those included in the ITAR, as modified or amended. The United States interprets the term "license or other written authorization" in Article 2 and the term "licenses or other authorizations" in Article 6(1), as these terms apply to the United States, and the term "prior written authorization by the United States Government" in Article 7, to refer only to such licenses, licensing requirements, and other authorizations as are required or issued by the United States pursuant to the ITAR, as modified or amended; and the United States interprets the reference to "the applicable licensing requirements and the implementing regulations of the United States Arms Export Control Act" in Article 13(1) to refer only to the applicable licensing requirements under the ITAR, as modified or amended. Among other things, the treaty does not modify or amend the authorities related to the permanent import of defense articles and services set out in Article 38(a)(1) of the AECA (22 U.S.C. 2778(a)(1)).

Declaration 1. Self-execution.

This declaration states that the treaty is not self-executing in the United States, notwithstanding the statement in the preamble to the contrary. The declaration represents the shared understanding of the committee and the executive branch. (The executive branch conveyed its position on this matter in a response to a question for the record submitted on September 20, 2010.) The treaty will be implemented in the United States through legislation and regulations thereunder.

The committee notes that the inclusion in a treaty of a statement on the purported self-executing nature of the treaty is highly unusual—perhaps unprecedented—and is contrary to the longstanding practice that such matters are determined through the shared understanding of the Senate and the executive branch. The committee strongly discourages the executive branch from including such provisions in future treaties.

Declaration 2. Private rights.

This declaration makes clear that the treaty does not confer private rights enforceable in United States courts.

Declaration 3. Intellectual property rights.

This declaration makes clear that no liability will be incurred by or attributed to the United States Government in connection with any possible infringement of privately owned patent or proprietary rights, either domestic or foreign, by reason of the United States Government's permitting Exports or Transfers or its approval of Re-exports or Re-transfers under the treaty.

VII. Section-by-Section Analysis of Resolution of Advice and Consent to Ratification of the U.S.-Australia Defense Trade Cooperation Treaty

Condition (1). United States preparation for treaty implementation.

The committee recommends that the Senate condition its advice and consent to ratification on a requirement that the President take several steps prior to entry into force of the treaty.

At least 15 days prior to entry into force, the President must submit a report to Congress that: (1) describes steps taken to ensure that the executive branch and United States industry are prepared to comply with treaty requirements; (2) analyzes the implications of the treaty for the protection of intellectual property rights of United States persons; (3) explains what steps the United States Government is taking and will take to combat improper illegal intangible exports under the treaty; and (4) sets forth the issues to be addressed in the Management Plan called for by Section 12(3)(f) of the Implementing Arrangement and the procedures that are expected to be adopted in that Plan.

Prior to entry into force, the President must certify that changes to the ITAR have been published in the Federal Register pursuant to the AECA and that such changes would: (1) make clear the legal obligation for any person involved in an Export, Re-Export, Transfer, or Re-Transfer under the treaty (as those terms are defined in the treaty) to comply with all requirements in the revised ITAR; (2) make clear the legal obligation for Approved Community members to comply with United States Government instructions and requirements regarding U.S. Defense Articles (as the term is defined in the treaty) added to the list of exempt Defense Articles pursuant to Article 3(2) of the treaty; limit a person from being a member of the U.S. Community pursuant to Article 5(2) of the treaty, if that person is generally ineligible to export pursuant to 22 CFR, section 120.1(c); and (4) require any nongovernmental entity that ceases to be included in the United States Community to comply with instructions from authorized United States Government officials and to open its records of transactions under the treaty to inspection by United States Government and, as appropriate, authorized Australian Government, officials pursuant to Article 12 of the treaty.

Prior to entry into force, the President must also certify the following:

> (1) that appropriate mechanisms have been established to identify, in connection with the process for determining whether a nongovernmental entity is in the United States Community pursuant to Article 5(2) of the treaty, persons who meet the criteria in section 38(g)(1) of the AECA (22 U.S.C. 2778(g)(1)). Section 38(g)(1) of the AECA imposes an obligation on the President to develop appropriate mechanisms to identify, in connection with the export licensing process under Section 38, persons who are the subject of an indictment, or have been convicted of a violation of, certain enumerated statutes;
>
> (2) that appropriate mechanisms have been established to verify that nongovernmental entities in the United States that Export pursuant to the treaty are eligible to export Defense Ar-

ticles under United States law and regulation as required by Article 5(2) of the treaty;

(3) that the Department of Homeland Security personnel at U.S. ports: (a) have prompt access to a State Department database containing registered exporters, freight forwarders and consignees, and watch lists regarding U.S. companies; and (b) are prepared to prevent attempts to export pursuant to the treaty by United States persons who are not eligible to export Defense Articles under United States law or regulation;

(4) that the Secretary of Defense has promulgated appropriate changes to the National Industrial Security Program Operating Manual and to Regulation DoD 5200.1–R, "Information Security Program," and has issued guidance to industry regarding marking and other treaty compliance requirements; and

(5) that a capability has been established to conduct post-shipment verification, end-use/end-user monitoring and related security audits for Exports under the treaty. This specific certification must also be accompanied by a report setting forth the legal authority, staffing and budget provided for such capability and additional executive branch or congressional action recommended to ensure effective implementation.

Condition 2. Treaty partner preparation for implementation.

Prior to entry into force of the treaty, the President must certify to Congress that the Government of Australia has enacted legislation to strengthen its controls over defense and dual-use goods, including controls over intangible transfers of controlled technology and brokering of controlled goods, technology, and services, and that the Government of Australia has promulgated regulatory changes required to satisfactorily implement the treaty regime.

Condition 3. Joint operations, programs, and projects.

The Secretary of State shall keep the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives informed of the lists of combined military and counter-terrorism operations, cooperative security and defense research, development, production, and support programs, and specific security and defense projects—i.e., the programs that define the scope of the treaty pursuant to Article 3(1). The Committee on Foreign Affairs is included because it, like the Committee on Foreign Relations, has jurisdiction over the AECA.

Condition 4. Exempted defense articles.

Condition 4(A) provides that the President may remove a Defense Article from the list Defense Articles exempt from the Scope of the treaty, if such removal is not barred by United States law, 30 days after the President informs the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives of such proposed removal. The 30-day notice period will give the committees time to discuss the proposed removal with the executive branch.

Under Condition 4(B), when a Defense Article is added to the list of Defense Articles exempt from the Scope of the treaty, the Sec-

retary of State must provide a copy of the Federal Register Notice delineating the policies and procedures that will govern the control of such Defense Article, as well as an explanation of the reasons for adopting those policies and procedures, to the Committee on Foreign Relations and the Committee on Foreign Affairs within 5 days of the issuance of such Notice.

Condition 5. Approved Community membership.

Under Condition 6(A), if sanctions are in effect against a person in the Australian Community pursuant to section 73(a)(2)(B) or section 81 of the AECA (22 U.S.C. 2797b(a)(2)(B) or 2798), the United States is required to raise the matter with Australia pursuant to Article 4(2) of the treaty and Section 6(9) of the Implementing Arrangement. These provisions relate to removal of an entity from the Australian Approved Community when the requesting Party (either the United States or Australia) considers such removal to be in its national interests.

Condition 6(B) requires the Secretary of State to inform the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives at least five days before the United States Government agrees to the initial inclusion in the Australian Community of a nongovernmental Australian entity, if the Department of State is aware that the entity, or any of its relevant senior officers or officials (1) has been convicted of violating a statute enumerated in section 38(g)(1) of the AECA; or (2) is, or would be if that person were a United States person: (a) ineligible to contract with any agency of the U.S. Government; (b) ineligible to receive a license or other authorization to export from any agency of the U.S. Government; or (c) ineligible to receive a license or other authorization to import defense articles or defense services from any agency of the U.S. Government. The United States has the power to reject such a person as a member of the Approved Community, and prior notice will give the committees an opportunity to weigh in if the Australian Government proposes to add such a person or if the State Department proposes to grant an exception to an otherwise ineligible person.

If the United States Government agrees to the continued inclusion in the Australian Community of a nongovernmental Australian entity, when the Department of State is aware that the entity, or any one or more of its relevant senior officers or officials, raises one or more of the concerns referred to in paragraph 6(B), the Secretary of State must inform and consult with the Committee on Foreign Relations and the Committee on Foreign Affairs not later than 5 days after such agreement.

Condition 6. Transition policies and procedures.

Article 3(3) of the treaty allows the Australian Government to acquire Defense Articles from the U.S. Government through the Foreign Military Sales (FMS) program and then convert them to treaty-covered status. The means by which this would be done have not yet been determined, however, so this condition requires the President to report to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives on these new policies at least 15 days before they are adopted.

Similarly, the treaty and Implementing Arrangements allow for entities in an Approved Community to move from the requirements of United States Government defense export licenses or other authorizations issued under the ITAR to the processes established under the treaty. Fifteen days before formally establishing the procedures for members of the Australian Community to transition to processes established under the treaty, the President must provide a report on such procedures to the Committee on Foreign Relations and the Committee on Foreign Affairs.

Condition 7. Congressional oversight.

To ensure Congress has the information necessary to fulfill its oversight responsibilities, the Secretary of State must inform the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives promptly of any report, consistent with Section 11(6)(f) of the Implementing Arrangement, of a material violation of treaty requirements or procedures by a member of the Approved Community. Further, the Department of State must brief both committees regularly regarding issues raised in the Management Board called for in Section 12(3) of the Implementing Arrangement, and the resolution of such issues.

Condition 8. Annual report.

The President must submit a report to Congress by March 31, 2011, and annually thereafter, which covers all treaty activities during the previous calendar year.

Understanding 1. Meaning of the phrase "identified in."

The treaty makes occasional reference to matters "identified in" the Implementing Arrangement, where in fact the Implementing Arrangement merely says that the Management Plan will specify these matters. Understanding (1) is intended to make clear that the Senate was aware of, and did not object to, that disconnect.

Understanding 2. Cooperative programs with exempt and non-exempt defense articles.

This understanding makes clear the view of the United States that if a cooperative program is mutually determined, consistent with Section 2(2)(e) of the Implementing Arrangement, to be within the Scope of the treaty pursuant to Article 3(1)(b) of the treaty despite involving Defense Articles that are exempt from the Scope of the treaty pursuant to Article 3(2) of the treaty, the exempt Defense Articles shall remain exempt from the Scope of the treaty and the treaty shall apply only to non-exempt Defense Articles required for the program.

Understanding 3. Investigations and reports of alleged violations.

This understanding makes clear that Article 10(3)(f) of the Implementing Arrangement does not detract in any way from the obligation in Article 13(3) of the treaty for each Party to "promptly investigate all suspected violations and reports of alleged violations of the procedures established pursuant to this treaty," and to "promptly inform the other Party of the results of such investigations."

Understanding 4. Exempt defense articles.

This understanding makes clear that if one Party to the treaty exempts a type of Defense Articles from the scope of the treaty pursuant to Article 3(2) of the treaty, then Defense Articles of that type will be treated as exempt by both Parties to the treaty.

Understanding 5. Intermediate consignees.

This understanding makes clear that any intermediate consignee of an Export from the United States under the treaty must be a member of the Approved Community or otherwise approved by the United States Government. Accordingly, third-country persons will not normally be responsible for transporting Exports under the treaty.

Understanding 6. Scope of treaty exemption

This understanding conveys the interpretation of the United States that the treaty does not exempt any person or entity from any United States statutory and regulatory requirements, including any requirements of licensing or authorization, other than those included in the ITAR, as modified or amended. The United States interprets the term "license or other written authorization" in Article 2 and the term "licenses or other authorizations" in Article 6(1), as these terms apply to the United States, and the term "prior written authorization by the United States Government" in Article 7, to refer only to such licenses, licensing requirements, and other authorizations as are required or issued by the United States pursuant to the ITAR, as modified or amended; and the United States interprets the reference to "the applicable licensing requirements and the implementing regulations of the United States Arms Export Control Act" in Article 13(1) to refer only to the applicable licensing requirements under the ITAR, as modified or amended. Among other things, the treaty does not modify or amend the authorities related to the permanent import of defense articles and services set out in Article 38(a)(1) of the AECA (22 U.S.C. 2778).

Declaration 1. Self-execution.

This declaration states that the treaty is not self-executing in the United States, notwithstanding the statement in the preamble to the contrary. The declaration represents the shared understanding of the committee and the executive branch. (The executive branch conveyed its position on this matter in a response to a question for the record submitted on September 20, 2010.) The treaty will be implemented in the United States through legislation and regulations thereunder.

The committee notes that the inclusion in a treaty of a statement on the purported self-executing nature of the treaty is highly unusual—perhaps unprecedented—and is contrary to the longstanding practice that such matters are determined through the shared understanding of the Senate and the executive branch. The committee strongly discourages the executive branch from including such provisions in future treaties.

Declaration 2. Private rights.

This declaration makes clear that the treaty does not confer private rights enforceable in United States courts.

Declaration 3. Intellectual property rights.

This declaration makes clear that no liability will be incurred by or attributed to the United States Government in connection with any possible infringement of privately owned patent or proprietary rights, either domestic or foreign, by reason of the United States Government's permitting Exports or Transfers or its approval of Re-exports or Re-transfers under the treaty.

VIII. Text of Resolutions of Advice and Consent to Ratification

THE U.S.-UK DEFENSE TRADE COOPERATION TREATY

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO CONDITIONS, UNDERSTANDINGS AND DECLARATIONS.

The Senate advises and consents to the ratification of the Treaty with the United Kingdom Concerning Defense Trade Cooperation (as defined in section 5 of this resolution), subject to the conditions in section 2, the understandings in section 3 and the declarations in section 4.

SECTION 2. CONDITIONS.

The Senate's advice and consent to the ratification of the Treaty with the United Kingdom Concerning Defense Trade Cooperation is subject to the following conditions, which shall be binding upon the President:

(1) United States Preparation for Treaty Implementation.

(A) At least 15 days before any exchange of notes pursuant to Article 20 of the Treaty, the President shall submit to the Congress a report—

(i) describing steps taken to ensure that the Executive branch and United States industry are prepared to comply with Treaty requirements;

(ii) analyzing the implications of the Treaty, and especially of Article 3(3) of the Treaty, for the protection of intellectual property rights of United States persons;

(iii) explaining what steps the United States Government is taking and will take to combat improper or illegal intangible exports (i.e., exports as defined in part 120.17(a)(4) of title 22, Code of Federal Regulations) under the Treaty; and

(iv) setting forth the issues to be addressed in the Management Plan called for by Section 12(3)(f) of the Implementing Arrangement and the procedures that are expected to be adopted in that Plan.

(B) Before any exchange of notes pursuant to Article 20 of the Treaty, the President shall submit to the Congress a certification that changes to the International Traffic in Arms Regulations (parts 120–130 of title 22, Code of Federal Regulations) have been published in the Federal Register pursuant to the Arms Export Control Act, as appropriate, that would, upon entry into force of the Treaty,—

(i) make clear the legal obligation for any person involved in an Export, Re-export, Transfer, or Re-transfer under the Treaty to comply with all requirements in the revised International Traffic in Arms Regulations, including by taking all reasonable

steps to ensure the accuracy of information received from a member of the Approved Community that is party to an Export, Re-export, Transfer, or Re-transfer under the Treaty;

(ii) make clear the legal obligation for Approved Community members to comply with United States Government instructions and requirements regarding United States Defense Articles added to the list of exempt Defense Articles pursuant to Article 3(2) of the Treaty;

(iii) limit a person from being a member of the United States Community, pursuant to Article 5(2) of the Treaty, if that person is generally ineligible to export pursuant to section 120.1(c) of title 22, Code of Federal Regulations; and

(iv) require any nongovernmental entity that ceases to be included in the United States Community to comply with instructions from authorized United States Government officials and to open its records of transactions under the Treaty to inspection by United States Government and, as appropriate, authorized United Kingdom Government officials pursuant to Article 12 of the Treaty.

(C) Before any exchange of notes pursuant to Article 20 of the Treaty, the President shall submit to the Congress—

(i) a certification that appropriate mechanisms have been established to identify, in connection with the process for determining whether a nongovernmental entity is in the United States Community pursuant to Article 5(2) of the Treaty, persons who meet the criteria in section 38(g)(1) of the Arms Export Control Act (22 U.S.C. 2778(g)(1));

(ii) a certification that appropriate mechanisms have been established to verify that nongovernmental entities in the United States that Export pursuant to the Treaty are eligible to export Defense Articles under United States law and regulation as required by Article 5(2) of the Treaty;

(iii) a certification that United States Department of Homeland Security personnel at United States ports—

(a) have prompt access to a State Department database containing registered exporters, freight forwarders and consignees, and watch lists regarding United States companies; and

(b) are prepared to prevent attempts to export pursuant to the Treaty by United States persons who are not eligible to export Defense Articles under United States law or regulation, even if such person has registered with the United States Government;

(iv) a certification that the Secretary of Defense has promulgated appropriate changes to the National Industrial Security Program Operating Manual and to Regulation DoD 5200.1–R, "Information Security Program," and has issued guidance to industry regarding marking and other Treaty compliance requirements; and

(v) a certification that a capability has been established to conduct post-shipment verification, end-use/end-user monitoring and related security audits for Exports under the Treaty, accompanied by a report setting forth the legal authority, staffing and budget provided for this capability and any fur-

ther Executive branch or congressional action recommended to ensure its effective implementation.

(2) TREATY PARTNER PREPARATION FOR TREATY IMPLEMENTATION.

Before any exchange of notes pursuant to Article 20 of the Treaty, the President shall certify to Congress that the Government of the United Kingdom has promulgated all necessary regulatory changes, including:

(A) changes to export control regulations, setting forth a Treaty-specific Open General Export License (OGEL);

(B) changes to the United Kingdom Security Policy Framework and related security regulations for Government and United Kingdom Industry; and

(C) changes to the MOD Classified Material Release Procedure (F680), to take account of Treaty Re-exports and Retransfers.

(3) JOINT OPERATIONS, PROGRAMS AND PROJECTS.

The Secretary of State shall keep the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives informed of the lists of combined military and counter-terrorism operations developed pursuant to Article 3(1)(a) of the Treaty; cooperative security and defense research, development, production, and support programs developed pursuant to Article 3(1)(b) of the Treaty; and specific security and defense projects developed pursuant to article 3(1)(c) of the Treaty.

(4) EXEMPTED DEFENSE ARTICLES.

(A) The President may remove a Defense Article from the list of Defense Articles exempt from the Scope of the Treaty, if such removal is not barred by United States law, 30 days after the President informs the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives of such proposed removal.

(B) When a Defense Article is added to the list of Defense Articles exempt from the Scope of the Treaty, the Secretary of State shall provide a copy of the Federal Register Notice delineating the policies and procedures that will govern the control of such Defense Article, consistent with Section 4(7) of the Implementing Arrangement, as well as an explanation of the reasons for adopting those policies and procedures, to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives within five days of the issuance of such Notice.

(5) CHANGES TO THE DEFINITION OF THE TERRITORY OF THE UNITED KINGDOM.

(A) The Secretary of State shall inform the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives within 15 days of the initiation of consultations with the United Kingdom concerning the inclusion of any additional territory or territories in the definition of "Territory of the United Kingdom" for the purposes of Article 1(8) of the Treaty, and shall inform the Committees within 15 days of receipt through diplomatic channels of notice that a territory or group of territories has been added to the definition of "Territory of the United Kingdom" for the purposes of Article 1(8) of the Treaty.

(B) The Secretary of State shall consult with the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives before approving any addition to the United Kingdom Community of a non-governmental entity or facility outside the territory of England, Scotland, Wales, or Northern Ireland.

(6) APPROVED COMMUNITY MEMBERSHIP.

(A) If sanctions are in effect against a person in the United Kingdom Community pursuant to section 73(a)(2)(B) or section 81 of the Arms Export Control Act (22 U.S.C. 2797b(a)(2)(B) or 2798), the United States shall raise the matter pursuant to Article 4(2) of the Treaty and Section 7(9) of the Implementing Arrangement.

(B) The Secretary of State shall inform the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives not later than 5 days before the U.S. Government agrees to the initial inclusion in the United Kingdom Community of a nongovernmental United Kingdom entity, if the Department of State is aware that the entity, or any one or more of its relevant senior officers or officials:

(i) Has been convicted of violating a statute cited in paragraph 38(g)(1) of the Arms Export Control Act (22 U.S.C. 2778(g)(1)); or

(ii) is, or would be if that person were a United States person,

(a) ineligible to contract with any agency of the U.S. Government;

(b) ineligible to receive a license or other form of authorization to export from any agency of the U.S. Government; or

(c) ineligible to receive a license or any form of authorization to import defense articles or defense services from any agency of the U.S. Government.

(C) The Secretary of State shall inform and consult with the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives not later than 5 days after the United States Government agrees to the continued inclusion in the United Kingdom Community of a nongovernmental United Kingdom entity, if the Department is aware that the entity, or any one or more of its relevant senior officers or officials, raises one or more of the concerns referred to in paragraph (B).

(7) TRANSITION POLICIES AND PROCEDURES.

(A) No fewer than 15 days before formally establishing the procedures called for in Section 5(5) of the Implementing Arrangement, the President shall provide to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives a report concerning the policies and procedures developed to govern the transition to the application of the Treaty, pursuant to Article 3(3) of the Treaty, of Defense Articles acquired and delivered under the Foreign Military Sales program.

(B) No fewer than 15 days before formally establishing the procedures called for in Section 8(2) of the Implementing Ar-

rangement, the President shall provide to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives a report concerning the policies and procedures developed to govern the members of the United Kingdom Community wishing to transition to the processes established under the Treaty, pursuant to Article 14(2) of the Treaty, from the requirements of a United States Government export license or other authorization.

(8) CONGRESSIONAL OVERSIGHT.

(A) The Secretary of State shall inform the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives promptly of any report, consistent with Section 11(4)(b)(vi) of the Implementing Arrangement, of a material violation of Treaty requirements or procedures by a member of the Approved Community.

(B) The Department of State shall brief the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives regularly regarding issues raised in the Management Board called for in Section 12(3) of the Implementing Arrangement, and the resolution of such issues.

(9) ANNUAL REPORT.

Not later than March 31, 2011, and annually thereafter, the President shall submit to Congress a report, which shall cover all Treaty activities during the previous calendar year. This report shall include:

(A) a summary of the amount of Exports under the Treaty and of Defense Articles transitioned into the Treaty, with an analysis of how the Treaty is being used;

(B) a list of all political contributions, gifts, commissions and fees paid, or offered or agreed to be paid, by any person in connection with Exports of Defense Articles under the Treaty in order to solicit, promote, or otherwise to secure the conclusion of such sales;

(C) any action to remove from the United Kingdom Community a nongovernmental entity or facility previously engaged in activities under the Treaty, other than due to routine name or address changes or mergers and acquisitions;

(D) any concerns relating to infringement of intellectual property rights that were raised to the President or an Executive branch Department or Agency by Approved Community members, and developments regarding any concerns that were raised in previous years;

(E) a description of any relevant investigation and each prosecution pursued with respect to activities under the Treaty, the results of such investigations or prosecutions and of such investigations and prosecutions that continued over from previous years, and any shortfalls in obtaining prompt notification pursuant to Article 13(3) of the Treaty or in cooperation between the Parties pursuant to Article 13(3) and (4) of the Treaty;

(F) a description of any post-shipment verification, end-user/end-use monitoring, or other security activity related to Treaty implementation conducted during the year, the purposes of such activity and the results achieved; and

(G) any Office of Inspector General activity bearing upon Treaty implementation conducted during the year, any resultant findings or recommendations, and any actions taken in response to current or past findings or recommendations.

SECTION 3. UNDERSTANDINGS.

The Senate's advice and consent to the ratification of the Treaty with the United Kingdom Concerning Defense Trade Cooperation is subject to the following understandings, which shall be included in the instrument of ratification:

(1) MEANING OF THE PHRASE "IDENTIFIED IN."

It is the understanding of the United States that the phrase "identified in" in the Treaty shall be interpreted as meaning "identified pursuant to."

(2) MEANING OF THE WORD "SCOPE."

It is the understanding of the United States that the word "Scope" in the Treaty shall be interpreted as meaning "the Treaty's coverage as identified in Article 3."

(3) COOPERATIVE PROGRAMS WITH EXEMPT AND NON-EXEMPT DEFENSE ARTICLES.

It is the understanding of the United States that if a cooperative program is mutually determined, consistent with Section 2(2)(e) of the Implementing Arrangement, to be within the Scope of the Treaty pursuant to Article 3(1)(b) of the Treaty despite involving Defense Articles that are exempt from the Scope of the Treaty pursuant to Article 3(2) of the Treaty, the exempt Defense Articles shall remain exempt from the Scope of the Treaty and the Treaty shall apply only to non-exempt Defense Articles required for the program.

(4) INVESTIGATIONS AND REPORTS OF ALLEGED VIOLATIONS.

It is the understanding of the United States that the words "as appropriate" in Section 10(3)(f) of the Implementing Arrangement do not detract in any way from the obligation in Article 13(3) of the Treaty, that "Each Party shall promptly investigate all suspected violations and reports of alleged violations of the procedures established pursuant to this Treaty, and shall promptly inform the other Party of the results of such investigations."

(5) EXEMPT DEFENSE ARTICLES.

It is the understanding of the United States that if one Party to the Treaty exempts a type of Defense Articles from the scope of the Treaty pursuant to Article 3(2) of the Treaty, then Defense Articles of that type will be treated as exempt by both Parties to the Treaty.

(6) INTERMEDIATE CONSIGNEES.

It is the understanding of the United States that any intermediate consignee of an Export from the United States under the Treaty must be a member of the Approved Community or otherwise approved by the United States Government.

(7) SCOPE OF TREATY EXEMPTION.

The United States interprets the Treaty not to exempt any person or entity from any United States statutory and regulatory requirements, including any requirements of licensing or authorization, other than those included in the International Traffic in Arms Regulations, as modified or amended. Accordingly, the United States interprets the term 'license or other written authorization' in Article 2 and the term 'licenses or other authorizations' in Arti-

cle 6(1), as these terms apply to the United States, and the term 'prior written authorization by the United States Government' in Article 7, to refer only to such licenses, licensing requirements, and other authorizations as are required or issued by the United States pursuant to the International Traffic in Arms Regulations, as modified or amended; and the United States interprets the reference to 'the applicable licensing requirements and the implementing regulations of the United States Arms Export Control Act' in Article 13(1) to refer only to the applicable licensing requirements under the International Traffic in Arms Regulations, as modified or amended.

SECTION 4. DECLARATIONS.

The Senate's advice and consent to the ratification of the Treaty with the United Kingdom Concerning Defense Trade Cooperation is subject to the following declarations:

(1) SELF-EXECUTION.

This Treaty is not self-executing in the United States, notwithstanding the statement in the preamble to the contrary.

(2) PRIVATE RIGHTS.

This Treaty does not confer private rights enforceable in United States courts.

(3) INTELLECTUAL PROPERTY RIGHTS.

No liability will be incurred by or attributed to the United States Government in connection with any possible infringement of privately owned patent or proprietary rights, either domestic or foreign, by reason of the United States Government's permitting Exports or Transfers or its approval of Re-exports or Re-transfers under the Treaty.

SECTION 5. DEFINITIONS.

As used in this resolution:

(1) The terms "Treaty with the United Kingdom Concerning Defense Trade Cooperation" and "Treaty" mean the Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation, done at Washington and London on June 21 and 26, 2007.

(2) The terms "Implementing Arrangement Pursuant to the Treaty" and "Implementing Arrangement" mean the Implementing Arrangement Pursuant to the Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation, which was signed in Washington on February 14, 2008.

(3) The terms "Defense Articles," "Export," "Re-export," "Re-transfer," "Transfer," "Approved Community," "United States Community," "United Kingdom Community," and "Territory of the United Kingdom" have the meanings given to them in Article 1 of the Treaty.

(4) The terms "Management Board" and "Management Plan" have the meanings given to them in Section 1 of the Implementing Arrangement.

(5) The terms "person" and "foreign person" have the meaning given to them by section 38(g)(9) of the Arms Export Control Act

(22 U.S.C. 2778(g)(9)). The term "U.S. person" has the meaning given to it by part 120.15 of title 22, Code of Federal Regulations.

THE U.S.-AUSTRALIA DEFENSE TRADE COOPERATION TREATY

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO CONDITIONS, UNDERSTANDINGS AND DECLARATIONS.

The Senate advises and consents to the ratification of the Treaty with Australia Concerning Defense Trade Cooperation (as defined in section 5 of this resolution), subject to the conditions in section 2, the understandings in section 3 and the declarations in section 4.

SECTION 2. CONDITIONS.

The Senate's advice and consent to the ratification of the Treaty with Australia Concerning Defense Trade Cooperation is subject to the following conditions, which shall be binding upon the President:

(1) UNITED STATES PREPARATION FOR TREATY IMPLEMENTATION.

(A) At least 15 days before any exchange of notes pursuant to Article 20 of the Treaty, the President shall submit to the Congress a report—

(i) describing steps taken to ensure that the Executive branch and United States industry are prepared to comply with Treaty requirements;

(ii) analyzing the implications of the Treaty, and especially of Article 3(3) of the Treaty, for the protection of intellectual property rights of United States persons;

(iii) explaining what steps the United States Government is taking and will take to combat improper or illegal intangible exports (i.e., exports as defined in part 120.17(a)(4) of title 22, Code of Federal Regulations) under the Treaty; and

(iv) setting forth the issues to be addressed in the Management Plan called for by Section 12(3)(f) of the Implementing Arrangement and the procedures that are expected to be adopted in that Plan.

(B) Before any exchange of notes pursuant to Article 20 of the Treaty, the President shall submit to the Congress a certification that changes to the International Traffic in Arms Regulations (parts 120–130 of title 22, Code of Federal Regulations) have been published in the Federal Register pursuant to the Arms Export Control Act, as appropriate, that would, upon entry into force of the Treaty,—

(i) make clear the legal obligation for any person involved in an Export, Re-export, Transfer, or Re-transfer under the Treaty to comply with all requirements in the revised International Traffic in Arms Regulations, including by taking all reasonable steps to ensure the accuracy of information received from a member of the Approved Community that is party to an Export, Re-export, Transfer, or Re-transfer under the Treaty;

(ii) make clear the legal obligation for Approved Community members to comply with United States Government

instructions and requirements regarding United States Defense Articles added to the list of exempt Defense Articles pursuant to Article 3(2) of the Treaty;

(iii) limit a person from being a member of the United States Community, pursuant to Article 5(2) of the Treaty, if that person is generally ineligible to export pursuant to section 120.1(c) of title 22, Code of Federal Regulations; and

(iv) require any nongovernmental entity that ceases to be included in the United States Community to comply with instructions from authorized United States Government officials and to open its records of transactions under the Treaty to inspection by United States Government and, as appropriate, authorized Australian Government officials pursuant to Article 12 of the Treaty.

(C) Before any exchange of notes pursuant to Article 20 of the Treaty, the President shall submit to the Congress—

(i) a certification that appropriate mechanisms have been established to identify, in connection with the process for determining whether a nongovernmental entity is in the United States Community pursuant to Article 5(2) of the Treaty, persons who meet the criteria in section 38(g)(1) of the Arms Export Control Act (22 U.S.C. 2778(g)(1));

(ii) a certification that appropriate mechanisms have been established to verify that nongovernmental entities in the United States that Export pursuant to the Treaty are eligible to export Defense Articles under United States law and regulation as required by Article 5(2) of the Treaty;

(iii) a certification that United States Department of Homeland Security personnel at United States ports—

(a) have prompt access to a State Department database containing registered exporters, freight forwarders and consignees, and watch lists regarding United States companies; and

(b) are prepared to prevent attempts to export pursuant to the Treaty by United States persons who are not eligible to export Defense Articles under United States law or regulation, even if such person has registered with the United States Government;

(iv) a certification that the Secretary of Defense has promulgated appropriate changes to the National Industrial Security Program Operating Manual and to Regulation DoD 5200.1–R, "Information Security Program," and has issued guidance to industry regarding marking and other Treaty compliance requirements; and

(v) a certification that a capability has been established to conduct post-shipment verification, end-use/end-user monitoring and related security audits for Exports under the Treaty, accompanied by a report setting forth the legal authority, staffing and budget provided for this capability and any further Executive branch or congressional action recommended to ensure its effective implementation.

(2) TREATY PARTNER PREPARATION FOR TREATY IMPLEMENTATION.

Before any exchange of notes pursuant to Article 20 of the Treaty, the President shall certify to Congress that the Government of Australia has—

(A) enacted legislation to strengthen generally its controls over defense and dual-use goods, including controls over intangible transfers of controlled technology and brokering of controlled goods, technology, and services, and setting forth:

(i) the criteria for entry into the Australian Community and the conditions Australian Community members must abide by to maintain membership, including personnel, information and facilities security requirements;

(ii) the record-keeping and notification and reporting requirements under the Treaty;

(iii) the handling, marking and classification requirements for United States and Australian Defense Articles Exported or Transferred under the Treaty;

(iv) the requirements for Exports and Transfers of United States Defense Articles outside the Approved Community or to a third country;

(v) the rules for handling United States Defense Articles that are added to or removed from the list of items exempted from Treaty application;

(vi) the rules for transitioning into and out of the Australian Community;

(vii) auditing, monitoring and investigative powers for Commonwealth officials and powers to allow Commonwealth officials to perform post-shipment verifications and end-use/end-user monitoring; and

(viii) offenses and penalties, and administrative requirements, necessary for the enforcement of the Treaty and its Implementing Arrangement; and

(B) promulgated regulatory changes setting forth:

(i) the criteria for entry into the Australian Community, and terms for maintaining Australian Community membership;

(ii) the criteria for individuals to become authorized to access United States Defense Articles received pursuant to the Treaty;

(iii) benefits stemming from Australian Community membership, including a framework for license-free trade with the United States in classified or controlled items falling within the scope of the Treaty;

(iv) the conditions Australian Community members must abide by to maintain membership, including:

(a) record-keeping and notification requirements;

(b) marking and classification requirements for defense articles Exported or Transferred under the Treaty;

(c) requirements for the Re-transfer to non-Approved Community members and Re-export to a third country of defense articles; and

(d) maintaining security standards and measures articulated in Defense protective security policy to protect defense articles pursuant to the Treaty;

(v) provisions to enforce the procedures established pursuant to the Treaty, including auditing and monitoring powers for Australian Department of Defence officials and powers to allow Department of Defence officials to perform post-shipment verifications and end-use/end-user monitoring;

(vi) offenses and penalties, including administrative and criminal penalties and suspension and termination from the Australian Community, to enforce the provisions of the Treaty; and

(vii) requirements and standards for transition into or out of the Australian Community and Treaty framework.

(3) JOINT OPERATIONS, PROGRAMS AND PROJECTS.

The Secretary of State shall keep the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives informed of the lists of combined military and counter-terrorism operations developed pursuant to Article 3(1)(a) of the Treaty; cooperative security and defense research, development, production, and support programs developed pursuant to Article 3(1)(b) of the Treaty; and specific security and defense projects developed pursuant to article 3(1)(c) of the Treaty.

(4) EXEMPTED DEFENSE ARTICLES.

(A) The President may remove a Defense Article from the list of Defense Articles exempt from the Scope of the Treaty, if such removal is not barred by United States law, 30 days after the President informs the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives of such proposed removal.

(B) When a Defense Article is added to the list of Defense Articles exempt from the Scope of the Treaty, the Secretary of State shall provide a copy of the Federal Register Notice delineating the policies and procedures that will govern the control of such Defense Article, consistent with Section 4(7) of the Implementing Arrangement, as well as an explanation of the reasons for adopting those policies and procedures, to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives within five days of the issuance of such Notice.

(5) APPROVED COMMUNITY MEMBERSHIP.

(A) If sanctions are in effect against a person in the Australian Community pursuant to section 73(a)(2)(B) or section 81 of the Arms Export Control Act (22 U.S.C. 2797b(a)(2)(B) or 2798), the United States shall raise the matter pursuant to Article 4(2) of the Treaty and Section 6(9) of the Implementing Arrangement.

(B) The Secretary of State shall inform the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives not later than 5 days before the U.S. Government agrees to the initial inclusion in the Australian Community of a nongovernmental Australian entity, if the Department of State is aware that the entity, or any one or more of its relevant senior officers or officials:

(i) Has been convicted of violating a statute cited in paragraph 38(g)(1) of the Arms Export Control Act (22 U.S.C. 2778(g)(1)); or

(ii) is, or would be if that person were a United States person,

(a) ineligible to contract with any agency of the U.S. Government;

(b) ineligible to receive a license or other form of authorization to export from any agency of the U.S. Government; or

(c) ineligible to receive a license or any form of authorization to import defense articles or defense services from any agency of the U.S. Government.

(C) The Secretary of State shall inform and consult with the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives not later than 5 days after the United States Government agrees to the continued inclusion in the Australian Community of a nongovernmental Australian entity, if the Department is aware that the entity, or any one or more of its relevant senior officers or officials, raises one or more of the concerns referred to in paragraph (B).

(6) TRANSITION POLICIES AND PROCEDURES.

(A) No fewer than 15 days before formally establishing the procedures called for in Section 5(5) of the Implementing Arrangement, the President shall provide to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives a report concerning the policies and procedures developed to govern the transition to the application of the Treaty, pursuant to Article 3(3) of the Treaty, of Defense Articles acquired and delivered under the Foreign Military Sales program.

(B) No fewer than 15 days before formally establishing the procedures called for in Section 7(2) of the Implementing Arrangement, the President shall provide to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives a report concerning the policies and procedures developed to govern the members of the Australian Community wishing to transition to the processes established under the Treaty, pursuant to Article 14(2) of the Treaty, from the requirements of a United States Government export license or other authorization.

(7) CONGRESSIONAL OVERSIGHT.

(A) The Secretary of State shall inform the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives promptly of any report, consistent with Section 11(6)(f) of the Implementing Arrangement, of a material violation of Treaty requirements or procedures by a member of the Approved Community.

(B) The Department of State shall brief the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives regularly regarding issues raised in the Management Board called for in Section 12(3) of the Implementing Arrangement, and the resolution of such issues.

(8) ANNUAL REPORT.

Not later than March 31, 2011, and annually thereafter, the President shall submit to Congress a report, which shall cover all

Treaty activities during the previous calendar year. This report shall include:

(A) a summary of the amount of Exports under the Treaty and of Defense Articles transitioned into the Treaty, with an analysis of how the Treaty is being used;

(B) a list of all political contributions, gifts, commissions and fees paid, or offered or agreed to be paid, by any person in connection with Exports of Defense Articles under the Treaty in order to solicit, promote, or otherwise to secure the conclusion of such sales;

(C) any action to remove from the Australian Community a nongovernmental entity or facility previously engaged in activities under the Treaty, other than due to routine name or address changes or mergers and acquisitions;

(D) any concerns relating to infringement of intellectual property rights that were raised to the President or an Executive branch Department or Agency by Approved Community members, and developments regarding any concerns that were raised in previous years;

(E) a description of any relevant investigation and each prosecution pursued with respect to activities under the Treaty, the results of such investigations or prosecutions and of such investigations and prosecutions that continued over from previous years, and any shortfalls in obtaining prompt notification pursuant to Article 13(3) of the Treaty or in cooperation between the Parties pursuant to Article 13(3) and (4) of the Treaty;

(F) a description of any post-shipment verification, end-user/end-use monitoring, or other security activity related to Treaty implementation conducted during the year, the purposes of such activity and the results achieved; and

(G) any Office of Inspector General activity bearing upon Treaty implementation conducted during the year, any resultant findings or recommendations, and any actions taken in response to current or past findings or recommendations.

SECTION 3. UNDERSTANDINGS.

The Senate's advice and consent to the ratification of the Treaty with Australia Concerning Defense Trade Cooperation is subject to the following understandings, which shall be included in the instrument of ratification:

(1) MEANING OF THE PHRASE "IDENTIFIED IN."

It is the understanding of the United States that the phrase "identified in" in the Treaty shall be interpreted as meaning "identified pursuant to."

(2) COOPERATIVE PROGRAMS WITH EXEMPT AND NON-EXEMPT DEFENSE ARTICLES.

It is the understanding of the United States that if a cooperative program is mutually determined, consistent with Section 2(2)(e) of the Implementing Arrangement, to be within the Scope of the Treaty pursuant to Article 3(1)(b) of the Treaty despite involving Defense Articles that are exempt from the Scope of the Treaty pursuant to Article 3(2) of the Treaty, the exempt Defense Articles shall remain exempt from the Scope of the Treaty and the Treaty shall apply only to non-exempt Defense Articles required for the program.

(3) INVESTIGATIONS AND REPORTS OF ALLEGED VIOLATIONS.

It is the understanding of the United States that the words "as appropriate" in Section 10(3)(f) of the Implementing Arrangement do not detract in any way from the obligation in Article 13(3) of the Treaty, that "Each Party shall promptly investigate all suspected violations and reports of alleged violations of the procedures established pursuant to this Treaty, and shall promptly inform the other Party of the results of such investigations."

(4) EXEMPT DEFENSE ARTICLES.

It is the understanding of the United States that if one Party to the Treaty exempts a type of Defense Articles from the scope of the Treaty pursuant to Article 3(2) of the Treaty, then Defense Articles of that type will be treated as exempt by both Parties to the Treaty.

(5) INTERMEDIATE CONSIGNEES.

It is the understanding of the United States that any intermediate consignee of an Export from the United States under the Treaty must be a member of the Approved Community or otherwise approved by the United States Government.

(6) SCOPE OF TREATY EXEMPTION.

The United States interprets the Treaty not to exempt any person or entity from any United States statutory and regulatory requirements, including any requirements of licensing or authorization, other than those included in the International Traffic in Arms Regulations, as modified or amended. Accordingly, the United States interprets the term 'license or other written authorization' in Article 2 and the term 'licenses or other authorizations' in Article 6(1), as these terms apply to the United States, and the term 'prior written authorization by the United States Government' in Article 7, to refer only to such licenses, licensing requirements, and other authorizations as are required or issued by the United States pursuant to the International Traffic in Arms Regulations, as modified or amended; and the United States interprets the reference to 'the applicable licensing requirements and the implementing regulations of the United States Arms Export Control Act' in Article 13(1) to refer only to the applicable licensing requirements under the International Traffic in Arms Regulations, as modified or amended.

SECTION 4. DECLARATIONS.

The Senate's advice and consent to the ratification of the Treaty with Australia Concerning Defense Trade Cooperation is subject to the following declarations:

(1) SELF-EXECUTION.

This Treaty is not self-executing in the United States, notwithstanding the statement in the preamble to the contrary.

(2) PRIVATE RIGHTS.

This Treaty does not confer private rights enforceable in United States courts.

(3) INTELLECTUAL PROPERTY RIGHTS.

No liability will be incurred by or attributed to the United States Government in connection with any possible infringement of privately owned patent or proprietary rights, either domestic or foreign, by reason of the United States Government's permitting Exports or Transfers or its approval of Re-exports or Re-transfers under the Treaty.

SECTION 5. DEFINITIONS.

As used in this resolution:

(1) The terms "Treaty with Australia Concerning Defense Trade Cooperation" and "Treaty" mean the Treaty between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, done at Sydney, September 5, 2007.

(2) The terms "Implementing Arrangement Pursuant to the Treaty" and "Implementing Arrangement" mean the Implementing Arrangement Pursuant to the Treaty between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, which was signed in Washington on March 14, 2008.

(3) The terms "Defense Articles," "Export," "Re-export," "Retransfer," "Transfer," "Approved Community," "United States Community," "Australian Community," and "Scope" have the meanings given to them in Article 1 of the Treaty.

(4) The terms "Management Board" and "Management Plan" have the meanings given to them in Section 1 of the Implementing Arrangement.

(5) The terms "person" and "foreign person" have the meaning given to them by section 38(g)(9) of the Arms Export Control Act (22 U.S.C. 2778(g)(9)). The term "U.S. person" has the meaning given to it by part 120.15 of title 22, Code of Federal Regulations.

IX. Letter From Senators Levin and Warner

CARL LEVIN, MICHIGAN, CHAIRMAN
EDWARD M. KENNEDY, MASSACHUSETTS
ROBERT C. BYRD, WEST VIRGINIA
JOSEPH I. LIEBERMAN, CONNECTICUT
JACK REED, RHODE ISLAND
DANIEL K. AKAKA, HAWAII
BILL NELSON, FLORIDA
E. BENJAMIN NELSON, NEBRASKA
EVAN BAYH, INDIANA
HILLARY RODHAM CLINTON, NEW YORK
MARK L. PRYOR, ARKANSAS
JIM WEBB, VIRGINIA
CLAIRE McCASKILL, MISSOURI
JOHN McCAIN, ARIZONA
JOHN WARNER, VIRGINIA
JAMES M. INHOFE, OKLAHOMA
JEFF SESSIONS, ALABAMA
SUSAN M. COLLINS, MAINE
SAXBY CHAMBLISS, GEORGIA
LINDSEY O. GRAHAM, SOUTH CAROLINA
ELIZABETH DOLE, NORTH CAROLINA
JOHN CORNYN, TEXAS
JOHN THUNE, SOUTH DAKOTA
MEL MARTINEZ, FLORIDA
ROGER F. WICKER, MISSISSIPPI
RICHARD D. DEBOBES, STAFF DIRECTOR
MICHAEL VINCENT KOSTIW, REPUBLICAN STAFF DIRECTOR

United States Senate
COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510–6050

August 27, 2008

Honorable Joseph R. Biden, Jr.
Chairman
Committee on Foreign Relations
United States Senate
Washington, DC 20510

Honorable Richard G. Lugar
Ranking Member
Committee on Foreign Relations
United States Senate
Washington, DC 20510

Dear Joe and Dick:

We are writing to express our strong support for two defense trade cooperation agreements which have been transmitted to the Senate for its advice and consent to ratification:

- The Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation, done at Washington and London on June 21 and 26, 2007;

- The Treaty Between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, done at Sydney on September 5, 2007.

We understand the Senate Foreign Relations Committee is currently considering these Treaties and drafting a resolution of ratification for consideration by the full Senate. We believe ratification of these agreements would strengthen U.S. national security by establishing streamlined procedures for defense cooperation and technology sharing between the United States and two of our closest allies -- the U.K. and Australia. This will facilitate ongoing and future cooperative defense programs, and will expedite and

enhance interoperability between U.S. warfighters and British and Australian forces in coalition operations such as Iraq and Afghanistan.

In the report accompanying the Senate Armed Services Committee version of the National Defense Authorization Act for Fiscal Year 2007, the committee noted its concern that existing U.S. regulations and procedures governing U.S.-U.K. technology sharing were unnecessarily impeding information sharing and military interoperability to the detriment of achieving our common security interests in ongoing and future operations. To address these concerns, the report stated: "With these considerations in mind, the committee strongly recommends that the President enter into a bilateral agreement with the United Kingdom to provide for the sharing of defense technology between our two governments in order to facilitate closer defense cooperation between the United States and the United Kingdom. Such an agreement should: (1) promote greater interoperability in the conduct of current and future military operations; (2) establish a vehicle and set policy for greater and easier sharing between the Governments of the United States and the United Kingdom of both classified and unclassified goods, technologies, and services; (3) drive greater bilateral, interagency, and industry coordination at the strategic, planning, resource, and execution levels; and (4) be consistent with the national security interests of both nations." We note that these concerns and our recommendations are equally valid and relevant with respect to U.S. defense cooperation with Australia.

The Department of Defense would benefit from these Treaties in a number of ways. Streamlining the U.S. export control process would facilitate joint research, development, production, acquisition, and support of defense equipment. This is not a one-way street. For example, U.S. warfighters have benefited greatly from U.K. and Australian research, development and production of Counter-Improvised Explosive Devices (IED) and Special Forces Equipment. These Treaties will also support close collaboration on the Joint Strike Fighter, a central component of our tactical aviation modernization strategy for decades to come.

Furthermore, according to Deputy Secretary of Defense Gordon England, "the Treaties will increase competition in the defense marketplace by creating an approved community of companies in all three nations, which will result in improved quality and reduced costs in the products we provide to the men and women of our Armed Forces." This would be a welcome development.

At the same time, the framework established by the Treaties would ensure that proper safeguards against the unauthorized release of defense technologies are in place. To prevent the release of sensitive information, the Treaties would require U.S.-origin defense items, including unclassified exports, to be treated as protected information under U.K. and Australian laws governing classified materials. The Treaties, and the implementing arrangements, also contain compliance and enforcement measures.

In our estimation, the U.S.-U.K. and U.S.-Australia defense trade cooperation agreements satisfy the objectives laid out in our committee report. These agreements will facilitate and deepen U.S. joint defense efforts with our allies and increase our ability to leverage the industrial knowledge and capacity of three of the most innovative defense industries in the world to better serve U.S. and allied forces. We urge the Senate Foreign Relations Committee to favorably report these Treaties soon so that the Senate has time to act on them during the current session of Congress.

Sincerely,

John Warner

Carl Levin

X. HEARING ON THE DEFENSE TRADE COOPERATION TREATIES, DECEMBER 10, 2009

TREATIES

THURSDAY, DECEMBER 10, 2009

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:04 a.m., in room SD–419, Dirksen Senate Office Building, Hon. John F. Kerry (chairman of the committee) presiding.

Present: Senators Kerry, Feingold, Shaheen, Kaufman, and Lugar.

OPENING STATEMENT OF HON. JOHN KERRY, U.S. SENATOR FROM MASSACHUSETTS

The CHAIRMAN. The hearing will come to order. Thank you all for being here. I apologize for a slightly late start.

Today, obviously, we meet to consider treaties with two of our closest allies, the United Kingdom and Australia. These are treaties that would change how our country controls arms exports and shares military technology. The committee actually first took testimony on these treaties in May of last year, so this is the second hearing that we are devoting to this, and there's a reason for that.

The commercial exports of U.S. defense articles and know-how currently require a license from the State Department, as do later retransfers to a third party or country. If an export or retransfer is above a certain value, the Department has to inform Congress prior to issuing a license. During the time that this has been in effect, Congress has never enacted a resolution to block a proposed sale. But our authority to do so gives Congress a voice in the transactions with significant implications for our national security.

America maintains arms export controls so that we can keep our weapons and technology from falling into the wrong hands to the best of our ability to do so. We do not want American weapons to contribute to human rights abuses, fuel destabilizing regional conflicts, or be used against us or our allies. And we reject any arms deal that violates our international obligations.

Our arms control export system imposes administrative burdens and delays that have wound up hindering legitimate trade and defense cooperation. And this has been a major issue with our friends, and particularly in this case with Great Britain and Aus-

tralia. It is particularly hindering in the case of cooperation required for joint weapons development programs. And sometimes, frankly, it makes sense to try to streamline the process.

We have done this under existing law for many arms exports to Canada, a close ally whose export controls largely mirror our own. It is hard to make an argument that either the United Kingdom or Australia don't rise to the same level of friendship and the same relationship with the United States as Canada.

We have important joint defense projects with both Australia and Great Britain—the United Kingdom—and the overwhelming majority of all arms export license requests involving them are approved. Our countries' forces obviously serve and die together in Afghanistan and elsewhere.

Australia and the United Kingdom's laws, however, differ from ours. And neither country, for different reasons, can guarantee an iron-clad control under its export control law over retransfers of U.S. defense articles or technology to third or fourth parties.

The United Kingdom's European Union treaty obligations, for example, prevent it from meeting the requirements of United States law for an exemption like Canada's. Therefore, the treaties before us seek to incorporate a new approach to get rid of these hurdles between us, streamline this operation and behave the way good friends ought to behave.

For arms exports relating to an approved set of joint projects or operations, these treaties allow all but the most sensitive U.S. arms and know-how to be exported without a case-by-case State Department approval.

Within the United Kingdom and Australia, only government entities and jointly approved—jointly approved—private companies and facilities will have access to weapons and know-how. And the United Kingdom or Australia will treat exports and transfers under the treaty not just as defense articles or defense services, but also as classified information.

This means that British or Australian users will need a security clearance and they will be bound by security standards applied to classified information. If the United States export is improperly handled or diverted, those found to have done so will face prosecution under United Kingdom or Australian national security laws, as well as export control laws.

The treaties leave a number of blanks that need to be filled in, so our committee has pressed the Executive to provide that additional information. At last year's hearing, the State Department was able to promise that draft regulations would be provided; then the Department of Justice warned that the committee needed to evaluate the initial State Department draft for the possibility that it might imperil prosecutions of individuals or companies who violate the treaties' terms. And so that's the process we've been engaged in.

In the intervening year, some significant progress has been made. The State Department produced draft regulations that reassured the Justice Department, which then told the committee that implementing legislation would not be needed to enable them to pursue court action against violators.

On the basis of this progress, we are now holding today's hearing; and I intend to move forward in drafting and passing a resolution of advice and consent to ratification.

Now, nobody in any treaty like this can predict with certainty exactly how every step of the actual work in practice is going to unfold. But I am convinced that the political and national defense benefits of advancing these treaties outweighs any risks.

We will have some work to do after the Senate acts with respect to authorities and protections concerning arms export established by existing law. And we can remedy, I believe, those things as we do go forward, and I think people are comfortable with that notion. But I see no need to hold up the treaties' entry into force while we do those ongoing tweaks, if you will. We should move ahead and trust that the benefits of this relationship with both the United Kingdom and Australia far outweigh any of these rather marginal questions that, I think, exist.

I'm pleased to welcome today Andrew Shapiro, the Assistant Secretary of State for Political-Military Affairs. He's well known to many of us, here, from his years as, then-Senator Clinton's national defense aide.

And Associate Deputy Attorney General James Baker is a career Justice Department official, and well-known for his exemplary service as head of the Office of Intelligence Policy and Review.

And gentlemen, we welcome both of you here, and look forward to your testimonies.

Before that, I recognize Senator Lugar.

STATEMENT OF HON. RICHARD G. LUGAR,
U.S. SENATOR FROM INDIANA

Senator LUGAR. Well, thank you very much, Mr. Chairman.

Today, as you pointed out, we consider pending defense trade treaties with the United Kingdom and Australia. And I join you in welcoming our witnesses, Mr. Andrew Shapiro, Assistant Secretary of State for Political-Military Affairs, and Mr. James Baker, Associate Deputy Attorney General.

This, as you also pointed out, is the committee's second hearing on these treaties. During our first hearing in May 2008, I noted that I supported the goal of these treaties and believed that, if carefully implemented, they could enhance our national security. During 2008, however, the Bush administration did not resolve many questions about the treaties' implementation and enforcement. Also unresolved were questions about how the treaties would affect congressional oversight and the Senate's role in the treaty-making process.

In 2003, the Bush administration requested waivers to provisions in the Arms Export Control Act for bilateral agreements with the United Kingdom and Australia. Those bilateral agreements would have created lists of individuals in the United Kingdom and Australia who qualified to receive unlicensed exports from the United States of what the Bush administration called "low-sensitivity, unclassified defense items."

Then, in 2007, the Bush administration negotiated and submitted the treaties that we are discussing today. The treaties loosen restrictions more than the 2003 bilateral agreements. They create

a set of new compliance procedures, permit exports of both classified and unclassified items, and apply to both commercial arms sales and to government sales under the Foreign Military Sales Program.

They also rely on "implementing arrangements" that are not being submitted for advice and consent, even though these arrangements govern the operation of the treaties.

Among the major issues considered at the hearing in 2008 were proposed amendments to the International Traffic in Arms Regulations to implement the treaties in the United States. President Bush promised in his letter transmitting the treaties to the Senate to provide these amendments to us. The final draft regulations, however, did not arrive in the Senate until September 2008.

Unfortunately, neither the implementing arrangements, nor the regulations clarified how enforcement would work. The State Department subsequently stated that the treaties would create a "safe harbor" for defense trade. The executive branch insisted it had created a strong system for ensuring enforcement and compliance by relying on classification laws in the United Kingdom and Australia. But it is not clear how enforcement will occur in the United States under a safe harbor.

We look forward to learning from our witnesses today how this safe harbor will work and how it will ensure enforcement in the United States.

A purpose of these treaties is to eliminate export licenses for defense articles being sold to the United Kingdom and Australia. The treaties specify that groups in the United States, the United Kingdom, and Australia may export and receive unlicensed defense articles if they are a part of the "Approved Community." The license-free regime applies to classified defense exports and sensitive defense technologies.

Some sensitive defense articles and information would still require licenses; however, the lists of such items may change with time.

The Foreign Relations Committee needs to understand how the administration will enforce against abuses of the treaties. If a person in the United States Approved Community makes a license-free export, but then diverts the export to unauthorized recipients, what recourse will the United States law enforcement authorities have? What authorities and resources are needed to effectively investigate and prosecute such conduct?

We also must understand fully how the treaties affect Congress' ability to oversee arms exports. By exempting exports from the Arms Export Control Act, the treaties eliminate advance notification to Congress of exports or retransfers of defense articles exported to the United Kingdom and Australia.

Another important point in need of clarification is the procedure required to make significant changes in the treaty regimes after they are approved. Under most treaties approved by the Senate, such changes may only be made by treaty amendments submitted to the Senate for approval. If changes can be made to these defense trade treaties through other means, the Senate may well have concerns.

In the case of these treaties, vital details are contained in the so-called "implementing arrangements" rather than in the texts of the treaties. These implementing arrangements address the treaties' scope and effect, including categories of items that may be exported without licenses, persons and entities in each country receiving license-free exports, rules on retransfers of items under the treaties, and arrangements for cooperation in enforcement.

The executive branch did not submit these "implementing arrangements" to the Senate for its advice and consent. This suggests that changes might be made to critical treaty components without Senate approval. The administration needs to explain in detail its intent in excluding these "implementing arrangements" from advice and consent.

Likewise, the Obama administration should inform the committee, and the entire Congress, whether it intends to negotiate similar treaties with additional countries. The Bush administration stated it would not seek additional defense trade treaties.

I look forward to addressing these important questions and issues with today's witnesses. And once again, we are very pleased you gentlemen are with us.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Lugar. And I appreciate the series of questions that you raise, all of which are important. And we look forward to having good dialogue on it.

Secretary Shapiro, if you would lead off, and Deputy General, if you'd follow? Thanks.

STATEMENT OF ANDREW SHAPIRO, ASSISTANT SECRETARY OF STATE FOR POLITICAL-MILITARY AFFAIRS, DEPARTMENT OF STATE, WASHINGTON, DC

Mr. SHAPIRO. Mr. Chairman, Senator Lugar, thank you for holding this hearing and for the opportunity to testify before the committee on the bilateral defense trade cooperation treaties between the United States and the United Kingdom, and the United States and Australia. The administration strongly supports ratification of these two treaties.

Mr. Chairman, I will deliver a brief oral statement, but also ask that the committee enter my written statement into the record.

The CHAIRMAN. Without objection, it will be.

Mr. SHAPIRO. First, I would like to thank the members of the committee and the committee staff for their diligent work on this initiative. Our interaction on these treaties has been invaluable. The insights and questions provided by the committee and its staff have helped to guide this administration's review of the treaties and informed the detailed regulations that the State Department will publish if the treaties are ratified.

This administration has conducted an exhaustive review of the treaties and their effect on our national security and foreign policy interests. I have met with officials from the United Kingdom and Australia to discuss the treaties and their importance to our bilateral relationships. We have worked closely with the Department of Defense to evaluate the treaties' ability to enhance interoperability with these important partners, while maintaining our national security interests.

We have also worked with the Department of Justice and the Department of Homeland Security to ensure that the provisions of the treaties can be implemented and enforced under current U.S. law. Today, I affirm to you that the President and his administration fully support the treaties and believe they would establish a stable framework for enhancing our strategic relationships with these two key allies.

When we speak about the details of these two treaties, it can be easy to lose sight of the exceedingly important role that they are designed to play. I would like to share one example with you.

When U.S. and coalition forces are attacked, an IED explodes, or a suicide bomber murders civilians, conducting a forensic investigation of the scene is essential. The information gained by such an investigation helps determine the sources of insurgent arms, ammunition, and explosives; it supports efforts to stem the flow of arms to insurgents. And it helps us to identify ways in which we can better protect our forces in combat.

Our military has highlighted the fact that there is an urgent need to improve current capabilities in this key area. The treaties would enhance U.S. industry's ability to engage in technical discussions on this subject with United Kingdom and Australian companies. Such companies could provide solutions to technological challenges, reduce costs, and accelerate delivery of expeditionary forensic capabilities to coalition forces.

Without the treaties, the ability of engineers and other scientists to even discuss the export controlled technology associated with expeditionary forensic capabilities are subject to many more bureaucratic processes and proceed much less seamlessly than they would with the treaty regime in place. I assure you that the benefits, such as more efficient delivery of key capabilities to our servicemembers would not be gained at the expense of our responsibility to protect U.S. defense technologies.

Under the treaty regime, the United States and its treaty partners would be able to prosecute cases under their national laws that involve transactions that do not satisfy the requirements and obligations that the parties would establish to implement the treaties.

Along with these gains, the treaties would also recognize and support the longstanding special relationship that the United States, the United Kingdom, and Australia share. We have long worked together to develop advanced strategic technologies; technologies that have provided the advantage to help win two World Wars, protected lives, and advanced our countries' interests in numerous conflicts.

United States/United Kingdom and United States/Australian cooperation on radar, initially developed and employed by the U.K. in the 1930s continues to this day. More recently, U.K.-developed counter-IED technology has been used by all three nations to better protect against this deadly threat.

These treaties come at a time when the United States, United Kingdom, and Australian forces are once again working together on the battlefield to protect our collective security. Ensuring that our forces can get the best technology in the most expeditious manner possible, and that they possess critical interoperability is essential

to our success, not only today's campaigns, but also in future efforts to address shared security challenges.

The treaties would also foster an even more competitive defense marketplace with these allies, and would create an environment that would help support the U.S. defense industrial base, and the jobs that it provides to Americans.

The Defense Trade Cooperation treaties with the United Kingdom and Australia support United States foreign policy and national security interests. They would fortify our bilateral relations with important partners, support our joint operations overseas, and foster the expeditious development of technologies that are critical to current and future security efforts. They would accomplish this while allowing us to continue to protect critical U.S. defense technologies.

On behalf of the administration, I encourage the Senate to provide its advice and consent to ratification of these treaties.

[The prepared statement of Mr. Shapiro follows:]

PREPARED STATEMENT OF ASSISTANT SECRETARY ANDREW SHAPIRO, BUREAU OF POLITICAL-MILITARY AFFAIRS, DEPARTMENT OF STATE, WASHINGTON, DC

Mr. Chairman, thank you for holding this hearing and for the opportunity to testify before the committee on the two bilateral defense trade cooperation treaties between the United States and the United Kingdom (Treaty Document 110–7), and the United States and Australia (Treaty Document 110–10). The ratification of these Treaties is strongly supported by this administration.

First, I would like to take this opportunity to thank the members of the committee and the committee staff for their diligent work on this initiative. Our interaction with the committee on these Treaties has been invaluable. The insights and questions provided by the committee have helped to guide this administration's review of the Treaties and informed the detailed draft regulations that the State Department will publish once the Treaties are ratified.

This administration has conducted an exhaustive review of the Treaties and their effect on United States national security and foreign policy interests. I have met officials from the United Kingdom and Australia to discuss the Treaties and their importance to our bilateral relationships. We have worked closely with representatives from the Department of Defense to evaluate the Treaties' ability to enhance interoperability with these important partners, while maintaining our national security interests. We have also worked with the Department of Justice and the Department of Homeland Security in order to ensure that the provisions of the Treaties can be implemented and enforced under current U.S. law. Today, I affirm to you that the President and his administration fully support the Treaties and believe they will establish a stable framework through which we can enhance our strategic relationship and battlefield readiness with these two key allies in the future.

When we speak about the details of these Treaties and the framework that they establish, it is easy to lose sight of the exceedingly important role that these Treaties are designed to play. I would like to share a few examples with you.

When United States and coalition forces are attacked, an IED explodes, or a suicide bomber murders civilians, conducting a forensic investigation of the scene is essential. The information gained by such an investigation helps determine the sources of insurgent arms, ammunition, and explosives; it greatly supports the gathering and analysis of intelligence, which helps us stem the flow of arms to insurgents. It allows us to identify ways in which we can better protect our forces in combat and it allows us to identify the dead and to prosecute the guilty. Our military has highlighted the fact that there is an urgent need to improve current capabilities in this key area. The Office of the Under Secretary of Defense for Acquisition, Technology and Logistics has stated that the Treaties, if ratified, could facilitate United States, United Kingdom, or Australian research and development that is needed to meet this urgent need. The Department of Defense has already awarded a number of contracts in this area, and the Treaties would enhance United States industry's ability to engage in technical discussions on this subject with United Kingdom and Australian companies. Such companies could provide solutions to technological challenges, reduce costs, and accelerate delivery of expeditionary forensic capabilities to coalition forces. Without the Treaties, the ability of engineers and other scientists

to just discuss the export controlled technology associated with expeditionary forensic capabilities could be subject to many more bureaucratic processes and proceed much less seamlessly than with the Treaty exemption regime in place. In this case, the Treaties could be used to help meet this urgent need more effectively and even more quickly.

Another urgent requirement is the need to field nonlethal capabilities for counterpiracy and maritime counterterrorism. The Department of Defense is actively pursuing development and acquisition of a range of nonlethal technologies and equipment in this area. The Department of Defense would like to work with U.K. and Australian naval authorities and acquisition organizations through cooperative programs and international contractor teaming. As with cooperation on forensics discussed above, the Treaties' streamlined export control arrangements would allow U.K. and Australian companies to work more seamlessly with U.S. firms to meet this urgent requirement. Furthermore, the United States and its key allies would gain more timely and flexible access to Australian and U.K. firms, which could develop more time-responsive, affordable solutions.

Real world technologies that are needed urgently today to save lives could be developed more quickly using the system that the Treaties, if ratified, would create.

The Treaties also recognize and support the longstanding special relationship that the United States, the United Kingdom, and Australia share. Since World War I, the United States and the United Kingdom have worked together to develop advanced strategic technologies; technologies that provided the advantage to help us win two World Wars, protect lives, and advance our countries' interests in numerous conflicts. The alliance between the United States and Australia was also forged on the battlefields of World War II, and as Australia's industrial base began to flourish, our economic and strategic relationship grew.

We have a long history of scientific and technological cooperation from which our nations have benefited. The combination of the British Merlin engine with the American-developed P–51 airframe resulted in the best fighter aircraft of World War II. United States-United Kingdom and United States-Australian cooperation in radar—initially developed and employed by the U.K. in the 1930s—continues to this day. U.K.-developed counterimprovised explosive device (IED) technology has been used by all three nations to improve systems that protect against this deadly threat in Iraq and Afghanistan.

These examples of cooperation in defense development, production, and support among the United States, Australia, and the United Kingdom illustrate the breadth and depth of the industrial dimension of our alliances. The Treaties, if ratified, will help the United States and these key allies develop and field the next generation technology that is needed to save lives and protect our countries' security and foreign policy interests. The Treaties would accomplish this by streamlining the processes by which certain controlled items are transferred between the United States and the United Kingdom or Australia. Specifically, the Treaties will provide the President with the authority to promulgate regulations that will allow, without prior written authorization, the export or transfer of certain defense articles and defense services controlled pursuant to the International Traffic in Arms Regulations (ITAR) between the United States and the United Kingdom or between the United States and Australia, when in support of:

1. Combined military and counterterrorism operations;
2. Cooperative security and defense research, development, production, and support programs;
3. Mutually agreed security and defense projects where the end-user is the Government of the United Kingdom or the Government of Australia; or
4. U.S. Government end-use.

The U.S. Government will maintain its authority over which foreign end-users may have access to ITAR-controlled items under the Treaties by mutually agreeing with the Government of the United Kingdom, and with the Government of Australia, on an "Approved Community" of private sector entities that may receive defense articles and defense services under the Treaties. Further, not all ITAR-controlled items will be eligible for export under the Treaties. We have identified such ineligible items in a proposed "Exemption List," which was carefully developed with the Department of Defense, and provided to the committee.

Both the United Kingdom and Australia have agreed to protect defense items exported from the United States under the Treaties using their national laws and regulations. These laws and regulations govern exports of controlled goods and technologies and safeguard classified information and material. This is an extremely important Treaty benefit; that is, the United Kingdom and Australia have agreed to classify as "Restricted" otherwise unclassified ITAR-controlled defense articles

exported from the United States pursuant to the Treaty. This subjects all handling, exports and reexports to the respective classified information laws and regulations. Under these legal authorities, the United Kingdom and Australia will require prior United States approval, in addition to their own governments' approval, for the reexport or retransfer of such items outside the Approved Community. In addition, we have agreed with the United Kingdom and Australia on detailed compliance and enforcement measures, to be imposed on members of each Community. These measures were negotiated by United States Government representatives from the Departments of State, Justice, Homeland Security, and Defense. These details, and others related to the implementation of the Treaties, are contained in the "Implementing Arrangements" called for in both Treaties.

Both the United States and its treaty partners will be able to prosecute cases involving exports, reexports and transfers that do not satisfy the specific requirements and obligations that the parties will establish to implement the Treaties.

We have determined that, if ratified, the Treaties would be implemented in the United States through federal regulations. First, the Department would promulgate regulations that would create an exemption from the requirement of a license under the Arms Export Control Act for particular, specified exports to the United Kingdom and Australia. Such regulations would require an exporter to meet certain conditions in order to take advantage of the exemptions contemplated by the treaties. New regulations would also independently prohibit certain exports that do not satisfy the conditions that must be met in order to come within the Treaty-based safe harbor. The latter regulations would be enforceable criminally pursuant to section 38(c) of the act and administratively pursuant to section 38(e) of the act. With this approach, we are confident that the Treaties and the United States underlying export-control framework can be robustly enforced. We very much appreciate the discussions that we had with the committee on this matter.

Beyond the specifics of how the regime established by the Treaties will function, it is important to understand how they would significantly advance many aspects of our bilateral relationships with the United Kingdom and Australia and support Unites States foreign policy and national security interests.

The United States, United Kingdom, and Australia have strong economic ties. Perhaps reflective of our shared cultures, customs, and language, the United States is the largest supplier of foreign direct investment in the United Kingdom and Australia. Likewise, the United Kingdom is the largest investor in the United States, while Australia is the eighth largest. In the defense sector, there are several large joint ventures between the firms of our nations, and many of these firms own subsidiaries in the United States, United Kingdom and Australia. United States, Australian and United Kingdom companies often work together on joint development projects. These partnerships help to leverage financial and technological resources between our nations. They have resulted in the development of technologies that are used to enhance the security of our nations and protect life.

The institutionalized reforms in these Treaties will create opportunities for more efficient exchanges between our defense firms and those of the United Kingdom and Australia, many of which specialize in development, production, and support of critical equipment needed to fight and win current and future conflicts.

The Treaties will create an even more competitive defense marketplace with these allies. In order to successfully confront future conflicts and security challenges, it is important to maintain critical industrial and engineering capabilities in the United States. In order to accomplish this, United States companies must have opportunities to compete and the ability to compete effectively. United States industry depends upon exports to maintain its proficiency and financial health. These Treaties would create an environment that would support the U.S. defense industrial base and the jobs that it provides to Americans.

These Treaties come at a time when United States, United Kingdom, and Australian forces are once again working together on the battlefield to protect our collective security. Ensuring that our forces can get the best technology possible in the most expeditious manner possible and that they possess the critical capability of interoperability is essential to our success, not only in today's campaigns, but also in future conflicts. Our nations will continue to rely upon each other in the future as we continue to fight violent extremism and address other shared security challenges.

United States, Australian, and United Kingdom forces deployed in current and future operations must continue to be able to rely upon the equipment produced by our three nations' defense establishments to fight and win against our collective adversaries. Past experience tells us that the United States, the United Kingdom, and Australia will continue to train and operate together as partners. A streamlined export control environment under the Treaties with these key allies would enhance

opportunities for future development of defense technology. Greater agility in development, and economies of scale in production and support, will result in more timely delivery of much-needed capabilities to our forces while reducing costs. This in turn will yield increased battlefield effectiveness, as all three nations' forces will be outfitted with common, interoperable, and supportable force protection, weapons, intelligence, surveillance, and reconnaissance, logistics, and command, control, and communications systems.

We must recognize the economic and strategic importance of facilitating legitimate and secure trade between our nations. The Treaties help to accomplish this objective.

I assure you that these benefits are not gained at the expense of our responsibility to protect U.S. defense technologies. As I noted before, we have excluded the most sensitive defense articles from Treaty eligibility. In both countries, only security-cleared entities and staff with a need to know may have access to items exported under the Treaties. Furthermore, Approved Community members will continue to have detailed recordkeeping requirements and would be subject to auditing, monitoring, and verification measures to ensure compliance and to aid in the investigation of potential violations.

The Defense Trade Cooperation Treaties with the United Kingdom and Australia support U.S. foreign policy and national security interests. They fortify our bilateral relations with important partners; they support our joint operations overseas, and they will foster the expeditious development of technologies that are critical to current and future military, counterterrorism, and security efforts. They accomplish this while allowing us to continue to protect critical U.S. defense technologies. On behalf of the administration, I encourage the Senate to provide its advice and consent to ratification of these Treaties.

The CHAIRMAN. Thank you very much.

STATEMENT OF JAMES BAKER, ASSOCIATE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. BAKER. Mr. Chairman, Ranking Member Lugar, members of the committee, thank you very much for inviting the Department of Justice to testify at this hearing today on ratification of the two treaties that are before you.

I'm pleased to discuss the Department's role in the fight against the illegal exportation of sensitive technology, and how the Department would enforce provisions of the two treaties to try to prevent such diversion.

I've submitted a written statement to the committee and I ask that it be make part of the record.

The CHAIRMAN. Without objection, it will be.

Mr. BAKER. And I will focus only on a few points from my statement in my oral remarks here today.

As the committee is aware, the Arms Export Control Act, or AECA, governs international defense cooperation including the sale and export of weapons, and is used to prevent foreign powers and entities from acquiring weapons of mass destruction and sensitive technologies.

The AECA authorizes the President to establish a munitions list and to create a licensing regime to control the export of defense articles and defense services. Through Executive order, the President delegated this authority to the Secretary of State who—through subordinate officers—issued the International Traffic in Arms Regulations, or ITARs—setting up a licensing regime and export regulations. Under the ITARs, certain persons and entities must register with the Department of State, and obtain a license prior to exporting defense articles or providing defense services.

The treaties establish approved communities of governmental agencies and private companies that may export or import defense

articles without such licenses. In brief, the treaties allow approved private companies in the United Kingdom and Australia to obtain certain defense articles and defense services from the United States without otherwise required export licenses from the Department of State.

The safe harbors that will be available under the regulations promulgated pursuant to the treaties will also permit members of an Approved Community to transfer defense articles on the U.S. Munitions List to another Approved Community member without having to obtain a license.

The Implementing Arrangements provide specifications related to the implementation of the treaties, including how items exported under the treaties will be protected and how entities may become members of the Approved Community. These provisions were negotiated following signature of the treaties.

The Implementing Arrangements also establish procedures for the United States and United Kingdom, on the one hand, and the United States and Australia, on the other, to share records and conduct audits and investigations. The Implementing Arrangements contemplate that, following ratification of the treaties, the United States would promulgate regulations to clarify the scope of the safe harbors and ensure that conduct falling outside of the designated safe harbors will be subject to the AECA's civil and criminal enforcement regime.

A transaction that fully complies with the safe harbor established by regulations promulgated pursuant to the treaties would not be subject to criminal or civil penalties under AECA. Conversely, a transaction falling outside of the designated safe harbors would remain fully subject to the civil and criminal enforcement measures under the AECA. As the Department has stated previously, no new authorizing legislation would be required to prosecute such a violation.

Under Supreme Court precedent, because the treaties are self-executing, they are "equivalent to an act of the legislature" for purposes of Federal law. Upon ratification of the treaties, therefore, the President would have the authority to issue regulations pursuant to the treaties themselves to create exemptions from the applicable licensing requirements of the AECA and ITAR and establish the designated safe harbors contemplated by the treaties.

In addition, the President would have the authority to promulgate regulations under section 38(a)(1) of the AECA to make conduct falling outside the designated safe harbors subject to the enforcement regime of the AECA. These regulations will establish conditions for persons exporting or transferring pursuant to the treaties, and an export or transfer that fails to satisfy those conditions would be enforceable through both criminal and civil sanctions.

Mr. Chairman, that concludes my opening statement. Again, I would like to thank the committee for the opportunity to appear before you today to discuss the treaties and the enforcement of our export laws. And I look forward to any questions that the committee may have.

[The prepared statement of Mr. Baker follows:]

PREPARED STATEMENT OF JAMES A. BAKER, ASSOCIATE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, DC

Senator Kerry, Ranking Member Lugar, and members of the committee, my name is James A. Baker, and I am an Associate Deputy Attorney General, with responsibility for national security matters. Thank you for inviting the Department of Justice ("the Department") to testify at this hearing on ratification of two treaties: (1) The Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation (June 21 and 26, 2007), S. Treaty Doc. 110–7 ("U.S.–UK Treaty"); and (2) the Treaty Between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation (Sept. 5, 2007), S. Treaty Doc. 110–10 ("U.S.–Australia Treaty") (collectively, the "Treaties"). I am pleased to discuss the Department's role in the fight against illegal export of sensitive technology and how the Department would enforce the provisions of the two Treaties to try to prevent such diversion.

I would like to emphasize one point regarding the Treaties from the Department's perspective. That is, the export regime established by the Treaties can be created without the need for any implementing legislation. The President has full authority under the Treaties and existing law to create the regime, including the authority to prohibit certain export activities. Indeed, with relatively minor regulatory amendments, we will have sufficient legal authorities to prosecute criminally, and to take administrative action against, persons and companies who violate the requirements of the regime, including diverting defense articles beyond participants in the regime.

THE THREAT OF ILLEGAL ACQUISITION OF RESTRICTED U.S. TECHNOLOGY

With the United States producing the most advanced technology in the world, it has become a primary target of illicit technology acquisition schemes by foreign states, criminals, and terrorist groups. The U.S. Government, defense sector, private companies and research institutions are routinely targeted as sources of arms, technology, and other materials. The items sought from America in these illegal schemes are as diverse as missile technology, nuclear technology, night vision systems, assault weapons, trade secrets, technical know-how, and fighter jet parts.

Foreign governments are aggressive in illegally acquiring sensitive U.S. technology. They have been observed directly targeting U.S. firms; employing commercial firms in the United States and third countries to acquire U.S. technology; and recruiting students, professors, and scientists to engage in technology collection.

China and Iran pose particular export control concerns. The majority of U.S. criminal export prosecutions in recent years have involved restricted U.S. technology bound for these nations. In fiscal year ("FY") 2008, for example, roughly 43 percent of all defendants charged in criminal export cases were charged with illegally exporting restricted materials to Iran or China. In total, Iran ranked as the leading destination for illegal exports of restricted technology in the prosecutions brought in FY 2008, as well as those in FY 2007.

Illegal exports of U.S. goods bound for Iran have involved such items as missile guidance systems, Improvised Explosive Device ("IED") components, military aircraft parts, night vision systems and other materials. Illegal exports to China have involved rocket launch data, Space Shuttle technology, missile technology, naval warship data, Unmanned Aerial Vehicle or "drone" technology, thermal imaging systems, military night vision systems and other materials.

The improper transfer of such goods poses direct threats to U.S. allies, U.S. troops overseas, and to Americans at home. Such transfers also undermine America's strategic, economic, and military position in the world.

THE NATIONAL EXPORT ENFORCEMENT INITIATIVE

Keeping U.S. weapons technology and other restricted materials from falling into the wrong hands is a top counterintelligence priority of the Department. Spearheaded by the National Security Division's Counterespionage Section, the National Export Enforcement Initiative is the Department's primary mechanism for achieving this objective by combating illegal exports of restricted military and dual-use technology from the United States. Led by a career prosecutor, the initiative is designed to enhance prosecution of these crimes and to deter illicit activity.

The cornerstone of the initiative has been the ongoing formation of multiagency Counter-Proliferation Task Forces in U.S. attorneys' offices around the country. Today, there are more than 20 Counter-Proliferation Task Forces or working groups operating nationwide, some straddling more than one judicial district, that include the Federal Bureau of Investigation, the Department of Homeland Security's U.S.

Immigration and Customs Enforcement, the Department of Commerce's Bureau of Industry and Security, the Pentagon's Defense Criminal Investigative Service, Naval Criminal Investigative Service, and Air Force Office of Special Investigations, and other agencies as well. The task forces have built on prior interagency efforts used in districts where officers from these and other agencies pool data and jointly pursue cases. Under the leadership of U.S. attorneys, the task forces foster coordination critical to the success of export control.

Because export control cases involve complex statutory and regulatory schemes, sophisticated technology, international issues, and, often classified information, training for prosecutors and agents has been a critical focus of the initiative. To date, the initiative has resulted in enhanced training for more than 1,000 agents and prosecutors involved in criminal and foreign counterintelligence investigations. The Department, along with other agencies, has also created the Technology Protection Enforcement Group ("TPEG"), an interagency headquarters-level working group, to enhance export control coordination among law enforcement agencies and between law enforcement agencies and the Intelligence Community.

With the creation of new task forces and the enhanced training and coordination among agencies, the number of criminal export prosecutions has grown nationwide. In its first full year of operations, during FY 2008, the National Export Enforcement Initiative resulted in criminal charges against more than 145 defendants, compared to roughly 110 defendants charged in FY 2007. Charges brought in these cases include violations of the Arms Export Control Act ("AECA"), the main export control statute, but also the International Emergency Economic Powers Act, the export control provision of the USA PATRIOT Improvement and Reauthorization Act of 2005, the Trading with the Enemy Act, and other statutes.

THE EXPORT CONTROL REGIME AND THE TREATIES' SAFE HARBORS

The Arms Export Control Act governs international defense cooperation, including the sale and export of weapons, and is used to prevent foreign powers and entities from acquiring weapons of mass destruction and sensitive technologies. The AECA authorizes the President to establish a munitions list and to create a licensing regime to control the export of defense articles and defense services. Through Executive Order 11958, the President delegated this authority to the Secretary of State who, through the office of the Deputy Assistant Secretary for Defense Trade Controls and Managing Director of Defense Trade Controls, Bureau of Political-Military Affairs, issued the International Traffic in Arms Regulations ("ITAR") setting up a licensing regime and export regulations. Under the ITAR, persons engaged in the business of manufacturing or exporting defense articles and defense services must register with the Department of State and obtain a license prior to exporting defense articles or providing defense services.

The Treaties establish Approved Communities of governmental agencies and private companies that may export or import defense articles without such licenses. In brief, the Treaties allow approved private companies in the U.K. and Australia to obtain certain defense articles and defense services from the United States without the otherwise required export license from the Department of State. The safe harbors that will be available under regulations promulgated pursuant to the Treaties will also permit members of an Approved Community to transfer defense articles on the U.S. Munitions List to another Approved Community member without having to obtain a license.

The Implementing Arrangements provide the specifications related to the implementation of the Treaties, including how items exported under the Treaties will be protected and how entities may become members of the Approved Community. These provisions were negotiated following signature of the Treaties. The Implementing Arrangements also establish procedures for the United States and United Kingdom and United States and Australia to share records and conduct audits and investigations. The Implementing Arrangements contemplate that, following ratification of the Treaties, the United States would promulgate regulations to clarify the scope of the safe harbors and ensure that conduct falling outside the designated safe harbors will be subject to the AECA's civil and criminal enforcement regime.

ENFORCING THE TREATIES

A transaction that fully complies with the safe harbor established by regulations promulgated pursuant to the Treaties would not be subject to criminal or civil penalties under AECA. Conversely, a transaction falling outside the designated safe harbors would remain fully subject to the civil and criminal enforcement measures under the AECA. As the Department has stated previously, no new authorizing legislation would be required to prosecute such a violation.

Because the Treaties are self-executing, they are "equivalent to an act of the legislature" for purposes of federal law. *Medellin* v. *Texas,* 128 S. Ct. 1346, 1356 (2008). Upon ratification of the Treaties, therefore, the President would have the authority to issue regulations pursuant to the Treaties themselves to create exemptions from the applicable licensing requirements of the AECA and ITAR. These regulations would thus establish the designated safe harbors contemplated by the Treaties and establish requirements for qualification for the safe harbor.

In addition, the President would have authority to promulgate regulations under section 38(a)(1) of the AECA to make conduct falling outside the designated safe harbors subject to the enforcement regime of the AECA. These regulations would be promulgated pursuant to the "broad statutory delegation" in section 38 of the AECA to control the import and the export of defense articles and defense services. *B-West Imports, Inc.* v. *United States,* 75 F.3d 633, 636 (Fed. Cir. 1996). It is the Department's understanding that these regulations will track those to be promulgated under the Treaties and would thus establish conditions for persons exporting or transferring pursuant to the Treaties, and an export or transfer that fails to satisfy those conditions would be enforceable through both criminal and civil sanctions.

CONCLUSION

Thank you for the opportunity to discuss the Department of Justice's role in enforcing export controls and its relation to the Treaties. I look forward to answering your questions.

The CHAIRMAN. Well, thank you very much, Mr. Baker, we appreciate it.

Let me begin by going at this question of the ability to deter and to prosecute violations.

Obviously, this has been a primary concern of the committee as we've gone along here. We appreciate the work you've done with our staff along the way to resolve any questions that might exist.

But for the record, I just wanted to make it absolutely clear, whether or not you are completely confident that these treaties will not weaken efforts with regards to prosecution and deterrence under the AECA.

Mr. BAKER. Mr. Chairman, thank you.

The Department has concluded that the regulations that will be issued following ratification of these treaties—if that's what you decide—will be enforceable. The Department will be able to enforce the ITAR regulations and the provisions of the AECA, following ratification of these treaties.

The CHAIRMAN. Under the regime that's envisioned by them, are you absolutely confident that if there were a diversion of a weapon or a technology, sold to a company in the United Kingdom or Australia, under the treaty, are you confident that that violator could be prosecuted in United States courts?

Mr. BAKER. Yes, Mr. Chairman. We are confident that if someone—the same way as is done today—someone who illegally diverts something on the munitions list, inappropriately, illegally, can be brought to court in the United States and prosecuted here.

The CHAIRMAN. In the letters transmitting the treaties to the Senate the President promised to provide any proposed amendments to the International Traffic in Arms Regulations.

The last draft of those amendments that was provided the committee came in, as Senator Lugar referenced, I think in September 2008. Have you made, or do you contemplate making, Secretary Shapiro, any more changes to those draft regulations?

Mr. SHAPIRO. Thank you, Senator Kerry.

We, as the new administration, reviewed the treaties and after consultation with the staff of the Foreign Relations Committee and

with the Justice Department, we've concluded that there may be—not major changes that need to be made, but changes that might need to be made. We don't anticipate these to be significant, but——

The CHAIRMAN. When do you anticipate the text might be forthcoming?

Mr. SHAPIRO. Our plan—we are eager to have these treaties ratified, and our plan is to get them to you as soon as we can, and we are working with the Justice Department toward that end.

The CHAIRMAN. Could you guarantee us, for instance, that we could have those by mid-January?

Mr. SHAPIRO. I'm hesitant to guarantee without consulting with my Justice Department colleague in advance, but I will commit to make every effort to do that and certainly, if you want them by mid-January, we want to satisfy that.

The CHAIRMAN. Can your Justice Department colleague perhaps help us here?

Mr. BAKER. We will make sure that—we will keep in mind your proposed deadline, and do everything we can to try to meet that, Senator. I'm also——

The CHAIRMAN. We reconvene on the 19th and this is overdue, frankly, in my judgment. So, I'd like the committee staff to have an opportunity, obviously, to be able to review those regs, and then see where we go in those early days of next year.

U.S. Customs officials at our borders and ports will be responsible for checking the paperwork of anyone trying to use the treaties to export a defense item. What is the status, in your judgment, of the readiness of our outbound Customs officials, in terms of personnel, training, equipment, to carry out the responsibilities under these treaties?

Mr. SHAPIRO. Well, I obviously don't want to speak for the Customs Department—Customs Service—but what I will say is, is that we are committed to ensuring that the Customs Service has all of the information that it needs to be able to track exports.

And indeed, you know, under the—currently as its contemplated—an exporter who wants to take advantage of the treaty would have to identify that in their Customs paperwork, they would have to identify that they were exporting to—who they were exporting to in the United Kingdom, which would allow confirmation of whether they're a member of the approved community or not.

And we will continue to work with Customs if they require any additional information to be able to track, just as they do now, where they have information that exporters provide, it is anticipated that exporters will have to provide that information in order to take advantage of the treaty provisions.

The CHAIRMAN. In October of this year, in response to a question for the record from the committee, Mr. Baker, the Department of Justice wrote, "further or more detailed information required in the shipper's export declarations and export information filed in the automated export system could assist in preventing abuse of the treaty exemption." And then you added that, "the requirement could be effected through regulations."

My question to you, Secretary Shapiro, is do you intend to require that exporters under the treaties indicate the joint operation, program or project for which the export is required, pursuant to Article 3(1)?

Mr. SHAPIRO. Again, our goal is to work with the Customs Service to ensure that they have the information that they need to properly track exports under the treaty. It's something we're willing to consider; I am not in a position now to say that, definitively one way or the other, but we wanted—certainly want to make sure that the Customs Service has the information they need to properly track exports under the treaty.

The CHAIRMAN. Well, do you have a concern, Mr. Baker—I mean, is this something that you would like to see them do, is this something that would help in terms of the enforcement process?

Mr. BAKER. I think we would certainly favor any efforts that we could undertake—especially the ones we suggest here—to try to gather more information before anything leaves the United States. So, these were some——

The CHAIRMAN. That can be done by regulation?

Mr. BAKER. We believe so, yes, Senator.

The CHAIRMAN. So, Mr. Shapiro, if they're suggesting that might be helpful, it would seem to me that it might be helpful to the ratification process if you were to include that in the January tasks, so to speak.

Mr. SHAPIRO. Understood.

The CHAIRMAN. I think that'd be helpful.

Are you considering other information that an exporter under the treaties might reasonably be required to provide as a matter of just regulatory, administrative process?

Mr. SHAPIRO. As of now, again, we want the Customs Service to be able to properly track exports under the treaty. We have no specific information that we have currently decided to include, but in that process of consultation with the Customs Service and the Justice Department, there are things that we can provide that would assist in that process, we want to work with them to reach that goal.

The CHAIRMAN. Are there any ongoing or planned negotiations—I think I heard you say this in the testimony, but I think Senator Lugar raised the question—are there any ongoing or planned negotiations with any other countries regarding arms export control exemptions and licensing requirements?

Mr. SHAPIRO. Senator Kerry, there are none. As you pointed out, the relationship with the United Kingdom and Australia is unique, and that's why we are pursuing the treaties with the United Kingdom and Australia, but we have no plans to negotiate with any other—defense trade cooperation treaties—with other countries, and there are no ongoing negotiations.

The CHAIRMAN. At last year's hearing—after the hearing, actually—Senators Biden and Lugar asked an extensive set of questions for the hearing record. Have you had a chance to review the State Department's answers to those questions?

Mr. SHAPIRO. Yes.

The CHAIRMAN. Do any of those answers need to be revised in any way?

Mr. SHAPIRO. A very small number will need to be revised, which we will plan to get over to you as soon as possible. Your staff was particularly helpful in pointing out, in our discussions, the need for possible revisions.

The CHAIRMAN. And those you'll try to get to us, also—well, that has to be in, actually, before we close the record here.

Mr. SHAPIRO. Yes.

The CHAIRMAN. Which would be, say—when we—I think a week from now?

Mr. SHAPIRO. OK. We will make sure that we get them to you.

The CHAIRMAN. That'd be great.

Now, I've received several letters relating to these treaties, submitted on behalf of the Aerospace Industry Association, Boeing Company, Northrop Grumman, and the Arms Control Association. I'd ask unanimous consent that they be made part of the record of the hearing.

[No response.]

The CHAIRMAN. If there's no objection, they will be.

The CHAIRMAN. Let me, Secretary Shapiro, also just commend the Department for the actions in pursuit of the Global Arms Trade Treaty. As you know, that would set legally binding minimum standards for weapons transfers and our export control system is a superb system—one of the best in the world—and it is very much in our interest, obviously, to try to bring the exporting countries up to those standards. So, I'm pleased that we're taking an active role in that, and I applaud that on your behalf.

I might ask, as a matter of the record, also, would you submit to us the—Mr. Baker, really, I think more to you, but probably combined—we just want clarity in the record, with respect to the precise legal theory for the implementation of the treaties. As you know, one approach is the amending or superseding of the provisions of the Arms Export Control Act that are not consistent with the framework suggested by the treaty.

And under the second approach there's the view that the treaty is the equivalent of a legislative enactment that addresses the same subject matter. And I think it would be helpful to us to just have the clarity with respect to that as we go forward, affecting the relationship between the treaties and the AECA.

Mr. BAKER. Certainly, Mr. Chairman. We'll go back through the different letters that we've sent to the committee and look at them again, and make sure that we can—we've provided you with the clearest answer possible.

The CHAIRMAN. Terrific. Appreciate it very much.

Senator Lugar.

Senator LUGAR. Thank you, Mr. Chairman.

Mr. Baker, with regard to regulations, first of all, in your prepared statement you address regulations that would be issued under the treaties and under the Arms Control Act to enforce the treaties. First question: Have these regulations been finalized? And, if not, when do you expect them to be finalized?

Mr. BAKER. No, Senator, they have not been finalized. These are the same regulations that we're talking about here with Secretary Shapiro, so we'll do everything we can to have those to you by mid-January.

Senator LUGAR. Mid-January?

Mr. BAKER. Yes, sir.

Senator LUGAR. Does the confidence of the Department of Justice about its ability to enforce the treaties depend on the final form these regulations take?

Mr. BAKER. Senator, very much so. The regulations—especially the changes to the ITAR regulations—will be critical to our ability to enforce violations of the export laws of the United States, so absolutely these regulations are very important.

Senator LUGAR. And will the administration provide these regulations to this committee for its review prior to committee action on the treaties? And if your answer is "Yes," will this be done in mid-January?

Mr. BAKER. Yes, Senator.

Senator LUGAR. That was a very important part of our rationale for holding this hearing today, as you know.

Now, Mr. Baker, on the safe harbors issue, your testimony refers to safe harbors in the Arms Control Act's enforcement regime that would be established under the treaties. The term "safe harbor" isn't contained in the treaties or the implementing arrangements. Your testimony indicates that the executive branch would promulgate regulations to clarify the scope of the safe harbors and to establish requirements to qualify for them. Has the administration made final decisions regarding the scope and qualifications requirements for these safe harbors? And if so, have these been communicated to this committee?

Mr. BAKER. No, Senator, again these are the same regulations we're talking about, and we need to get these right, we need to finalize them so that it's absolutely clear to everyone what is permitted and what's prohibited. So, these are very important, and we're still working on them.

Senator LUGAR. And that will be a part of this mid-January submission?

Mr. BAKER. Yes, sir.

Senator LUGAR. Finally, given that these safe harbors are not part of the treaties before the Senate, what role does the administration envision the Senate would have in reviewing or approving them?

Mr. SHAPIRO. I'll take this one. Which is, obviously we are going to be submitting these regulations before the consideration by the Senate of the advice and consent—for advice and consent. So, the Senate will have an opportunity to review before any potential vote on these treaties. And we are, you know, committed to fully consulting with this committee and the Senate on the nature of the safe harbors that this will provide.

Senator LUGAR. So, hypothetically, the committee might make suggestions for changes, amendments, and what have you, at the time of this submission?

Mr. SHAPIRO. Well, and I would just say, as I mentioned previously, we don't anticipate that the regulations that we will be submitting will have major changes from the ones that were previously submitted. These are just as we have worked with the Justice Department on sharpening the basis for enforcement, we realize that there may need to be some changes, but we don't an-

ticipate that these changes will be major, and so there—you have a sense based on what you have already, and then you will have additional information when we provide the revised regulations.

Senator LUGAR. Secretary Shapiro, on April 29, Secretary Clinton wrote to us about these treaties. She suggested that she would oppose efforts by the Senate to establish oversight requirements for treaty implementation, through either legislation or resolutions of advice and consent.

She further suggested that such oversight requirements "would frustrate the treaties' purpose." Secretary Clinton proposed that the Senate's oversight interests be addressed by a series of congressional notification procedures, which she pledged the Department would implement as a matter of policy.

Now, Secretary Shapiro, what assurance would the Senate have that oversight procedures implemented by this administration as a matter of policy would be continued by future administrations?

Mr. SHAPIRO. Well, I would say that it is in this—not only this administration's interest, but any administration's interest to have a close working relationship regarding the oversight of these treaties, going forward. I would point out that we, in the, we seek—we have a cooperative relationship regarding arms sales which are not enshrined in law, but which have developed through practice and procedures which numerous administrations have followed, because it is important for the working relationship between the executive branch and the legislative branch. And so, we anticipate that that same tradition would continue, because it would be in the interest of working together with the executive branch and the legislative branch.

Senator LUGAR. Why would this administration oppose appropriate legal requirements that would keep the Congress informed about the implementation of the treaties?

Mr. SHAPIRO. Well, again, to go back to the Secretary's letter, our goal is to have these treaties ratified as expeditiously as possible, to ensure that the United States, United Kingdom, and Australia are able to take full advantage of the terms of the treaties. And we believe that, in her letter she laid out a number of suggested consultation mechanisms, and we believe that those suggested consultation mechanisms would enable Congress to have the ability to provide its input to the executive branch, without a need to actually legislate them.

Senator LUGAR. Well, without being tedious, I still would ask how mandating a congressional role in overseeing the treaties would frustrate their purpose. In other words, why can't this be incorporated in the treaty, as opposed to the question arising two administrations down the trail when those folks come to us and we have a different idea about all of this?

Mr. SHAPIRO. Again, I would go back to, you know, we have various consultation mechanisms in the arms sales process which are not enshrined in law, which—but which work—which do work. I mean, we have an ongoing conversation on how to improve them, and how to make them more efficient, but those were not enshrined in law, but administrations have continued to follow them from administration to administration.

So, we think that the consultations that Secretary Clinton offered in her letter would be adequate to allow Congress to offer its advice and input to the administration, without the need for legislation. And we would anticipate that future administrations would see the benefit of this, as well, as administration after administration has seen it in the arms sales context.

Senator LUGAR. Well, obviously, one reason why this has arisen again is that perhaps we should have confidence other administrations would have. But there, at least, is a case to be made for penning it down now while we're thinking about it.

Let me ask, given the oversight responsibilities of the House of Representatives with respect to arms control, does the Obama administration believe the House has an interest in the proposed arrangements for implementing the treaties and has the administration consulted with the House concerning these arrangements?

Mr. SHAPIRO. As these were negotiated as treaties and under the Constitution, the Senate has the responsibility to provide advice and consent on treaties, our efforts have been focused on the Senate, and toward what we need to satisfy the Senate's concerns toward ratification. So, that has been the focus of our efforts, thus far.

Senator LUGAR. This is doubling back to the history of the situation, but as we've pointed out, during a May 2008 hearing with Bush administration officials they declined to submit the implementing arrangements. Obviously, you're taking a different stance by pledging to transmit the aforementioned package by mid-January, so I'll not try to review the problem of conflict between your interpretation and theirs. You've decided along with us, perhaps, that this is best to proceed and we appreciate that.

Let me just ask whether or not the administration believes the Senate should have a role in approving future changes to be made in the implementing arrangements as time goes by? Furthermore, do you see the changes that might be constructive?

Mr. SHAPIRO. Well, as the Secretary pointed out in her letter, she would commit that we would consult with the Senate before any changes in—we would provide notification well in advance of changes to the implementing arrangements.

Senator LUGAR. What if we disagree with these changes down the trail, and there's really no permanent record, at least as a part of the treaty ratification now?

Mr. SHAPIRO. Well, I mean, I think that our administration and future administrations would take the concerns of Congress quite seriously. And that would be, you know, the purpose of a notification, would be to offer an opportunity to receive those comments from the committee and from the Senate.

Senator LUGAR. Well, my time has concluded for the moment, we may come back if we can, Mr. Chairman.

The CHAIRMAN. Absolutely.

Senator LUGAR. But, I think this is still a point of discussion. I understand your point of view, that changes might be made. We might agree or disagree with them. I suppose, in terms of congressional oversight, some would argue the responsible course is to pen things down now, before we ratify, so that we don't have a specula-

tion as to future administrations' agreements or disagreements that we know more about the future.

I'll leave it at that for the moment, Mr. Chairman. And you'll have to——

The CHAIRMAN. I'll come right back to you.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

Thank you for being here to testify.

Our partnerships with Australia and the United Kingdom are, of course, among our most important alliances, and I strongly support efforts to expedite our arms exports to these key partners in a manner that retains Congress' constitutional role in overseeing our arms control regime. In the wake of the terrorist attacks of September 11, it's more important than ever that we strengthen our arms control regime.

The illicit arms trade aids terrorists and the states that sponsor them. It also contributes to instability, including in areas of particular concern to me as the chair of the Subcommittee on African Affairs.

So, with these overriding concerns in mind I just have a couple of questions.

Mr. Baker, the licensing regime creates an evidentiary trail that the Justice Department uses to prosecute those who attempt to divert weapons or munitions to criminal entities, terrorist organizations, or state sponsors of terrorism, that's right, isn't it?

Mr. BAKER. Yes, sir.

Senator FEINGOLD. And in what percentage of prosecutions for violations of our arms export laws has the Department relied upon evidence obtained from the licensing process?

Mr. BAKER. Obtained from the licensing process? Senator, I would expect that it's a high percentage, I could get you a more accurate answer for the record if I could take that back and go back and do some research on that, but I would—it's a high percentage, in terms of the evidentiary trail.

Senator FEINGOLD. Thanks for that answer, and I look forward to the more specific follow-up.

Mr. Baker, we're entering uncharted legal territory by substituting the proven licensing system with an, as of yet, unproven system of vetting so-called "approved communities." If unforeseen legal problems arise, will our only recourse be to issue new regulations, and if a future administration is unwilling to make such changes to the regulations, what remedy would Congress have?

Mr. SHAPIRO. I mean, I would say on—that the—we anticipate that these treaties will offer significant benefits. Under the—and the Justice Department, in our consultation, which Mr. Baker talked about is confident of its ability to prosecute, and he can talk to that more fully. But, I would say that it is our intent that these be enforceable. We want to protect national security. And if there—we don't anticipate that there would be problems, we don't think that we think that we have worked out with the Justice Department a firm basis for enforcement. But if we have missed something, we will want to correct it, because we want to ensure that violations are able to be prosecuted if there are violations of the treaty.

Senator FEINGOLD. Mr. Baker, would you like to answer that?

Mr. BAKER. Just to amplify, Senator, yes. I mean, one—as you know, from your experience on the Judiciary Committee, enforcing the criminal laws of the United States is a multifaceted enterprise, and the first step of that is to make sure that the statutes and regulations under which prosecutions would be brought are as crystal clear as we can make them. Should we encounter problems in the future, obviously, that's something that we would fix. That would come out, I assume, in judicial findings or difficulties we would have in bringing charges, and so on and so forth.

So, I think we would be very supportive—indeed, urging—that any changes that we saw that needed to be made to the regulations would be done.

Senator FEINGOLD. Mr. Baker, if defense articles or services are retransferred to entities outside of the approved communities, would a congressional resolution to block such transfer enjoy the benefit of the expedited procedures provided in the Arms Export Control Act?

Mr. BAKER. So, Senator, to make sure that I understand—so this would be a reexport from the United Kingdom or Australia to another location?

Senator FEINGOLD. To entities outside of the approved communities.

Mr. BAKER. Yes, I think——

Mr. SHAPIRO. I will say that, under the terms of the treaty, a retransfer or reauthorization outside of the approved community requires our—U.S.—approval. And so, and if they do not—if they do not obtain U.S. approval, then that is a violation of the law that can be prosecuted. So, we think that there—that that provides ample means to ensure that there are not improper retransfers or reauthorizations outside the approved community.

Senator FEINGOLD. Do you agree with that, Mr. Baker?

Mr. BAKER. Yes, retransfers—I'm sorry—well, retransfers or reexports without U.S. Government approval would be illegal, under the AECA and the ITAR regulations as we would put them forth after ratification.

Senator FEINGOLD. I thank you both.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Lugar.

Senator LUGAR. Mr. Baker, in the August 20, 2009, letter to Attorney General Holder, Senator Kerry and I asked whether there were any authorities that the Department of Justice believes to be important or useful to effect the enforcement of the treaties that would require an enactment of new legislation.

Now, the Department answer indicated that, "There are no additional authorities necessarily for enforcement of these treaties." Whether the additional authorities are necessary is a different question than whether such authorities would be useful, or would put the treaties enforcement on a sounder basis.

At this point, what is the Department of Justice's position on enforcement of the treaties being made more effective or less vulnerable for a legal challenge to enact, when appropriate, imple-

menting legislation, rounding the enforcement authorities for the treaties in the Arms Control Act itself?

Mr. BAKER. Our current assessment, Senator, is that the combination of the treaties, the AECA, and the ITAR regulations would provide us with adequate tools to establish a criminal violation of the—of those regulations and that framework. So, our assessment is that because of the way the treaties are drafted and their structure, that they are self-executing, therefore no implementing legislation is required.

I can certainly take back as a question—if that's OK with you, Senator, the question about whether additional legislation would be necessary. Or would it be helpful, or would it add something? Our assessment is that sitting here today, it's not necessary, and that we can do what we need to do within the existing structure.

Senator LUGAR. Well, please take back the dual question whether it's necessary or whether, in fact, it's desirable as a point of good government and permanent implementation of this idea.

Mr. BAKER. Yes, I will. Thank you, Senator.

Senator LUGAR. Now, Mr. Baker, or Secretary Shapiro, where do these treaties fit into the review that on August 13 the White House announced as a broad-based interagency process for reviewing the overall U.S. export control system, which includes defense trade processes? That's a broader concept, but how do these treaties fit into that review?

Mr. SHAPIRO. As Senator Kerry pointed out, these treaties are being negotiated with two close allies—the United Kingdom and Australia—and provide a streamlined mechanism for defense trade cooperation.

Our export trade review is looking at the system as a whole. How do we—is it appropriate for a 21st century world, and are there improvements that we can make that would better protect our national security and update it for the 21st century?

It is not anticipated that that export review would impact the regime that we are establishing with the treaties, but that is a much broader look at the defense trade process, in general, not just the State Department, the Commerce Department—it's an interagency process and is trying to, again, make sure that we are protecting our national security adequately in the 21st century.

Senator LUGAR. Please discuss, just for a moment, whether or not this review contemplates major changes in the way in which the United States conducts defense trade with the United Kingdom or Australia. Are these special cases or is there anything more to be said about those two?

Mr. SHAPIRO. And again, the review has just gotten underway, but in my participation in the review, it is not designed to—it has not been discussed that it would change, in any way, the defense trade regime that is being established under these treaties. Again, it's a much broader view that it's taking a look at a whole export control system that we currently have, and particularly the licensing systems at both the, you know, Department of Commerce and Department of State, so—and this treaty regime creates a different structure for that defense trade.

So, I would, again, we're early in the review, so I don't have much more to say, but in the discussions that we've had, indeed,

people have pointed to the, you know, to these treaties as, you know, something that we want to get ratified as a way of improving our defense trade relationship between the United States and United Kingdom and Australia, but it has not been contemplated in the discussions thus far that the export trade review will take a look at these treaties and make any changes or modifications to these treaties.

Senator LUGAR. Well, let me ask just one final question, and this may be sort of an outrageous example of difficulty, but let us take the situation in which a party in the United States that is prepared to supply weapons or information or whatever is required by the United Kingdom or Australia, but this party—in addition to those two countries—makes some exports to potential terrorist organizations in the world. It could be under any number of covers, people supposedly as the customers may seem, on the face of it, as legitimate customers under the treaty, but the parties involved understand, really, that there is a more liberal regime going on, here, and that this may be the vehicle for making those kind of transfers.

Now, clearly, as you contemplate, the work both in State and Justice, you believe you would have means of investigation and prosecution in this country of parties, whoever they might be who might contemplate such an activity. I'm just simply curious, in the world in which we live, how rigorous this investigation is, all the way through. How long it takes us to discover that there is something amiss here before we begin looking for the culprits who may, by this time, have fled our shores altogether.

Mr. SHAPIRO. Well, I would point out that the treaty contains certain protections that are designed to prevent that type of conduct from happening. You have to be a member of the approved community. We, in the United States, get to sign off on who is a member of the United Kingdom or Australian approved community. And we do that in consultation with our intelligence agencies and the Department of Justice, to make sure that front companies are not going to be members of the approved community. So, that's a first line of defense.

Senator LUGAR. Would Australian and United Kingdom intelligence persons, or their equivalent of our investigative folk, also be doing that? In other words, do we have the benefit of whatever they know about particular customers?

Mr. SHAPIRO. Right. Well, remember that in both countries, members—they can only have members of the approved community who have intelligence security clearances. And in order to get security clearances, they've been vetted.

So only those companies or persons who have security clearances can be members of the approved community. So, presumably, those intelligence agencies are vetting people to ensure that they are not members of front companies, or involved in transactions that we would not want.

So, the treaty provides a means to prevent that from happening. In the event that somehow, some way, somebody got through that process, then we have—then the—and we discover that they have not—that they have tried to export under the license improperly, we will have records through just the way people with the license

have to file with the Customs Service certain information, people who are taking advantage of the treaty will also be filing with the Customs Service certain information, and they can check to ensure that the export is going to the person who is listed on the paperwork that they filed, and again that person should be a member of the approved community.

Mr. BAKER. Senator, yes, just briefly—the scenario that you described, I think, is obviously illegal. It would be obvious, I believe, under our laws as we would put them forward in the regulations that that type of conduct would be prohibited.

The challenge, then, becomes investigating it. Learning about the offense in the first instance—and there's a variety of ways that law enforcement agencies and agents learn about offenses that I could go through here, but the next trick will then be to gather the evidence and to interview the witnesses who will be some—in the hypo that you described—some in the United States and some abroad.

We will have to work closely with our allies in a collaborative fashion to obtain that evidence, to get access to those witnesses and to bring those people to justice. So, it's a multifaceted response, again, to try to address the kind of illegal activity that you've described in your hypothetical.

Senator LUGAR. And, at least in your initial conversations with our allies, they understand the predicament for all three of us—Australia, United Kingdom, and the United States, that there's a vetting procedure to begin with, those who are buying and selling, but beyond that, an agreement for cooperation in terms of collaborative investigation involving agencies internationally.

Mr. SHAPIRO. Right. And that is included in the text of the treaties that requires that violations have to be reported immediately, and that there must be cooperation in any investigations. So, this is an obligation that both countries have undertaken.

Senator LUGAR [presiding]. Thank you very much.

In the absence of the chairman, let me recognize you, Senator Shaheen.

Senator SHAHEEN. Thank you very much, Senator Lugar, and I apologize, I was at another hearing. But I wanted to be here for two reasons.

First, to recognize Jim Baker who I had the good fortune to work with at the Kennedy School. And my favorite story about Jim is that he put on this sign for the students who were coming into see him, "Not 'the' Jim Baker." [Laughter.]

So, we're delighted to have you here before the committee today. Thank you very much.

But also wanted to be here because I wanted to make a point that we heard yesterday at the European Affairs Subcommittee, which I chair. And, obviously, I think, all of us want to be able to support the ultimate objectives of these treaties, these are our most critical allies, they're fighting shoulder to shoulder with us in Afghanistan and a closer defense trade relationship will help to reaffirm the important ties and increase the ability of our forces to work on the ground, both in Afghanistan and in other places in the future.

And I also appreciate the economic gains that would come from a more efficient and streamlined exchange between our defense firms and those of the United Kingdom and Australia and that's a particular concern for us in New Hampshire where we have a number of defense-related businesses who are very interested in the outcome of what happens with these treaties. I think BAE Systems is probably the biggest of those, who you all would recognize, but also we have a number of their suppliers and smaller businesses who are very concerned about what will happen.

So, I want to offer my full support to the chairman and ranking member, as we look at the best way to deal with moving these treaties forward.

But, the issue that came up yesterday with respect to concern in these treaties and others, is export control reform. And I know, Senator Lugar, that you raised this in your questions, but what we heard from some of the business interests who were testifying, particularly small business, is concern about the requirements that they need to comply with if they're going to export.

And given the significance, I think, to our future economy, we need to make sure that while we protect our security, we also have regulations that help our businesses compete.

So, I wonder—I guess this question is really for you, Mr. Shapiro, what—whether you're looking at ITAR regulations and what potential there is to take a look at whether the current regulations are still consistent with the new global economy that we're in, or if it's—if some of the—they were designed for the cold war, and whether we need to upgrade those?

Mr. SHAPIRO. Thank you, Senator Shaheen. And I remember, during my confirmation hearing, you asked me about these treaties, and I'm glad that we're able to have this hearing to answer further questions about them.

As far as the export control reform effort, I think you hit it right on the head, which is, we want to ensure that we have an export control system that protects national security, but also ensures that we have a system that makes sense in a 21st century economy.

Now, we have gotten down in our review—it's still in the earlier stages—we have not gotten down to the level of, this regulation or that regulation needs to be changed. And indeed, it's a very important part of this review, that we want to have robust congressional consultation. And we want to know from the congressional perspective what makes sense and what doesn't. You're hearing from constituents, you've had—a number of people on the Hill—have had expertise in this area, and we want to be able to make sure that that is informing the administration's export control reform effort.

So, the answer is "Yes," we are taking that very seriously, to ensure that we have an export control reform effort that both protects national security but is also—has mechanisms, efficient mechanisms—and we fully intend to consult closely with Congress on this, going forward.

Senator SHAHEEN. And, do you have a timetable for when that might start, and how long that might take?

Mr. SHAPIRO. Well, we've begun meeting, internal to the administration. I think congressional consultations will begin in earnest

after the New Year, and how long it will take, you know, I think there is an eagerness to get this done. Secretary Gates has made clear that this is a priority of his. Under Secretary Tauscher has expertise from her time in the House, so we've got the right team in place to pursue this, but we want to do it as quickly as makes sense. And, which will garner the support, obviously, of Capitol Hill. So, I don't want to put a timetable on it, but we recognize that this is a very real issue to a lot of—to our national security, but also to a lot of constituents. And so we want to get it right.

Senator SHAHEEN. OK. I appreciate that, and certainly support that sentiment. I hope that there will be some sense of urgency about the need to address this.

Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN [presiding]. Well, thank you very much, Senator Shaheen, I appreciate it. We appreciate your stewardship of the European Affairs Subcommittee. And I know you have a sense of how urgent this is.

This has really, kind of, dragged on and it's something that we've got to resolve, one way or the other.

Now, Senator Lugar has asked important questions and I would like just to incorporate the full committee in wanting to have the answers appropriately. This is not adversarial. We have one interest, which is to facilitate the process in a way that keeps faith with our interests about arms exports.

And so, my hope is that you can really burn and churn, give the answers Senator Lugar needs, that we need, to be reassured about our direction, so the full Senate can give its advice and consent in an intelligent and sensitive way to the interests that are at stake, here.

If there are no—Senator Lugar, do you have any other questions?

[No response.]

The CHAIRMAN. If not, we appreciate you coming up today, we look forward to getting that information by mid-January, as I say. I think that providing, you know, we're satisfied and we have the ability to move forward, which I would hope we could, we could do so expeditiously.

I know our friends in the United Kingdom and in Australia are waiting to see how we proceed here, and obviously, I think it's important to those relationships.

We stand adjourned.

[Whereupon, at 11:16 a.m., the hearing was adjourned.]

Additional Material and Questions and Answers Submitted for the Record

Letters Submitted for the Record by Senator John Kerry

ACA | Arms Control Association

December 9, 2009

Hon. John F. Kerry, Chairman
Hon. Richard G. Lugar, Ranking Member
Senate Foreign Relations Committee

Dear Senators Kerry and Lugar and other members of the Committee:

As the Committee holds a hearing tomorrow on the Defense Trade Cooperation Treaties with Australia and the United Kingdom, we urge you to consider the following concerns and recommendations we have about the treaties.

The U.S. arms export control system is widely and rightfully regarded as one of the best in the world. This administration has recently committed to pursuing a legally binding global arms trade treaty "that contains the highest possible…standards for the international transfer of conventional weapons." As our country engages in this worthwhile and needed effort, steps that could weaken our export control system should be rejected.

At the broadest level, we are concerned that the establishment of license exemptions, especially those related to weapons and associated technologies, makes it **more difficult to monitor and control arms transfers, creates opportunities for diversion, and weakens law enforcement.** The fact that these treaties are with close U.S. allies Australia and the United Kingdom does not in itself allay these concerns.

After reviewing the publicly available information specific to these treaties, we believe that there are three areas that deserve further clarification, review, and remedy:

- Monitoring of license-free exports and subsequent retransfers;
- Enforcement of violations;
- Congressional oversight.

Monitoring. Licenses provide a first opportunity to not only assess whether an export should occur, but also to track an export's movement out of the country, and ideally make it easier to track end uses and any subsequent transfers, if they occur. Without a license, it must be crystal clear how the United States will be able to monitor an export's movement and end uses. Without sufficient monitoring, it will be increasingly difficult to discover and deter abuses of the treaty's provisions and other U.S. laws.

Specific areas that we believe deserve your attention include: identifying and allocating resources that the Department of Homeland Security and Customs and Border Protection may require to monitor a license-free regime; establishment of high standards for vetting and tracking of freight forwarders and other intermediaries; insuring that non-U.S.

members of the trusted community will monitor U.S. exports and share information in such a way that abuses can be detected and prosecuted.

We also suggest that additional analysis be done to determine whether these treaties increase the opportunities for **illicit activity originating within the United States**. Although attention has been placed on how Australian and UK companies would be vetted for inclusion into treaty-created trusted communities, it is our impression that the barrier to entry into the U.S. approved community is rather low. The increased flow of unlicensed items within trusted communities could either overwhelm existing accountability systems, especially for smaller companies, or create new opportunities for illicit activity.

Enforcement. Based upon our conversations with legal experts, we believe that uncertainty exists concerning the administration's legal authority to enforce these treaties. It is our understanding that a violation of the treaty would be enforced by reference to the Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR) that implement the Act. The treaty, however, carves out an exemption from those laws. In order to make it absolutely clear how a treaty violation would be prosecuted, statutory and regulatory changes may be needed. Absent such changes, a treaty violator may challenge their prosecution based on ambiguity surrounding treaty enforcement, thereby encouraging bad behavior and discouraging Department of Justice prosecutions.

As you review the treaty, please clarify not only what legal changes are needed, but also determine that they have indeed been made. Further below we recommend that implementing legislation be adopted as a resolution to this issue.

Additionally, we believe these treaties may serve as a precedent for future treaties. We ask that you consider the added difficulties that prosecuting a violation may entail if no license is available. Further, we expect that in many cases all evidence of wrongdoing may exist outside of the United States and therefore rely on the cooperation of foreign governments and sources. If there is any doubt about the availability or access to that evidence, we are concerned that enforcement will be jeopardized. Such weakened enforcement capabilities must be weighed against expected advantages of a treaty system.

Congressional oversight. As we mentioned in a note to the Committee last year, pursuit of the exemption agreement as a self-executing treaty circumvents the House and appears to bypass Congressionally-mandated requirements for country licensing exemptions, setting a precedent that could weaken U.S. arms export controls and Congressional oversight. In 2000, Congress established a specific set of requirements that must be met before the President can exempt a foreign country from arms export licensing requirements. Section 38(j) of the Arms Export Control Act (AECA) allows country exemptions only for countries meeting specific end-use, retransfer, handling and law enforcement requirements. The purpose of these requirements is to allow license-free arms exports only to countries whose export control regimes are as robust as ours in key

ways. The AECA also requires a determination by the Attorney General that the exemption agreement requires sufficient documentation for law enforcement (§38(f)(2)). The Department of Justice should be asked to make such a determination.

Further, the Senate has only been asked to provide its advice and consent to the treaty text, not to the implementing arrangements and other understandings that may be created to support the treaty. This means that future changes to what items may be exported under the treaty is therefore at the discretion of this and subsequent administrations. While it might be proper for the administration to approve companies that can participate in the treaty's trusted community we believe that Congress should provide more direct oversight into the items that may be exported within that community.

We recommend that if these treaties do move forward, they do so only with the necessary **implementing legislation**. Such legislation could clarify exactly how violations of the treaty are to be legally determined and treated, therefore making prosecution more straightforward. They could also be written to establish Congressional oversight into the treaties' function, especially any changes to the items excluded from the treaty.

We ask that this statement be placed in the hearing record.

Sincerely,

Daryl G. Kimball,
Executive Director,
Arms Control Association

Jeff Abramson,
Deputy Director,
Arms Control Association

W. James McNerney, Jr.
Chairman of the Board
President &
Chief Executive Officer

The Boeing Company
100 N Riverside MC 5003-6010
Chicago, IL 60606-1596

December 3, 2009

The Honorable John Kerry
Chairman, Committee on Foreign Relations
United States Senate
439 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I am writing to thank you for scheduling a hearing and moving forward on the pending Defense Trade Cooperation Treaties between the United States and the United Kingdom and the United States and Australia. As the Congress and Administration consider issues related to these important treaties, I believe that efficient defense cooperation between our respective nations is a key element to enhancing our shared national security, economic and foreign policy interests.

The Boeing Company has a strong presence in both the United Kingdom and Australia and is proud to count them among our most loyal customers. The State Department estimates there are over 14,000 export licenses a year for defense trade activity trade with these nations. According to State, ratification of the treaties would reduce this burden by up to 70 percent and facilitate the timely flow of goods and components related to defense cooperation activities. An efficient and predictable export control regime with our most trusted allies will not only enable a nimble framework for defense cooperation, but will also meet U.S. export control policy objectives.

We appreciate your leadership in the ratification of these important treaties. As you proceed, please know you have the full support of The Boeing Company.

Sincerely,

W. James McNerney, Jr.

Marion C. Blakey
President and Chief Executive Officer

December 4, 2009

The Honorable John Kerry (D-MA)
Senate Foreign Relations Committee
446 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Kerry:

I am writing on behalf of the Aerospace Industries Association (AIA), which represents 270 leading U.S. aerospace manufacturers and their more than 630,000 employees, to express our continued support for the Defense Trade Cooperation Treaties with the United Kingdom and Australia. There are a number of reasons we believe ratification of these Treaties would be in the interests of the United States, not the least of which is the value to our national security and economic vitality.

National Security Implications

Our military relationships with both Australia and the United Kingdom date back many years. From WWII, through the Cold War, and finally to modern day military missions in both Iraq and Afghanistan, these countries have been critically important allies in defeating extremism. Our forces have fought side by side in the past and will do so in the future. It is imperative for our national security interests that we are able to work seamlessly with both countries on the battlefield to ensure that we optimize our tactical and intelligence advantages.

AIA has long supported a rigorous export control system that protects our most advanced technologies. At the same time, it is imperative that this system operate in a manner to facilitate technology sharing and cooperation with our closest allies. Ratification and implementation of the Defense Trade Cooperation Treaties with both the United Kingdom and Australia would make their forces more capable and interoperable with American forces – allowing for force-multiplying capabilities in fighting our common adversaries. These Treaties will also help ensure that U.S. forces have the best means to meet and surmount threats to our national security.

The Treaties would also allow the State Department to better conduct their mission of evaluating the national security and foreign policy implications of licensing an export. The total number of defense trade licenses reviewed by the State Department has increased by eight percent annually. By appropriately streamlining the cumbersome process of approving these licenses on a transaction by transaction basis, the State Department can maximize its limited resources in evaluating more sensitive export applications.

Economic Implications

It is also important to mention the economic implications of both Treaties for our country. As the trade association for the United States aerospace industry, AIA represents high-wage, highly skilled aerospace employees across three sectors: national security, civil aviation, and space systems. Our member companies export 40 percent of their total output, and we routinely post the nation's largest manufacturing trade surplus, which was over $57 billion in 2008. Aerospace indirectly supports two million middle class jobs and 30,000 supplier companies from all 50 states. The aerospace industry continues to look to the future by investing more than $100 billion over the last 15 years in research and development.

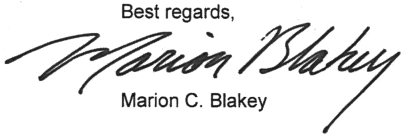
In the current global economic climate, the Defense Trade Cooperation Treaties will help sustain and create American jobs. It is important that we keep these American workers in mind when deciding public policy decisions on Capitol Hill. We believe that by eliminating trade barriers with our closest allies, the United States can continue to sustain and grow jobs through these critical exports.

It is clear that the United States, United Kingdom, and Australia are all fully vested in each other's economies. The United Kingdom is the largest foreign investor in the United States with over $360 billion in investments, and Australia invests $121.4 billion. The Defense Trade Cooperation Treaties will help facilitate more foreign investment in the U.S. defense industrial base.

Finally, the defense industry has consistently sought to provide the U.S. government with the best products at the best price. Because the Treaties would facilitate interaction between U.S. prime contractors and United Kingdom and Australian partners on Department of Defense contracts, U.S. forces and the U.S. taxpayer would reap the benefits in a challenging budget environment.

Moving forward, it is our hope that the Defense Trade Cooperation Treaties with both the United Kingdom and Australia will be passed out of the Senate Foreign Relations Committee and considered in the full Senate. These exact sentiments were expressed in an AIA letter that was signed by the CEOs of the AIA Executive Committee on May 21st, 2008. We submitted this letter for the record during last year's Senate Foreign Relations Committee hearing on the Defense Trade Cooperation Treaties and ask that you consider it, and its contents, while deliberating the passage of these Treaties.

Best regards,



Marion C. Blakey

RESPONSES OF ASSISTANT SECRETARY OF STATE ANDREW SHAPIRO TO QUESTIONS SUBMITTED BY SENATOR RICHARD LUGAR

Question. The Bush administration answered a series of questions for the record in connection with this committee's May 21, 2008, hearing on these treaties.

- Do answers submitted in 2008 continue to accurately represent the executive branch's current views and may the committee rely on them as authoritative? If not, please identify particular answers that no longer reflect the position of the executive branch and provide the committee with appropriate revised answers, including explanations as to the need for each revision.

Answer. Based on a review of the questions for the record submitted following the May 2008 hearing, revisions have been made to the following questions: 5, 7, 44, 50, 53, 63, 72, and 79. Please see the attached submission for the revisions and explanatory notes.

Question. In your written statement, you suggested that the treaties could promote development of anti-IED capabilities and counterpiracy and maritime counterterrorism capabilities important to current military operations.

- Does the Department believe that governmental programs of the sort in your testimony are ineligible for license exceptions under existing authorities available to the Department of State and Defense under the Arms Export Control Act (AECA)?

Answer. Exemptions available under existing authorities would potentially permit a limited number of the transactions and other activities involved in such programs to occur on a license-free basis. However, these existing exemptions do not cover the range of activities encompassed by such programs that exemptions under the treaties would allow, nor do the limited exemptions that currently exist afford the flexibility and enhanced ability for collaboration involving United States, United Kingdom, and Australian industry that would be available under the treaty regime.

Question. In response to a question for the record at the committee's May 2008 hearing on the treaties, the Bush administration stated that the median processing time for license applications for the United Kingdom and Australia was "7 days and 8 days respectively."

- Is this information still accurate? If not, please indicate the current median processing time for such license applications.
- Please indicate how this license processing time poses significant challenges for addressing urgent needs of the sort described in your testimony.

Answer. The median processing time for the United Kingdom and Australia continues to be 7 days and 8 days respectively in calendar year 2009. Nonetheless, the export licensing process introduces the potential for delay. The treaties are designed to mitigate delays that can occur under the export licensing process.

In terms of delay, the treaties would accelerate the export of defense articles and services and ensure that urgently needed goods and services can be delivered in the most expeditious manner.

Although many export transactions can be anticipated by industry, others are not. For those members of the approved community working on a project covered under the treaties, the treaty regime will encourage the free flow of discussions concerning controlled data, thereby allowing scientists, engineers, sales associates and others to do their job more efficiently and with less interruption. They would not have to halt conversations regarding technical data covered by the treaties. Today, if these conversations cross into areas unanticipated in the original license applications, including discussing information about a different model of a particular system not listed in the license application, firms must stop the process and wait the period needed to file for and receive approval from the government for this activity. This stoppage can be particularly detrimental to the collaborative process.

Furthermore, by removing the need to process thousands of licenses approved for both countries (over 99 percent of which were approved) the treaties will permit us to better focus on license applications to countries and transactions that require individual review. This will support our efforts to ensure that all licenses are processed in a timely manner, especially those that are needed to support the development of technology needed by U.S. and coalition forces.

The treaties, if ratified, would encourage the flow of information and could eliminate days if not weeks of time currently spent filing and waiting for a license before urgently needed equipment could be shipped, data shared, or services provided. Facilitating the flow of defense trade to these close allies enhances our mutual security, signifies the close, special relationships we enjoy, facilitates interoperability by permitting United Kingdom and Australian Armed Forces to obtain U.S. equipment/

technology with minimal to no delay, removes barriers to defense trade that may cause foreign manufacturers to design out U.S. content/technologies, and enables us to more closely integrate our defense industries for the long term.

ADDITIONAL RESPONSE OF ASSISTANT SECRETARY ANDREW SHAPIRO TO QUESTIONS SUBMITTED BY SENATOR LUGAR (SEPTEMBER 20, 2010)

Question. What is the administration's position on whether the Defense Trade Cooperation Treaties with the United Kingdom and Australia are self-executing in the United States?

Answer. Notwithstanding the statement in the preamble of these Treaties, the Treaties are not self-executing. They will be implemented through legislation and regulations thereunder.

ATTACHMENT: REVISED 2008 QUESTIONS FOR THE RECORD

QUESTIONS FOR THE RECORD SUBMITTED TO ACTING UNDER SECRETARY OF STATE JOHN ROOD BY SENATOR JOSEPH BIDEN, MAY 21, 2008 (REVISED JANUARY 26, 2010)

Question No. 5. Each treaty states in the preamble that "the provisions of this Treaty are self-executing in the United States."

a. Was this language included at the request of the United States?

b. Why was it necessary to include this language?

c. What is the legal effect of including this language in the preamble?

d. Does the inclusion of this language limit in any way the manner in which these treaties can be implemented in the United States?

Answer. a. Yes.

With respect to b, c, and d, below, I am advised by the State Department's Legal Adviser that:

b. It was not legally necessary to include this language in order to make the treaties self-executing in the United States—this could alternatively have been clarified through the record of the Senate's advice and consent; however, at the time the treaties were negotiated, it was considered desirable to leave no doubt as to the intended effect.

c. It reflects a clear intent with respect to the domestic legal effect of the treaties in the United States, including that the treaties themselves provide sufficient authority to issue the regulations necessary to fully implement them.

d. The Senate may, in consultation with the executive branch, take steps in the Senate's resolution of advice and consent to each treaty to address the manner in which these treaties are to be implemented.

Question No. 7. Under what legal authority will the Department of State promulgate regulations for these treaties, given that the current International Traffic in Arms Regulations (ITAR, 22 CFR 120–130) are promulgated under the authority of section 38 of the Arms Export Control Act, which presumably will be superseded by the treaties?

- If no provision of law can be cited, what implications will that have for enforcement actions against a company that fails to abide by the new regulations?

Answer. Upon ratification of the treaties, the President would have the authority to issue regulations pursuant to the treaties themselves to create exemptions from the applicable licensing requirements of the Arms Export Control Act and International Traffic in Arms Regulations. These regulations would thus establish the designated safe harbors contemplated by the treaties and establish requirements for qualification for the safe harbor.

In addition, because the treaties would not supersede section 38(a) of the Arms Export Control Act, as amended, the President would have authority to promulgate regulations under section 38(a)(1) of the Arms Export Control Act, as amended, to make conduct falling outside the designated safe harbors subject to the enforcement regime of the Arms Export Control Act.

Question No. 44. Article 5(2) of each treaty states the United States Approved Community shall consist of nongovernmental entities "registered with the United States Government and eligible to export Defense Articles under United States law and regulation."

a. On what basis is initial registration ever denied?

b. The International Traffic in Arms Regulations, at 22 CFR 122.1(c), notes that "Registration does not confer any export rights or privileges." Under current regulation and practice, is eligibility to export established at the time of registration, or only when the entity applies for its first license to export? If the latter, what measures will be taken to establish a registered nongovernmental entity's eligibility to export defense articles and, as a result, its membership in the United States approved community, if that entity has not yet applied for a license to export?

Answer. a. Neither initial nor renewal applications to register are denied by the Department for anything but procedural reasons (e.g., errors on the application). The Arms Export Control Act requires that companies in the defense arena (as defined by specific criteria) must register with the Department and maintain this registration and does not include a provision to deny a registration even for serious criminal offenses. Even companies that have been debarred are still required to maintain their registration as long as their defense related activities meet the requirements for registration. In rare cases, the Department will return a registration application based on its analysis that the entity is not required to register under the regulations or its activities are more appropriately and directly regulated through another company that is or should be registered with the Department.

b. Eligibility is a key element of the Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR). Registration is the first step but an exporter must also be eligible as defined in the ITAR. As provided in Article 5(2) of each treaty, exporters under the treaties must meet the same requirements currently followed for existing ITAR exemptions—they must be registered and eligible.

Question No. 50. How will the U.S. Government ensure that the freight forwarders and intermediate consignees involved in license-free exports or transfers under the treaties are legitimate and reliable entities?

- Will freight forwarders and intermediate consignees have to be members of the approved community? If so, what is the legal authority under which the executive branch will establish this or any other requirement relating to such persons, if section 38(g) of the Arms Export Control Act is not applicable to exports or transfers under the treaties and given that neither the treaties nor the implementing arrangements mention freight forwarders or intermediate consignees?
- Will it suffice to require that freight forwarders and consignees be members of the approved community? Article 5(2) requires that United States community members be "registered with the United States Government and eligible to export defense articles under United States law and regulation," but it is not clear to the committee whether an entity engaged only in license-free exports or transfers would be investigated in the manner that a registered exporter is investigated when it first obtains an export license.
- What are the possible advantages and disadvantages of requiring that freight forwarders and consignees for exports and transfers be certified Customs Brokers?
- What are the possible advantages and disadvantages of requiring that freight forwarders and consignees for exports and transfers register with the Department of State? Does the Directorate of Defense Trade Controls (DDTC) have sufficient resources to run a registration and investigation program of this sort?

Answer. In the United States, some freight forwarders are also registered as exporters, subjecting them to the registration and eligibility requirements established for inclusion in the approved community. For those who are not, we are exploring an option to allow the use of other freight forwarders/intermediate consignees engaged in activities under the treaty who are in good standing with the Department of Homeland Security's Bureau of Customs and Border Protection (CBP) as licensed Customs Brokers. The advantage of this approach is that licensed Customs Brokers are subject to background investigation and must pass a comprehensive examination of U.S. customs regulations administered by CBP. Another possible option would be to require that freight forwarders/intermediate consignees handling exports under the treaty register with DDTC. A registry of freight forwarders/intermediate consignees would be different from current ITAR registration requirements for manufacturers, exporters, and brokers, but would be subject to the same vetting procedures used for registration. The advantage of this approach is that it includes screening against the Department's Watchlist and vetting by law enforcement. While this would represent additional workload, we believe it could be managed with existing resources or resources made available by the decline in licensing workload associated with the treaties. The State Department, in conjunction with CBP,

has been exploring options and will implement them in the International Traffic in Arms Regulations.

The legal basis for placing requirements on the freight forwarders and intermediate consignees comes from the treaties as well as section 38(a)(1) of the Arms Export Control Act, as amended.

Question No. 53. Under the terms of the treaties, what legal authority is there for any Party to use freight forwarders or intermediate consignees that are not members of the approved community to handle exports or transfers?

- May the initial export of a defense article be handled by an entity not in the approved community, because it has not yet been provided to a Treaty Partner? If so, will the U.S. Government still have the legal authority to restrict the choice of freight forwarders or intermediate consignees?
- Once a defense item has been exported, must subsequent transfers be handled only by approved community members, because any transfer "from the Approved Community" must be treated as a retransfer or a reexport pursuant to Article 1?

Answer. The requirements applicable to freight forwarders and intermediate consignees will be specified in the regulations promulgated pursuant to the Arms Export Control Act and the treaties. These regulations will detail the ability of freight forwarders and intermediate consignees to participate in treaty exports. The legal basis for placing requirements on the freight forwarders and intermediate consignees comes from the treaties as well as section 38(a)(1) of the Arms Export Control Act, as amended.

Question No. 63. Under Secretary Rood, in his testimony before the committee on May 21, 2008, told the committee that it was the opinion of the State Department's Office of the Legal Adviser that "the Treaty will change the legal reporting requirements under the Arms Export Control Act," making it discretionary for the executive branch to provide notification to Congress prior to providing United States Government approval for a retransfer or reexport pursuant to Article 9(1) of both treaties.

a. Other than the treaties themselves, what provision of United States law authorizes the President to consent (or withhold such consent) to the retransfer or the reexport of defense articles exported pursuant to the treaties?

b. If notification to Congress of proposed retransfers and reexports will be discretionary, does the executive branch believe that the provisions of section 3(d) of the Arms Export Control Act regarding procedures for consideration of a resolution of disapproval will still apply to these cases? Or will Congress have to change the law if it wants to preserve its role in the review of arms transfers to third parties?

c. What other provisions of U.S. law on the export or transfer of defense articles would no longer apply if such defense articles are not exported pursuant to section 38 of the Arms Export Control Act, such as under an agreement meeting the conditions of section 38(j)? For example, would sections 3(a), 3(c)(2), 3(f), 3(g), 4, 5, 6, 23, 24, 39, 39A, 40, 73 and 81 of the Arms Export Control Act still apply to exports or transfers or, as appropriate, to the approval of reexports or retransfers?

d. What is the effect of the treaties on the application of laws governing the transfer of nuclear, chemical or biological materials, equipment or technology? If such exports were not to be exempted from the scope of the treaties pursuant to Article 3(2) and section 4 of the implementing arrangements, or were later to be removed from the list of defense articles exempt from the scope of the treaty, could items under Categories XIV and XVI of the United States Munitions List be exported under the treaties without an export license or other case-by-case authorization?

e. What is the effect in United States law of the statement in Article 3(3) of both treaties that, "Once delivered pursuant to a [Foreign Military Sales program] Letter of Offer and Acceptance, such Defense Articles may be treated as if they were exported under this treaty in accordance with procedures mutually determined in the implementing arrangements"? Does that statement affect in any way the requirements of section 3(d) of the Arms Export Control Act?

Answer. I am advised by the office of the State Department's Legal Adviser of the following:

a. As a retransfer or reexport of defense articles exported pursuant to the treaties is outside of the scope of the treaties' licensing exemptions, retransfer or reexport authorization would be provided in accordance with section 38 of the Arms Export Control Act, as amended (AECA).

b. Section 3(d) of the AECA does not apply as a matter of law because the original export was not pursuant to section 38 of the AECA.

c. As stated in the answer to Question 8, certain statutory provisions, though not explicitly overridden by the treaties, are rendered irrelevant for exports and transfers that fall within the scope of the treaties because there will be no license application or other approval pursuant to section 38 of the AECA to trigger the provisions of the statute. With respect to the particular provisions referenced in the question:

- The requirement in section 3(a) to obtain authorization prior to any retransfer to a person not an officer, employee or agent of the particular government or to change the end-use of a defense article or defense service would not apply to a defense article or defense service for which the transfer or the change in end-use is pursuant to the treaty;
- The requirement in section 3(a)(2) to report to Congress where a substantial violation of any agreement entered into pursuant to the Arms Export Control Act, or any predecessor act, may have occurred will continue to apply with respect to defense articles and defense services provided pursuant to a letter of offer and acceptance pursuant to the Foreign Military Sales program;
- The restriction in section 3(f) on the making of sales and leases will continue to apply;
- The requirement in section 3(g) relating to agreements applicable to sales or leases would continue to apply to letters of offer and acceptance pursuant to the Foreign Military Sales program;
- Defense articles and defense services will still only be sold or leased for the purposes identified in section 4;
- The requirements of section 5 will continue to require a standard clause in U.S. Government contracts entered into for the performance of any function under the Arms Export Control Act. With respect to the reporting requirement contained in section 5(c), while such requirement will continue to apply to Foreign Military Sales, it will not apply to exports pursuant to either treaty as such exports will not be a "licensed transaction under this Act";
- The requirements of section 6 will continue to apply to the issuance of letters of offer and the extension of credits or guarantees. Such requirements will not apply to exports under either treaty as such exports may occur without the issuance of an export license;
- Section 23 will remain a potential authority for the provision of defense articles and defense services to Australia and the United Kingdom;
- Guaranties may be provided pursuant to section 24;
- Section 39 will continue to apply to sales made pursuant to the Foreign Military Sales program. However, it will not apply to exports under either treaty as such exports will not be "licensed or approved under Section 38";
- Section 39A will continue to apply to sales made pursuant to the Foreign Military Sales program. However, it will not apply to exports under either treaty as such exports will not be "licensed under this Act";
- Section 40 will continue to apply;
- Section 73 will continue to apply; and
- Section 81 will continue to apply.

d. The list of defense articles exempted from treaty coverage includes "Defense Articles listed in the Missile Technology Control Regime (MTCR) Annex, the Chemical Weapons Convention (CWC) Annex on Chemicals, the Convention on Biological and Toxin Weapons, and the Australia Group (AG) Common Control Lists (CCL)." The list of exempted defense articles also includes "USML Category XVI Defense Articles specific to design and testing of nuclear weapons" and Defense Articles specific to naval nuclear propulsion. DOD is unlikely to recommend, or agree to, a removal of either of these exemptions. Items in Categories XIV and XVI of the United States Munitions List could only be exported under the treaties without a license if they did not include one of the listed exempted technologies and if they met all other requirements of the treaties (e.g., approved community, approved program or project, etc.).

e. If the treaty partner government transfers in accordance with the treaties a defense article or defense service originally sold pursuant to the FMS program, it is not required to request or obtain USG authorization. Therefore, the notification requirements contained in section 3(d) of the AECA would not apply.

Question No. 72. Article 12 states that "Each Party shall require that entities within its Community . . . maintain detailed records . . . [and] shall ensure that such records . . . are made available upon request to the other Party." Is it the view of the executive branch that the treaties themselves, upon Senate advice and consent and ratification by the President, give the executive branch legal authority to require by regulation that United States persons maintain detailed records and

make such records available to foreign governments in connection with the treaties? If so, please explain.

a. To what officials, in each Treaty Partner, would such records be available on request?

b. Would such requests require the concurrence of the Treaty Partner?

c. Section (3)(a) of the implementing arrangements states that the sharing of records between Participants shall be "subject to their respective laws." What are the relevant provisions of law in the United States and in each Treaty Partner, and how are they likely to affect the maintenance and sharing of detailed records required by Article 12?

Answer. The executive branch's legal authority derives from the Arms Export Control Act, as well as the treaties. The sharing of such records will be done in accordance with the procedures outlined in the Implementing Arrangements, section 11(2), to support treaty operations and enforcement efforts.

a. In Australia, such records would be available to government officials in organizations including the Department of Defence (Defence Export Control Office, Defence Legal and the Defence Security Authority), Australian Customs Service and the Australia Federal Police. In the United Kingdom, records would be available to government officials in organizations including Department of Business, Enterprise, and Regulatory Reform and Her Majesty's Revenue and Customs as enforcing agencies and to the Ministry of Defence, which will monitor compliance with the treaty.

b. Concurrence of the Treaty Partner would be required where a request was made from one Treaty Partner of an entity in the jurisdiction of the other, i.e., a U.S. request relating to a British company and vice versa. Neither the United Kingdom, Australia, nor the United States would be expected to seek concurrence where it is checking records of entities in its own territory.

c. In the United States, the government's ability to obtain records and documents would be subject to our domestic laws, most importantly the fourth amendment to the U.S. Constitution. Australia's legislation to give effect to the provisions of the treaty will require that Australian community members make and maintain records in relation to each activity done pursuant to the treaty. It is proposed that if a member fails to make and maintain such records it should constitute an offence. Various U.K. legislation must be considered when dealing with a request of this kind, including the Data Protection Act, Freedom of Information Act and the Official Secrets Act, as well as common law duties of confidentiality. Given the type of records to be transferred, it is not expected that there would be a problem in allowing the transfer, especially as companies will have agreed to provide such information as part of joining the approved community.

Question No. 79. If an export under the treaties is diverted to a third party while on route to a Treaty Partner, what offenses will have been committed under U.S. or Treaty Partner law? (Assume, for the purposes of this question, that both the shipper and the putative end-user were involved in the diversion and that wrongful acts were committed in both countries.) Which Party to the treaty will have the primary role regarding investigation and prosecution?

Answer. It will depend on the facts. The diversion to a third party of an export from the United States might constitute conduct falling outside the terms of the treaties, their Implementing Arrangements, and the regulations promulgated pursuant to the treaties. As the amendments to the International Traffic in Arms Regulations would require that the foreign parties obtain U.S. Government authorization prior to any retransfer or reexport, such conduct would constitute a violation of the Arms Export Control Act and the International Traffic in Arms Regulations. Such conduct may also violate new Australian legislation that would be enacted to implement the provisions of the treaty. Such conduct may also violate the U.K. Trade in Goods Control Order 2005, which has effect when there has been an export control offense but the goods have never touched U.K. soil, provided the act that led to them being "diverted" was done either by a U.K. citizen anywhere in the world or by a foreign national based in the United Kingdom. This U.K. legislation has been widely drafted such that "any act calculated to promote" would mean that what may appear a minor role in the act could be caught under this order. The treaty partners would work together to investigate the matter in a coordinated fashion. The Treaty Partners would consult each other on possible prosecutions related to the conduct and determine the most effective and efficient means of criminal investigation and prosecution. The independent prosecuting authorities in each nation would maintain discretion in any individual case.

RESPONSES OF ASSOCIATE DEPUTY ATTORNEY GENERAL JAMES A. BAKER TO QUESTIONS SUBMITTED BY SENATOR RICHARD G. LUGAR

Questions. Under the executive branch's proposed approach to implementing these treaties, it would rely on the self-execution of the treaties themselves to create an exception to the license requirements contained in the Arms Export Control Act (AECA), and it would then rely on the AECA to promulgate regulations making conduct falling outside treaty-created safe harbors subject to the AECA's enforcement regime. In so doing, the executive branch would appear to be relying, at root, on a treaty as the basis for modifying the scope of the criminal and civil liability regime provided for in the AECA.

- No. 1. Has the Department of Justice's Office of Legal Counsel reviewed whether it is consistent with the Constitution to rely in this way on a treaty to alter the scope of a criminal liability regime created by statute? If so, what has the Office of Legal Counsel concluded on this question? If not, please indicate why such a review by the Office of Legal Counsel has not been conducted.

Answer. It is the view of the Department of Justice that the exemptions to the enforcement regime of the Arms Export Control Act that would be established by the United Kingdom and Australia treaties and the regulations promulgated thereunder would be constitutionally permissible. Although a treaty generally cannot itself establish a Federal criminal offense, see, e.g., *Hopson* v. *Krebs,* 622 F.2d 1375, 1380 (9th Cir. 1980) ("Treaty regulations that penalize individuals are generally considered to require domestic legislation before they are given any effect"); *The Over the Top,* F.2d 838, 845 (D. Conn. 1925), we are not aware of any authority for the view that treaties may not exempt certain actors from, or have the practical effect of narrowing the scope of, criminal culpability under other Federal law. The United Kingdom and Australia treaties, and the regulations to be promulgated thereunder, would not prescribe any additional criminal offenses; rather, they would merely exempt certain conduct, undertaken in conformity with the treaties and the implementing regulations, from the AECA's enforcement regime. Please also see the response to Question 8.

- No. 2. Is the Department of Justice aware of any other instances in which a self-executing treaty has provided the basis for modifying the scope of a statutory regime providing for criminal or civil penalties under U.S. law? Please identity any such instances.

Answer. The United States has previously entered into treaties that provide persons with immunity from civil suits and criminal sanctions in particular circumstances. See, e.g., 1961 Vienna Convention on Diplomatic Relations, art. 31(l), 23 U.S.T. 3227 (granting diplomatic agents "immunity from the criminal jurisdiction of the receiving State," as well as immunity from "civil and administrative jurisdiction" with certain exceptions); 1963 Vienna Convention on Consular Relations, art. 43(l), 21 U.S.T. 77, 104 (granting consular officials immunity from "the jurisdiction of" the host country's judicial or administrative authorities for "acts performed in the exercise of consular functions"). Moreover, in *Cook* v. *United States (The Mazel Tov),* 288 U.S. 102, 118–19 (1933), the Supreme Court held that a "self-executing" treaty between the United States and Great Britain "superseded" the authority that an earlier statute had conferred upon the Coast Guard to board, search, and seize vessels suspected of being engaged in the illegal smuggling of liquors into the United States beyond our territorial waters.

Questions. In an August 20, 2009, letter to Attorney General Holder, Senator Kerry and I asked whether there were any authorities the Department of Justice believes to be important or useful to the effective enforcement of these treaties that would require the enactment of new legislation. The Department's answer indicated only that "there are no additional authorities necessary for enforcement of these treaties." Whether additional authorities are "necessary" is a different question than whether such authorities would be useful or would put treaty enforcement on a sounder footing.

- No. 3. Does the Department of Justice believe enforcement of these treaties could be made more effective, or less vulnerable to legal challenge, through the enactment of appropriate implementing legislation grounding the enforcement authorities for the treaties in the AECA?

Answer. As both the Department of Justice and the Department of State previously have advised the committee, new legislation is not needed to implement the treaties, or to penalize conduct that falls outside the scope of the treaties and implementing regulations. The AECA already contains sufficient authorities to penalize

exports that do not satisfy the conditions for exemption established by the treaties and implementing regulations.

- No. 4. In an enforcement proceeding, does the Department of Justice believe that U.S. courts will attach as much weight to regulations issued in the absence of a new implementing statute as they would to a statute providing authorities for enforcing the treaties?

Answer. Yes.

- No. 5. From an enforcement perspective, what disadvantages, if any, does the Department of Justice see to the enactment of implementing legislation to provide authorities for enforcing the treaties?

Answer. Although the Department does not foresee any disadvantages from an enforcement perspective if Congress were to enact further implementing legislation, we do not believe such legislation is necessary.

Questions. If the Senate is to approve these treaties, it is important that we have a high degree of confidence that the law enforcement community will have the tools and resources it needs to enforce against any abuses of the treaties.

- No. 6. Can you assure the committee that the Department of Justice's ability to enforce against such abuses will not be diminished by the absence of amendments to the AECA to provide the authorities for such enforcement actions?

Answer. With clear and precise implementing regulations issued by the Department of State within the International Traffic in Arms Regulations ("ITAR"), the absence of legislative amendments to the Act would not diminish our ability to enforce the Act.

- No. 7. Does the Department of Justice believe that the treaties and regulations your testimony contemplates require the compilation and maintenance of sufficient documentation relating to the export of United States defense articles, defense services, and related technical data to facilitate law enforcement efforts to detect, prevent, and prosecute criminal violations of any provision of the AECA, including the efforts on the part of countries and entities engaged in international terrorism to illicitly acquire United States defense items?

Answer. The regulations issued by the Department of State within the ITAR to implement and effectuate the treaties include additional and strong documentation requirements as well as the requirement for foreign companies to comply with the document demands of law enforcement agencies. Such conditions will contribute significantly to our ability to investigate and prosecute diversion schemes and the abuse of the treaties' exemption.

Question. In your testimony, you indicate that the executive branch would intend to rely on section 38(a)(1) of the AECA to promulgate regulations making conduct falling outside treaty-created safe harbors subject to the AECA's enforcement regime. Other provisions of the AECA operate to limit the President's ability to establish regulations exempting foreign countries from the AECA's license requirements. For example, section 38(j) of the AECA provides that the President may use the AECA's regulatory authority to exempt a foreign country from the AECA's licensing requirements only if specified conditions are met.

- No. 8. Does the Department of Justice believe that the requirements of section 38(j) of the AECA must be satisfied before the executive branch may promulgate regulations under section 38(a)(1) of the AECA to implement these treaties? If not, why not?

Answer. No. Subsection 38(j) provides that the President may not utilize the regulatory authority in paragraph 38(a)(1) "to exempt a foreign country from the licensing requirements of this chapter" except pursuant to the terms of a "binding bilateral agreement with the foreign country" as specified under that section. 22 U.S.C. § 2778(j)(1)(A); see also id. § 2778(f)(2). The regulations exempting certain parties acting pursuant to the United Kingdom and Australia treaties from the AECA's licensing requirements, however, would be promulgated pursuant to the self-executing treaties themselves, not paragraph 38(a)(1). To the extent that the Secretary of State promulgates regulations under paragraph 38(a)(1) of the AECA, those regulations would not themselves exempt any parties from the AECA's licensing requirements; rather, they would clarify that conduct falling outside the treaties and their implementing regulations is subject to the AECA's enforcement regime.

Questions. In your testimony you indicate that the content of the regulations implementing these treaties would be critical to the Department of Justice's ability to enforce against abuses of the treaties.

- No. 9. Do you agree that in order to ensure effective prosecution, it will be crucial that any regulations promulgated regarding permitted and prohibited activities in a safe harbor created by the treaties must be precise and complete regarding what actions constitute offenses under the treaties, their implementing arrangements, and regulations implementing the treaties in the United States?

Answer. Yes. Regulations promulgated under paragraph 38(a)(1) of the AECA will ensure that conduct falling outside of the treaties' exemptions, and conduct violating the prohibitions and conditions of the ITAR, are subject to the AECA's civil and criminal enforcement regime.

- No. 10. If so, what elements does the Department of Justice believe must be included in such regulations to satisfy such requirements?

Answer. Such regulations will specify the precise scope and limits of the treaties' exemptions, and the conditions that must be satisfied in order to qualify for such exemptions. In addition, the regulations will unambiguously prescribe prohibited conduct or conduct falling outside the treaties' exemptions.

RESPONSES OF ASSISTANT SECRETARY OF HOMELAND SECURITY JOHN MORTON, IMMIGRATION AND CUSTOMS ENFORCEMENT, AND ACTING COMMISSIONER JAYSON P. AHERN, CUSTOMS AND BORDER PROTECTION, TO QUESTIONS SUBMITTED BY SENATOR RICHARD LUGAR

Question No. 1. In 2003, then-Under Secretary for Border Security and Transportation Security Asa Hutchinson stated with regard to bilateral agreements for licensing exemptions with the United Kingdom and Australia that "Depending on the volume of license exempt cargo moving through each [U.S.] port, these proposed ITAR country exemptions could increase or significantly increase . . . workloads and require additional inspectors" for outbound Customs review of exports made under the agreements.

In 2008, DHS stated in answers for the record submitted to this committee that U.S. Customs and Border Protection (CBP) "expects the impact on inspections for [the treaties] to be minimal because the new regulatory exemption may be handled similar to existing exemptions." It also stated that "CBP does not plan on adding additional officers at . . . ports" as a result of implementation of the treaties in the United States.

- Do CBP's 2008 answers mean that no more scrutiny will be applied to outbound review of exports made under the treaties than would be applied to unlicensed exports under, for example, the Canadian exemption?

Answer. CBP utilizes a number of techniques to screen and target licensable export shipments. The existence of a license or license exemption is not the sole criteria in determining the need for additional screening requirements. Therefore, should the treaties be ratified, exports made under the license exemptions for the treaties would currently receive the same level of scrutiny as a licensed shipment.

Question. No. 2. Will CBP or Immigration and Customs Enforcement (ICE) modify any existing practice or seek any additional resources for review of munitions exports to the United Kingdom and Australia, and do CBP and ICE expect that DHS will provide updated guidance to CBP and ICE regarding review of munitions exports to the United Kingdom and Australia, once the treaties are in force?

Answer. The inspection of exports is the primary responsibility of CBP. ICE is charged with the investigation of illegal exports. ICE will continue to utilize its broad export authorities to investigate the illegal export and diversion of munitions items. Based on the implementing arrangements and proposed U.S. Government and foreign government regulations, policy, and procedural changes for the Defense Trade Cooperation Treaties with the United Kingdom and Australia, ICE would be permitted to participate with the host government on end-use verifications in order to ensure the prompt investigation by the host government of alleged violations. The treaties have not yet been ratified, so new regulations have not yet been issued.

Question. No. 3. What impact will the implementation of these treaties have on ICE's Project Shield America?

Answer. Through ICE's industry outreach program, "Project Shield America" (PSA), special agents conduct presentations for U.S. manufacturers of arms and sensitive technology to educate them about export laws and solicit their assistance in preventing illegal foreign acquisition of their products. Since late 2001, ICE special agents have conducted more than 17,000 industry outreach presentations, which

have resulted in tips that have led to successful ICE criminal investigations around the world. Although ICE does not believe there will be a significant impact on PSA, the implementation of the treaties will necessitate the updating of materials and require additional training for ICE special agents who conduct PSA outreach.

Question No. 4. In the absence of legislation grounding enforcement authorities for the treaties in a statute, does ICE believe that the treaties would pose any challenges for its investigation efforts in export enforcement that would prevent or inhibit its ability to pursue cases resulting in arrests, prosecutions, and convictions of offences under the Export Administration Act, the Arms Export Control Act, the Trading with the Enemy Act, the International Emergency Economics Powers Act, or other related statutes?

Answer. No, legislative changes are not needed to implement the treaties, as the absence of legislation will not pose any additional challenges for its investigative efforts in export enforcement. ICE continues to believe that strong implementing regulations are a vital component to the success of these treaties.

As far as whether or not the current U.S. statutes are legally sufficient to allow export enforcement investigations and prosecutions, ICE defers to the statements made by James A. Baker, Associate Deputy Attorney General, U.S. Department of Justice, before the Senate Committee on Foreign Relations at a December 10, 2009, hearing on the treaty between the United States, the United Kingdom of Great Britain, and Northern Ireland concerning defense trade cooperation:

> A transaction that fully complies with the safe harbor established by regulations promulgated pursuant to the treaties would not be subject to criminal or civil penalties under AECA [the Arms Export Control Act]. Conversely, a transaction falling outside the designated safe harbors would remain fully subject to the civil and criminal enforcement measures under the AECA. As the Department has stated previously, no new authorizing legislation would be required to prosecute such a violation.
>
> Because the treaties are self-executing, they are "equivalent to an act of the legislature" for purposes of Federal law. *Medellin* v. *Texas,* 128 S. Ct. 1346, 1356 (2008). Upon ratification of the treaties, therefore, the President would have the authority to issue regulations pursuant to the treaties themselves to create exemptions from the applicable licensing requirements of the AECA and ITAR [International Traffic in Arms Regulations]. These regulations would thus establish the designated safe harbors contemplated by the treaties and establish requirements for qualification for the safe harbor.
>
> In addition, the President would have authority to promulgate regulations under section 38(a)(1) of the AECA to make conduct falling outside the designated safe harbors subject to the enforcement regime of the AECA. These regulations would be promulgated pursuant to the "broad statutory delegation" in section 38 of the AECA to control the import and the export of defense articles and defense services. *B-West Imports, Inc.* v. *United States,* 75 F.3d 633, 636 (Fed. Cir. 1996). It is the Department's understanding that these regulations will track those to be promulgated under the treaties and would thus establish conditions for persons exporting or transferring pursuant to the treaties, and an export or transfer that fails to satisfy those conditions would be enforceable through both criminal and civil sanctions.

Question No. 5. Given that the scope of the treaties is larger than the scope of the bilateral licensing exemption agreements, does CBP believe that workloads on its inspectors would increase or significantly increase?

Answer. CBP has statutory and regulatory authority to take appropriate action, including the authority to investigate, detain or seize any export or attempted export, of defense articles or technical data contrary to the International Traffic in Arms Regulations (ITAR).

CBP has been coordinating with the Department of State, Directorate of Defense Trade Controls to ensure the regulatory provisions implementing the United Kingdom and Australia treaties can be effectively and efficiently enforced for all export shipments. Additionally, CBP coordinates with the Census Bureau to modify the Automated Export System (AES) to address the conditions of the proposed ITAR exemptions.

To identify shipments that do not meet the conditions established by the ITAR to implement the treaties, CBP will use AES and the Automated Targeting System (ATS) to identify shipments that have a high-risk of being in violation of the ITAR. For those shipments targeted CBP will inspect the commodities and review the

associated shipping documents. If violations are believed to exist, the shipments will be detained by CBP and referred to the Directorate of Defense Trade Controls to determine if there is a violation of the ITAR. Once the determination is made, the shipment will be either released or in the case of a violation the shipment will be seized by CBP.

Question. No. 6. In 2005, the U.S. Government and Accountability Office (GAO) found that 256 CBP officers were assigned to cover all outbound enforcement at 317 U.S. ports of exit and border crossings. In 2008, DHS stated in answers submitted to this committee that 256 CBP officers were assigned to outbound enforcement, supported by 32 nonuniformed personnel. Have these numbers changed since 2008?

Answer. In March 2009 CBP reestablished the Outbound Enforcement Division to focus on export and outbound enforcement issues. The office includes program managers that work with the Department of State, Directorate of Defense Trade Controls to address all export control issues for all International Traffic in Arms Regulations controlled commodities.

CBP has increased the number of personnel performing outbound enforcement at the 317 U.S. ports of exit from approximately 256 in 2008 to over 350 in 2009. Local CBP ports of exit continue to manage and address local outbound enforcement operations based on workload or identified threat.

CBP is working with the local ports of exit to reestablish Outbound Enforcement Teams in those ports where personnel are available and there is sufficient export workload.

Question No. 7. Given that the scope of the treaties is larger than the scope of the bilateral licensing exemption agreements, how can CBP contend that no additional inspectors will be required to ensure that the burdens mentioned in 2003 by then-Under Secretary Hutchinson do not pose challenges to the investigative and enforcement missions of CBP and ICE?

Answer. As explained in Question No. 5 (850863) CBP has statutory and regulatory authority to take appropriate action, including the authority to investigate, detain or seize any export or attempted export, of defense articles or technical data contrary to the International Traffic in Arms Regulations (ITAR).

The number of shipments under the proposed United Kingdom and Australia ITAR license exemptions is expected to relate to a corresponding decrease in the number of shipments under a license to the same countries. Therefore, we do not anticipate an increase in shipments that would necessitate an increase in the number of inspectors that are needed.

RESPONSES OF ASSOCIATE DEPUTY ATTORNEY GENERAL JAMES BAKER TO QUESTIONS SUBMITTED BY SENATOR RUSSELL FEINGOLD

Question. Mr. Baker, during the hearing I asked whether, if defense articles or services are retransferred to entities outside the approved community, a congressional resolution to block such a transfer would enjoy the benefit of the expedited procedures provided in the Arms Export Control Act. You responded that such transfers would require U.S. approval. I understand but that does not mean that it would trigger the special procedures laid out in the Arms Export Control Act. My reading is that the expedited review procedures of that Act would not be triggered by a retransfer because such retransfer would be governed by the terms of the treaty not the Act. Is that correct?

Answer. It is correct that the "report-and-wait" procedures set forth in 22 U.S.C. § 2753(d)(3) by their terms apply only to certain defense articles and services the export of which has been "licensed or approved under" section 38 of the AECA, and thus would not apply to the retransfer of items exported pursuant to an exemption under the treaties and their implementing regulations. Nevertheless, as the Department of State indicated in its response to QFR No. 64 in 2008, it "intends to notify Congress of any request to retransfer or reexport to a person or entity outside of the particular approved community a defense article or defense service where the value of such transaction meets or exceeds the thresholds identified in section 3(d) of the AECA." The Department of State has informed us that this remains an accurate statement of its intention, i.e., that the Department of State which has the authority under the treaties to withhold approval of such retransfers (see Article 9 of the treaties)—would not provide such approval in a case where Congress by joint resolution (i.e., enacted legislation) prohibits such retransfer.

Question. Please list the information required pursuant to the Arms Export Control Act and the information that will be required pursuant to the regulations to be issued under the treaties.

Answer. The information generally required pursuant to the Act and the ITAR depends upon the nature of the export license or approval requested and is set forth at sections 123, 124, and 125 as well as other portions of the ITAR. The information required with regard to exports under the treaties will be listed at sections 126.16 and 126.17 of the proposed revised ITAR regulations. The Department of State issues and administers those requirements.

Question. Please list the information derived from the license application that was most commonly used to prosecute violators of the Arms Export Control Act or International Traffic in Arms Regulations.

Answer. Our prosecution of AECA violations commonly involves unlicensed diversion schemes. When applicable to an investigation, information contained in a licensing application concerning the end-use and end-user is generally of greatest interest to investigators.

○