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TREATIES

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TREATIES

WEDNESDAY, MAY 21, 2008

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

The committee met, pursuant to notice, at 9:39 a.m., in room SD–419, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Present: Senators Biden, Feingold, Lugar, and Hagel.

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

Senator LUGAR [presiding]. I have been asked to commence the hearing. The chairman will be with us in just a few minutes, but I will give an opening statement and then the chairman will arrive and take over our hearing, and we will proceed in the regular order.

I simply want to say I welcome the opportunity to consider, with the witnesses and with our colleagues, these two defense cooperation treaties with the United Kingdom and Australia. I support the goal of these treaties, and I believe that if carefully implemented, they will enhance United States national security.

The subject of streamlining defense cooperation with our two close allies first came before this committee as bilateral agreements creating exemptions from arms licenses for defense trade. As chairman, I initiated the first legislative action on these agreements in 2003 by including language in S. 925, the Foreign Relations Authorization Act for Fiscal Year 2004, which was necessary to bring the agreements into force.

In 2004, language was eventually included in the defense authorization bill regarding the agreements. Unfortunately, that language did not include the exemptions that I had authored, and it merely established expedited review of licenses for the United Kingdom and Australia.

Last summer, in the final days of Prime Minister Blair's term, the United States announced it had signed a treaty with the United Kingdom in defense trade. On September 20 of last year, President Bush submitted that treaty to the Senate. On December 3, 2007, a nearly identical treaty with Australia arrived.

The fundamental purpose of these treaties, like the original 2003 bilateral agreements, is to eliminate the requirements for export licenses to certain firms and individuals in the United Kingdom and Australia. The treaties before us, however, are more expansive. The bilateral agreements from 2003 were limited in scope to what

Secretary Colin Powell called "low-sensitivity, unclassified, defense items." The treaties would go further to include license-free treatment for classified defense exports and sensitive defense technologies.

The treaties set up groups of individuals and firms in the United Kingdom and Australia who may receive unlicensed defense articles if they are part of an approved community. The treaties also create a list of cooperative endeavors and joint military operations for which unlicensed exports may be made.

Many aspects of these treaties require careful explanation by the administration. Of particular concern is the treaties' use of what the President's message of transmittal refers to as "implementing agreements." These implementing agreements would govern some of the most critical aspects of the treaties, including enforcement and the scope of the treaties' application. Yet the transmittal message states—and I quote—"The administration does not intend to submit any of the implementing arrangements to the Senate for advice and consent."

The administration must illuminate provisions of the treaties and implementing arrangements that lack specificity. The Foreign Relations Committee may want the fullest possible understanding of how these treaties will work. For example, article 3 of the treaty with the United Kingdom states that the licensing exemptions created by the treaty will apply to certain counterterrorism operations; research, development, production and support programs; and other specific projects which are to be specified in an implementing agreement. However, the relevant implementing agreement refers only to various criteria that will be used to develop specifics related to article 3. It does not list the actual projects, programs, and operations to which the treaty applies. Thus, the treaty's scope is expressed in an implementing arrangement that says the application of the treaty will be determined at a later time and under relatively vague criteria.

I am confident we can enable a clearer understanding of article 3 and other provisions that will allow for Senate passage this year. This will require effort on the part of both the administration and the Senate. The administration must expedite answers to questions for the record or other committee inquiries within 2 or 3 weeks of this hearing.

I am glad we are moving forward today. I remain committed to the proposition that we can achieve ratification of these treaties in this Congress.

I thank the chairman again for calling the hearing and look forward to our discussion this morning.

And I now welcome the chairman.

OPENING STATEMENT OF HON. JOSEPH R. BIDEN, JR., U.S. SENATOR FROM DELAWARE

The CHAIRMAN [presiding]. Thank you. I apologize for being late and thank you, Mr. Chairman, for beginning this hearing.

I have a longer statement, but as usual, I would like to associate myself with the remarks that you made and focus on just two points.

The Arms Export Control Act has never been a very popular piece of legislation. Our allies and friends have found it difficult, and there have been many attempts over the years, a 40-year history of the existence of this to amend it to accommodate changes. This treaty comes up with a novel way to deal with what was attempted earlier under the tenure of Secretary of State Powell to deal with particularly Australia and the United Kingdom, two good friends.

But, as an old saying goes, the devil is in the details, and there are surely a lot of details in this treaty that at least I do not know enough about. The issues left unresolved in the treaties include some very significant ones, procedures to determine what qualifies as an activity in support of which defense articles and services may be exported under the treaty; defense articles and services to be excluded from the treaties; criteria that United Kingdom and Australian facilities and personnel must meet in order to be eligible to receive exports under the treaties; procedures for obtaining United States approval of re-exports; procedures for the United States to gain access to facility records of the handling of U.S. goods and technology, especially—especially—if something is diverted and the United States wants to find out how and why it happened; and procedures for coordinating enforcement efforts.

The committee and the Senate will also need assurances regarding the ability to enforce the provisions of these treaties and to deal with cases in which entities are removed from an "Approved Community" or previously exported items are added to the list of items excluded from a treaty.

Finally, the committee and the Senate will want to look very closely at the impact of these treaties on congressional prerogatives. If export licenses are no longer required for some exports, will there be no prior notice and review of those exports?

If a British or Australian entity wants to re-export an item obtained without an export license, it will need U.S. Government approval, but will that approval be under section 3(d) of the Arms Export Control Act and thus subject to the congressional review procedures of that part of the law? Or does section 3(d) apply only to items previously exported pursuant to the law?

What are the implications for Congress, as well as for domestic implementation, of having a treaty state "that the provisions of this treaty are self-executing in the United States"?

The duty of this committee is to proceed with care and precision so that the Senate's action will help to ensure proper implementation and enforcement. And today's hearing is one part of that process.

Our witness today for the hearing is the Honorable John Rood, Acting Under Secretary of State for Arms Control and International Security. We would like to welcome you, Mr. Secretary.

And I understand that other officials from the State Department's Office of the Legal Adviser and from the relevant Departments will also be available to answer questions concerning these treaties. Is that correct?

So I welcome you all and I expect we will make use of all your expertise today. So I thank you and welcome you and since we

have such a small gathering today, Senator Hagel, would you like to make any comment?

Senator HAGEL. I will wait.

The CHAIRMAN. All right. Thank you.

[The prepared statement of Senator Biden follows:]

PREPARED STATEMENT OF HON. JOSEPH R. BIDEN, JR., U.S. SENATOR FROM DELAWARE

Forty years ago, the Arms Export Control Act was enacted to fashion an orderly process for promoting U.S. arms sales while preventing the spread of advanced military technology and equipment to our enemies or to countries that might misuse those exports.

Over the years, this legislation has been amended to deal with such concerns as restraints on sales to developing countries, end-use monitoring, bans on incentive payments, bans on sales to state sponsors of terrorism or sales that would help countries build weapons of mass destruction, and sanctions on persons improperly selling systems or components that breach the Missile Technology Control Regime.

The U.S. export control regime has never been popular. It's time-consuming. It results in some businesses being denied the right to sell their products and services. Sometimes this means that foreign competitors get the business. Sometimes our allies chafe at restrictions, especially the requirement that they secure U.S. Government approval before re-exporting arms or components with U.S. content.

But the law has served a national purpose—of closely regulating the flow of arms to ensure that they do not disrupt regional security, and preventing the proliferation of dangerous technologies. Close congressional oversight has been essential to guarding against an executive branch instinct to preserve alliances abroad and the defense base at home, which sometimes can conflict with other, equally significant national interests.

Since the 1990's, changes in the structure of the arms industry have also affected export control. More companies are multinational now, and more weapons systems are built with components and technology from multiple countries. Projects like the Joint Strike Fighter are designed to meet the needs of multiple buyers and to promote interoperability between the United States and its allies.

The Arms Export Control Act has long had a provision for joint projects with NATO countries—section 27—but not all projects come within its purview. So, from time to time, our closest allies have sought broader relief from export license requirements. Canada has such broader relief, because its export control regime is patterned on ours and because U.S. and Canadian industry are closely integrated.

Five years ago, the administration tried unsuccessfully to grant export license relief to the United Kingdom and Australia under the provisions of section 38 of the Arms Export Control Act. Our two close allies were unable, for different reasons, to meet the standards of section 38, and the House of Representatives would not relax those standards (although the Senate was willing to do so).

Last year, the administration tried another approach. After speedy and secret negotiations, it signed treaties with the U.K. and Australia to grant them export control relief.

The treaties before us today are based on an innovative approach to export control that may solve the problems that hampered earlier efforts to provide export license exemptions. Rather than relying solely upon the U.K. and Australian export control regimes, those countries will treat U.S. arms exports under the treaties as classified information—thus bringing the exports under their information security laws, such as the U.K.'s Official Secrets Act.

In the U.K., the intent is that by treating imported U.S. arms and technology as classified information, the British Government can require U.S. Government approval for any re-export—even for a re-export to a fellow member of the European Union. The EU bars countries from controlling the flow between its members of "dual use" items that have both military and nonmilitary uses; but it has no bar on controlling the flow of classified information.

Similarly, in Australia, the government has no right to restrict the flow of defense items from one Australian entity to another. But it can restrict the flow of classified information.

The old saying that "the devil is in the details" surely applies to these treaties. Many details of implementation are left to the implementing arrangements, which were negotiated early this year and provided to the committee. And much of what the treaties left to the implementing arrangements has been kicked further down

the road, to procedures to be worked out by the management board that will implement each treaty.

The issues left unresolved by the treaties include some significant ones:

- Procedures to determine what qualifies as an activity in support of which defense articles and services may be exported under the treaty;
- Defense articles and services to be excluded from the treaties;
- Criteria that U.K. and Australian facilities and personnel must meet in order to be eligible to receive exports under the treaties;
- Procedures for obtaining U.S. approval of re-exports;
- Procedures for the United States to gain access to facility records of the handling of U.S. goods and technology (especially if something is diverted, and the United States wants to find out how and why it happened); and
- Procedures for coordinating enforcement efforts.

The committee and the Senate will also need assurances regarding the ability to enforce the provisions of these treaties and to deal with cases in which entities are removed from an "Approved Community" or previously exported items are added to the list of items excluded from a treaty.

Finally, the committee and the Senate will want to look closely at the impact of these treaties on congressional prerogatives:

- If export licenses are no longer required for some exports, will there be no prior notice and review of those exports?
- If a British or Australian entity wants to re-export an item obtained without an export license, it will need U.S. Government approval.

  But will that approval be under section 3(d) of the Arms Export Control Act, and thus subject to the congressional review procedures of that part of the law? Or does section 3(d) apply only to items previously exported pursuant to that law?
- What are the implications, for Congress as well as for domestic implementation, of having a treaty state "that the provisions of this Treaty are self-executing in the United States"?

The duty of this committee is to proceed with care and precision, so that the Senate's action will help to ensure proper implementation and enforcement. Today's hearing is one part of that process.

The witness for today's hearing is the Honorable John Rood, Acting Under Secretary of State for Arms Control and International Security. Welcome.

I understand that other officials—from the State Department's Office of the Legal Adviser and from other relevant Departments will also be available to answer questions concerning these treaties. I welcome them as well, and I expect that we will make use of their expertise today.

The CHAIRMAN. The floor is yours, Mr. Secretary.

STATEMENT OF HON. JOHN C. ROOD, ACTING UNDER SECRETARY FOR ARMS CONTROL AND INTERNATIONAL SECURITY, U.S. DEPARTMENT OF STATE, WASHINGTON, DC

Mr. ROOD. Mr. Chairman, Senator Lugar, Senator Hagel, thank you for holding this hearing and for the opportunity to testify before the committee on the two bilateral defense cooperation and trade treaties between the United States and the United Kingdom and Australia. Before proceeding with my oral statement, Mr. Chairman, I would like your permission to place my full written statement in the record.

The CHAIRMAN. Yes. Your entire statement will be placed in the record.

And I also would ask unanimous consent that my entire opening statement be placed in the record as well.

Mr. ROOD. Thank you.

Mr. Chairman, these treaties represent a paradigm shift in the way the United States conducts defense trade with its closest allies. Rather than reviewing individual export licenses, the treaties will establish an environment where trade in defense articles, technology, and services can take place freely and securely between

approved communities in the United States, United Kingdom, and Australia when such trade is in support of combined military and counterterrorism operations; joint research development, production and support programs; mutually agreed projects where the end-user is the United Kingdom or Australian Government; or United States Government end-users.

The United States Government will determine which end-users may have access to United States Munitions List items under the treaties by maintaining a mutually agreed-upon approved community list of private sector entities in the United Kingdom and Australia. Not all controlled items will be eligible for export under the treaties, and we have identified such items in a proposed exemption list which was developed by the Department of Defense.

Both the United Kingdom and Australia have agreed to protect United States origin defense items exported under the treaty by using their national laws and regulations which govern the safeguarding of classified information and materiel, and also to require prior U.S. approval for the re-export and re-transfer of such items outside the approved community. We have agreed on detailed compliance and enforcement measures which were negotiated by the Departments of State, Defense, Justice, and Homeland Security.

The details of how the treaties will work are contained in the implementing arrangements called for in both treaties. If ratified, the treaties will be self-executing in that no additional implementing legislation will be required to bring them into force, although we will need to publish Federal regulations implementing their effect on existing law.

Mr. Chairman, there is a strong strategic rationale for the treaties. First, from an investment and trade perspective, the United States, the United Kingdom, and Australia are already closely connected. The United States is the largest foreign investor in the United Kingdom with over $360 billion in investments, and also in Australia with $120 billion invested in that country. The United Kingdom's $300 billion of investments in the United States makes it our largest foreign investor, and Australia is the eighth largest foreign investor in the United States.

The economic interdependence of our countries is one aspect of a much deeper bond. Our shared historical experience, culture, values, and above all, commitment to human liberty form the deep and solid basis for our alliance, and the treaties will further cement these relationships.

Second, our three nations have an enduring strategic interdependence. Going back to our alliance with Great Britain and the Commonwealth States during World War I, defense relations have strengthened United States-United Kingdom-Australia alliance ties throughout recent history. United States military hardware helped Britain stand against fascist aggression in World War II. United States and United Kingdom scientific and technological cooperation led to tremendous advances in military technology such as the invention of radar and advances in code-breaking technology. In addition to close cooperation during World War II, the United States-Australia alliance continued to mature as symbolized most recently by the ANZUS Treaty of 1951. And of course, throughout the cold

war, our defense industries worked closely together, which was critical in defeating communism.

Today the United States, the United Kingdom, and Australia are once again engaged in an overarching struggle, this time against terrorism. The attacks in New York City, Washington, DC, London, and Bali are grim reminders of the transnational threat we face. The United States must work with its allies to create new institutional paradigms that facilitate the effective strategic cooperation we need to deal with the threats of the 21st century.

Mr. Chairman, let me suggest three benefits that will flow from these treaties.

First, the treaties will further strengthen our alliance in the war on terror. A streamlined export control environment will allow greater opportunities for joint research, development, production, and support of defense equipment, and will expedite the delivery of critical capabilities to our forces. Greater economies of scale in production and support will reduce costs. Having the forces of all three nations outfitted with interoperable and supportable warfighting capabilities will yield increased battlefield effectiveness.

Second, the treaties will create an even more competitive defense industry marketplace. The institutionalized reforms in these treaties will foster more efficient exchanges between our countries' defense firms and will also improve the competitive environment. Our forces will have greater and lower cost access to cutting-edge technologies, much to the taxpayers' benefit.

Finally, it is worth considering the projected trends in export licenses. The State Department expects to receive 85,000 export licenses in fiscal year 2008, and we project an annual growth rate of about 8 percent. Industry officials and representatives from our closest allies often raise concerns that export license delays inhibit multilateral cooperation for military and counterterrorism operations. Over the past 2 years, the State Department has processed over 15,000 such export licenses for the U.K., and over 99.9 percent of those export licenses were approved—those requests were approved. We expect the treaties will remove the requirement for about two-thirds of the licenses needed today for the United Kingdom and Australia.

I emphasize that these benefits are not gained at the expense of our fundamental duty to protect critical U.S. defense technologies. As I mentioned, 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 treaty. In the U.K., articles exported under the treaty will be subject to the Official Secrets Act, as well as other relevant U.K. laws. In Australia, treaty-exported articles will be subject to the Crimes Act and the Criminal Code and Customs Acts. Approved community entities will have detailed record-keeping requirements and can be subject to auditing, end-use monitoring, and verification measures to ensure compliance and to investigate potential violations.

Mr. Chairman, on behalf of the administration, I respectfully urge the Senate to act on the treaties in a timely manner, and I would be pleased to answer any questions you have now.

[The prepared statement of Hon. Rood follows:]

PREPARED STATEMENT OF HON. JOHN C. ROOD, ACTING UNDER SECRETARY FOR ARMS CONTROL AND INTERNATIONAL SECURITY, 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 Australia (Treaty Document 110–10). On behalf of the administration, I urge you and your colleagues in the Senate to promptly provide advice and consent to the ratification of these treaties.

The U.K. and Australia Defense Trade Cooperation Treaties represent a paradigm shift in the way the United States conducts defense trade with its closest allies. Rather than reviewing and approving individual export licenses, once ratified and fully implemented, the treaties will establish an environment where trade in defense articles, technology, and services can take place freely and securely between approved communities in the United States, United Kingdom, and Australia. These treaties are designed to enable each nation's government and industry to work together in a flexible, agile manner to provide the best possible defense technology and equipment to our military forces and counterterrorism organizations.

The treaties will permit, without prior written authorization, the export of defense articles, technical information, and services controlled pursuant to the International Traffic in Arms Regulations, or ITAR, between the United States and the United Kingdom and Australia, when in support of:

- Combined military and counterterrorism operations;
- Joint research, development, production, and support programs;
- Mutually agreed projects where the end-user is Her Majesty's Government or the Government of Australia; or the U.S. Government.

The U.S. Government will maintain its authority over which end-users may have access to U.S. Munitions List items under the treaties by mutually agreeing with Her Majesty's Government, and with the Government of Australia, on an approved community of private sector defense and counterterrorism related entities in these countries. The U.S. Government will not approve the British and Australian Government entities that will be eligible to use the treaties, but we will clearly identify those entities for compliance and enforcement purposes. Not all ITAR-controlled items will be eligible for export under the treaties. We have identified such items in a proposed "Exemption List," which was carefully developed by the Department of Defense, and provided this to the committee staff.

Both the U.K. and Australia have agreed to protect U.S.-origin defense items exported under the treaty using their national laws and regulations which govern the safeguarding of classified information and materiel, and to require prior U.S. approval for the re-export and re-transfer of such items outside the approved community. We have agreed with the United Kingdom and Australia on detailed compliance and enforcement measures, to be required of members of each approved community, which were negotiated by the Departments of State, Justice, Homeland Security (specifically, Customs and Border Protection, and U.S. Immigration and Customs Enforcement), and the Department of Defense. Violations of the treaties will be prosecuted under the laws of the responsible participant.

These details, and others related to how the treaties will actually work, are contained in the "Implementing Arrangements" called for in both treaties. These arrangements will become effective on the date of entry into force of the treaties. If ratified, the treaties will be self-executing; that is, no additional implementing legislation will be required to bring them into force, although we will need to publish Federal regulations implementing their effect on existing law. The administration believes that these treaties will play a key role in our ability to manage risk while fulfilling our dual obligations of building partnership capacity with key allies and protecting U.S. defense technology through export controls.

I will now highlight the strategic rationale for the treaties and explain why swift Senate action to provide its advice and consent would significantly advance U.S. national security objectives with our two closest allies.

First, from an investment and trade perspective, the United States, the United Kingdom, and Australia are already connected to a remarkable degree. The United States is the largest foreign investor in the United Kingdom with over $360 billion in investments. Indeed, close to a third of U.S. direct investment to all EU countries reaches the U.K., while about 40 percent of U.S. investment in G–8 countries is in the U.K. Likewise, the United States has invested over $120 billion in Australia,

making it that nation's largest foreign investor. To put these numbers in perspective, it is worth considering U.S. economic relations with rising global powers, China and India. While increasing rapidly, U.S. investments in those countries are approximately $22 billion and $9 billion, respectively—still significantly less than in the U.K. and Australia.

These relationships are, of course, reciprocal. The U.K.'s 300 billion dollars' worth of investments in the United States makes it our largest foreign investor. These investments account for over one-fourth of all EU investments in the United States. Australia is the eighth-largest investor in the United States.

The economic interdependence between the United States, the United Kingdom, and Australia is only one aspect of a much deeper bond that connects our nations—a bond that Winston Churchill called "the fraternal association of the English-speaking peoples." Our shared historical experience, culture, and—above all—commitment to the ideals of human liberty, form the deep and solid basis for our alliance over many years, and the implementation of these treaties will further cement these relationships.

This leads me to my next reason for swift Senate action on these treaties—our enduring strategic interdependence. Going back over 90 years to our alliance with Great Britain and its Commonwealth States against the Central Powers during World War I, defense relations in particular have served to strengthen United States-United Kingdom-Australia alliance ties throughout recent history. In the early years of World War II, President Franklin Roosevelt provided the U.K. with military hardware under the lend-lease program, helping Britain stand as a bulwark in Europe against fascist aggression. U.S.-U.K. scientific and technological cooperation throughout the war led to tremendous advances in military technology, such as the invention of radar in the U.K. and advances in code breaking, and the Manhattan Project in the United States. Ultimately, the efficient, integrated nature of the allied defense industry proved decisive in dealing the final deathblow to the Axis powers. While spending less than 40 percent of our GDP on military spending during World War II, the introduction of U.S. troops in Europe and the Pacific helped secure an allied victory in WWII. In addition to close cooperation during World War II, the United States-Australia alliance continued to mature as symbolized most clearly by the ANZUS Treaty of 1951. Interestingly, the ANZUS Treaty and NATO Article 5 were both invoked after the September 11 attacks on the United States.

This military cooperation continued throughout the cold war as allied defense industries worked together on a wide range of advanced technologies and knowledge, producing key strategic weapons systems like ballistic missile submarines and Tomahawk cruise missiles, which are invaluable to our combined arsenals today. The collaborative nature of our defense industries was critical in defeating communism.

The United States, United Kingdom, and Australia are once again engaged in an overarching struggle, this time against terrorists and insurgents operating outside conventional boundaries of warfare. The September 11 attacks in the United States, the July 7 attacks in London, and the October 2002 Bali bombing are grim reminders of the transnational threat we face.

However, effective cooperation in the war on terrorism is not inevitable; the United States must work with its allies to create new institutional paradigms that facilitate strategic collaboration. It is in this context that I hope you will consider the treaties. Specifically, I will suggest three benefits we expect to see if the Senate provides advice and consent to the treaties.

First, the treaties will further strengthen the United States-United Kingdom-Australia alliance. Both the U.K. and Australia are critical allies in the war on terrorism, supporting coalition missions in Afghanistan and Iraq with operational, tactical, and intelligence support. In the event of future military engagements, the United States would naturally look to the U.K. and Australia for support as key coalition partners. A streamlined export control environment under the treaties with these key allies will allow greater opportunities for joint research, development, production, and support of defense equipment by government and industry, and would expedite the delivery of critical warfighting technologies to our military forces and counterterrorism organizations fighting the war on terrorism every day. Greater agility in development, and economies of scale in production and support, will result in more timely delivery of capability to our operational forces while reducing costs. This in turn will yield increased battlefield effectiveness because 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.

Second, the treaties will create an even more competitive defense marketplace with these allies. The institutionalized reforms in these treaties will create opportunities for more efficient exchanges between our defense firms and those of the U.K. and Australia, many of which specialize in development, production, and support of critical equipment needed to fight and win current and future conflicts. Treaty implementation will improve the competitive environment, thereby attracting more firms into the defense marketplace by lowering the costs of entry into an international market. This is particularly important given our continuing trend toward greater private-sector investment in defense research and development. The operational forces of the U.S. and its key allies will have greater—and lower cost—access to world class, cutting-edge technologies in the United States, United Kingdom, and Australia, much to taxpayers' benefit.

The promise of innovation is not simply a long-term prospect; a number of ongoing programs and projects would progress with greater ease immediately after the treaties' entry into force. For example, the United States, United Kingdom, and Australia are already working jointly on technologies to defeat Improvised Explosive Devices (IEDs), which our forces face on a daily basis in Iraq and Afghanistan.

Finally, it is worth considering projected trends in export licenses. In FY 2008, the State Department's Bureau of Political-Military Affairs expects to license up to $96 billion in authorized exports for direct commercial sales. The number of applications received has increased at about 8 percent annually. We anticipate that total licenses received will rise from 69,000 in FY 2006 to 85,000 in FY 2008. Industry officials and government representatives from our closest allies often raise concerns that export license processing delays are inhibiting efforts toward multilateral cooperation in support of military and counterterrorism operations. Over the past 2 years, the State Department has processed over 15,000 such export licenses for defense trade with the U.K. alone. Over 99.9 percent of these requests were approved. We judge that, when implemented, the treaties will remove the requirement for approximately two-thirds of the licenses required today for both the U.K. and Australia.

All of the benefits flowing from increased research and development cooperation, freer trade, and a more competitive market are in no way gained at the expense of our fundamental duty to protect critical U.S. defense technologies. In both countries consignment and end-use of treaty exported articles will be limited to security-cleared facilities and entities, as well as security-cleared staff with a bona fide need-to-know. In the U.K., Defense articles exported under the treaty will be subject to the Official Secrets Act, as well as other relevant U.K. laws. In Australia, the "official secrets" section of the Crimes Act, as well as the Criminal Code Act and Customs Act will similarly apply to exports under the treaty. Approved community companies are required to maintain all records of treaty-related transactions for a minimum of 5 years and can be subject to audit. The treaties also provide for end-use monitoring and verification to ensure compliance and investigate potential violations.

In considering the two treaties before you, I hope that the distinguished members of this committee will reflect on not only the immediate defense implications of ratification, but also the larger strategic importance of the treaties. Confronting emerging security challenges will require strong alliances inspired by shared ideals and facilitated by effective institutions. Enduring friendships with the U.K. and Australia are paramount. These treaties will establish a framework for greater cooperation in support of our efforts with these key allies in the decades to come.

With this in mind, I respectfully urge the Senate to act on the treaties in a prompt and timely manner. I would be pleased to answer any questions you might have.

The CHAIRMAN. Thank you. Let me ask you to expand a little bit on what on the surface sounds like it makes a lot of sense, but I am not sure it does, about this helping us fight the war on terror and what happened in New York City. Most of what is written about that says what we need is intelligence, not new weapons systems. Are you telling me that this is really a major element, or is this just the same old malarkey about the war on terror justifies everything? I mean, seriously. I am being deadly earnest about it. I mean, everybody uses the terminology to justify everything. We are going to fight the war on terror.

I am empathetic to the treaties. I need a lot more detail, but explain to me your comment when you referenced what happened in New York City. How would any export control act have any impact on what happened in New York City? I mean, any treaty relating to exports.

Mr. ROOD. Senator, there are technologies and programs that will be developed more rapidly and easily and we think more effectively under the treaty than they are today. There are a number of areas where those kinds of new development activities can be, we think, applied to the counterterrorism area. And today, as I think was evident in your question, the so-called front line is a little bit hard to distinguish at times, whether that is Kandahar, Afghanistan, or that is New York or Sydney, Australia. That front line changes. But what does not change is the necessary ability for the United States, United Kingdom, and Australian defense industries to be able to rapidly develop new technologies, whether they be for intelligence, as you mentioned, or for means to interdict terrorist threats in whatever form they come. We think there will be efficiencies developed and new ways of doing business that will lower the cost, make these technologies more interoperable, and indeed, more effective.

The CHAIRMAN. Are you confident that the U.K. can meet the terms of the treaty while at the same time living up to their EU obligations? Because that is what caused this dilemma in the first place.

Mr. ROOD. Yes. We think that the U.K. can implement its obligations consistent with its EU obligations. First, in the crafting of the treaty, this was a consideration that we took into consideration from the outset. We worked closely with the U.K. in that regard. One of the key tools that will allow that to occur is that the U.K. will control the re-export or re-transfer of goods from the United Kingdom using, in part, their Official Secrets Act. The EU regulations do not apply to the U.K.'s Official Secrets Act. This is their means of maintaining——

The CHAIRMAN. How successful have the Brits been in prosecuting violations of their Official Secrets Act?

Mr. ROOD. The British have a good record of implementing their export control regime, as well as protection of classified information. We think that they will be able to use the various legal tools they have, whether that is the Official Secrets Act or their other domestic legislation related to export controls, which will also apply. It is a bit of a belt and suspenders approach in order to effectively enforce the treaty.

The CHAIRMAN. Article 5 of the treaty states that the United States community—and that is a term of art in the treaty—will include nongovernmental United States entities registered with the United States Government and eligible to export defense articles under the United States law and regulations.

What will a U.S. entity have to do other than register in order to gain membership in the United States community?

Mr. ROOD. Under the present system that we have today—the statutory authority, of course, is the Arms Export Control Act—defense exporters need to register with the State Department, and there is an established procedure by which they will do that. The

implementing arrangements for this treaty add additional requirements for U.K. and Australian entities to be in respective approved communities.

But the short answer is that we in the administration will use those existing authorities that we have to review defense exporters for eligibility to export under the treaty. For the United Kingdom and Australian approved communities we will follow the procedures under the implementing arrangements, and we will take into account a wide range of factors before we would place a company in the so-called approved community. That could be their compliance record, whether there are any pending indictments or other law enforcement matters against them. And we would, of course, have the ability over time to continually evaluate that. Once a firm is placed in the approved community, they can be removed from that community as well by the administration.

The CHAIRMAN. Well, under the present Arms Export Control Act, specifically section 38(g), it prohibits someone who has been convicted of certain crimes from being a party to a licensed export as either an exporter or a recipient unless the President finds that mitigating steps have been taken.

Now, from my staff's review of these treaties, it does not seem to bar that same person from joining the approved community and sending or receiving unlicensed defense items. Why?

First of all, am I correct, and if I am correct, why has it been deleted?

Mr. ROOD. Senator, it is our understanding that the same standard would apply as it currently does under the Arms Export Control Act as under the treaty.

The CHAIRMAN. I am looking back at my staff. I will follow up with you on that. That is not my impression.

The question I had was how was the President going to treat convictions for violating laws that are listed in 38(g) but not in the treaty implementation agreement. In other words—you understand the question.

Mr. ROOD. My understanding, Senator, is that if a person is convicted today under the Arms Export Control Act, they are not eligible to export today, and that that same standard would apply under the treaty, which is that if you are a convicted individual, you would also not be eligible for participation in the approved community under the operation of the treaty.

The CHAIRMAN. Let me say it another way because I may be wrong about this, to state the obvious. That is why I am asking the question.

Mr. ROOD. Yes, sir.

The CHAIRMAN. These issues now come up under the review for an export license. Someone comes seeking a license and you all review whether or not they have been convicted of a crime. Under the treaty, there is no such review. So what is the mechanism? We do not know and you do not lay it out, to the best of my knowledge, what the mechanism will be. If someone comes now and says, I want to become part of the approved—what is the term of art?

Mr. ROOD. Approved community.

The CHAIRMAN. The approved community. And I do not see any written, specific criteria like in the Arms Export Control Act that

you look at to determine whether or not they can be part of the approved community—not that I do not trust administrations, but I do not trust administrations. I have been here for seven, Democrat as well as Republican.

So all kidding aside, I mean, I may be missing something here, but what is the mechanism? What assurance do we have that you are being as fastidious and that is still the rule? Now the President has to notify us that, look, I am providing—yes, someone applied for a license. They have a conviction, but there is a reason why we should grant the license anyway. There is an exemption. The way the treaty is written, as I read it, it could be that—and by the way, sometimes there are middlemen here. We are not necessarily talking about—I am not questioning the integrity of our British and Australian allies. But there are middlemen involved here. So why is there not—are you going to provide for us the criteria you are going to look at? If you are not, you may have trouble getting the treaty again—doing this again. That is what I am trying to get at here. How do we know?

Mr. ROOD. Yes, sir. As I understand it, if you are a convicted individual, felony or something of that nature, you are not eligible under today's Arms Export Control Act standard for export. That will not change under the treaty. Today we have a transactional approach, each transaction by each transaction being reviewed by the administration. Under the treaty, we changed that paradigm to review the participants in a different process, and so the review process will be to vet the individuals and the companies and entities that——

The CHAIRMAN. Are there written criteria, implementing language for the treaty, as to what criteria you will use to vet those individuals? And will they be available to us to see before we approve this treaty?

Mr. ROOD. Yes to both questions.

The CHAIRMAN. Good.

Mr. ROOD. The implementing arrangements spell out a set of criteria that are used to evaluate whether a firm will be included or individuals in the so-called approved community. So in our review of whether an individual would be part of that community, we would look at things such as their criminal record or whether there were any pending indictments, things of that nature to determine whether or not they should be in the approved community. And as I mentioned, once you are in the approved community, that is not a status that you enjoy permanently.

The CHAIRMAN. No; I understand that.

Mr. ROOD. If someone were convicted at a later date of a crime——

The CHAIRMAN. No——

Mr. ROOD [continuing]. Then they could be removed.

The CHAIRMAN. I got that. As I said, the devil is in the details. My time is running out, but let me ask one last question.

Will U.S. law enforcement agencies and personnel be committed to investigate alleged overseas violations of treaty undertakings, or will such action be restricted to the treaty partner's law enforcement agencies and personnel?

Mr. ROOD. The principal role for, of course, enforcing the treaty in the United Kingdom and Australia will fall to the governments of Australia and the United Kingdom. They have domestic legal authorities under which we think they can enforce the treaty. The treaties do call for and require cooperation in law enforcement matters in order to investigate potential violations. For example, there is a discussion in the treaty about—in the implementing arrangements, rather, about determining the proper venue for prosecution. You may have a case where it is more favorable to do that in one country or another—to talk about the procedures by which the two countries would do that. So we think we are going to enjoy the kind of cooperation that will be necessary in order to implement this treaty and to enforce it.

The CHAIRMAN. Well, you know, there are things that occur. What brought this to mind was if illegal diversion occurs during the transfer while on transit from the United States to the United Kingdom, for example, the question is who is the investigative agency. Does our FBI—do our agencies have the authority and jurisdiction to investigate and prosecute it and go forward, or is that—since the destination was Great Britain and it was in their control or in an intermediate Party's control that was associated with the destination country—who has that jurisdiction? Because it seems to me what is going to happen here is that this is going to get more and more distant—the place where diversion is likely to occur. You know, there are a lot of freight forwarders and intermediate consignees to deal with in this process. It is not like you take it from such and such a defense firm and that firm personally delivers it. I assume we will get more detail on how these particular items will be handled.

What I am asking my staff to do is to go back and take a look at the enforcement mechanisms in the existing Export Control Act and how those enforcement mechanisms will be different under the treaty implementation language you are going to come up with. That is what I want to see.

But my time is up, and I thank you.

Senator LUGAR. Thanks very much, Mr. Chairman.

Secretary Rood, during my opening statement, I enumerated sort of a multiyear project of moving these treaties along. You have asked that we ratify these expeditiously, and I think the chairman and members of the committee are eager to do that. But it could become a mission impossible if we are not really able to get from you or the administration things we need.

Now, specifically there are three parts in the defense trade treaties. First are the treaties with the United Kingdom and Australia signed in June and September and sent to the Senate in September and December of last year. Second, there are the implementing arrangements which were signed in February and March and recently sent to the committee. And third, there are regulations that will implement the treaties.

Now, at this point, Mr. Secretary, we do not have these regulations despite President Bush's letter of transmittal which states that in addition to the implementing arrangements, his administration is prepared to provide the Senate the "proposed amendments to the International Traffic in Arms Regulations" that would imple-

ment the treaty. To act on these treaties in a prompt and timely manner, which you have requested, we need this information.

Therefore, for the record, I have these three questions specifically.

When will you provide the regulations to us that will implement these treaties? That is the first question.

Second, do the United Kingdom and Australia view the implementing arrangements they have concluded with you as legally binding?

And third, why did you provide the implementing arrangements to the Senate only for its information and not for advice and consent?

Mr. ROOD. Sir, we have, of course, engaged with the committee staff on a number of occasions to brief on how the treaties would operate, and to answer questions about enforcement and other matters. And we have provided a number of written answers to questions. Just for illustration, I believe the last Senate staff briefing took 9 hours, but our folks were there. The first one I believe was 6 hours, and there are dozens of written questions that we have provided answers to.

I say that only to illustrate the point that we think we are being cooperative, and we, of course, want to be, to explain how the treaty will operate. It is a significant change to today's operation. So we recognize the oversight role of the committee and, indeed, we plan to continue to cooperate closely with your staff.

With respect to the specific question you raised with regard to regulations that would make changes to today's ITAR regulations, we are still working on those. You were correct. The treaties and the implementing arrangements have been completed and provided to the Senate, as well as some accompanying documentation on things like the exclusion list, or the technologies that would not be covered by the treaty.

The regulations will probably be finished a little bit later in the summertime. Once we have completed those, we would, of course, provide them to the committee. As stated in the President's transmittal letter—what we were trying to make clear in the President's transmittal letter—is that those would be provided in due course to the committee. The President did not make a commitment in there to provide them prior to ratification, but we are, of course, working on them as fast as we can.

Senator LUGAR. Would it not be appropriate to have those prior to ratification? Is this not an integral part of the process, the three parts we are talking about?

Mr. ROOD. The implementing arrangements provide a fair amount; we think a significant explanation of how the treaty will operate.

The regulations are very similar to the kind of regulations that exist today to implement the Arms Export Control Act. So this is very common that agencies develop regulations to implement the statutes that are passed by Congress. We see this as an analogous situation where the Congress is being asked to provide—or the Senate in this case—its advice and consent to ratification of the treaties. We have provided the implementing arrangements, and

we in the administration, as we would customarily do, are preparing regulations to implement the legal statutes.

Senator LUGAR. You continue to take the position then that the implementing arrangements are only for our information and not for advice and consent. Is that correct?

Mr. ROOD. The treaty is self-executing and in the areas where the treaty refers to the specific implementing arrangements, that specific provision will also be legally enforceable. We have provided the implementing arrangements in full to the committee prior to the consideration of advice and consent to ratification. So I think as a practical matter, we feel as though we have provided the relevant documentation to the Senate. As a technical legal matter, the implementing arrangements are not a separate international agreement requiring advice and consent by the Senate. Rather, the treaty, we think, as a legal matter is the item that does require that action by the Senate.

Senator LUGAR. Well, then my third question, Do the United Kingdom and Australia view the implementing arrangements they have concluded with you as legally binding?

Mr. ROOD. The treaty itself specifies areas where the implementing arrangement will apply to issue A, B, or C. So by the construction of the treaty, those provisions in the implementing arrangements are also legally binding, and they are viewed in that manner by the United Kingdom and Australia, as well as ourselves.

Senator LUGAR. But, nevertheless, your contention still is that they are for our information and do not require advice and consent. Only the treaty requires advice and consent.

Mr. ROOD. Yes; that is correct.

Senator LUGAR. Well, I think there is some disagreement on this, and I do not want to belabor it. But I think probably we need to have some more conversation and likewise the staffs. I am inclined to see this all as one package with three parts, and I am not certain I understand. But as I said, I will not belabor it indefinitely. I think I have raised the points for the record. You understand at least my general consternation about the process.

Mr. ROOD. Senator, the only thing I would say briefly in response is that we see it as an analogous situation to that of today where Congress, as an example, does not approve the ITAR regulations that exist now. We regularly consult with the committee about those and any particular changes, for instance, before we put something in the Federal Register. So we see the regulations that would implement this treaty as being similar and the same type as the regulations we use today to implement the law.

Senator LUGAR. Well, I hear your position. As I say, maybe we need to discuss this further.

Now, there are a couple of other areas, while you are before us, that I want just to make a note of. Recently I learned that an austere budget environment required the Department of Commerce to make cuts to the treaty implementation and compliance functions. We understand that the State Department did not disagree with those decisions. Specifically, the cuts may result in termination of Commerce Department representation to our mission to the Organization for the Prohibition of Chemical Weapons and has slowed

an already glacial pace of implementation for the U.S. additional protocol to our safeguards agreement with the IAEA.

Now, first, what did you do when you learned of these cuts, and second, what are you doing now to remedy the situation?

Mr. ROOD. Senator, first, with regard to the Department of Commerce's budget, that is something that the Commerce Department is the principal authority on. We at State are not always consulted about various revisions to the Commerce Department's budget. The OMB process exists for that, but we typically are the arbiter mainly for the State Department's budget.

As to the specific questions you mentioned about the exact levels of the cuts and the potential effect on some things such as the OPCW, sir, I would like to take that for the record and get you a precise answer.

Senator LUGAR. All right. I would appreciate that because I think you are cognizant of the cuts. We certainly are. I think there is a serious matter with regard to arms control. So your response for the record we would appreciate.

[The written response from Under Secretary Rood follows:]

The Department of Commerce and the Office of Management and Budget are responsible for allocating limited resources in order to meet Commerce responsibilities. The Department of State's ability to influence the internal funding decisions of other Cabinet agencies is limited. When the Department learned of funding cuts in the Treaty Compliance Division of Commerce's Bureau of Industry and Security (BIS), we expressed our concern to Commerce that this not be allowed to adversely affect treaty implementation, particularly with respect to Commerce's obligation to host CWC inspections of U.S. chemical industry. Commerce told us that congressional cuts in the BIS appropriation for fiscal year (FY) 2008 had forced the imposition of significant fiscal constraints across the Bureau. We have been assured that Commerce has sufficient funds available to carry out this important function in FY08, and will also continue to work toward implementation of the Additional Protocol.

Subsequently, the State Department's Ambassador Javits, who heads the U.S. Delegation to the Organization for the Prohibition of Chemical Weapons (OPCW), raised the issue of maintaining Commerce Department representation on the delegation with Under Secretary Mario Mancuso and Secretary Carlos Gutierrez. In response, we have been assured that the Department of Commerce intends to resume permanent representation on the U.S. Delegation to the OPCW when possible. In the meantime, we will do our best to ensure that CWC issues affecting U.S. industry are closely coordinated with the Department of Commerce.

Senator LUGAR. Now, second, a consistent item on the United States Russian agenda has been the negotiation of a legally binding successor agreement to the START treaty which is set to expire in 2009. When the Senate ratified the Moscow Treaty, it did so on the understanding that a successor agreement to START would be negotiated to provide verification of the arms control progress of Russia and the United States.

My questions specifically—and you may want to take these for the record. Is the administration supporting including new limits on strategic forces as part of a follow-on agreement? And second, do you intend to submit the outcome of your negotiations to the Senate for advice and consent to ratification?

Mr. ROOD. Sir, a follow-on agreement for nuclear reductions to the START treaty is something that is very important to us in the administration. On Monday of this week, I met with my Russian counterpart, Deputy Foreign Minister Kislyak, and his team, including others from the Ministry of Defense and the Russian Intel-

ligence Services to talk about a follow-on agreement to the START treaty. I have had numerous discussions in that regard with my Russian counterpart.

The President and President Putin, as you saw in the recent agreement at Sochi, called this a significant area that their countries would pursue. Our policy is to seek the lowest possible level of nuclear weapons, consistent with our obligations to allies and our national security requirements. And we hope that that will be embodied in a legally binding follow-on to the START treaty. In all likelihood, that would be another treaty that would require Senate advice and consent.

At present, we have a difference of opinion with our Russian colleagues. Our view in the administration is that we want a treaty that will set limits on strategic nuclear warheads. We think that that is the appropriate focus of the follow-on treaty. Our Russian colleagues have sought a treaty with a broader scope, something which would also cover conventional armaments and conventional delivery systems and things of that nature. We are in the process of transitioning to a greater reliance on conventional weapons and a reduced reliance on nuclear forces. We, therefore, do not wish to expand the scope of the treaty or other legally binding agreement in the manner that our Russian colleagues have identified.

Both sides, the Russians and the United States, do not wish to simply continue the existing START treaty. It is a phonebook-sized document of 750 pages. The negotiations began under Brezhnev, when he was leader of the Soviet Union, and were concluded under Gorbachev. And so we both recognize they need to be updated as a minimum. We in the United States would like another approach, as I said, that focuses on strategic nuclear warheads and sets limitations upon them.

Senator LUGAR. Well, I appreciate your response. I raise the question because, really, throughout the recent years, there has been an attitude I think on the part of the administration that a follow-on to this was not really required, even though the Moscow Treaty was sold to us on the basis that something would occur in 2009. Now, this is not the forum really to pursue all of that, but I just wanted to register a serious concern about our negotiating posture and our activities because I think we do need a follow-on.

I am not persuaded that because START I is a phonebook, that somehow or other it is not pertinent. I think it is very pertinent, and I suspect that the need to continue the observations that we now have with the Russians mutually and the joint enforcement is of the essence, as opposed to what I think was a looser interpretation of the Moscow Treaty.

But maybe further hearings will eliminate that, and I appreciate, Mr. Chairman, your indulgence in raising these additional points.

The CHAIRMAN. I thank you, Senator. We have had a brief discussion about this. I think it is appropriate that you and I sit down and lay out a set of hearings on this soon, on the larger issue of arms control.

As I said, I remember our meeting with the President and how the Moscow Treaty was sold to us. I remember I was sitting in the Oval Office and the things we both said to the President and the

representations that were made. So I think it is important that we proceed.

And by the way, I am much less politic than my friend is, but until we work out the matter that the Senator raised, there is going to be no treaty. It is not going to come out of this committee. So we will have to have a little meeting here about how we are going to deal with these other issues. It is not hard. We can come to an agreement, but if we do not come to agreement, we are not going to have a treaty.

Senator.

Senator FEINGOLD. Thank you so much, Mr. Chairman.

Thank you, Mr. Rood, for being here. I just want to follow up on what Senator Lugar was asking you, basically reiterate what he was getting at. It is my understanding that the regulations that will govern exports under the treaty will not be issued prior to ratification of the treaties. Is that correct?

Mr. ROOD. The regulations would not be issued prior to ratification of the treaties? Sir, was that your question?

Senator FEINGOLD. That is right.

Mr. ROOD. No. We plan to complete the regulations later this summer. The Senate has been asked to provide its advice and consent to ratification before we deposit—the administration, that is, deposits the instrument of ratification and, therefore, allows the treaty to enter into force. We will have to have in place regulations. Sir, what we have asked is that—the treaty and the implementing arrangements, of course, have been provided to the committee. We would like the Senate to provide its advice and consent. We will continue our work on regulations as we customarily would do to implement statutes, and prior to the entry into force of the treaty, which will occur when the President deposits the instrument of ratification, we would, of course, have to have those regulations be complete.

Senator FEINGOLD. Will it then be within the discretion of the President to determine whether to notify the Congress about transfers and re-transfers conducted pursuant to the treaties?

Mr. ROOD. We plan to continue to notify the committees of oversight in the manner spelled out in the Arms Export Control Act statute. So Congress, this committee, would continue to receive advance notifications under the thresholds and of the type of equipment under the standards that exist today in the current statute.

Senator FEINGOLD. But you see it as within the President's discretion whether to do that or not?

Mr. ROOD. Let me just consult our legal adviser as to whether technically—legally what the status is, but I will tell you as a matter of practice, I know that that is our intention, to continue to notify the committee as the current statute requires.

[Pause.]

Mr. ROOD. I am advised by the State Department's Office of the Legal Adviser that while we do intend and we are making the commitment by the administration to continue to inform the committee in the same manner as called for under the present statute, that the treaty would change the legal reporting requirements under the Arms Export Control Act. And so that would be discretionary.

Senator FEINGOLD. I understand that not all provisions of the implementing agreement are binding. Can you list those provisions that are binding?

Mr. ROOD. The treaty in its terms specifically refers to the implementing arrangements. For example, as you go through the treaty text, it will say this will be identified in the implementing arrangements concerning issue A or issue B or issue C. In each and every case where the treaty refers to the implementing arrangements, those elements of the implementing arrangements will be legally binding.

Senator FEINGOLD. Section 10(3)(f) of the implementing agreement provides that any materiel violation of the treaty must be reported immediately to Her Majesty's Government "which will notify the United States Government as appropriate." In short, is it correct to say that Her Majesty's Government has the discretion to determine when to notify the United States of violations or to handle them itself? Is that correct?

Mr. ROOD. You said that was section 10(3)(f), sir?

Senator FEINGOLD. 10, sub 3, sub f.

Mr. ROOD. Sir, perhaps I could respond to your next question while our legal staff refers to that specific provision in the implementing arrangement.

Senator FEINGOLD. Let us move on and we will come back to that.

How many prosecutions have been successfully carried out in the United Kingdom and Australia pursuant to their secrecy laws? How many of these prosecutions actually pertain to illegal arms transfers?

Mr. ROOD. This is a new arrangement that would exist in the U.K. whereby the Official Secrets Act will begin to be applied to defense articles and services sent to the U.K. from the United States. The type of arrangement envisioned under the treaty does not presently exist. We have had good cooperation with the U.K. in the area of protection of classified information under the Official Secrets Act. And we have a General Security Agreement with the U.K. that the Ministry of Defense in the U.K. and the Defense Department in the United States are the primary interface. And we have had a good experience there as well. So——

Senator FEINGOLD. But how many of these prosecutions were successful pertaining to illegal arms transfers?

Mr. ROOD. What I was trying to say is this is a new arrangement that is envisioned under the treaty. At present, we are not exporting articles to the U.K. under the treaty system. As to the specific number of prosecutions in the U.K. under the Official Secrets Act, sir, I do not know the number, but I could take that for the record.

Senator FEINGOLD. Let me ask about their current laws and whether they have been successful prosecuting under their current laws.

Mr. ROOD. We think the U.K. has had a good record in running their export control system and in enforcing the protection of classified information. As to the specific number of prosecutions that the U.K. has conducted, sir, I would have to get that for you for the record.

Senator FEINGOLD. If you could get that back to me. We are just trying to get information here, and I would appreciate that.

[The written response from Under Secretary Rood follows:]

The Government of the United Kingdom has informed the State Department that in the period from 2000 to 2008, Her Majesty's Revenue & Customs (HMRC) successfully prosecuted 10 cases of export control violations. In addition, there were 378 seizures of goods and HMRC issued 64 warning letters to exporters. Currently, HMRC investigators have seven active cases, and are considering launching investigations into a further six. With regard to the Official Secrets Act, the U.K. Crown Prosecution Service decided to prosecute seven cases in the same time period. Of those, six were prosecuted successfully with a variety of custodial sentences awarded, dependent on the seriousness of the offense, ranging from 3 months to 11 years imprisonment. In a number of cases significant fines were also imposed.

While noting the relatively small size, and niche nature, of Australia's defense-related exports, the Government of Australia (GOA) has informed the State Department that there have been a number of investigations into breaches and alleged breaches of the Customs Act and WMD Act, with some prosecutions resulting. Since 2004, there have been 3 prosecutions for export control violations, and there are currently 26 cases being investigated for breaches of export controls. The GOA's Customs Cargo System profiling system, which identifies potentially at-risk exports, has resulted in over 500 matches against the profiles, resulting in 26 disruptions where the goods were held pending resolution of concerns about the export. The GOA also noted that there have been 56 disruptions of potential exports as a result of other ongoing law enforcement activity, and that over 70 warning letters have been issued to exporters since 2004.

Senator FEINGOLD. How frequently will inspections be made of companies that are involved in programs or projects undertaken pursuant to the treaty and will those be unannounced inspections?

Mr. ROOD. The treaty envisions end-use monitoring and verification, including inspections of the type that you referred to. We have a program today called Blue Lantern that we implement at the State Department. That will be continued under the treaty. And so we expect that we will continue to have the kinds of insight that we do today.

Senator FEINGOLD. My question was how frequent will they be and will they be unannounced.

Mr. ROOD. Senator, there can be unannounced inspections. The frequency and modality of how we do those will be as the system is today, which is discretionary on our part. It is not something where we have like a quarterly schedule. We try to apply our limited resources for these kind of end-use verifications in the particular areas where we have some suspicion or some concern. There is not a uniform schedule where each and every person is treated the same.

Senator FEINGOLD. Mr. Rood, do you have an answer for me on section 10(3)(f) after consulting with your lawyers?

Mr. ROOD. Sir, the answer to your question with respect to section 10(3)(f) of the implementing agreement is that notification of materiel violations would be required by virtue of article 13, subparagraph 3 of the treaty.

Senator FEINGOLD. So that Her Majesty's Government would not have the discretion to determine when to notify the United States of violations?

Mr. ROOD. Yes; that is correct.

Senator FEINGOLD. Would not have the discretion. Would be required to do so. Right, Mr. Rood?

Mr. ROOD. Yes, sir.

Senator FEINGOLD. OK.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

I have several additional questions, but it seems to me, Mr. Secretary, the real potential—I want to emphasize "potential"—sticking point here will be how we treat the issue that was raised very briefly by me, in more detail by Senator Lugar. I want to make it clear that the impetus for this treaty—he and I voted for the proposals that were made in the change of the Export Control Act to accommodate the British and the Australians—What is it now, how many years ago now—in 2003, 5 years ago. So we are on the same page.

But it really does matter as an institutional matter. We are clear on what precedent we are setting in approving a treaty that may or may not—your argument, and I am not suggesting it is illegitimate, is that these details of implementation that come later in the summer are not necessarily required to be subject to advice and consent. It seems to me—and obviously, I do not speak for Senator Lugar—that they may very well be. That is an issue we are going to have to resolve. Until we resolve that, moving this treaty is not likely.

Now, you may be able to convince the two of us and others on the committee that you are correct. I think not. But until that gets resolved, I can tell you as chairman of the committee we are not going to move this treaty until we resolve that. It does not mean we cannot resolve that tomorrow or in 3 days or 2 weeks. There is no time impediment here. It is a matter of, from my perspective, the institutional prerogative of the Senate in terms of advice and consent to a treaty and what we are bound to and what we are not bound to.

So at any rate, I do not want to belabor the point.

Mr. ROOD. Well, perhaps I could just try an initial response.

The CHAIRMAN. Please.

Mr. ROOD. With the treaty, we have provided the treaty document itself. The implementing arrangements go into some level of detail about how this treaty would, in fact, be implemented. We have also provided other written documentation to the committee which identifies how the treaty would work.

In normal practice, when the Senate passes a bill which is then signed into law, the Congress acts first to establish the legal basis, the statutory basis. It is very common that then the agencies promulgate regulations to implement the statutes at a later date than passed by Congress.

The CHAIRMAN. That is true.

Mr. ROOD. This is an analogous situation where the Congress, the Senate in this case, is being asked to provide advice and consent to establish the statutory basis and in terms of regulation, the administration——

The CHAIRMAN. I chaired the Judiciary Committee for 17 years.

Mr. ROOD. I should not engage——

The CHAIRMAN. No, no. I do not mean to suggest you should not. I stand to be educated. I can learn something new every day.

There is one fundamental difference. As chairman of the Foreign Relations Committee, I cannot go back and amend the treaty. I can amend the law. If the Food and Drug Administration, which you

give regulatory capability to after we set out the broad constraints, comes up with something we do not like, guess what? I introduce a piece of legislation, and bang, it changes. I take away their authority. Guess what? I cannot do that as chairman of the Foreign Relations Committee or as a sitting Senator. A Senator cannot do that. The Senate cannot do that. So there is a fundamental difference—a fundamental difference. Presidents negotiate treaties and we give consent, and once we get consent, we are basically out of the business. It is a question as to what we are consenting to.

It reminds me of—well, it does not matter. I do not want to waste your time. But that is the fundamental difference. Once we sign off, we are out of the game. If I sign off on the analogous situations you pointed out to, we can change it in a heartbeat, assuming we have enough votes to override a Presidential veto, if they veto it. So we can change it. We cannot do that to a treaty. The Senate cannot amend a treaty on its own.

Mr. ROOD. The Senate could not amend the treaty on its own. However, you could in the Senate choose to pass legislation, along with, of course, the Congress, that would establish new statutory requirements. And as long as those statutory requirements were consistent with the treaty, we would not be in violation of the treaty. So if there is an element of a Federal regulation that for some reason you disagreed with the regulation, the Congress could in theory legislate upon that regulation, and so long as it was not inconsistent with the treaty, there would not be an issue raised there.

The CHAIRMAN. That is the key.

Mr. ROOD. What the Senate will provide is its advice and consent to the treaty and how it operates; that will be common before and after ratification.

The CHAIRMAN. We trust you, but let us verify. [Laughter.]

Thank you very much. I appreciate it very much. I am sure we can work this all out. At least I am confident we can.

I am sorry. Staff is pointing out that the committee has received several letters and statements regarding the treaty. So I would ask unanimous consent that they be placed in the record.

As well, I am sure that the Department will be prepared to permit that we leave the record open for additional questions that may come from our colleagues here.

As I said, I am confident we ought to be able to work this out, but we do have to talk. And so I thank you very, very much, and we are adjourned.

[Whereupon, at 10:25 a.m., the hearing was adjourned.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. CHUCK HAGEL, U.S. SENATOR FROM NEBRASKA

Mr. Chairman, I want to thank you for holding this hearing today on two treaties of vital consequence to the stability and security of the United States and our allies at a critical time in the world.

The world is facing one of the most transformational times in our history. We are witnessing a diffusion of power unlike any we have ever seen—one driven in part by emerging powers, energy, and massive demographic trends.

How we manage our relations with the rest of the world over the next several years will have a significant effect on how secure and prosperous a 21st century America will be. The Defense Trade Cooperation Treaties with the United Kingdom and Australia—two of America's most critical allies—are key steps in reaffirming the value of these important bonds.

Signed in the summer and fall of 2007, the treaties before us today would strengthen the defense and security relationship between the United States, the United Kingdom, and Australia by reducing barriers to the increased trade of military goods, equipment, and technology between our three countries. These agreements benefit the United States in meaningful and significant ways.

First, these agreements will increase interoperability and efficiency between our forces and those of our allies deployed overseas. As our military men and women fight shoulder to shoulder with our allies, they will need to be able to communicate easily and operate seamlessly with each other.

Second, these agreements will increase America's national security efforts by helping the U.S. Government focus on preventing sensitive exports to potential adversaries and enemies. According to the State Department, in 2005 and 2006, U.K. companies submitted nearly 13,000 license applications for U.S. defense articles to be shipped to the United Kingdom; 99.9 percent of these time-consuming licenses were eventually approved.

Third, these treaties are good for American business. Estimates suggest that the United Kingdom buys more than 50 billion dollars' worth of defense articles from U.S. companies every year. That's enough to maintain nearly 100,000 American workers. To better protect these jobs and our defense industries, we need to break down trade barriers with our allies, not build new ones.

Finally, these agreements will help strengthen and expand two of the most critical alliances for global peace and stability in the world today. The U.S. needs to once again reinvest in our most important relationships. This is not the time to bend to protectionist attitudes or isolationist feelings.

I support the two treaties before us today and hope that the Senate will move expeditiously to ratify these agreements.

LETTER FROM THE SENATE COMMITTEE ON FOREIGN RELATIONS TO HON. MICHAEL B. MUKASEY, ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC, July 3, 2008.

Hon. MICHAEL B. MUKASEY,
Attorney General, U.S. Department of Justice,
Washington, DC.

DEAR MR. ATTORNEY GENERAL: On September 20 and December 3, 2007, the President submitted to the Senate the Defense Trade Cooperation Treaties between the United States and the United Kingdom (Treaty Doc. 110–7) and Australia (Treaty Doc. 110–10). The Senate Foreign Relations Committee held a hearing on these treaties on May 21, 2008. We had requested that the Department of State arrange to have a Department of Justice witness or official present to answer questions at that hearing, and we regret that none attended.

The Department of Justice, especially its Criminal Division, plays a vital role in enforcing U.S. arms export laws and regulations. For that reason, the Committee will benefit greatly from your insights and expertise regarding the defense trade cooperation treaties and their likely impact on export law investigations and prosecutions.

The Committee would appreciate your responding to the attached set of questions for the record, to assist it in evaluating the implications of U.S. ratification of the treaties. We would appreciate receiving your answers by July 18. You may also be contacted by the Department of State, as one question for the record sent to that department asked for an estimate of the U.S. Government-wide costs of implementing the treaties, specifically including costs that will be borne by your department. If you or your department have any questions regarding this request, please contact Staff Director Antony Blinken or Mr. Edward Levine, or Minority Staff director Kenneth Myers, Jr., or Mr. Thomas Moore.

Sincerely,

JOSEPH R. BIDEN, Jr., *Chairman.*
RICHARD G. LUGAR, *Ranking Member.*

RESPONSES OF ATTORNEY GENERAL MUKASEY TO QUESTIONS SUBMITTED FOR THE RECORD BY SENATORS BIDEN AND LUGAR

Question. What role did the U.S. Department of Justice or the Federal Bureau of Investigation play in the negotiation of these treaties?

Answer. The U.S. Department of Justice was not involved in the negotiation of the treaties, but the Department of State consulted with the Department of Justice regarding legal issues during the period of negotiations.

Question. What is the view of the Criminal Division regarding the construction and enforceability of paragraphs (1) and (2) of Article 13 of the treaties?

Answer. Within the Department of Justice, criminal export control enforcement is now handled by the National Security Division. Paragraphs (1) and (2) of Article 13 of the treaties will be enforceable if implemented through regulations issued pursuant to the Arms Export Control Act (AECA), 22 U.S.C. § 2778(c), and included within the International Traffic in Arms Regulations (ITAR), 22 CFR § 120–130.

Question. What are the advantages and impediments, for enforcement of chapter 3 of the Arms Export Control Act (22 U.S.C. 2771, et seq.), of a system in which certain exports and re-exports are exempt from AECA controls, but a violation of the rules governing exempt transactions brings one back under the requirements and penalties prescribed in AECA?

Answer. There are greater challenges in investigating and prosecuting violations of the AECA when export control documentation is less available. Closer coordination with Treaty Partners will be necessary to obtain evidence located overseas. In addition, amendments to the ITAR will be required to ensure that unlicensed or unapproved re-exports and re-transfers of U.S. defense articles are prohibited.

Question. What legal recourse will the United States have if a member of the U.S. Community, without prior U.S. Government approval, re-transfers an unclassified defense article to a U.S. firm that is not in the U.S. Community?

Answer. The AECA and ITAR only prohibit the unlicensed export of a defense article. See 22 U.S.C. § 2778(b)(2); 22 CFR § 120.17. A re-transfer of a U.S. defense article from a U.S. company to another U.S. firm is unlikely to require a license unless foreign persons are also involved in the transaction or the defense article is sent out of the United States.

Question. What legal authority will the State Department have to enforce AECA controls over a previously exported defense article in the event that an entity is expelled from the Agreed Community or a Party to a treaty adds that defense article to the list of items exempted from the treaty? Will it be able to cancel or constrain the authorization for an export that did not need U.S. Government approval in the first place?

Answer. Such controls may be imposed through regulations promulgated pursuant to the AECA, 22 U.S.C. § 2778(c), and included within the ITAR. The ITAR currently includes re-transfer and re-export controls upon U.S. defense articles resold or transferred to an unauthorized foreign end-user after an initial authorized export. See 22 CFR §§ 123.9(a) and 123.9(c). Such controls raise a variety of factual and investigative challenges to enforcement.

Question. Would an intermediate consignee be subject to criminal penalties under AECA for diverting a license-free export?

Answer. Assuming that a person acts to export or re-export a U.S. defense article with the requisite knowledge and criminal intent, that sufficient admissible evidence is available, and that such conduct is prohibited by the ITAR, then such a person may be subject to criminal penalties.

Question. Will the written acknowledgments that members of the Treaty Partner Communities will be required to provide pursuant to section 11(4)(b) of the implementing arrangement with the United Kingdom and section 11(b) of the implementing arrangement with Australia be useful for enforcement purposes in U.S. courts?

Answer. Such provisions and acknowledgements of U.S. law and prohibitions may be useful for enforcement purposes.

Question. Does the Attorney General believe that the treaties 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 chapter 3 of the Arms Export Control Act, including the efforts on the part

of countries and factions engaged in international terrorism to illicitly acquire sophisticated United States defense items?

If not, what are the shortfalls and how might they be remedied?

Answer. The elimination of the licensing procedures reduces the layers of scrutiny that aid in deterring and preventing the diversion of munitions to criminal entities, terrorist organizations, or state sponsors of terrorism. Currently, U.S. exporters and the U.S. Government perform background checks on an export-by-export basis. U.S. exporters typically check the bona fides of overseas companies and their officials to satisfy themselves that the end-use and end-user supplied by the foreign purchaser will ultimately be approved for an export license. The U.S. Government then conducts a thorough review of the transaction. These steps provide additional layers of security and an evidentiary trail for future investigations and prosecutions in the event that an unlawful diversion occurs.

Under the current system, companies seeking to circumvent the law must take affirmative steps to evade the ITAR's requirements and proscriptions—typically by falsifying information included within the license application or shipping documents required to be filed with Customs and Border Protection at the time of the export. Such affirmative conduct creates a domestic evidentiary trail upon which any ensuing investigation can be initiated and based. The license exemption, in effect, moves our first line of defense against illegal diversions to the U.K. and Australia.

The following actions or efforts may remedy some of the likely shortfalls: Close coordination in the detection and investigation of export control and embargo violations between the Treaty Partners; a substantial increase in the resources devoted to outbound customs review in the U.S.; a substantial increase in the resources committed to investigative agencies charged with the detection, prevention, and investigation of export control and embargo violations in the U.S., the U.K., and Australia; and a significant expansion in the ability and numbers of U.S. law enforcement officials to conduct post-shipment verification reviews and searches in the U.K. and Australia.

Question. What is the view of the Department regarding the records of each Treaty Partner in prosecuting violations of security and export control laws?

Answer. The U.K. has prosecuted a handful of export control cases in recent years. Australia prosecutes export enforcement cases under its export control laws and other criminal laws. We expect that the treaties will result in an increased number of investigations and prosecutions by our Treaty Partners in the future.

Question. What prosecutorial options will be open to the United Kingdom against companies in the U.K. Community that engage in unapproved re-transfers or re-exports, and how will British law affect the ability of U.S. prosecutors to pursue those cases?

Answer. It is understood that the U.K. does not have a statutory regime or legal basis to prosecute corporations violating the terms of the treaty or its Official Secrets Act. It is understood that the U.K. may prosecute corporate executives under the Official Secrets Act or other related criminal statutes in relation to unauthorized re-transfers or re-exports of U.S. defense articles. It is hoped that the U.K. would cooperate in a U.S. investigation and prosecution of a corporation which allegedly had violated willfully the terms of the AECA and ITAR.

Question. What is the view of the Department regarding the records of each Treaty Partner in cooperating with U.S. authorities in investigations and prosecutions relating to violations of security and export control laws, or of other laws listed in section 38(g)(1) of the Arms Export Control Act (22 U.S.C. 2778(g)(1))?

Answer. The Treaty Partners have a long history of cooperation in a variety of criminal investigations and prosecutions. With respect to export control investigations, both countries are willing to assist to the extent permitted by their domestic laws.

LETTER FROM THE SENATE COMMITTEE ON FOREIGN RELATIONS TO HON. MICHAEL CHERTOFF, SECRETARY OF HOMELAND SECURITY, DEPARTMENT OF HOMELAND SECURITY

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC, July 3, 2008.

Hon. MICHAEL CHERTOFF,
Secretary of the Department of Homeland Security,
Washington, DC.

DEAR MR. SECRETARY: On September 20 and December 3, 2007, the President submitted to the Senate the Defense Trade Cooperation Treaties between the United States and the United Kingdom (Treaty Doc. 110–7) and Australia (Treaty Doc. 110–10). The Committee on Foreign Relations held a hearing on these treaties on May 21, 2008.

Although the Department of Homeland Security did not testify at that hearing, it plays an important role in enforcing U.S. arms export laws and regulations. U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement are on the front line in guarding against illegal arms exports and imports. When the rules for arms transfers are changed, your department has to adjust its procedures and resources to maintain our national security.

The Committee would appreciate your responding to the attached set of questions for the record, to assist it in evaluating the implications of U.S. ratification of the treaties. We would appreciate receiving your answers by July 18. You may also be contacted by the Department of State, as one question for the record sent to that department asked for an estimate of the U.S. Government-wide costs of implementing the treaties, specifically including costs that will be borne by your department. If you or your department have any questions regarding this request, please contact Staff Director Antony Blinken or Mr. Edward Levine, or Minority Staff Director Kenneth Myers, Jr., or Mr. Thomas Moore.

Sincerely,

JOSEPH R. BIDEN, Jr., *Chairman.*
RICHARD G. LUGAR, *Ranking Member.*

RESPONSES OF SECRETARY MICHAEL CHERTOFF TO QUESTIONS FOR THE RECORD SUBMITTED BY SENATORS JOSEPH BIDEN AND RICHARD LUGAR

Question. What role did the Department of Homeland Security play in negotiating these treaties? To what extent was U.S. Customs and Border Protection (CBP) consulted, and what input did it provide, regarding the likely impact of treaty provisions on its operations?

Answer. Although the Department (DHS), CBP, and Immigration and Customs Enforcement (ICE) were not involved with the negotiations of the treaties themselves, both were involved in the negotiations of the implementing arrangements ("IAs") required by the treaties. Over a period of several months, representatives from CBP and ICE participated in several rounds of in-person and video-conference negotiations with delegations from the United Kingdom and Australia regarding the IAs.

CBP provided input on the IAs' export procedures, specifically involving the mechanism to identify the shipments. It is our understanding this will be accomplished through the promulgation of new regulations so that shipments under the treaties will fall under a new licensing exemption. CBP will use its established processes should questions arise about the legitimacy of a particular export, or if violations are discovered. Outreach to the exporting community, referrals to the ICE EXODUS Command Center, and appropriate enforcement action will all play a role.

ICE also played a lead role in negotiation of enforcement-related provisions of the IAs required by the treaties. Attaché offices in London and Singapore provided information and guidance to the U.S. negotiating team regarding ICE enforcement of U.S. export controls, provided specifics regarding the cooperation between ICE and U.K. and Australian authorities in export enforcement activity.

ICE helped to negotiate favorable terms for provisions to obtain bills of lading, invoices, shipping documents, photographs, personal information, business information, and other evidence in order to investigate and prosecute violators of U.S. export laws. ICE also requested that the IAs contain provisions to employ investigative techniques such as conducting interviews, collecting evidence, and participating in joint investigations with U.K. and Australian authorities.

Question. What impact would the treaties have on CBP's ability to carry out effective controls and inspections over items exported under the authority of the treaties?

Answer. CBP expects the impact on inspections for this exemption to be minimal because the new regulatory exemption may be handled similar to existing exemptions. ICE expects that the Defense Trade Cooperation Treaty will have little effect on current United States-Australia processes or activities associated with investigating the illegal export of U.S. defense articles. The treaty may facilitate leveraging of new authorities to address violations in the United Kingdom. The United States-United Kingdom IAs delineate that violations of the treaty shall be considered violations of the Official Secrets Act, a new avenue for cooperation in investigation.

Question. What information will Department of Homeland Security personnel need in order to ensure that an asserted export or transfer and the freight forwarders and any intermediate consignees involved in it are legitimate?

Answer. In addition to the current requirements for all exports reported in AES, all approved exporters, freight forwarders, and consignees for articles exported under the treaty are to be shared with CBP for incorporation into our targeting system. CBP receives regular updates from the State Department on its list of approved freight forwarders, and the list of exporters and consignees will also need to be provided. In general, CBP looks for anomalies in export transactions, and this would include a review of the parties involved, including any intermediate consignees.

Question. Which elements of that information will be provided by other U.S. Government entities, and what provisions have been made to ensure that such information will be available, in usable form, when needed?

Answer. It is CBP's understanding that the State Department will provide the list of approved exporters and consignees (in addition to the approved freight forwarders). This data will be provided electronically with updated lists to be provided whenever there is a change.

Question. What impact will overseeing unlicensed exports pursuant to the treaties have on CBP's implementation of the Automated Export System (AES) used at U.S. ports of exit and border crossings? Does the AES incorporate an up-to-date version of the complete Directorate of Defense Trade Controls watch list?

Answer. All exports that are exempt from licensing under the ITAR need be reported in AES, and the appropriate exemption must be cited to support the regulatory basis for the export. The new exemptions under the treaties will be handled in the same manner.

AES does not incorporate the Defense Trade Controls (DDTC) Watch List directly. This information is checked by CBP's Automated Targeting System (ATS) using AES data. ATS checks the watch list, and also runs license checks and determines whether freight forwarders are registered with DDTC.

Question. The U.S. Government Accountability Office found in its February 2005 report "Arms Export Control System in the Post-9/11 Environment" (GAO–05–234) that only 256 CBP officers were available to cover outbound enforcement at 317 U.S. ports of exit and border crossings. Under the treaties, Department of State export license data for shipments to the United Kingdom and Australia would no longer exist for predeparture transfer to CBP. How many CBP officers are available today to cover outbound enforcement?

Answer. 265 CBP officers are assigned to outbound enforcement, supported by 32 nonuniformed personnel.

Question. Will CBP need to increase the number of officers assigned to U.S. ports of exit to screen unlicensed arms shipments to the U.K. and Australia under the treaties?

Answer. No; CBP does not anticipate requiring additional officers since exports of defense articles between the U.K. and Australia will either qualify for the treaty, and therefore a license exemption, or still require a license. Either way, all exports will be reported in AES and can be screened by CBP prior to export.

Question. If so, how many additional officers will be needed and what will be the expected costs?

Answer. Please see above.

RESPONSES OF UNDER SECRETARY JOHN ROOD TO QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR NORM COLEMAN

Background from Senator Coleman

We have heard that the U.S.-U.K. treaty is expected to reduce the number of export licenses needed to ship products to the U.K. by 70 percent. While prime contactors may be able to identify the final recipient of their product and take advantage of the treaty, subcontractors have a much more difficult time. If I understand it correctly, a subcontractor with facilities in England may still be required to obtain export licenses for products that go back and forth between the company's U.S. and U.K. facilities. Further, a subcontractor to a prime may not know the final destination of the product and therefore would need to continue obtaining export licenses from the Department of State for their products. For example, a company that manufactures parts that are used in an aircraft may not know whether that aircraft is destined for the U.S., the U.K., or some other allied partner. Therefore I would like clarification with respect to the following questions:

Question. How does the treaty benefit companies in this situation?

Answer. Subcontractors involved in exports covered by the treaty would enjoy the same benefits as the prime contractors. Assuming that all entities are members of the United States or United Kingdom Approved Community, that the technologies are not exempted under the treaty, and that the operation, project, program or government end-use is legitimate as described in Article 3 of the treaty and sections 2 and 3 of the implementing arrangement, there should be no license requirements for either the prime or subcontractors. Assuming that the operation, project, program or government end-use remains within the scope of the treaty in all respects described above, partners in the U.S. and U.K. can continue to export to and from the U.S. without a license. With respect to information provided to subcontractors, the information required of an exporter under traditional licensing is identical to the treaty requirements. Were an applicant to submit a license that did not identify the end-user, that license would be subject to a return without action until the information is obtained—which rarely happens. As such, it is our assumption that all exporters will have access to the information required to conduct treaty exports.

Question. How does the Department of State calculate the 70-percent reduction in the number of export licenses when subcontractors will have to continue obtaining licenses in this situation?

Answer. The 70-percent reduction in the number of export licenses was based on an analysis of previous licenses to the U.K., and excluding those that would have been precluded based upon the exempted technologies. This figure of an estimated 70-percent reduction is an estimate only. As stated in response to the first question, subcontractors—assuming that they are in an Approved Community, exporting non-exempt technologies, for a treaty-defined end-use—should not require a license. The Department of State is of the opinion that the circumstances portrayed above, in which information would not be available to all parties involved in a transaction, would be relatively rare and should diminish over time as companies on both sides of the Atlantic gain experience with the treaty and its requirements.

LETTER FROM HON. GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, THE WHITE HOUSE, WASHINGTON, DC

APRIL 7, 2008.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: On September 20 and December 3, 2007, respectively, I forwarded to the Senate for its advice and consent 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, and 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.

My Administration has completed the implementing arrangements called for in both treaties, and these documents have been provided to the Committee on Foreign Relations, as requested.

The treaties will help advance our national security interests by ensuring that the United States and our two closest allies have streamlined access to relevant defense

technologies available within the Approved Community established by these treaties, while safeguarding those technologies using robust, mutually agreed security and export control standards. Such access will expand the breadth and depth of collective efforts to develop, produce, and support leading-edge military technologies, improve interoperability, and ultimately enhance our future joint military and counterterrorism operations with the United Kingdom and Australia.

The Government of the United Kingdom and the Government of Australia are moving forward with their respective domestic processes leading to ratification. I strongly support these treaties, and I urge the Senate to give its advice and consent in an expedited fashion so that I may ratify both treaties promptly.

Sincerely,

GEORGE W. BUSH.

LETTER FROM RIGHT HON. GORDON BROWN, PRIME MINISTER OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND TO SENATOR JOSEPH R. BIDEN, JR.

10 DOWNING STREET,
London, England, 11 April 2008.

DEAR SENATOR BIDEN: The US-UK Defence Trade Co-operation Treaty signed in June 2007 represented a significant step in achieving even closer military and security relationships between our nations. Since that time the respective Administrations have jointly completed negotiations on the implementation arrangements for the Treaty and, in February 2008, signed a Memorandum of Understanding to detail those arrangements. Separately, the British Parliament has completed its Treaty ratification processes and the British Government is now ready to finalise the administrative details that should allow us to put the new arrangements into effect.

This is a well negotiated and effective package of measures that will deliver real benefits to both countries, such as enhanced collaboration on addressing the immediate security challenges of IED defeat and counter-terrorism. Its development has involved sustained and detailed collaborative work between our two countries over a considerable period of time.

The Government fully understands the commitments required to ensure that the new arrangements can be implemented and subsequently operated in accordance with the terms that have been agreed. We are determined to make the new arrangements successful for both countries.

I would like to emphasise the importance which I and the British Government attach to bringing this Treaty and its implementing arrangements into effect as soon as possible. Accordingly, I look forward to early Senate ratification of the Treaty to enable the new arrangements to take rapid effect. Timely ratification, in the coming weeks, would represent a strong and valuable signal of our continued intent to enhance the closeness and effectiveness of our military and security relationships. I hope that an early date can be set for a Senate hearing, and look forward to being able to discuss this when I visit Washington next week.

Yours sincerely,

GORDON BROWN.

LETTER FROM HON. DENNIS RICHARDSON, AMBASSADOR OF AUSTRALIA TO THE UNITED STATES

EMBASSY OF AUSTRALIA,
Washington, DC, 19 May 2008.

Hon. JOSEPH BIDEN,
Chairman, Senate Committee on Foreign Relations,
Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: Please find enclosed a letter from Prime Minister Rudd concerning the Australia-United States Defense Trade Cooperation Treaty.

We are grateful for the work your staff has undertaken on the Treaty to date, and very much appreciate your decision to schedule a committee hearing on May 21.

I am available to discuss the matter further at any stage, should you so wish.

Yours sincerely,

DENNIS RICHARDSON.

Enclosure.

LETTER FROM HON. KEVIN RUDD, PRIME MINISTER OF AUSTRALIA

5 MAY 2008.

Hon. HARRY REID,
Senate Majority Leader,
Capitol Building, Washington DC.

DEAR SENATOR HARRY REID: Thank you once again for our very positive discussion during my recent visit to Washington DC. During our meeting I expressed my, and the Australian Government's, support for the Australia-United States Defense Trade Cooperation Treaty signed in September 2007. I would like to further emphasise the strategic significance of this Treaty to both our countries.

The Implementing Arrangements which underpin the Treaty were signed on 14 March 2008. Those Arrangements articulate the comprehensive and robust support and control mechanisms needed to give effect to a Treaty of such importance.

The Treaty provides an unparalleled opportunity for our two nations to further enhance our interoperability in defence and counter terrorism activities; rapidly establish and grow collaborative research and development programs that will maintain the technological edge our nations seek in the defence and counter terrorism arenas; and provide significant opportunities for the industries of our two countries to work more effectively together delivering the defence capabilities we need.

I want to assure you and the United States Senate that the Australian Government is both fully committed to the intent of the Treaty and acknowledges the commitments and responsibilities inherent in giving it effect.

We would welcome early ratification by the United States Senate. Ratification of the Treaty would constitute a powerful statement of our shared commitment to the protection of our valuable defence technologies and the significance our two countries place on the interoperability of our Defence forces. Australia is also engaged in the process of formal ratification of the Treaty.

I look forward to hearing of the Senate's deliberations.

I have copied this letter to Senators Mitch McConnell, Joseph Biden and Richard Lugar.

Yours sincerely,

KEVIN RUDD.

LETTER FROM THE RIGHT HONORABLE BARONESS ANN TAYLOR OF BOLTON, MINISTER OF STATE FOR DEFENCE EQUIPMENT AND SUPPORT, UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

MINISTRY OF DEFENCE,
Whitehall, London, 14 November 2007.

Senator JOE BIDEN,
Chairman, Senate Committee on Foreign Relations,
Washington, DC, USA.

DEAR SENATOR BIDEN: I have recently been appointed in succession to Paul Drayson as Minister for Defence Equipment and Support at the Ministry of Defence. I wanted to let you know that Her Majesty's Government has formally presented the US-UK Defense Trade Co-operation Treaty to both Houses of Parliament. This complements the submittal by the President to the Senate on 20 September 2007. The House of Commons Defence Committee will be scrutinising the Treaty and will take evidence on 21 November 2007 before recommending ratification.

In calendar year 2006 over 8,500 licenses were granted by the U.S. Department of State in support of US-UK defence related transactions at a value in excess of $14 billion. Of these transactions the vast majority were for the movement of UNCLASSIFIED information, goods and services for the Ministry of Defence or the Department of Defense as the end-user. In this context, I would like to take the opportunity to stress the great importance that Her Majesty's Government places on this Treaty as it will greatly improve our ability to support our forces that are operating side by side around the world. The Treaty will more easily allow our joint expertise to be brought to bear on the challenges our forces currently face on the ground and ensure we are well prepared for the challenges of the future. In addition, the Treaty will bring benefits to both our defence industries, enabling them to work more closely and efficiently together to deliver greater value for money, at a time when our respective defence budgets are coming under great stress. All this is backed by a system of firm security controls, to which Her Majesty's Government is fully committed.

Early ratification of the Treaty would be a strong indicator of the continued strength of the US-UK partnership and I very much hope that we can work together to ensure timely implementation. I will keep you apprised of developments in the UK, and look forward to discussing this with you on a future visit to Washington which I hope to undertake later in the year.

Thank you for your continued support and commitment.

Yours sincerely,

Baroness ANN TAYLOR.

LETTER FROM THE AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.

ARLINGTON, VA, *May 21, 2008.*

Hon. JOSEPH BIDEN,
Senate Foreign Relations Committee,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR BIDEN: On behalf of the 275 member companies we represent across the United States, the Aerospace Industries Association (AIA) urges the United States Senate to consider and vote in support of the Defense Trade Cooperation Treaties with the United Kingdom and Australia.

The United Kingdom and Australia are the United States' closest partners in the world today. Warfighters from these stalwart allies stand shoulder to shoulder with our forces in Iraq, Afghanistan, and in countless other operations. These experiences have demonstrated the vital need for coalition forces to operate together seamlessly. The United States and its closest allies must have the capability to share key defense technologies quickly and efficiently to meet common objectives on the battlefield.

AIA has long supported a rigorous export control system that keeps our most advanced technologies out of the hands of our adversaries. At the same time, it is imperative that this system also operate in a predictable, efficient and transparent manner to facilitate technology sharing and cooperation with our closest allies. The Defense Trade Cooperation Treaties with the United Kingdom and Australia will help reduce the defense licensing caseload at the State Department, enabling our government to focus its efforts on preventing those that would threaten our national security from obtaining our most sensitive technologies. AIA stands ready to support the U.S., United Kingdom, and Australian Goverrnnents as they develop the necessary regulations and guidelines to ensure effective implementation of the treaties.

AIA looks forward to working with you as you consider the Defense Trade Cooperation Treaties with the United Kingdom and Australia. We respectfully urge the Senate to move expeditiously in the coming weeks toward consideration and approval of these treaties by the Senate Foreign Relations Committee and then the full Senate.

Thank you for your time and consideration.

Best regards,

Marion C. Blakey, President and CEO, Aerospace Industries Association
Dr. Ronald D. Sugar, Chairman, CEO and President, Northrop Grumman Corporation
William H. Swanson, Chairman and CEO, Raytheon Company
James Albaugh, President and CEO, Boeing Integrated Defense Systems
Kenneth C. Dahlberg, Chairman, President and CEO, Science Applications International Corporation
Robert J. Stevens, President, Chairman and CEO, Lockheed Martin Corporation
Stephen Finger, President, Pratt and Whitney, United Technologies Corporation
Walter P. Havenstein, President and CEO, BAE Systems, Inc.
Clayton M. Jones, Chairman, Aerospace Industries Association, Chairman, President and CEO, Rockwell Collins.

LETTER FROM RON RITTENMEYER, CHAIRMAN, PRESIDENT AND CEO, EDS, PLANO, TX

MAY 22, 2008.

Hon. JOSEPH R BIDEN, Jr.,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR CHAIRMAN BIDEN: EDS provides communication and information services to the U.S. Department of Defense, the United Kingdom's Ministry of Defense and Australia's Defense Agency. We recognize the values of efficiency, interoperability

and information sharing in providing service to the military, particularly armed forces on deployment in theaters like Iraq and Afghanistan.

The United Kingdom and Australia are the closest allies of the United States. Our armed forces often deploy together and have to be able to work together seamlessly in information sharing and communications in battle theaters as well as in cyber warfare.

EDS supports a robust export control regime to maintain the security of our leading technologies. We believe the purpose of export controls is to keep technology away from adversaries. The U.S. Department of State and the U.S. Department of Defense should focus their scarce resources on the threats from those trying to steal our technology not on routine business with trusted allies. Allies—like the U.K. and Australia—should be able to engage in commerce and partnership with the U.S. The Defense Trade Cooperation Treaty with the U.K. and Australia will accomplish such a goal.

EDS is always available to work with you as you consider the Defense Trade Cooperation treaties with the United Kingdom and Australia. We respectfully urge a review by the Senate Foreign Relations Committee and ratification by the Senate in this session of Congress.

Thank you for your consideration of our perspective.

Sincerely,

RON RITTENMEYER,
Chairman, President and CEO.

LETTER FROM ROBERT J. STEVENS, CHAIRMAN, PRESIDENT AND CEO, LOCKHEED MARTIN CORPORATION, BETHESDA, MD

MAY 13, 2008

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Senate Committee on Foreign Relations,
Dirksen Senate Office Building, Washington, DC.

Hon. Richard G. Lugar,
Ranking Member, Senate Committee on Foreign Relations,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATORS: It is my understanding that you and your colleagues on the Senate Foreign Relations Committee will soon take up the U.S. defense trade cooperation treaties that have been negotiated with the United Kingdom and Australia. Lockheed Martin strongly supports the treaties and respectfully urges that they be ratified—and implemented—as quickly as possible.

The treaties were negotiated against the backdrop of an export licensing caseload at the State Department that is growing dramatically, now reaching nearly 85,000 cases annually. A significant portion of that caseload involves licensing in support of our government's own defense and security initiatives. It is, therefore, in our country's best interest to ensure that such licensing be conducted as efficiently as possible. This is particularly true of the defense cooperation between the U.S and the United Kingdom and Australia. The treaties are specifically intended to address that important objective by significantly improving management of licensing and technology sharing, with appropriate limitations, involving two of our closest allies.

I appreciate your longstanding commitment to preventing the most sensitive of U.S. defense technologies from falling into the hands of our nation's adversaries, while ensuring engagement with our closest allies and partners in countering today's global security threats. I believe that ratification and prompt implementation of the treaties will advance those goals, and I urge your strong support for Senate approval of the treaties as soon as practicable.

Sincerely,

ROBERT J. STEVENS.

LETTER AND STATEMENT FROM THE ARMS CONTROL ASSOCIATION, FEDERATION OF AMERICAN SCIENTISTS, AND WISCONSIN PROJECT ON NUCLEAR ARMS CONTROL

MAY 21, 2008.

Hon. JOSEPH R. BIDEN, *Chairman,*
Hon. RICHARD G. LUGAR, *Ranking Member,*
Senate Foreign Relations Committee,
Washington, DC.

DEAR SENATORS BIDEN AND LUGAR: As the Committee holds a hearing today on the Defense Trade Cooperation Treaties with Australia and the United Kingdom, we urge you to consider the questions and concerns we have identified after reviewing the treaties, their implementing arrangements and other public documents. Attached is a statement conveying these questions and concerns, along with several recommendations. We ask that this statement be placed in the hearing record.

Sincerely,

DARYL G. KIMBALL,
Executive Director, Arms Control Association.
ARTHUR SHULMAN,
General Counsel, Wisconsin Project on Nuclear Arms Control.
Dr. IVAN OELRICH,
Vice President of Strategic Security, Federation of American Scientists.

Enclosure.

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 U.S. arms export control system is widely and rightfully regarded as one of the best in the world. This regime of prelicense checks, retransfer and end-use restrictions and notification requirements, and post-shipment end-use monitoring is effective at preventing the unauthorized acquisition and use of U.S. weapons and military technology. By keeping these items out of the hands of terrorists, criminals, and rogue regimes such as Iran; preserving our military technological edge; and serving as a model for other governments, arms export controls contribute directly and profoundly to U.S. national security and the advancement of key U.S. foreign policy objectives. For this reason, it is vitally important that the rigor and integrity of this system be preserved, and that Congress systematically and thoroughly scrutinize any significant changes before they are implemented. Of the recent proposals to change the arms export control system, none are potentially more significant than the Defense Trade Cooperation Treaties with the U.K. and Australia, which have been described by State Department officials as a "paradigm shift in how the U.S. government does export controls.[1]

It is important to note that many (but not all) of the concerns identified below stem in part from a lack of detailed information about the administration's plans for implementing the treaties. Without this information, it is impossible to assess the adequacy of the treaty as a substitute for the licensing process and other requirements under the Arms Export Control Act. With that caveat in mind, below are questions and concerns about the treaty that require immediate attention from the Senate.

TRANSFER CONTROLS AND ENFORCEMENT

Assessing the Treaty's likely impact on U.S. export controls and law enforcement is not possible without additional information about how the treaties will be implemented. Nonetheless, the following section identifies several concerns that are based upon problems with previous licensing exemptions and existing (limited) information about the treaties and plans for implementing them.

Arms transfers to allied countries, even close allies who share many of our interests and foreign policy goals, are not immune to diversion. There are several examples of arms traffickers setting up shop in the territory of close allies for the express purpose of acquiring and illicitly retransferring U.S. weapons and technology to embargoed regimes and other bad actors. In 2003, for example, agents searched the

[1] "Interview with Frank Ruggiero," Defense News, 21 April 2008, http://www.state.gov/t/pm/rls/rm/104012.htm.

premises of 18 U.S. companies suspected of shipping thousands of components for missile systems and military aircraft to the London-based facility of Multicore, LTD, a front company for the Iranian military that "conduct[ed] no legitimate business" and received "military purchasing instructions from the Iranian government," according to the Department of Homeland Security.[2]

Similar activity in Canada reportedly prompted the State Department to scale back the longstanding licensing exemption for arms exports to that country in 1999. In 2002, the Government Accountability Office (GAO) published a list of these incidents, which included attempts to acquire and illicitly retransfer missile components, communication systems, fighter jet components, and other controlled items to several proscribed destinations, including Pakistan, Iraq, Iran, China, Libya, and the Sudan. One noteworthy case involved a Chinese entity shopping for controlled U.S. infrared technology. After a U.S. company informed the Chinese buyer that U.S. law prohibited the transfer of the technology to China, the buyer "suggested that the export could take place through a Canadian company under the Canadian exemption and then be re-exported to China," according to the GAO.[3]

While not perfect, the State Department's system of robust, case-by-case licensing is among the best in the world at detecting and preventing diversion attempts and other problematic arms transfers. Trained licensing officers check all parties to each proposed transfer (e.g. freight forwarders, intermediate consignees, etc.) against a watchlist of over 130,000 foreign and domestic entities, review documentation for telltale signs of diversion, and conduct end-use checks through the Blue Lantern End-Use Monitoring Program.[4]

Generally speaking, licensing exemptions abridge this system in ways that have the potential to increase the risk of unauthorized exports. By eliminating the pre-license checks performed by licensing officers, the responsibility for spotting diversion attempts and ensuring that the proposed transfer complies with U.S. laws and regulations shifts to the exporter—who may lack the training and resources to do so effectively—and to customs officials, who may lack the time and resources to adequately screen license-free exports before they leave U.S. ports.[5] These risks have been highlighted in reports and statements by the GAO, the House International Relations Committee, and the Criminal Division of the Justice Department, among others. In 2004, the House International Relations Committee warned of ". . . inherently greater risks of diversion associated with unlicensed commercial exports of U.S. weapons and other defense commodities . . ."[6] A year later, the GAO conveyed similar concerns from enforcement officials, reporting that "Homeland Security and Justice officials . . . generally do not favor export licensing exemptions because exemptions increase the risk of diversion and complicate enforcement efforts." They noted, for example, that "individuals seeking to obtain U.S. arms illicitly can establish "front companies" overseas that obtain arms under an exemption and then divert those items to other countries."[7]

The treaties attempt to address these risks by, inter alia, limiting license-free arms exports to prescreened members of an approved community and only for an as-yet undisclosed list of "operations, programs and projects" that meet the needs of the U.K. or Australian governments. The implementing arrangements also lay out specific eligibility criteria against which prospective nongovernmental British and Australian members of the approved community will be assessed, and limit access to items exported under the treaty to U.K. and Australian individuals with appropriate security clearances. Each government has assembled a short list of sensitive items that are exempt from the scope of treaty, and the retransfer of U.S. defense articles outside of the approved community requires U.S. Government approval. The treaties and implementing arrangements also refer to various (often vague) requirements for marking, identifying, transmitting, storing and handling defense articles; self-audit regimes; "verifications, site visits and inspections" and

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[2] "ICE Agents Search 18 Firms in 10 States Suspected of Illegally Exporting Military Components to Iranian Arms Network," Press Release, Department of Homeland Security, 10 July 2003.

[3] "Lessons To Be Learned From the Country Export Exemption," Government Accountability Office, GAO–02–63, March 2002, pp. 21–23.

[4] Directorate of Defense Trade Controls, "Defense Trade Controls Overview," 2006, http://www.fas.org/asmp/resources/110th/defense__trade__overview__2006.pdf.

[5] See "Lessons to Be Learned From the Country Export Exemption," Government Accountability Office, March 2002, p. 8–11 and "U.S. Weapons Technology at Risk: The State Department's Proposal to Relax Arms Export Controls to Other Countries," House International Relations Committee, 1 May 2004, p. 18—20.

[6] U.S. Weapons Technology at Risk . . ., p. 3.

[7] "Arms Export Control System in the Post-9/11 Environment," Government Accountability Office, GAO–05–234, February 2005, p. 44.

"mechanisms to conduct post-shipment verifications and end-use or end-user monitoring."

If rigorously implemented, these types of safeguards could significantly reduce the risk of unauthorized arms transfers. But the devil is in the details of implementation, and many of these details are not included in the treaties and implementing arrangements. If the Senate has not already done so, it should:

- Request detailed summaries of each of these safeguards, particularly the self-audit regimes, site visits and inspections, and post-shipment verification and end-use monitoring mechanisms. These summaries should describe precisely how these safeguards will work and when they will be fully operational, and include detailed information about the staffing, funding, and regulatory and procedural changes necessary for relevant U.S. Government agencies to implement them.
- Confirm that all parties to transfers under the treaty, including freight forwarders and intermediate consignees, will be thoroughly vetted ahead of time. This confirmation should include details about the vetting process.
- Confirm that Customs and Border Protection has the capacity, i.e., the staffing, expertise and infrastructure, to effectively screen treaty-related shipments and spot potential violations—including arms traffickers masquerading as members of the approved community—before the shipments leave U.S. ports.

Monitoring and preventing the unauthorized retransfer of exported items after they are shipped can be more difficult in regard to items shipped under exemptions. Under the International Traffic in Arms Regulations (ITAR), retransfer and changes in end-use require the submission of a written request to the State Department.[8] The request must describe the defense article(s) in question and indicate the quantity and value of these articles, identify the new end-user, and describe the new end-use. Under the treaties, members of the approved community would not have to seek permission from the State Department before retransferring exempt items to each other. The Senate should:

- Raise the question of how the administration intends to systematically monitor and track these items as they move around the approved community.
- Inquire about specific plans for post-shipment end-use monitoring—including regular audits and routine site inspections—in the U.S., U.K. and Australia.

Another concern about licensing exemptions generally is their effect on law enforcement and specifically the absence of an export license and related paperwork, which has the potential to hinder prosecutions of suspected arms export violations. In 2000, the Department of Justice noted the importance of the "domestic evidentiary trail" created by the licensing process and warned that country licensing exemptions could "greatly impede the ability of the law enforcement community to detect, prevent and prosecute criminal violations."[9] Similar concerns about licensing exemptions have been expressed by the House International Relations Committee and the Government Accountability Office.[10]

Beyond the missing paperwork, the House International Relations Committee also noted the inclination of the courts to "view the licensing requirement as highly relevant to the establishment of a person's legal duty under U.S. law" and the tendency of federal prosecutors to "regard the absence of a license requirement as signifying an activity of lesser importance to the U.S. government . . ."[11]

The treaties and implementing arrangements contain several recordkeeping, compliance, cooperation and enforcement measures. It is unclear, however, if these measures and requirements are an adequate substitute for the "domestic evidentiary trail" generated during the licensing process. If the Senate has not already done so, it should:

- Request a detailed analysis of the treaties' likely impact on the investigation and prosecution of criminal violations of the Arms Export Control Act, including the loss of documentation associated with the licensing process, from the Justice Department.

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[8] The ITAR does not require prior written approval for the retransfer of some U.S. components incorporated into foreign weapon systems to NATO countries, Australia and Japan. The entity that is re-exporting the item must send DDTC a written notification, however.

[9] "Letter From Deputy Assistant Attorney General Swartz to Senior Adviser Holum," April 27, 2000.

[10] U.S. Weapons Technology at Risk . . ., p. 21. See also "Arms Export Control System in the Post-9/11 Environment," U.S. Government Accountability Office, 7 April 2005 and "Challenges Exist in Enforcement of an Inherently Complex System," Government Accountability Office, GAO–07–265, December 2006, p. 17.

[11] U.S. Weapons Technology at Risk . . ., p. 21.

- Request a detailed briefing on the British and Australian governments' track record in regard to cooperating with U.S. law enforcement officials on overseas export control investigations.

STATUTORY REQUIREMENTS AND CONGRESSIONAL OVERSIGHT

Pursuit of the exemption agreement as a self-executing treaty 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)), an important requirement given the Justice Department's aforementioned concerns about licensing exemptions.

Statements reportedly made by administration officials last year suggest that the arrangements made with the U.K. as part of that treaty do not fully satisfy these requirements.[12] But even if the U.K. treaty meets these requirements "in spirit" as the administration has claimed, it still sets a precedent that could be used in the future to circumvent both the letter and the spirit of the AECA.

Similarly, the treaties set a precedent that could undermine the role of country licensing exemptions as an inducement for other governments to strengthen their export control systems. As mentioned above, the Arms Export Control Act requires that governments seeking a country exemption to agree—via a binding bilateral agreement—to strengthen their export controls so that they are at least comparable to those of the United States in several key ways. Negotiating country licensing exemption agreements via a self-executing treaty appears to render inapplicable the requirements identified in section 38(j) of the Arms Export Control Act.

Pursuit of the exemption agreements in the form of a treaty also effectively bypasses the House of Representatives. In recent years, the House has been a source of thoughtful, probing, and rigorous analysis of U.S. arms export controls and proposed changes to these controls. Through public hearings and the release of GAO and committee reports, House members have increased transparency and stimulated public debate over critically important export control issues. Cutting the House out of the loop reduces oversight and, consequently, accountability.

Finally, the treaties are, for the most part, mere frameworks. The scope and function of each treaty is meaningfully (but not entirely) described in its implementing arrangements, which apparently can be changed at any time without input from Congress. It appears that the Senate is being asked to approve something that is not complete and will never be final.

The Senate should:

- Request a detailed list of requirements in the Arms Export Control Act that would apply to the treaty and those that would not apply.

RESPONSES OF ACTING UNDER SECRETARY JOHN ROOD TO QUESTIONS FROM SENATORS JOSEPH BIDEN AND RICHARD LUGAR

Question No. 1. Under Secretary Rood testified that these treaties "represent a paradigm shift in the way the United States conducts defense trade with its closest allies." Public reports indicate that there is strong interest among other allies, particularly in NATO, in negotiating similar treaties.

a. What has the administration stated in reply to requests from other countries for similar treaties?

b. Is the administration prepared to consider similar treaties for other countries?

Answer.

a. Our consistent reply has been that this administration has no plans for additional Defense Trade Cooperation Treaties with any other country.

b. This administration will not seek additional defense trade treaties.

Question No. 2. One reason cited in the hearing testimony for seeking license-free exports was to establish more interoperability with the United Kingdom and Aus-

[12] See "U.S.–U.K. Defense Export Control Treaty Faces Hurdles in Congress," Inside U.S. Trade, 13 July 2007.

tralia. Please explain how current licensing of defense articles, defense services, and technical data inhibits achieving interoperability (despite the expedited review mandated in section 1225(b) of Public Law 108–375, the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005) with regard to specific major defense programs or joint military operations in which Australia and the United Kingdom currently participate.

Answer. In general, export license development and subsequent government processing allows for a level of interoperability. The expedited review mandated in section 1225(b) of Public Law 108–375 further enhances cooperation and interoperability with our two closest allies, the U.K. and Australia. Expedited review, however, has no affect on the time required by U.S. contractors to assess an international program, create an export license application, and submit the application for USG review and approval. Through initiatives such as the Approved Communities, Approved Programs and Projects, etc., the treaties will encourage the broadening and intensification of bilateral cooperation between industries and governments at the earliest stages of development. This will further enhance the breadth and depth of U.S.–U.K. and U.S.–Australian interoperability. The treaties also reduce time to deliver interoperable equipment to coalition forces, including U.S. forces, beyond that of expedited license reviews.

Question No. 3. How much will it cost the U.S. Government, on a per annum basis, to implement the defense trade treaties, taking into account costs in the Departments of State, Defense, and Homeland Security, in particular? Please include any additional information security costs that will result from license-free trade in classified defense articles.

a. Will Customs and Border Protection have to engage in additional inspections?

b. Will CBP have to increase the number of officers assigned to U.S. ports?

Answer. We anticipate the additional costs, such as initial training costs, to the interagency to be less than $1 million. Any additional requirements in this area will likely be met by resources freed up from the decline in licensing workload created by the treaties. We also do not anticipate any additional costs associated with information security as the majority of treaty exports will be treated as unclassified in the United States and there will be no additional security costs associated with classified treaty exports. Under the terms of the "Security Implementing Arrangement for Operations Between the Ministry of Defense of the United Kingdom and the Department of Defense of the United States," known familiarly as the "Industrial Security Agreement," paragraph 4.c stipulates that "[c]osts incurred by either of the parties through implementation of other security measures, including costs incurred through the use of the diplomatic courier service or any other authorized official courier service, will not be reimbursed. There shall be provisions in classified contracts for security costs to be incurred under the contract, such as special costs for packing, transport and the like, which shall be borne by the Party for whom the service is required under the contract. If, subsequent to the date of contract, the security classification or security requirements under the contract are changed, and the security costs are thereby increased or decreased, the provisions of the contract that may be affected shall be subject to an equitable adjustment by reason of such increased or decreased costs. Such equitable adjustments shall be accomplished under the appropriate provisions in the contract governing changes." The United States-Australia "Industrial Security Agreement" has similar provisions.

a. CBP does not plan on adding additional officers at the ports.

b. Existing procedures should be able to address treaty exports without increased resources to fund additional inspections. New approaches to such inspections might be undertaken but these should be able to be managed with existing resources.

Question No. 4. What is your best estimate of how much it will cost U.S. industry to comply with the regulations or processes developed to implement the defense trade treaties?

a. Will the regulatory changes required to implement the treaties in the United States constitute a "major rule" as defined by section 804(2) of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 804(2))?

Answer. We believe the overall costs of compliance to U.S. industry should decrease as a result of the treaties. The requirements for recordkeeping should be virtually identical to those required for licensed exports, and any additional costs incurred in determining if an export meets the treaty limitations should be offset by savings derived from the absence of need for an infrastructure to process licenses.

a. We believe that the changes do not meet the criteria for being a "Major" rule under Public Law 104–121 as (1) the annual effect on the economy will not be

$100,000,000 or more; (2) there will be no major increase in costs or prices for consumers, industry, Federal, State, or local government agencies or geographic regions and; (3) there will be no significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets.

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; however, 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.

d. The Senate and executive branch can address questions left open by the language, such as whether the treaties provide for judicially enforceable rights.

Question No. 6. Your testimony says that "[i]f ratified, the treaties will be self-executing; that is, no additional implementing legislation will be required to bring them into force." What existing legislation, if any, would be utilized to enforce and implement the treaty? Please be specific.

Answer. The implementing arrangements and the regulations issued in accordance with the treaties would be utilized to implement the treaties. Conduct falling outside of the procedures established pursuant to the treaties, including their implementing arrangements, or the regulations issued in accordance with the treaties, would be subject to the requirements of the Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR). Such conduct could constitute violations of the AECA, the ITAR, and information security-related U.S. laws and regulations. All of these laws and regulations may be utilized for enforcement purposes.

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?

a. 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. The Department of State will promulgate regulations based on the authority of the treaties themselves.

a. Article 13 of each treaty recognizes that regulations will be promulgated to implement that treaty's effect on existing law. As provided in Article 13 (1) and (2) of each treaty:

> Article 13(1): Compliance with the procedures established pursuant to the Treaty, the Treaty's Implementing Arrangements, and any regulations promulgated to implement the Treaty's effect on existing law, by persons or entities exporting and transferring defense articles, constitutes an exemption to the applicable licensing requirements and implementing regulations of the AECA.
>
> Article 13(2): Conduct falling outside the terms of the Treaty, the Treaty's Implementing Arrangements, and any regulations promulgated to implement the Treaty's effect on existing law, remains subject to applicable licensing requirements and implementing regulations, including any criminal, civil, and administrative penalties or sanctions contained therein.

Question No. 8. If these treaties are ratified and a provision of either of these treaties conflicts with existing treaty or statutory law, it would override that treaty or statute where there is such a conflict. Please set forth, with specificity, which provisions in the two pending treaties conflict with treaty or statutory provisions now in force, and therefore would override them. Please provide an exhaustive list of the existing treaty or statutory law that will be affected, not a list of examples.

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

The treaties, pursuant to their terms, allow for exports and transfers without the requirement for separate U.S. Government licenses or approvals. Statutory provision(s) that will be affected include:

22 U.S.C. 2778(b)(2)—as it applies to exports and transfers that fall within the scope of the treaties.

22 U.S.C. 2753(a)—as it applies to transfers of defense articles or defense services originally provided to the other government pursuant to the Foreign Military Sales program where such subsequent transfer is pursuant to either treaty.

Other statutory provisions, though not explicitly overridden by the treaties, are rendered irrelevant as a matter of law for exports and transfers that fall within the scope of the treaties because there will be no license application or other approval pursuant to 22 U.S.C. 2778 to trigger the provisions of the statute, such as 22 U.S.C. 2753(d), 22 U.S.C. 2765(a), 22 U.S.C. 2776 (c) and (d), and 22 U.S.C. 2779(a)(2).

Question No. 9. Will the treaties be self-executing for each of the Treaty Partners?

a. Please list, in detail, the changes that will be required to existing law in the United Kingdom and Australia in the event that both treaties are ratified.

b. Please describe the major regulatory changes that each Treaty Partner will have to promulgate.

Answer.

Australia:

The State Department has been advised by the Australian Government of the following:

a. Australia would need to enact new legislation to give effect to Australia's rights and obligations under the Australia-U.S. Treaty concerning Defense Trade Cooperation (the Treaty). New legislation to enact the terms of the Treaty will include provisions addressing:

(1) 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;

(2) The recordkeeping and notification and reporting requirements under the Treaty;

(3) The handling, marking, and classification requirements for U.S. and Australian defense articles exported or transferred under the Treaty;

(4) The requirements for exports and transfers of U.S. defense articles outside the approved community or to a third country;

(5) The rules for transitioning U.S. defense articles into and out of the terms of the Treaty;

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

(7) 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

(8) Offenses and penalties, and administrative requirements, necessary for the enforcement of the Treaty and its implementing arrangement.

It is proposed that these changes be brought into force through amendments to the current Weapons of Mass Destruction (Prevention of Proliferation) Act 1995 (WMD Act). The name of this act will be amended to better reflect the objective of the act. In conjunction with legislation to implement the Treaty, Australia is also bringing forward 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. These provisions will also be included in the amended WMD Act.

b. The major regulatory changes that Australia will have to promulgate are:

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

(2) The criteria for individuals to become authorized to access U.S. defense articles received pursuant to the Treaty;

(3) Benefits stemming from Australian Community membership, including a framework for license-free trade with the U.S. in classified or controlled items falling within the scope of the Treaty;

(4) The conditions Australian Community members must abide by to maintain membership, including but not limited to:

i. Recordkeeping and notification requirements;

ii. Marking and classification requirements for defense articles exported or transferred under the Treaty;

iii. Requirements for the re-transfer to non-approved community members and re-export to a third country of defense articles; and

iv. Maintaining security standards and measures articulated in defense protective security policy to protect defense articles pursuant to the Treaty;

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

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

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

United Kingdom:

The State Department has been advised by the U.K. Government of the following:

a. No changes will be required to existing law to give effect to the U.K.'s rights and obligations under the Treaty, as the U.K. will rely on existing legislation such as the Official Secrets Act.

b. There will be several regulatory changes made to support the Treaty. These are:

- Changes to U.K. export control regulations, including development of a treaty-specific Open General Export License (OGEL).
- Changes to the U.K. Manual of Protective Security and related security regulations for Government and U.K. Industry.
- Changes to the MOD Classified Material Release Procedure (F680) to take account of treaty re-exports and re-transfers.

Question No. 10. The treaty with Australia defines the term "Scope" as the "Treaty's coverage as identified in Article 3" (Article 1(j)). Article 13(2) of the treaty states that "Conduct falling outside the terms of this Treaty," and its implementing arrangements and regulations remain subject to applicable law. The "Overview" accompanying the Secretary's letter of submittal, in describing Article 13, states that conduct "outside the *scope* of the Treaty" remains subject to applicable law (Treaty Doc. 110–10, at xi) (emphasis added). Is the term "scope," as used in the submittal letter, equivalent to the treaty term, as defined in Article 1?

Answer. No. The cited reference to "scope" in the "Overview" is equivalent to "the terms of."

Question No. 11. Article 1(1) of the treaty with the United Kingdom and Article 1(1)(c) of the treaty with Australia define "Defense Services" by reference to the United States Munitions List. Why are the British and Australian munitions lists not also referenced?

a. This definition appears to permit the export to the United Kingdom under the treaty of items that the United Kingdom controls only as dual-use items, the re-transfer of which to other European Union countries would not be subject to arms export controls.

b. What are the implications of relying on the Official Secrets Act as a major predicate for enforcement in the United Kingdom? What sorts of enforcement actions are taken under that act against individuals and entities, and what new challenges will the treaty raise for enforcement under that act?

Answer. The U.S. Munitions List is the basis for the treaties.

a. The list of items exempt from the U.K. Treaty includes "Defense Articles not controlled by the U.K. Munitions List (UKML) or Annex 4 to the U.K. Dual Use List that the U.S. controls under the USML." Therefore, USML items that the United Kingdom may treat as dual-use items are excluded from the treaty. The United States Munitions List (USML) and United Kingdom Military List (UKML) cover broadly similar items and the exceptions are few in number. The list for the Australia Treaty includes similar language: "Defense Articles not controlled by the Australian Munitions List (Australian ML) or the Australian Dual Use List that the U.S. controls under the USML."

b. The use of the Official Secrets Act (OSA) to protect treaty material within the U.K. provides a level of protection in U.K. law that has not previously existed for the majority of U.S. defense articles. With the OSA as the basis for enforcement, all material transferred under the treaty will be given the same level of protection that is currently given to RESTRICTED material, and in some respects to CON-

FIDENTIAL material (the requirement for "List X" status and an SC Clearance). Enforcement of the OSA under the treaty will be no different from the enforcement activities that are currently carried out for other U.K. classified material.

Question No. 12. Article 1(8) of the treaty with the United Kingdom gives Her Majesty's Government the option of giving notice that it includes in the definition of the Territory of the United Kingdom, in addition to England and Wales, Scotland and Northern Ireland, "any territory for whose international relations the United Kingdom is responsible."

a. Which such territories might be included? Has Her Majesty's Government consulted with the United States Government about including such territories in the definition of the Territory of the United Kingdom?

b. Will the United States object if Her Majesty's Government proposes to include territories that are known to be offshore business havens? Will U.S. Government concurrence be required to include such territories?

c. In what manner will the executive branch inform Congress if Her Majesty's Government initiates such consultations, and/or gives such notice?

d. Will the United States be able to require removal of any nongovernmental United Kingdom entity or facility from the approved community regardless of its location within the Territory of the United Kingdom?

Answer. a. Other such territories could include Bermuda, Anguilla, the Falklands Islands and Gibraltar. To date, the U.K. Government has not consulted with the United States Government about including such territories.

b. Whether the United States would object to the inclusion of any particular territory would depend on the relevant facts at the time. U.S. Government concurrence is not required to include such territories within the definition of "Territory of the United Kingdom" for treaty purposes. As provided in Article 1(8), Her Majesty's Government is required to consult with, and give notice through diplomatic channels, regarding the inclusion of any such territories. The United States would, however, need to concur on the inclusion of all members of the approved community.

c. The administration is prepared to discuss with the Senate any procedure by which the executive branch might notify Congress in the event of such a change.

d. The U.S. can remove a nongovernmental entity or facility from the U.K. Community and U.S. concurrence is required to add a nongovernmental entity or facility.

Question No. 13. What would the implications be for enforcement of the treaty if the United Kingdom were to include a "territory for whose international relations the United Kingdom is responsible" pursuant to Article 1(8)?

a. Are the personnel of all "List X" facilities subject to the Official Secrets Act and to all of that act's penalties for violations?

b. Do all personnel at "List X" facilities retain U.K. security clearances?

c. Would the Official Secrets Act be enforceable in a "territory for whose international relations the United Kingdom is responsible?" Alternatively, would the United Kingdom have jurisdiction in England if the offense concerned acts in such a territory by persons who were citizens of such a territory?

d. Will the U.S. Government be able to take into account any limitations in Her Majesty's Government's ability to enforce compliance with this treaty, its implementing arrangement and regulations, when evaluating a proposed member of the U.K. Community, even though that criterion is not specifically listed in section 7(4) of the implementing arrangement?

Answer. There are no implications for enforcement arising from the inclusion of such territories.

a. Not all "List X" facilities will be members of the United Kingdom Community. As provided by Article 4 of the treaty, only those facilities that meet mutually agreed eligibility requirements, are accredited by Her Majesty's Government in accordance with the implementing arrangements, and are mutually agreed to by the parties will be members of the United Kingdom Community. All personnel of facilities in the United Kingdom Community who require access to defense articles exported under the treaty will have an appropriate security clearance at least at the United Kingdom "security check" level, as provided in section 7(11) of the implementing arrangement and, thus, will be subject to the Official Secrets Act and to all of that act's penalties for violations.

b. As noted in subparagraph "a" above, not all "List X" facilities will be members of the United Kingdom Community. All personnel of facilities on "List X" who are part of the United Kingdom Community and who require access to defense articles exported under the treaty will have an appropriate security clearance at least at the United Kingdom "security check" level, as provided in section 7(11) of the implementing arrangement.

c. Yes. The Official Secrets Act extends to any act done by any person in these territories as if it were done in the U.K.

d. Yes; section 7(4)(f) of the implementing arrangement includes "national security risks" as one of the criteria against which nongovernmental United Kingdom entities and facilities will be assessed for inclusion on "the List." Limitations in Her Majesty's Government's ability to enforce compliance with the treaty would be considered under these criteria.

Question No. 14. The 2003 legislative initiative to permit a licensing exemption agreement under section 38(j) of the Arms Export Control Act would have applied to all unclassified exports of defense articles and services. The treaties apply, by contrast, to classified as well as unclassified exports of defense articles, but are limited by the provisions of Article 3. They would appear, thus, to be both more far-reaching and more complicated than the legislative proposal. What are the advantages and disadvantages, in the administration's view, of the approach adopted in the treaties?

a. Which of the requirements listed in section 38(j)(2) of the Arms Export Control Act would each Treaty Partner not be able to satisfy with respect to the treaties?

Answer. The advantage of the approach adopted in the treaties, which permits the export and transfer of both classified and unclassified defense articles and services, is that it applies to the broadest possible range of defense articles and services while tailoring the exclusions to those defense articles and services which contain sensitive technologies, whether classified or unclassified. Another advantage of the treaties is that they apply to both hardware and intangibles, while some previous initiatives under 38(j)(2) covered only hardware. An additional advantage of the treaties is that unclassified USML items will now be subject to controls under the Official Secrets Act, which is a level of enhanced control not envisioned in the 2003 legislation.

a. Because the President chose to negotiate these agreements as treaties, rather than as bilateral agreements under 38(j), a comprehensive review to determine which requirements of 38(j)(2) would or would not be satisfied by the treaties was deemed unnecessary and was not conducted. Some of the provisions of 38(j)(2) are not addressed in the treaties and, thus, presumably the treaties do not satisfy those provisions, such as 38(j)(2)(B)(iii)—controls on international arms trafficking and brokering—and 38(j)(2)(B)(iv)—cooperation with United States Government agencies, including intelligence agencies to combat efforts by third countries to acquire defense items, although nothing in the treaties precludes such cooperation. Other provisions of 38(j)(2) are specifically addressed in the treaties, such as 38(j)(2)(A)(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 re-exports to third countries; 38(j)(2)(B)(i)—controls on the export of tangible and intangible technology; including via fax, phone, and electronic media; and 38(j)(2)(B)(ii)—appropriate controls on unclassified information relating to defense items exported to foreign nationals.

Question No. 15. Article 3(2) of each treaty provides that the "Treaty shall not apply to those Defense Articles that are identified in the Implementing Arrangements as exempt from the Scope of this Treaty." This language contrasts with Article 3(1)(b), which describes certain programs "identified *pursuant* to the Implementing Arrangements" (emphasis added) (see also Article 4(1)(a) (similar)). The implementing arrangements do not contain an identification of such defense articles, but rather leave the task of such identification to a subsequent procedure. How does section 4 of the implementing arrangement with each Treaty Partner comply with Article 3(2) of the respective treaty?

Answer. The administration and its U.K. and Australian counterparts view the phrases "identified in" and "identified pursuant to" to be synonymous. For example, several treaty articles (Articles 1(3), 1(4) and 1(11) of the United Kingdom Treaty and Articles 1(1)(b), 1(1)(e), and 1(1)(f) of the Australia Treaty) indicate that specific individuals or facilities will be "identified in" subsequent articles, yet the subsequent articles do not identify each person or facility by name, but rather refer to the process by which the individuals and facilities will be identified. Likewise, Article 9(1) of each treaty provides that exceptions to the re-transfer and re-export authorizations will be "identified in" the Implementing Arrangements, yet section 9(12) of the United Kingdom implementing arrangement and section 9(7) of the Australia implementing arrangement leave the task of identifying the specifics of the exceptions to a subsequent procedure.

Question No. 16. What criteria will be used as the basis for U.S. decisions on what defense articles to exempt from the scope of the treaties?

Answer. If a specific technology meets any one of the following criteria, it is included on the List of Technologies Exempt from the Treaties, pursuant to Article 3(2) of each treaty. The technologies are those that:

1. Are controlled according to U.S. Presidential Directive;
2. Are controlled subject to applicable international agreements or arrangements (e.g., the MTCR, or Chemical or Biological Warfare regimes);
3. Are not controlled for export as defense articles by the U.K. or Australian Government; and/or,
4. Are targeted, sensitive technologies that should not be freely transferred within an "Approved Community," but only to specifically identified recipients pursuant to an export license.

Question No. 17. Please confirm that no defense articles controlled in order to comply with the guidelines and control lists of the Nuclear Suppliers Group (NSG), the Australia Group (AG) or the Missile Technology Control Regime (MTCR) will be exported pursuant to the treaties. If any such items may be exported under the treaties, please explain what they are and why they will not be exempted pursuant to Article 3(2).

Answer. No defense articles controlled for compliance with the NSG, the AG, or the MTCR may be exported under the treaties per the List of Defense Articles Exempted from Treaty Coverage which 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)."

Question No. 18. How long will it take to establish the "policies and procedures" pursuant to section 4(7) of the implementing arrangements that will govern those defense articles that were previously exported or transferred but are later added to the list of exempt defense articles, and how will the executive branch inform Congress of such "policies and procedures"?

Answer. The administration will establish the policies and procedures as quickly as possible prior to the addition of any item to the list of exempt defense articles. The administration is prepared to discuss with the Senate procedures by which the executive branch might notify Congress of the policies and procedures noted in section 4(7).

Question No. 19. The word "scope" is used in the treaty with the United Kingdom in several instances. It is the title of Article 3. Article 3(2) refers to items "exempt from the Scope of this Treaty." Article 6(1) applies to "Defense Articles within the Scope of this Treaty." The term is capitalized. Article 1 states that "Terms capitalized in this Treaty, and their variants, shall have the meaning established in this Article." The word "Scope" is not, however, defined in Article 1. What does the term mean, and how is that meaning established in this treaty?

Answer. The "scope" of the United Kingdom Treaty is the treaty's coverage as identified in Article 3, entitled "Scope." For the purposes of the United Kingdom Treaty, it was not deemed necessary to include a separate definition of "Scope" since it appeared to be self-explanatory by the terms of Article 3. When the Australian Treaty was negotiated, the Australian negotiators asked that a definition of "Scope" be added to Article 1. The word "Scope" has an identical meaning in both treaties.

Question No. 20. What are the criteria, referenced in section 2(1) of the implementing arrangements, that are used by the U.S. Department of Defense and its counterparts in each Treaty Partner Government to establish and document combined military operations and combined counterterrorism operations?

Answer. Section 2(1) of the implementing arrangement calls for developing and maintaining a list of combined Operations. The U.S. DOD will use the criteria found in Joint Publication 3–16 (Joint Doctrine for Multinational Operations) to develop and update the combined Operations list. After consulting with the U.K. MOD and Australian DOD, DOD will provide the Department of State with a validated combined Operations list, and revisions thereto.

Question No. 21. With regard to the implementing arrangements with each Party, what are the "cooperative program legislative authorities" referenced in section 2(2)(a)?

a. If there is a finite list of such authorities, please name all of them; if there are specific criteria for determining additional cooperative program legislative authorities, please list them.

b. What is the "valid cooperative program international agreement or arrangement" referenced in section 2(2) (b) and (c)?

Answer. a. I am advised by the Department of Defense that the "corporate program legislative authorities" referenced in section 2(2)a are the following: 10 U.S.C. 2350a, 10 U.S.C. 2350b, 10 U.S.C. 2350f, 10 U.S.C. 2350i, 10 U.S.C. 2350l, 10 U.S.C. 2358, 22 U.S.C. 2767 (section 27 of the AECA), and 22 U.S.C. 2796d (section 65 of the AECA).

b. I am advised by the Department of Defense that a "valid cooperative program international agreement or arrangement" is: An agreement or arrangement which is based on the legal authorities cited in the answer to the question above, where the agreement or arrangement (1) has entered into force or effect; and (2) has not expired or been terminated.

Question No. 22. Section 2(2)(e) of each implementing arrangement states that programs involving defense articles "exempt from the scope of the Treaty" will be excluded from the list called for under that paragraph, "unless otherwise mutually determined for any program that also involves "Defense Articles not exempt from the scope of the Treaty."

a. Will license-free exports or transfers be permitted in such programs for defense articles otherwise "exempt from the scope of the Treaty," or only for defense articles that have not been exempted?

b. If the former is true, how is this exception to the exclusion justified, in view of the unqualified prohibition on inclusion of such exempt items in Article 3(2) and section 4 of the implementing arrangements?

Answer. a. Items exempt from the scope of the treaty will not be exported or transferred under this provision. This is intended to allow for exports or transfers in support of a subset of a larger program.

b. Items exempt from the scope of the treaty will not be exported or transferred under this provision.

Question No. 23. Does section 3(1)(b) of the implementing arrangements have any implications under the Competition in Contracting Act and the Federal Acquisition Regulations? Will the solicitations that are described in that section be considered to permit other than full and open competition under 10 U.S.C. 2304(c)(4) or 41 U.S.C. 253(c)(4)?

Answer. I am advised by the Department of Defense that the treaties have no implications on the Competition in Contracting Act. Changes to the Defense Federal Acquisition Regulations Supplement (DFARS) and Federal Acquisition Regulation (FAR) will be required for solicitations and contracts that will be treaty-eligible. No such changes to the DFARS or FAR will affect current requirements for full and open competition.

Question No. 24. When do you expect to complete and publish the initial lists of eligible: "combined military and counterterrorism operations" (Article 3(1)(a), implementing arrangement section 2(1)); "cooperative security and defense research, development, production, and support programs" (Article 3(1)(b), implementing arrangement section 2(2)); and, "mutually agreed specific security and defense projects where Her Majesty's Government is the end-user" (Article 3(1)(c), implementing arrangement section 2(3))?

a. Will Congress be notified of changes to such lists in the same way that the public is notified, or will there be a separate mechanism?

Answer. The lists will be completed and published prior to bringing the treaties into force in accordance with Article 20 of both treaties. The SFRC was provided an illustrative version Article 3(1)(b) cooperative program list in furtherance of the April 7, 2008, staff briefing.

a. The administration is prepared to discuss with the Senate procedures by which the executive branch might notify Congress in the event of such changes.

Question No. 25. Section 3(a)(2) of the Arms Export Control Act states that no agreement shall be entered into for a cooperative project (as defined in section 27 of the act) unless the country with which such agreement has been made "shall have agreed not to transfer title to, or possession of, any defense article or related training or other defense service so furnished to it, or produced in a cooperative project . . . to anyone not an officer, employee, or agent of that country . . . and not to use or permit the use of such article or related training or other defense service for purposes other than those for which furnished unless the consent of the President has first been obtained." When the President provides such consent, notification to this committee is required pursuant to section 3(d). If the treaties are ratified, will the requirements of sections 3(a)(2) and 3(d) of the act continue to apply to all cooperative projects under section 27 of the act?

Answer. It is possible that defense articles or defense services may be exported for the purposes of cooperative projects pursuant to the treaties. With respect to the transfer of such items by HMG or the Government of Australia within their respective approved community, the provisions of section 3(a) and 3(d) will not apply. The provisions of section 3(a)(2) will continue to apply to re-exports for section 27 cooperative programs with the U.K. and Australia.

Question No. 26. Article 3(1)(c) in each treaty limits the scope of the treaty to, in part, "specific security and defense projects where the . . . [treaty partner] is the end-user." Section 2(3) of the implementing arrangements states: "In furtherance of Article 3(1)(c), the Participants will develop, establish and maintain information concerning mutually determined specific security and defense Projects, *including* the publication of lists of such Projects where the . . . [treaty partner] is the end-user" [emphasis added]. This suggests that there may also be projects under section 2(3) where the Treaty Partner is not the end-user. In addition, the first criterion for such projects, in section 2(3)(a), is that "[t]he purpose of the Project must be focused on meeting the needs of" the Treaty Partner, but a subsidiary objective may be "security and defense exports to third parties."

a. Does section 2(3) of the implementing arrangements allow for "mutually determined specific security and defense Projects" other than ones in which the Treaty Partner "is the end-user?" If so, then under what authority in the treaty is its scope thus being broadened? Or is section 2(3) an amendment to the treaty?

b. What balance between end-use by the Treaty Partner and prospective exports to third parties will be required for a project to be considered to be "focused on" end-use by that government?

c. How will defense articles previously exported for such a project be treated if the balance between end-use by the relevant government and transfer to a third Party changes at some later date and the project is no longer within the scope of the treaty?

Answer. a. No. The formulation follows that in section 2(1) and 2(2), where the participants agree to "develop, establish, maintain and publish information . . . including lists" and allows for the publication of information other than lists. The scope of the treaty is clear; this language does not broaden the scope of Article 3(1)(c).

b. This is not an issue of balance. To meet the requirements of Article 3(1)(c) the end-use must be, first and foremost, for the government of the Treaty Partner. Section 2(3)(a) of the implementing arrangements confirms that the primary purpose of the project must be to meet a legitimate security or defense requirement of the Treaty Partner. If, at some time in the future, the Treaty Partner desires to export to a third country a defense article developed through one of these projects, they will have to obtain USG authorization to do so in accordance with the AECA and the ITAR.

c. If a project is no longer within the scope of the treaty, licensing requirements apply to all exports.

Question No. 27. Will the executive branch consult with Congress in advance of any changes to the list of defense articles exempt from each treaty pursuant to Article 3(2)?

a. If so, what form might such consultations take?

b. Will the public be informed of planned changes to the list of exempt defense articles in advance?

Answer. The administration plans to continue to consult with Congress on the operation of the treaty and on substantial changes affecting its operation.

a. The administration expects to consult with members and staff of oversight committees as appropriate.

b. In general, no; though it is possible that in particular cases the Defense Trade Advisory Group may be advised of planned changes.

Question No. 28. The Foreign Military Sales (FMS) Program was created to provide for sales of U.S. weapon systems to the armed forces of other countries. Why will defense articles exported under the FMS Program be eligible for license-free transfers to approved community members, pursuant to Article 3(3)?

a. What use will likely be made of this option? What weapon systems will likely be transferred, in what numbers, and for what purposes?

b. Does section 5 of the implementing arrangements give the United States any role in determining whether defense articles exported under the FMS Program are within the scope of Article 3(1) of the treaty? If not, why not?

c. Section 5(1) of the implementing arrangements requires that defense articles "exempt from the scope of the Treaty" that are exported under the FMS Program

be listed separately in an FMS Letter of Offer and Acceptance (LOA). Does this requirement apply only to defense articles exempted from the scope of the treaty pursuant to Article 3(2) and section 4 of the implementing arrangements, or also to defense articles that are outside the scope of the treaty because they do not meet the standards of Article 3(1)?

d. Why will each Treaty Partner merely maintain a register of FMS items that are subsequently transferred under the treaty, pursuant to section 5(4) of the implementing arrangements, rather than notifying either the United States or the producer that a weapon system will be, or is being, transferred?

e. Section 5(5) of the implementing arrangements states: "Terms of the FMS LOA unrelated to the provisions implemented under the Treaty will govern." Please explain which provisions of an LOA will be considered "unrelated to the provisions implemented under the Treaty" and indicate, in particular, whether end-use restrictions and security provisos will be among them.

f. How long will it take to develop the procedures required by section 5(5) of the implementing arrangements governing transition of those defense articles acquired and delivered through the FMS Program to their being treated as defense articles exported pursuant to the treaty? How will the executive branch inform Congress of such procedures?

g. Please list those technologies that were approved for release through an Exception to National Disclosure Policy (ENDP) as a part of any FMS sale to either the United Kingdom or Australia since the year 2000. Please indicate whether such ENDP is still in force and, if so: (i) Whether the technology in question will be exempted from the scope of the treaty pursuant to Article 3(2); and (ii) if it will not be exempted, then whether provisos attached to the ENDP will be maintained in any transfer pursuant to the treaty.

Answer. Under the Arms Export Control Act, sales of defense articles and defense services to foreign countries under the Foreign Military Sales (FMS) program are made by the U.S. Government and executed by the DOD. All FMS sales require the approval of the Secretary of State but do not otherwise require licenses that the AECA requires for exports for direct commercial sales where U.S. companies export defense articles or defense services to foreign countries.

The procedures applicable to the export of defense articles and defense services pursuant to an FMS case from the United States to either Her Majesty's Government or the Government of Australia will remain unchanged under the treaties. The intent is to allow for the transfer of defense articles and defense services, without the need for individual approvals from the Department of State, from the armed forces of either the United Kingdom or Australia to approved community members of that country to achieve the broader purposes of the treaty, such as for maintenance, overhaul or repair.

a. For example, we anticipate that aircraft, engines, vehicles and other items may be transferred to approved community members for purposes such as maintenance, overhaul, and repair.

b. Section 5 of the implementing arrangements gives each partner country the discretion to determine whether a transfer meets the treaty criteria. However, the U.S. Government must agree (1) to inclusion of the Operation, Program, or Project on the list, (2) that the technology is not exempt from the scope of the treaty, and (3) to inclusion of nongovernmental members in the relevant approved community.

c. The LOA should identify items that are ineligible for transfer under Article 3(2) of the treaty at the time that the LOA is executed. Prior to any transfer of an item sold pursuant to the FMS program, the partner government must determine that the transfer is for a purpose identified in accordance with Article 3(1) of the treaty. This determination requirement is the same as for items sold commercially and exported pursuant to either treaty.

d. Maintaining a register is not a small requirement on the partner country. It creates a documented record that is available to the U.S. Government for review or tracking of any transfer within the approved community. This is in accordance with procedures for other items transferred within the approved community pursuant to the treaty. The United States does not need or want a notification of each movement, and can meet its responsibilities and address particular concerns by requiring these records to be kept and to be made available for review.

e. All the standard terms and conditions of the LOA will continue to apply, except that the requirement for prior approval of the Department of State for re-transfers of defense articles or defense services will not apply to transfers of defense articles or defense services under the treaty.

f. We are working closely with Her Majesty's Government and the Government of Australia on the various elements of the Management Plan. The administration

is prepared to discuss with the Senate procedures by which the executive branch might notify Congress of the processes and procedures noted in section 5(5).

g. Normally exceptions to the National Disclosure Policy for Australia and the U.K. are not required. Under the National Disclosure Policy, authority to disclose classified military information to both countries has been delegated to the Military Services. However, for certain very sensitive programs involving production (Joint Strike Fighter, the U.K. submarine program, the Australian COLLINS Class submarine program, and advanced infrared countermeasures flares for aircraft) approved exceptions were required. Provisos in the ENDPs will remain in effect regardless of the treaty provisions and apart from the treaty due to the classified nature of the information.

Question No. 29. Section 4 of the implementing arrangements provides that the Treaty Partner's Defense Ministry will develop and maintain a list of defense articles to be exempted from the scope of the treaty; the United States will similarly develop and maintain a list of defense articles to be exempted from the scope of the treaty; and these two lists will be "combined to constitute the list of defense articles exempt from the scope of the Treaty."

a. Is there to be, under each treaty, only one combined exclusion list applying both to exports of defense articles to the Treaty Partner Community and to exports to the United States Community pursuant to Article 8 of each treaty?

b. What is the process for combining these two lists? Please provide details.

c. Will each participant retain the right to exempt certain defense articles from the scope of the treaty despite any objections from the other Party? Or if a Treaty Partner puts an item on its list, will it be possible for the United States to veto adding that item to the combined list?

d. What is the process for removing items from the combined list? If the United States wishes to remove an item from the list that the United States originally added to the list, can it do so without the Treaty Partner's approval?

Answer. a. Each country is obligated to create its own list of items exempt from coverage under the treaty that will be combined in accordance with the implementing arrangements.

b. The process for combining the two lists will be determined by the Management Board.

c. The treaty does not require lists to be mutually agreed.

d. The United States may remove an item from its list without approval of the Treaty Partner; it may not remove an item from the Treaty Partner's list.

Question No. 30. Article 4(1) and Article 4(3) of the treaty with Australia require that entities within the Australian Community be located in the Territory of Australia. Articles 4(1) and 4(3) of the treaty with the United Kingdom do not contain the same requirement. The definitions of "Export" and "Transfer" in the treaty with the United Kingdom make no reference to the Territory of the United Kingdom (only re-exports and re-transfers make mention of the Territory of the United Kingdom). The treaty itself would appear to permit the export or transfer of defense articles to a nongovernmental United Kingdom entity or facility located outside of the Territory of the United Kingdom. Is this correct?

a. Section 7(4)(a) states that nongovernmental United Kingdom entities and facilities "must be on Her Majesty's Government's 'List X' of approved facilities" to be included in the United Kingdom Community pursuant to Article 4(1)(c). Are there any "List X" facilities outside of the Territory of the United Kingdom?

b. Is there any legal bar to a facility outside of the Territory of the United Kingdom being included on "List X?"

Answer. Exports and transfers can only take place between entities within the approved community, within the territory of the United Kingdom or the United States. The only exception to this is the re-export of defense articles to operational theaters in support of U.K. Armed Forces, as described in the Implementing Arrangement Section 9 paragraph 12.

a. No—"List X" sites only exist in U.K. territory.

b. "List X" relies on the protections provided by the Official Secrets Act, therefore a "List X" site could not exist outside of U.K. territory.

Question No. 31. As a matter of policy, under what circumstances will the U.S. Government agree to accepting in the U.K. Community an entity that is located—

a. In a territory of the United Kingdom outside of England and Wales, Scotland and Northern Ireland, pursuant to Article 1(8); or

b. Outside of the territory of the United Kingdom?

Answer. a. The Department of State will evaluate each nongovernmental entity proposed for the approved community on an individual basis, and will consider the

Directorate of Defense Trade Controls Watchlist and any law enforcement information on the entity, as well as any input from the Intelligence Community and the Department of Defense.

b. The Department of State will evaluate each nongovernmental entity proposed for the approved community on an individual basis, and will consider the Directorate of Defense Trade Controls Watchlist and any law enforcement information on the entity, as well as any input from the Intelligence Community and the Department of Defense. We do not anticipate admitting to the approved community entities outside of the territory of the United Kingdom.

Question No. 32. Section 7(4)(a) of the implementing arrangement with the United Kingdom and section 6(4)(a) of the implementing arrangement with Australia seem to make it impossible for a Treaty Partner's nongovernmental entity or facility not on "List X" (or on "the Government of Australia's list of approved facilities for the handling of classified information and material") to be part of the approved community. Is this a correct interpretation?

Answer. To be in the United Kingdom Community, a nongovernmental entity must first be on "List X." Facilities approved by the Australian Government to handle classified information and materials are members of the Australian Defence Industry Security Program (DISP). It is anticipated that the assessment criteria for Australian Community membership application would be similar to those for the DISP membership application. While DISP is designed to provide members with information and guidance to assist in protecting classified information, equipment, assets and material, it is not a prerequisite for entities wanting to join the Australian Community to be DISP members. Current DISP members wanting to join the Australian Community will have to make application to the Australian Department of Defence so that they may be screened against the other assessment criteria pursuant to the treaty and the implementing arrangement.

Question No. 33. What is the process and what are the criteria by which the United Kingdom determines what entities and facilities qualify to be on Her Majesty's Government's "List X" (in light of section 7(4)(a) of the U.S.–U.K. implementing arrangement) and Australia determines what entities and facilities qualify to be on that Government's list of approved facilities for the handling of classified information and material (in light of section 6(4)(a) of the U.S.-Australia implementing arrangement)?

a. In particular, what standards apply for foreign-owned companies in those countries? How do those standards compare to those that are applied by the United States (in light of Article 5(2) of the treaties)?

Answer.

Australia:

The State Department has been advised by the Australian Government of the following:

As stated in the answer to Question No. 32, joining the DISP will not be a prerequisite for membership of the Australian Community per se. Rather DISP membership processes and criteria will be incorporated into the treaty application procedure.

The processes and criteria for DISP membership requires compliance with the Australian Government's protective security standards and obligations, covering physical, personnel, and information and communications technology (ICT) security. There is also a system of regular validations and reviews to ensure that these standards and obligations continue to be met once membership is granted.

Any requirement to obtain membership of the DISP is determined through an evaluation of the merits of each individual case. This requirement is determined by Defence Security Authority (DSA), with due consideration of Australia's international agreements and arrangements, and in consultation with the Defence elements.

The following description covers the current process for membership of the DISP and does not include any potential modification for specific treaty requirements.

Australian defense industry entities who wish to join DISP must provide written sponsorship to DSA including the following information (which will also be necessary for entities applying to join the Australian Community):

- Details of the sponsor. Sponsorship may be from a Defence element, an existing DISP member, or another Australian Government entity.
- The entity's corporate information and structure (see response to Question No. 33a for more detail about how this relates to foreign ownership, control, and influence).

- Accreditation type. Facilities Accreditation, Personnel Accreditation and/or Consultant Accreditation. For Facilities Accreditation the entity must further nominate whether they need accreditation for:
  - Document storage;
  - ICT systems;
  - Equipment storage; or
  - Communications security (COMSEC).
- Accreditation level: RESTRICTED (minimum under the treaty), CONFIDENTIAL, SECRET or TOP SECRET.
- Reason for requiring membership of DISP including:
  - Details of proposed access, including time frames;
  - Project or contract details; and
  - Any likely future considerations.

On receipt of this information DSA assesses the claims for membership including:

- The foreign intelligence threat;
- The risk of unauthorized access to classified material;
- The nature of any foreign ownership, control or influence; and
- The existence of a relevant bilateral government-to-government security instrument for the protection of classified information.

The next stage is the Facilities Accreditation process:

- Facilities Accreditation is an assessment of the physical security of the entity's premises where the entity will be handling, storing, and processing classified information. There are up to four components assessed depending on the entity's particular circumstances (see above).
- Entities receive a management brief outlining what areas of their physical security need to be approved. It is then the responsibility of the entity to make the improvements within a reasonable period of time.

Once an entity has received the Facilities Accreditation it will be assessed against the other Australian Community criteria as outlined in the Implementing Arrangements Section 6(4).

Personnel Accreditation comprises a security clearance process for individuals. Treaty requirements are specified in section 6 (subheading "Access") of the Implementing Arrangement. Defence will fully implement those requirements as well.

a. DISP accreditation requires that, in order to adequately assess the suitability of an entity, the entity must provide DSA with information on the following:

(1) Ownership details through all intermediary companies up to, and including, the ultimate holding company (if applicable);

(2) Ownership details for companies or individuals with:

i. 5 percent or more of the company's voting stock, and

ii. 25 percent or more of the company's nonvoting stock.

(3) Names, addresses, and nationalities of management positions within the sponsored entity, such as Board members, executives and senior managers;

(4) Contracts held with foreign persons and/or entities;

(5) Ownership in whole or in part by any foreign interest; and

(6) Any other factors that indicate a capability of foreign control and/or influence over the management or operations of the entity.

United Kingdom:

The State Department has been advised by the U.K. Government of the following: The criteria and process for any U.K. facility to be placed on the MOD's "List X" is as follows:

- For the purposes of the treaty, a company that wishes to use the treaty will apply to the MOD in the first instance requesting permission to become part of the approved community. The first stage of this application will be clearance of that company's relevant facilities onto "List X."
- A company as a whole does not join "List X," only the particular facility on which the classified material will be stored processed or held is considered and vetted for "List X" status.
- The sponsored site is required to complete a detailed form stating: Company history, Nationality, Parentage, Board makeup and to give such other information as to enable a formal checking process to begin which will cover both the company and the site(s) defined.
- A specialist MOD team conducts initial due diligence checks with various Government Departments/Agencies to seek information with regard to the: Security

record, conduct, ownership and general probity of the company and its defined potential "List X" site(s).

- Issues arising from Foreign Ownership Control or Influence are also assessed. Ownership must be defined and it is required that at least 50 percent of the Board will be British Nationals resident in the U.K. A Board-level contact is identified and this person is named as the responsible Board member and focus for security-related matters.
- One of the major responsibilities of the Board Level Contact and Company Security Controller is to put in place clear procedures for and guarantee the segregation and protection of relevant protectively marked material (such as treaty material).
- The Board member chosen as the security focus and the potential Company Security Controller are identified and each is security cleared to at least SC level through the Defense Vetting Agency.
- When all company/site due-diligence checks are completed these are considered by the Directorate of Defense Security within the MOD.
- If all is in order, a specialist Field Security Assurance Officer visits the site to consider and advise on physical security measures and give a brief to both the Board-level contact and the Company Security Controller. Training is made available for both.
- Once the site can demonstrate compliance with the required security standards it is placed on "List X."
- A "List X" site is governed by Cabinet Office security regulations (the Manual of Protective Security) and subject to regular Directorate of Defense Security inspection/audit and guidance.

a. Both governments have Foreign Ownership, Control, or Influence (FOCI) policies similar to U.S. policies. Industrial Security Agreements with the U.K. and Australia have requirements for FOCI. Companies that are determined by security authorities in both countries to be under financial, administrative, policy, or management control of individuals or other entities of a third Party country may participate in a contract or subcontract requiring access to classified information provided by the U.S. only when enforceable legal measures are in effect to ensure that individuals or other entities of a third Party country will not have access to classified information that is provided or generated under the contract or subcontract. If enforceable legal measures are not in effect to preclude access by individuals or other entities of third-Party countries, the written consent from the U.S. must be obtained prior to permitting such access.

Question No. 34. The committee understands that if a foreign-owned entity or facility is to be on "List X," one Board member must act as the security focus and take responsibility for security matters within the company, and that such Board member "is answerable under the law."

a. Please explain what this means.

b. Does this person have special responsibilities under the Official Secrets Act?

Answer. The State Department has been advised by the U.K. Government of the following:

a. All persons within the U.K. are subject to the Official Secrets Act (OSA) irrespective of their employment, status or nationality and are individually responsible for protecting classified material. However, the Board Level Contact is specifically tasked within the company to have Board-level responsibility for security at the relevant "List X" site or sites. This makes them specifically accountable for ensuring the company's security arrangements are fit for purpose. Therefore, in the event of an infringement that occurred due to a failure in security process, it would be that individual who would be seen to be both responsible and to have failed in his/her duty under the OSA. The Company Security Controller could also share liability where processes had been blatantly broken or negligently ignored.

b. Neither the Board Level Contact nor the Company Security Controller have named and defined functions under U.K. legislation. However, as individuals they have liability under the Official Secrets Act, as does any other person while in the U.K. They both also have defined and agreed roles within the company or "List X" facility, meaning a failure by the company as a whole could make these individuals the subject of a criminal prosecution under U.K. law.

Question No. 35. May section 7(4)(a) of the implementing arrangement with the United Kingdom, and section 6(4)(a) of the implementing arrangement with Australia, be amended or deleted without the advice and consent of the United States Senate?

Answer. Yes. However, the administration is prepared to discuss with the Senate procedures by which the executive branch might notify Congress in the event of such an intended change.

Question No. 36. Section 7(4)(c) of the implementing arrangement with the United Kingdom and section 6(4)(c) of the implementing arrangement with Australia note that one criterion against which potential members of the United Kingdom or Australian Community will be judged is "previous convictions or current indictments" for violating United States export laws or regulations. Why were the other conditions required by section 38(g)(4) of the Arms Export Control Act for issuing a license without a Presidential determination—that is, those conditions unrelated to export control laws or regulations—not also included as criteria for assessing inclusion in the United Kingdom or Australian approved community?

Answer. The referenced sections of the implementing arrangements provide sufficient discretion to the executive branch for it to refuse inclusion of a nongovernmental entity into the respective approved community based on the criteria identified in section 38(g)(4).

Question No. 37. Will the United States Government be able under the treaties to request removal from the approved community of a nongovernmental United Kingdom/Australia entity or facility for any reason it deems to be in its "national interest" (pursuant to section 7(9) and section 6(9) of the implementing arrangements, respectively), independent of the criteria in section 7(4) and 6(4)?

Answer. The referenced sections of the implementing arrangements provide sufficient discretion to the executive branch for it to remove a nongovernmental entity from the respective approved community based on national interest of the U.S.

Question No. 38. Article 4(1)(d) of the treaties requires that nongovernmental Treaty Partner employees who are in the approved community be employees of an entity or facility that is also in the approved community, and that they have security accreditation and a need-to-know. Section 7(11) of the U.S.–U.K. implementing arrangement addresses the latter requirement, but does not address the former one or cite Article 4(1)(d). Is it the intent of the drafters that the section 7(11) requirement be an elaboration on the Article 4(1)(d) requirement, rather than a substitute for it?

- a. Is it similarly the intent of the drafters that Treaty Partner government personnel in the approved community, pursuant to Article 4(1)(b), will have to be associated with a Treaty Partner government facility that is related to the scope of the treaty, pursuant to Article 4(1)(a)?

Answer. The requirement in section 7(11) is an elaboration of the requirement found in Article 4(1)(d). In regard to Treaty Partner government personnel, while it is expected that such personnel would be assigned to organizations related to the scope of the treaty, it is possible that an appropriately cleared government person with a particular expertise from another agency might be brought in to work on an operation, program or project under the scope of the treaty.

Question No. 39. Articles 4 and 5 of the treaties use the phrase "security accreditation and a need-to-know." Does "security accreditation" mean the same thing as "security clearance"? If not, please explain how the two terms differ.

Answer. For the purposes of the treaties, the two terms are interchangeable.

Question No. 40. Article 4(1)(d) and section 7(11) of the U.S.-U.K. implementing arrangement (section 6(11) of the U.S.-Australia implementing arrangement) state that access to defense articles will be granted only to those individuals with, in addition to the appropriate security clearance, a "need to know."

a. Who will determine the "need to know" of an individual working for a nongovernmental Treaty Partner entity or facility, given that the Treaty Partner government will not know that such defense article has been exported or transferred to that individual's employer?

b. Will the "need to know" for particular entities, facilities, and personnel be limited to particular projects? Or will it be permissible to transfer defense articles between projects?

Answer. a. As with current security practices, the "need to know" requirement will generally be met and handled by approved community members rather than centrally managed or controlled by the Treaty Partner.

b. In the context of the treaties, the "need to know" requirement will be governed by the scope and limitations of the treaty and not a particular operation, program, or project. Consequently, entities in the approved community may utilize defense articles for different operations, programs, or projects without government review or

approval as long as the operations, programs, or projects fall within the scope of the treaties and meet treaty requirements.

Question No. 41. How will the U.S. Government vet all eligible foreign end-users for inclusion in the U.K. and Australian Communities? Which U.S. agencies will participate in such vetting?

Answer. The vetting of approved community members is detailed in the implementing arrangements for each country. In the case of the United Kingdom, entities must first be on "List X." In the case of Australia, procedures will follow those for the Australian Defence Industrial Security Program (DISP) and additional criteria determined by the Australia Department of Defence (see response to Question No. 32). The United Kingdom and Australia will review and vet requests by entities seeking membership in their respective community, and the United States and the Treaty Partner will mutually determine which entities are allowed to join the approved community. In making its determination, the Department of State will evaluate each nongovernmental entity proposed for the approved community on an individual basis, and will consider the Directorate of Defense Trade Controls Watchlist and any law enforcement information on the entity, as well as any input from the Intelligence Community and the Department of Defense.

Question No. 42. Would access to defense articles exported pursuant to the treaties be limited to nationals of the United States and the relevant Treaty Partner? Or is it reasonable to expect that some third-country nationals will also have such access, by virtue of having Treaty Partner security clearances and a need to know?

Answer. A limited number of third country nationals may have access to defense articles exported pursuant to the treaties. Section 6(14) of the implementing arrangement with Australia provides that no nationals of third countries who are not also Australian citizens will be permitted access to defense articles without the prior authorization of both the Government of Australia and the United States Government, unless both governments agree to a different procedure and that procedure is detailed in the Management Plan. Section 7(11) of the implementing arrangement with the United Kingdom provides that serving members of Her Majesty's Armed Forces may have access to defense articles exported under the treaty, and some of those individuals may be third country nationals, such as the Nepalese Gurkhas. Section 7(12) of the implementing arrangement with the United Kingdom provides that access may not be granted to individuals with close ties to countries or entities of concern to either the U.S. or the United Kingdom unless both governments agree.

Question No. 43. Will the U.K. and Australian Communities include any distributors of parts and components, or only end-users of parts and components?

Answer. Neither the treaties nor the implementing arrangements preclude distributors from being members of the approved community. However, it is highly unlikely that this would happen as such distributors would have to be cleared to handle classified information or material by the Treaty Partner.

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. 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. 45. Will a United States nongovernmental firm, individual or entity wishing to join the United States Community under the treaties have to meet the eligibility requirements set forth in 22 CFR 120.1(c) regarding eligibility to export? If not, how and why would the requirements differ?

a. What information will the firm, individual, or entity have to provide to the Department of State?

b. What documentation would the firm, individual, or entity need to provide the State Department's Directorate of Defense Trade Controls in the Bureau of Political-Military Affairs (PM/DDTC) prior to making exports under the treaties?

c. What procedure will be adopted to identify the applicant, the freight forwarder, any intermediate consignees and the end-users with respect to a proposed export, to verify the accuracy of information provided by the exporter or freight forwarder, and to confirm the legitimacy of the transaction under the treaties?

d. What information will be shared with, or sought from, U.S. law enforcement agencies?

Answer. To be in the U.S. approved community, a United States nongovernmental firm, individual, or entity must be both registered with the Department of State and satisfy the eligibility requirements in 22 CFR 120.1(c).

a. Firms, individuals, and entities would have to provide all information currently required under the registration requirements of the ITAR.

b. No additional requirements are envisioned for exports other than for those exports which the administration intends to provide advance notification to Congress.

c. The procedures used will be the same as those used under the ITAR for exports under an exemption.

d. As is current practice and in accordance with the requirements of the AECA, all registration applications will be vetted with law enforcement and run against the Directorate of Defense Trade Controls Watchlist.

Question No. 46. Section 38(g)(4) of the Arms Export Control Act requires a case-by-case Presidential determination, predicated on a Presidential finding, before issuing an export license if any Party to the export meets certain conditions. Article 5(2) of the treaties requires that nongovernmental entities be "eligible to export defense articles under United States law and regulation" to be a member of the United States approved community.

a. Can a nongovernmental United States entity that meets the condition of section 38(g)(4) of the Arms Export Control Act be considered "eligible to export defense articles" without the Presidential determination and finding required by the Arms Export Control Act?

b. Will case-by-case reviews occur before such an entity is included in the United States approved community?

c. How will entities that employ individuals who meet the conditions of section 38(g)(4) be dealt with?

d. How will nongovernmental U.S. entities (and their previous exports) be dealt with if, after having been members of the United States Community, such entities (or employees thereof) meet the conditions of section 38(g)(4)?

Answer. Article 5(2) of each treaty provides that, to be in the approved community in the United States ("U.S. Community"), a United States nongovernmental firm, individual, or entity must be both registered with the Department of State and satisfy the eligibility requirements in 22 CFR 120.1(c).

a. Nongovernmental U.S. entities that are registered and eligible (and therefore in the U.S. Community) will be removed from the approved community if the Department of State is prohibited from issuing them licenses pursuant to section 38(g)(4).

b. Yes; the case-by-case review procedures and regulatory practices currently followed by the Department of State in regard to questions of eligibility, granting exceptions for specific transactions and reinstating an entity's eligibility in accordance with 38(g)(4) will continue to apply. Nongovernmental U.S. entities that are registered and eligible (and therefore in the U.S. Community) will be removed from the approved community if they become ineligible.

c. Individuals that meet the conditions of section 38(g)(4) are generally ineligible and would therefore not be permitted to participate in an export under the treaty. The eligibility of entities that employ such individuals will be reviewed on a case-by-case basis.

d. U.S. entities that become ineligible (and their previous exports) will be subject to case-by-case review procedures and regulatory practices currently followed by the Department of State in regard to questions of eligibility, granting exceptions for specific transactions, and the treatment of prior exports.

Question No. 47. Why do the treaties and implementing arrangements make any U.S. registered company that is otherwise eligible to export defense articles also eligible to make unlicensed exports to the United Kingdom and Australia, instead of limiting eligibility to companies with a track record of trustworthiness in previously monitored transactions or in handling sensitive information?

a. How will the U.S. Government prevent front companies from procuring defense articles, declaring them as license-free exports to the United Kingdom or Australia, and diverting them to a third country or other unauthorized end-user?

Answer. In drafting the treaties and implementing arrangements, the administration sought to have a significant impact on how defense trade is conducted with these two key allies. To do this, it was decided to include all U.S. registered exporters to provide the benefits to all and to establish a foundation for a new paradigm for defense cooperation. This decision not to winnow this list down to a subgroup of registrants also was based in recognition that U.S. registrants already undergo review and vetting against the Department's Watchlist and with law enforcement.

a. It is the vetting process which we believe minimizes the risk of front companies registering with the Department of State for the purposes of acquiring defense articles and exporting them as treaty-related exports and then diverting them to unauthorized destinations. Unauthorized exporters will remain subject to the criminal and civil penalties of the AECA.

Question No. 48. Article 5 of each treaty requires, "as appropriate, security accreditation and a need-to-know" of employees of both governmental and nongovernmental entities in the United States Community.

a. Will a person's past conduct, under the treaty or otherwise, affect security accreditation determinations for the employees of nongovernmental entities even if the nongovernmental entities are eligible to export defense articles under United States law and regulation?

b. Will security accreditation be required of employees in the United States Community who do not handle classified exports or transfers? Will any U.S. persons be required to obtain "security accreditation and a need to know" that they do not already have?

c. If so, who will determine the criteria on the basis of which accreditation and need-to-know decisions will be made, who will make those decisions, and what process will there be to appeal a negative decision?

Answer. a. Yes; an employee's past conduct, under the treaties or otherwise, may affect the individual's eligibility for security accreditation but it will not have an effect on the nongovernmental entities' security accreditation unless the employee is also identified as key management personnel. If the employee is identified as key personnel, the nongovernmental entity may elect to remove the employee from the key position pending the result of an investigation or final disposition of the security issue.

b. No; security accreditation will not be required of employees in the United States Community who do not handle classified exports or transfers. For the U.K. Treaty, only those U.S. persons having access to exports or transfers classified at the CONFIDENTIAL level or higher will be required to obtain "security accreditation and a need-to-know." Under the Australian Treaty security accreditations for U.S. persons and nongovernmental entities will be required only when access to Australian RESTRICTED and higher information is involved.

c. The basis on which accreditation and need-to-know decisions are made are based on E.O. 12958, "Classified National Security Information;" E.O. 12968, "Access to Classified Information;" and E.O. 12829, "National Industrial Security Program." Department or agency heads are responsible for determining access based on a favorable adjudication of an appropriate investigation of the employee and a determination of a need-to-know based on a lawful government purpose. Within the Department of Defense, the Defense Office of Hearings and Appeals handles hearings and appeals on negative security accreditation decisions. E.O. 12968 sets forth similar hearings and appeals proceedings for all other departments and agencies in the executive branch.

Question No. 49. How will an entity know that it is a member of the United States Community? Will there be a publicly available list of members of the United States Community?

Answer. To be in the U.S. Community an entity must be registered with the Department and eligible to export as defined in the regulations promulgated pursuant to the treaties. Such registrants will know they are in the approved community by virtue of this registration and the regulations. At this time, there is no plan to publish a list of entities registered with Department and in the approved community. Such information is considered proprietary and there are practical reasons (e.g., registration is at a corporate not the business unit level) why publishing such a list would not be workable.

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?

a. 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?

b. 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.

c. What are the possible advantages and disadvantages of requiring that freight forwarders and consignees for exports and transfers be certified customs brokers?

d. 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 U.S., 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 under the treaty to those 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, is exploring the options and will implement in the regulations promulgated pursuant to the treaties.

The legal basis for placing requirements on the freight forwarders and intermediate consignees comes from the treaties and implementing arrangements.

Question No. 51. Please summarize the reporting and approval requirements that will pertain for nongovernmental entities in the United States Community regarding activities under the treaties, and compare them to the reporting and approval requirements that pertain under existing law and regulation.

Answer. The reporting and approval requirements are the same as those now required of exporters who currently claim an exemption. Under the treaty, there would be no case-by-case approval of exports. The treaties replace the transactional approach to export licensing to one driven by approved communities, limited purposes, and delineated technologies. Recordkeeping requirements under the treaties will be robust and largely mirror existing recordkeeping requirements applicable to defense trade that are specified in the ITAR. Such records would include purchase orders, shipping documents and electronic shippers export documents filed in the Automated Export System. Similar to existing requirements, these records must be made available to the U.S. Government upon request.

Question No. 52. Executive branch officials have stated that in the last 2 years, the State Department has processed over 13,000 export licenses for the United Kingdom, with only 16 denials.

a. For how many of those 13,000 license applications was the President required to notify Congress pursuant to section 36 of the Arms Export Control Act (22 U.S.C. 2776(c))?

b. How many licenses did the United States approve for Australia in the same timeframe, and how many of those were denied?

c. Would any of the proposed exports to the United Kingdom or Australia that were denied licenses have been permitted if the treaties had been in effect? If so, please indicate the defense articles and end-users in question. If not, please cite the specific safeguards in the treaties that would have prevented such exports from occurring.

d. How many of the license applications for the United Kingdom and Australia were returned without action (RWA) by the State Department's Directorate of Defense Trade Controls in the past 5 years (2003–2007)? Please provide separate data with regard to each country.

e. How many of the license applications for the United Kingdom and Australia were approved with provisos? Please estimate the proportion of the applications approved with provisos that would have been eligible for license-free export if the treaties had been in effect, and indicate what sorts of provisos are thus likely not to be imposed under the treaties.

f. What is the current median processing time for license applications for the United Kingdom and Australia?

Answer. a. There were 24 Congressional Notifications during that period, none were subject to a joint resolution recommending denial.

b. Over the past 2 years, 4,087 licenses were approved for exports to Australia, 12 cases were denied.

c. Exports pursuant to the treaties will be in accordance with procedures that clearly exclude technologies of concern, limit the potential end-users to those that have been vetted, and limit the potential end-uses. In the absence of the specific lists that will encompass the approved communities, the approved operations, programs, and projects, or the excluded technologies, it is not possible to determine the effect in this limited number of cases.

d. For the period in question, 5,527 cases destined to the United Kingdom were returned without action, 1,976 destined to Australia were similarly treated.

e. During the last year, 1,678 licenses were approved with provisos for Australia, 3,861 licenses were approved with provisos for the United Kingdom. As addressed in response to Question "c" above, exports pursuant to the treaties will be in accordance with procedures that clearly exclude technologies of concern, limit the potential end-users to those that have been vetted, and limit the potential end-uses. In the absence of the specific lists that will encompass the approved communities, the approved operations, programs, and projects, or the excluded technologies it is not possible to determine the effect in these cases.

f. Seven days and eight days respectively.

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?

a. 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?

b. 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 re-transfer or a re-export pursuant to Article 1?

Answer. The requirements applicable to freight forwarders and intermediate consignees will be specified in the regulations promulgated pursuant to 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 and implementing arrangements.

Question No. 54. Article 6 and section 10 of the implementing arrangements set standards for the marking of defense articles. How will these standards apply in the United States and in each Treaty Partner regarding oral communications (whether face-to-face or electronic) and electronic communications of text other than attached documents?

Answer. The requirements for marking are discussed in the implementing arrangements and will be detailed as well in the regulations to be published in accordance with the treaties. These requirements are designed to ensure that all treaty exports regardless of their form—tangible, intangible, oral, electronic, physical, etc.—will be clearly marked or identified and properly controlled. The U.S. and its Treaty Partners will employ current security policies and procedures to implement Treaty Implementing Arrangement Section 10, paragraph 10(c)(ii) requirements regarding marking and identification of such communications. Such marking and identification practices are already well understood and practiced by those with clearances to handle classified information. Specifically, technical data (including data packages, technical papers, manuals, presentations, specifications, guides and reports), regardless of media or means of transmission (physical, oral or electronic) will be required to be individually labeled or, where such labeling is impracticable, be accompanied by documentation (such as contracts, invoices, shipping bills, or bills of lading) or a verbal notification clearly associating the technical data with the appropriate markings.

The Department of Defense is drafting guidelines and procedures to cover when and how exports and transfers are to be marked in a change to the National Industrial Security Operating Manual (NISPOM) and DOD 5200.1–R, "Information Security Program." In addition, special guidance will be issued to cleared U.S. defense industry entities on marking and other treaty compliance provisions. Under current security and disclosure regimes for oral and electronic communications, the identification of the classification and controls will be made at the beginning and end of such communications.

Question No. 55. Given that the term "Transfer" is defined as "the movement of previously exported defense articles within the approved community" (Article 1(9) of the U.K. treaty and Article 1(1) of the Australia treaty), can a transfer be effected under the treaty if it uses a freight forwarder or an intermediate consignee that is not in the approved community?

Answer. The requirements applicable to freight forwarders and intermediate consignees will be specified in the regulations issued in accordance with the treaties. These regulations will detail the ability of freight forwarders and intermediate consignees to participate in treaty exports. Initial exports and subsequent transfers under the treaties will have to comply with these requirements once established.

Question No. 56. Section 5(2)(a) of the implementing arrangements requires the Treaty Partner to determine that an initial transfer of defense articles acquired under the FMS Program "falls within the scope of Article 3(1) and that, at the time of the transfer, such defense articles are not exempt from the scope of the Treaty." Given that the Treaty Partner must make this determination, why is it not required to inform either the U.S. Government or the producer of the defense articles in question of the transfer?

Answer. This is in accordance with procedures for other items transferred within the approved community pursuant to the treaty. The U.S. does not need a notification of each movement, but requires records to be kept and made available for review.

Question No. 57. Article 2 states that each treaty "provides a comprehensive framework for Exports *and Transfers,* without a license or other written authorization, of Defense Articles . . . *to the extent that such Exports and Transfers are in support of the activities identified in Article 3(1)*" [emphasis added]. Article 7 permits the transfer within each Treaty Partner Community of defense articles exported pursuant to the treaty, but makes no reference to a requirement that transfers be in support of activities identified in Article 3(1). Do all Parties to the treaties agree that transfers must be in support of the activities identified in Article 3(1)?

Answer. Yes.

Question No. 58. What controls will apply to defense articles exported pursuant to the treaty that are then transferred to the United States by members of the U.K. and Australian Communities who come to the United States to continue work on projects or programs for which the exports were made under the treaties?

Answer. Transfers and exports under the treaty may occur within the United States. In the situation described, involving members of the approved community, the treaty would apply provided the operations, programs, or projects remain within the scope of the treaty and the defense articles involved are not exempt from the scope of the treaty.

Question No. 59. What will happen to items that are exported under the treaties (or exported under the FMS program and then treated as an exported item), but subsequently are removed from the United States Munitions List and become subject to the controls of the Export Administration Regulations and the Commerce Control List (CCL)? Will there be any requirement for U.S. exporters to notify the Department of Commerce or seek approval for past license-free exports and transfers?

a. How will any such changes in statutory and regulatory controls be implemented in the United Kingdom and Australia to ensure that such items receive adequate scrutiny and appropriate control, if such control is required under the EAR and the CCL?

b. How will the executive branch ensure that foreign nationals who may not be aware of the change in U.S. regulations regarding such items will understand the controls applied to such items when they change jurisdiction from the ITAR to the EAR?

Answer. The Export Administration Regulations and the Commerce Control List (CCL) do not require notification of transfers once an export reaches its destination country. The designation of the item under the treaty will serve to ensure that USG approval will be required when re-transfer outside of the approved community or re-export from the Treaty Partner country is required, stricter requirements than required by the Department of Commerce. The Department of State can notify the recipient of the change of jurisdiction at that time.

Question No. 60. What legal or regulatory authorities and what programs already exist, under which license-free exports to the United Kingdom and Australia (including project authorizations) have occurred since 2003? Will such defense articles be eligible to be treated as though exported under the treaty? If so, under what authority in the treaty will this be permitted?

a. What procedures will apply if defense articles exported under other cooperative programs are to be transitioned to treaty status? In particular, who will decide these questions and what consultation or notification will be required?

b. Will there be any reporting requirements or limits on the number or size of shipments, similar to those in parts 123.16, 125.4, and 126.14 of the ITAR?

Answer. License-free exports have occurred under various exemptions provided for in the ITAR, such as exemptions of general applicability ITAR 125.4. (Project authorizations are licenses; exports under their terms are not license free). Such exemptions will continue to be available to exporters if they chose to use them. Articles transferred pursuant to such exemptions are eligible to be treated as though exported under the treaties provided the members of the approved communities follow the procedures established in section 7 of the implementing arrangement with Australia or section 8 of the implementing arrangement with the U.K.

- a. For defense articles previously exported in support of cooperative programs, the Transition provisions in section 7 of the implementing arrangement with Australia and section 8 of the implementing arrangement with the U.K. will apply. The draft Defense Trade Cooperation Treaty Regulations contain information on the Transition notification process.
- b. There are no limits on the number or size of shipments. The administration intends to provide advance notification of exports that would meet or exceed the Congressional Notification thresholds of the AECA Sec. 36 (c) and (d).

Question No. 61. Article 8(1) of the treaty with Australia provides that all exports "to the United States Community under this treaty shall not require export licenses or authorizations" except under blanket authorizations. Article 8 of the treaty with the United Kingdom provides only that such exports "shall not require *additional* export licenses or other authorizations" [emphasis added], and the committee understands that some British arms exports to the United States do currently require case-by-case licenses. Why did the United States agree not to change current British procedures in this regard? Will Australia have to change any of its current procedures?

a. Given that the United Kingdom, like the United States, will have the right under Article 3(2) to designate certain defense articles as outside the scope of the treaty, why will it need also to maintain its current case-by-case license requirements?

Answer. Under the United Kingdom's export licensing system, open general licenses (OGELs) are considered export licenses, though they are not "case-by-case licenses." As the U.K. intends to utilize OGELs to implement the treaty, the term "additional" in this context means licenses other than OGELs (or equivalent successor authorizations should the U.K. revise its system) that do not require case-

by-case review and approval by the British Government. The Government of Australia is revising it laws and procedures to update its export controls and to implement the treaty. The treaty does not require exporters to use its provisions; in accordance with Article 3(4) exporters may opt to use traditional export licenses. Australia plans to amend legislation in order to implement a system of "license-free" movement for defense articles pursuant to the treaty. This will involve amending the Customs (Prohibited Export) Regulations 1958 and Customs (Prohibited Import) Regulations 1956 to allow members of the approved community to import and export goods pursuant to the treaty without having to seek the individual licenses that would normally be required under these regulations. Members of the Australian Community will be issued with an approval or authorization that will officially identify them as members and will allow them to move defense articles pursuant to the treaty within the approved community without having to seek individual licenses.

Question No. 62. Article 9 generally requires Treaty Partner approval of all re-transfers and re-exports, with "supporting documentation that includes United States Government approval of the proposed re-transfer or re-export." What procedures will be adopted to assure that U.S. Government approval has been obtained?

a. Must these approvals be on a case-by-case basis, or do the treaties permit the use of blanket authorizations by the Treaty Partners? If the latter is the case, how will the United Kingdom modify its blanket authorization system to require the documentation of U.S. Government approval?

b. What form(s) will the "supporting documentation" take?

c. Can the "supporting documentation" be oral, or must it be written?

d. Will an e-mail suffice, or will there have to be a written document supporting that e-mail (e.g., in an attachment)?

Answer. The U.K. will make changes to its existing procedures for controlling the release of classified material (the F680 process). For transfers under the treaty, a check will be made to ensure that USG approval for re-exports or re-transfers has been granted. As all treaty material will be classified, those wishing to re-export or re-transfer must seek approval from the U.K. MOD. If they do not they will have breached the Official Secrets Act by releasing classified material without authorization. The MOD will require evidence that the USG has approved such a release before granting its own approval. The U.K.'s export control processes will be changed to make it a requirement of treaty-related export licenses that an MOD security release authorization has been granted.

a. The re-export and re-transfer processes are there to deal with exceptional instances when treaty material needs to be moved outside of the approved community—companies should not use the treaty if they intend to re-export or re-transfer at a later date. Approval of re-exports and re-transfers will be on a case-by-case basis, to allow the appropriate checks to be made that the proposed recipient is suitable to receive the treaty material. The U.K.'s Open General Export License (OGEL) will only permit exports to companies within the approved community. Re-exports and re-transfers will therefore not be covered by the OGEL.

b-d. The administration has determined that the supporting documentation will be written, most likely in the form of a license or other existing authorization issued from the Department of State. Once finalized, the U.K. MOD will only accept authorization evidence in this form. E-mail and oral documentation will not suffice.

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 re-transfer or re-export 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 re-transfer or the re-export of defense articles exported pursuant to the treaties?

b. If notification to Congress of proposed re-transfers and re-exports 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 re-exports or re-transfers?

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 re-transfer or re-export pursuant to the treaties is outside of the scope of the treaties, re-transfer or re-export authorization would be provided in accordance with section 38 of the Arms Export Control Act (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 No. 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 re-transfer 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 where 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 apply, although an export pursuant to the treaties 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. 64. Please provide an authoritative list of the circumstances in which notice to Congress that is currently required by law will no longer be legally required under the treaties.

a. Under which of these circumstances does the executive branch intend to notify Congress as a matter of policy, even though it will no longer be required by law to do so? In those cases, how will notification differ, in character or in timing, from that which is currently provided?

b. The committee has been informed that the executive branch intends to exempt from treaty coverage defense articles, regardless of classification (including those modified or improved), when used for marketing purposes, that have not previously been licensed for export by the U.S. Department of State, Directorate of Defense Trade Controls. Will this exemption result in continued notice to Congress of the first export of a given defense article even if such export is a direct commercial sale, or will it not result in any continued notice to Congress because the exemption pertains only to marketing licenses (as opposed to permanent exports of equipment)?

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

Exports from the United States pursuant to either treaty will not require, as a matter of law, notification pursuant to section 36 (c) or (d) of the Arms Export Control Act (AECA). Transfers within the approved community will not require notification pursuant to section 3(d) of the AECA.

a. The administration plans a notification process to provide Congress information on exports that meet or exceed the notification thresholds of AECA section 36 (c) and (d). The administration intends to provide such information 15 days prior to export and this notification will contain the same information as required under the statute. The administration intends to notify Congress of any request to re-transfer or re-export 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.

b. Exports of such defense articles will be governed by section 38 of the AECA and therefore the requirements of section 36 would apply.

Question No. 65. Article 9(2) states that "Defense Articles that have approval to be Re-transferred or Re-exported shall be governed by the terms and conditions of such approvals of the United States Government." As a matter of law, will those terms and conditions have to comply with requirements set forth in the Arms Export Control Act (e.g., in section 3(a))?

a. As a matter of policy, will the executive branch ensure that those terms and conditions comply with all requirements in the Arms Export Control Act regarding third-Party transfers?

Answer. Re-transfers and re-exports will as a matter of policy and law include obligations required by the AECA and the International Traffic in Arms Regulations.

Question No. 66. Why is Article 10 (contained in each treaty) necessary?

a. If a member of the approved community wants to transfer a defense article to a firm other than the original producer of the defense article, is either Party to the treaty under an obligation to determine whether the original producer has approved or will be compensated for the transfer?

b. If a Party to the treaty knows that a member of the approved community intends to transfer a defense article to a firm other than the original producer of the defense article without permission from the original producer, is the Party under any obligation to stop the transfer?

c. If a transfer that infringes upon asserted intellectual property rights of a U.S. firm is authorized by a Treaty Partner (e.g., because it is a transfer of a defense article originally exported under the Foreign Military Sales program), what legal recourse will that firm have?

d. If defense articles exported under the treaty have been incorporated into other end items or have been modified or changed by a member of the approved community, would the United States or the original producer still have an ability to assert controls over such items pursuant to the treaties or their implementing arrangements?

e. What does "pursuant to this Treaty" mean at the end of Article 10(1)?

f. Could a situation arise in which the intellectual property rights of persons or entities within the approved community would require a loosening of the security standards otherwise applicable under the treaties? If so, please explain why that might occur and how it would be handled.

Answer. The treaty only addresses export licensing; intellectual property issues are outside of the scope of the treaty.

a. That issue is outside of the scope of the treaty.

b. This issue is outside of the scope of the treaty.

c. The treaty only deals with export licensing; the firm will have the same legal recourse currently available.

d. The United States continues to have export licensing jurisdiction over such items. With regard to intellectual property or other rights, they are outside of the scope of the treaty.

e. It modifies the phrase "Approved Community," and makes clear that inclusion in the approved community does not grant or diminish intellectual property rights.

f. The treaty removes the requirement for an export license. It does not deal with intellectual property rights. If, because of intellectual property restrictions, an item does not qualify for export under the treaty, existing export licensing procedures will be used.

Question No. 67. Article 11(3) of each treaty uses the term "safeguarded," a term not found in Article 11(1). What is the reason for the difference?

Answer. Although the term "safeguarded" is not found in Article 11(1), both sections 11(1) and 11(3) of both treaties refer to the GSAs which provide for the safeguarding and protection of classified information. The term "safeguarded" was added to Article 11(3) to place additional emphasis on the need to protect defense articles at higher levels of classification.

Question No. 68. The Department has stated to the committee that items exported under the treaty with the United Kingdom would be subject to the Official Secrets Act and that U.K. Crown Servants and Government Contractors within the approved community will be responsible for ensuring that defense articles are suitably protected. The terms "Crown Servants" and "Government Contractors" are defined under section 12 of the Official Secrets Act 1989.

a. Will all nongovernmental members of the United Kingdom Community and their employees meet the definition of "Government Contractors?" Or could there be nongovernmental members of the U.K. Community that were not "Government Contractors," perhaps because all their work involved the United States Government as the end-user?

b. What offense under the Official Secrets Act 1989 would be committed by an employee of a nongovernmental approved community entity who inappropriately retransferred defense articles, or provided them to an individual without the need to access defense articles (although they were appropriately marked pursuant to the treaty and its implementing arrangements)?

c. What offense would be committed by such a person if the activity occurred outside the United Kingdom, either before the defense articles were appropriately marked (e.g., at an intermediate stop in their initial export) or, with regard to technical data, during an overseas visit, or if Her Majesty's Government could not show that any damage had resulted from the improper activity?

d. Would there be some other offense(s) committed under United Kingdom law in the cases described in Questions "b" and "c"?

Answer. a. The U.K. Government has informed us that, yes, as approved community members using the treaty to support USG-only projects they would be covered under section 12(2) b of the Official Secrets Act, which defines a "Government Contractor" as one which provides goods or services under an agreement with another nation, namely the treaty.

b. Subject to having sufficient evidence to prove all elements of the offense, and depending on the circumstances, an offense could be committed under section 2

(Defence), section 3 (International Relations), section 5 (Information resulting from unauthorized disclosures or entrusted in confidence) or section 8 (Safeguarding of Information).

c. The Official Secrets Act applies overseas only if the activity concerned is carried out by a British citizen, Crown Servant or by any person in any of the Channel Islands or colony, and if the activity would amount to an offense if done in the U.K. However, should any other individual move treaty material outside of the approved community without authorization while overseas, they will have breached U.K. Export Control laws, as they would not have a valid export license for such a transfer. It is a requirement of the OSA that any disclosure must be damaging (as defined by the act). No offense will have been committed under the OSA where damage cannot be shown.

d. If treaty material was exported from the U.K. without authorization, an individual could be prosecuted for a breach of the Export Control Act. If however the goods did not touch U.K. soil but the act leading to the export from one third country to another was conducted either by an individual based in the U.K. or by a U.K. citizen based anywhere else in the world, such an individual could be prosecuted under the Trade in Goods (Control) Order 2003.

Question No. 69. What protections does each Treaty Partner accord to "Restricted" information, and how do they compare to the protection that the United States gives to "Confidential" information or to "Sensitive but Unclassified" or "For Official Use Only" information?

a. The U.K.'s Manual of Protective Security reportedly permits "Restricted" information to be stored and processed on unclassified corporate networks and e-mail systems. Under this circumstance, how will one limit access within a firm to those individual employees having a U.K. clearance at the "Security Check" level and a "need-to-know," as provided in section 7(11)(b) of the implementing arrangement with the United Kingdom?

Answer. The Australian Government has advised the State Department of the following:

Defense security policy as it relates to information security is based upon the Australian Government Protective Security Manual (PSM). The PSM dictates mandatory requirements for all Australian Government departments and agencies in the management of protective security.

Australia's Department of Defence applies the principles of the PSM to its own operations through the Defence Security Manual (DSM). The DSM also applies to industry through the Defence Industry Security Program. DSM policy will apply to members of the Australian Community.

Protection of RESTRICTED information is based upon the following standards:

- Need to know.
- Holding an appropriate security clearance (minimum of RESTRICTED in this instance).
- Classified information must be stored in a container (for example a secure filing cabinet) appropriate to its classification.
- Protective markings must be correctly applied to classified information.
- Classified information must be transferred or transmitted using methods that reduce the risk of interception.
- Department of Defence employees and contractors must receive appropriate training to ensure that they are aware of their security responsibilities for classified information.

Specific physical security protections are applied according to the underlying security of the location in which the information is stored or handled.

The U.S. does not have an equivalent classification to RESTRICTED. Under the Security Agreement between the Government of Australia and the Government of the United States of America concerning Security Measures for the Protection of Classified Information, dated 25 June 2002, the U.S. must treat Australian Restricted material as Confidential. Australia does not use a "Sensitive but Unclassified" caveat; such material would be classified at least RESTRICTED and cannot be passed over an unprotected network, such as the Internet, or to persons unauthorized to receive it. All Department of Defense information is considered to be official, even if not classified, and may not be publicly released without specific authorization.

The U.K. Government has advised the State Department of the following:

In the United Kingdom, the level of protection afforded to classified material is decided by assessing the risk of release and the impact this would have on U.K. interests. A proportionate set of protective measures are then put in place for each classification. For RESTRICTED material, measures must be in place that will stop

an inadvertent release or an opportunistic attempt to gain unauthorized access. HMG's Manual of Protective Security (MPS) defines the measures that must be taken to prevent such a release. These include details of the storage requirements, handling and transfer requirements and how classified material should be disposed of. In addition, the MPS defines how access to material by individuals should be controlled, following these basic principles:

- An individual must have a proven need to know.
- An individual must have an appropriate Security Clearance (for the treaty, the more demanding SC level check, rather than the baseline check normally required for access to RESTRICTED sites).
- An individual must have received briefing on the protective security controls required to handle material classified at that level.

The Board-level contact and Company Security Controller are responsible for ensuring systems are in place to ensure only those with a need to know can gain access to classified material, both physically and electronically, and that staff have appropriate clearances and security training. This includes access controls to storage areas and computer systems.

For the treaty, the requirement that all Approved Community Facilities must have "List X" clearance means that treaty material will also benefit from a higher degree of protection than such material normally would (equal to CONFIDENTIAL level and above, depending on the site). It should also be noted that for material transferred under the treaty with a U.S. classification of CONFIDENTIAL or above will be protected at the equivalent U.K. classification. Only U.S. UNCLASSIFIED material will receive a U.K. RESTRICTED classification under the treaty.

Under the U.S. Industrial Security Agreement with the U.K., "U.K. RESTRICTED" information is handled in the United States as U.S. UNCLASSIFIED information that is exempt from public release (i.e., "For Official Use Only"). Documents or material so marked are stored in locked containers affording appropriate protection or closed spaces or areas that will prevent access by unauthorized personnel. Australian RESTRICTED information must be protected as U.S. CONFIDENTIAL.

a. The U.K. Manual of Protective Security (MPS) requires that RESTRICTED information can only be handled stored or processed on accredited machines, systems or networks, operating to HMG approved Security Operating Procedures and standards for that level of Protective Marking. The unauthorized use of any machine is not permitted under MPS. All MOD and "List X" laptops require approved full disk encryption before they can be removed from a "List X" or MOD Site.

Under the U.S.–U.K. Industrial Security Agreement, before any Communications and Information System within the United States is allowed to store, process or forward U.K. RESTRICTED information, it must first be given security approval, known as Accreditation. Under the Industrial Security Agreement, Accreditation is defined as a formal statement by appropriate authority confirming that the use of a system meets the appropriate security requirement and does not present an unacceptable risk of compromise. For standalone desktop PCs and laptop systems utilized in DOD establishments, the system registration document together with the Security Operating Procedures serves as the required Accreditation. For contractors, guidance on the use of Communications and Information Systems will be incorporated within the RESTRICTED Conditions Requirements Clause in the contract.

Question No. 70. Will the General Security Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America of 14 April 1961 (GSA) need to be amended to reflect that items provided not only under the GSA but also under the treaty are now to be marked/controlled by the terms of the GSA in the United Kingdom? If so, will any legislative amendment be necessary, either in the United States or in the United Kingdom, to authorize such a change?

Answer. The referenced GSAs will not require amendment as a result of the treaties, as both GSAs apply to the use, handling, storing, safeguarding and protection of all classified information or material exchanged between the Governments.

Question No. 71. Will the United States receive the notification required of U.K. Community members under section 11(4)(b)(v) of the implementing arrangement with the U.K. and of Australian Community members under section 11(6)(e) of the implementing arrangement with Australia?

Answer. Yes.

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. Yes; the requirement for approved community members to collect and retain these records as well as the authority to share these records with the Treaty Partners will be done pursuant to the authority of 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. 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.

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 who 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 U.K., Australia, nor the U.S. would be expected to seek concurrence where it is checking records of entities in its own territory.

c. 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 offense. 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. 73. Article 12(1) of each treaty states that entities within either approved community will be required to maintain "detailed records" related to all movements under the treaty. Pursuant to section 11(4)(b)(iv) of the implementing arrangement with the United Kingdom and section 11(6)(d) of the implementing arrangement with Australia, approved community members will be required to maintain for at least 5 years records relating to any export, transfer, re-export, or re-transfer of a defense article. How long would corresponding records need to be maintained for defense articles exported pursuant to licenses or approvals outside of the mechanisms of the treaty, as permitted under Article 3(4)?

Answer. Records related to the export of defense articles exported under authority other than the treaties will be subject to existing recordkeeping and retention requirements detailed in the ITAR.

Question No. 74. Article 12(3) allows for "appropriate legislative notifications." How will U.S. ratification of these treaties affect the reports required pursuant to section 25 and section 36(a) of the Arms Export Control Act?

a. Will reporting of possible or actual sales under the treaties still be required?

b. If not, will the executive branch continue to include those sales in the reports?

c. Will some such reporting become impossible, because the U.S. Government will not have the information on which to base such reporting?

Answer. The reporting requirements contained in sections 25 and 36(a) applicable to government-to-government sales will continue to apply. There are no legal

requirements arising from either section applicable to exports pursuant to the treaties.

Question No. 75. Article 13(1) of each treaty provides a legal and regulatory exemption for "Compliance with the procedures established pursuant to this Treaty . . ." Article 13(2) states that "Conduct falling outside the terms of this Treaty remains subject to" applicable requirements and sanctions.

a. Why are these articles needed in addition to the other provisions in the treaties that exempt covered items from the requirement to obtain export licenses?

b. What is "conduct falling outside the terms of this Treaty," and how does it differ from conduct "in violation of" the treaty or its implementing arrangements? Why does Article 13(2) refer to "conduct," rather than to compliance or noncompliance?

c. Is conduct that violates the implementing arrangements enforceable in the same manner as conduct that violates the treaties, and are the written acknowledgements that will be required from members of the Treaty Partner communities, pursuant to section 11(4)(b) of the implementing arrangement with the United Kingdom and section 11(b) of the implementing arrangement with Australia, necessary to make that clear?

d. Will "conduct falling outside the terms of this Treaty" remain subject to applicable requirements and sanctions even if a member of the approved community makes every effort to comply with the procedures established pursuant to this treaty? Will U.S. producers or exporters incur any civil or criminal liability if an illegitimate buyer fools them into thinking that the defense articles are within the scope of the treaty and are being shipped to a member of the approved community?

e. If a member of the approved community departs from the procedures established pursuant to this treaty in one respect (e.g., through a violation of a security requirement), will it then be "outside the terms of this Treaty" in subsequent actions as well (e.g., if it engages in a transfer before the earlier infraction is corrected)?

f. Will "conduct falling outside the terms of this Treaty" by one member of the approved community (e.g., failure to meet the scope requirements pursuant to Article 3(1) or the security and recordkeeping requirements pursuant to Articles 11 and 12) subject the subsequent actions of other approved community members that receive the defense article in question to the requirements and sanctions in existing law? Thus, will there be an affirmative duty upon all parties to an export or transfer to assure full compliance with all the procedures established pursuant to this treaty?

Answer. a. Article 13(1) explicitly establishes that standard export control requirements do not apply to exports that are in accordance with the treaties, the implementing arrangements, and the regulations issued in accordance with the treaties. Article 13(2) limits Article 13(1) in that conduct falling outside of the terms of the treaties, the implementing arrangements, and the regulations issued in accordance with the treaties are subject to the standard export control requirements.

b. The treaties and the implementing arrangements establish obligations and commitments between the relevant governments. Therefore, only the governments may comply with or violate such obligations and commitments. Use of "conduct falling outside the terms of" is intended to capture activity by private parties.

c. As stated above, private parties are not expected to violate the treaties or their implementing arrangements. Article 13 of both treaties contemplates regulations that will identify the specific requirements for private parties. The referenced acknowledgments are expected to be helpful in reminding members of Treaty Partner communities of their obligations and in enforcing such obligations.

d. Enforcement actions pursuant to the Arms Export Control Act and the International Traffic in Arms Regulations take into account the specific facts associated with any action. It is not appropriate to respond to the limited hypothetical questions provided here.

e. A violation of a security requirement would be considered to be activity outside of the terms of the treaties. Any subsequent actions with respect to the relevant defense article or defense service would need to be considered in the context of the nature of such violation.

f. In accordance with section 11 of the implementing arrangements foreign members of the approved communities are required to acknowledge their obligations as members of the approved communities. Any prior or subsequent violation by a Party would need to be considered in the context of the nature of such violation.

Question No. 76. Why is there no provision in Article 13 for joint investigations?

Answer. Article 13 does not preclude joint investigations; a specific provision was not deemed necessary.

Question No. 77. For each Treaty Partner, is there any "conduct falling outside the terms of this Treaty" that would constitute an extraditable offense under its extradition treaty with the United States?

Answer. The export of a U.S. defense article or defense service from the United States caused by a foreign person who is not within the approved community would constitute conduct falling outside the terms of the treaty and would constitute a violation of the Arms Export Control Act and International Traffic in Arms Regulations. With regard to a willful violation, the United States would continue to maintain that such a violation of the Arms Export Control Act is an extraditable offense.

The Australian Government has stated that the Treaty on Extradition between Australia and the United States of America would apply in circumstances wider than just offenses under the treaty. Article II of the Australia-U.S. Treaty on Extradition provides that "an offence shall be an extraditable offence if it is punishable under the laws in both [Australia and the United States of America] by deprivation of liberty of more than 1 year, or by a more severe penalty." Accordingly, any conduct that falls outside the terms of the Australia-U.S. Defense Trade Cooperation Treaty that is punishable under the laws in both Australia and the United States of America by deprivation of liberty of more than 1 year, or by a more severe penalty would generally be an "extraditable offence" under the terms of the Australia-U.S. Treaty on Extradition.

U.K. Government has stated that Article 2 of the United Kingdom-United States Extradition Treaty of 2003 states that only that conduct that is punishable in both the U.K. and the USA with at least 12 months' imprisonment constitutes an extradition offense. However, Article 4 allows for the possible extradition of an individual for an offense committed outside of the territory of the Requesting State. Action can be taken on such a request and extradition ordered where, either the Requested State has a similar jurisdiction over such conduct or, if it does not, the Requested State is given the discretion to grant extradition. A state can claim jurisdiction, and potentially request extradition, under any of the following grounds:

1. Objective territoriality: Where a state asserts jurisdiction over acts committed outside of its territory, but which have or are intended to have substantial effects within the State;
2. Active personality: Where the State of the nationality of a victim is entitled to assert jurisdiction over the conduct of its nationals abroad;
3. Passive personality: Where the State exercises its jurisdiction on the basis of the nationality of the victim of a crime committed abroad;
4. Protective principle: Where jurisdiction is asserted on the basis of the impact of the conduct on a State's key interests, e.g., national security;
5. Universal jurisdiction: Where a State can claim jurisdiction over crimes committed outside of the boundaries of the State (regardless of nationality, country of residence or any other nexus with the Requesting State), e.g., war crimes, etc.

Question No. 78. Which of the documents referenced in section 11(2) of the implementing arrangements are international agreements, binding under international law? Please submit separately a copy of each of the documents referenced in section 11(2) of the implementing arrangements, other than the treaties referenced therein, that is an international agreement, binding under international law.

Answer. I am advised by the office of the State Department's Legal Adviser that the instruments identified in subparagraphs (a) and (f) of section 11(2) of the implementing arrangement with the United Kingdom and subparagraph (e) of the implementing arrangement with Australia are international agreements, binding under international law. While the executive branch has already complied with applicable Case-Zablocki requirements with respect to these agreements, copies are being provided as a part of this package.

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. An export from the U.S. that is diverted to a third Party might constitute conduct falling outside the terms of the treaties, implementing arrangements, and associated regulations; and therefore remain subject to the Arms Export Control Act and the International Traffic in Arms Regulations. Such conduct may also violate new Australian legislation that is planned to 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 U.K. 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.

Question No. 80. What is the U.S. enforcement experience regarding export control offenses in which no export license was required by the International Traffic in Arms Regulations? How many indictments and convictions under the Arms Export Control Act were there in 2003–2007 for such cases?

Answer. As commonly charged, a criminal prosecution for a violation of the Arms Export Control Act requires a showing beyond a reasonable doubt that a person exported (or caused the export of) a defense article or defense service without a license from the Department of State and that the person did so willfully. See 22 U.S.C. 2778(b)(2) and 2778(c); 22 CFR 127.1. Accordingly, with regard to the export of defense articles and defense services in violation of the Arms Export Control Act and the International Traffic in Arms Regulations, all criminal prosecutions require a showing that an export license from the State Department was required and was not obtained. Likewise, if an exporter claims an exemption under the ITAR that did not provide the authority for the export, the exporter would meet the precondition that "an export license from the State Department was required and was not obtained."

Additionally, the State Department has conducted civil investigations which have involved the misuse of exemptions. The civil settlements with Raytheon involving illegal exports through Canada to Pakistan and the settlement with General Dynamics involving illegal exports to Canada are two examples. The proposed charging letters in these cases did not include specific charges for violations of an ITAR exemption but rather addressed the failure to obtain an export license.

Question No. 81. What impact, if any, will the treaties have on the operations and actions of various companies that are operating under consent agreements from past arms export cases?

Answer. Companies under Consent Agreements that have not been statutorily or administratively debarred by the Department may remain in the approved community. In future Consent Agreements the Department will likely explicitly address whether or not to suspend the Company's authority to use the treaty. Such an approach would be consistent with the Department's practice of suspending a registrant's ability to use certain ITAR exemptions in response to specific concerns with the registrant's reliability as an exporter.

Question No. 82. Pursuant to section 11(4)(b)(iii) of the implementing arrangement with the United Kingdom and 11(6)(c) of the implementing arrangement with Australia, nongovernmental United Kingdom/Australia Community entities must acknowledge in writing that any re-transfer or re-export of defense articles without prior approval will be a violation of the United States International Traffic in Arms Regulations, Arms Export Control Act, and related laws and regulations. Will this acknowledgement form a predicate for both criminal and civil action against violators in each country? Will courts in each country accept it as evidence that a violator knew, or should have known, the obligations of Treaty Partner Community members under the treaties?

a. Under what laws can such action be taken by each Treaty Partner? In particular, what actions can the United Kingdom take against an entity under the Official Secrets Act, and what criminal penalties can be assessed? If civil actions are pursued, what penalties can be assessed and what is the record of each Treaty Partner regarding such prosecutions and convictions?

b. Please cite exactly which provisions of the Arms Export Control Act and the International Traffic in Arms Regulations would be violated if a U.S. defense article exported pursuant to the treaty (that is, without a license) were then re-transferred or re-exported by a foreign person without consent of the United States Government.

c. Please also cite the "related [U.S.] laws."

d. Why does section 11(4)(b)(iii) of the implementing arrangement with the United Kingdom state only that "the United States Government considers" these acts to be

violations of U.S. law and regulations, while section 11(6)(c) of the implementing arrangement with Australia states affirmatively that such activity "constitutes a violation of Australian law as well as" U.S. law and regulations?

e. Would re-transfers or re-exports without approval not necessarily violate British law?

f. Does the United Kingdom question whether such acts would violate U.S. law and regulations? Does it contest the right of the United States to prosecute violators if the acts are committed by non-Americans in the United Kingdom?

g. Why does section 11(4)(b)(viii) of the implementing arrangement with the United Kingdom state that "No objection will be made by the United Kingdom Community member to any reasonable request by either Participant to . . . inspect any premises in accordance with the established mechanisms of cooperation," while section 11(6)(h) of the implementing arrangement with Australia requires that all inspections be "by the government of Australia in accordance with Australian laws and regulations?" How will U.S.-requested audits and inspections in the United Kingdom differ from those in Australia in practice?

Answer. This provision was included to both educate approved community members on their obligations under the treaty and the enforcement provisions of the AECA, as well as to provide documentation to help establish and demonstrate knowledge of the law and regulations usable in a criminal investigation.

Such an acknowledgement may be relevant to a prosecution under the treaty but such an acknowledgement is not a requirement for a prosecution under Australian law.

For the United Kingdom, the acknowledgement in section 11(4)(b)(iii) means that nongovernmental U.K. Community entities are put on notice that the U.S. Government will consider such breaches to be violations of the U.S. ITAR, the AECA and related laws. This would not form a predicate for criminal action in the U.K. where no U.K. law has been breached. It may entitle an aggrieved Party to take civil action provided it could establish a quantifiable loss emanating from the action in question. Were a matter to reach courts in the U.K. it would be difficult to see the courts being persuaded by an argument, in light of the acknowledgement, that the offending Party did not realize that the U.S. would consider that its laws had been breached.

a. Treaties to which Australia is Party are implemented through the enactment of domestic legislation, unless legislation that satisfies the requirements of a treaty is already in place. Australia does not currently have legislation to satisfy all of the requirements of the Australia-U.S. Treaty concerning Defence Trade Cooperation (the Treaty). New legislation to enact the terms of the treaty will include provisions addressing:

(a) 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;

(b) The recordkeeping and notification and reporting requirements under the treaty;

(c) The handling, marking and classification requirements for U.S. and Australian defense articles exported or transferred under the treaty;

(d) The requirements for exports and transfers of U.S. defense articles outside the approved community or to a third country;

(e) The rules for transitioning U.S. defense articles into and out of the terms of the treaty;

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

(g) 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

(h) Offenses and penalties, and administrative requirements, necessary for the enforcement of the treaty and its implementing arrangement.

It is proposed that these changes be brought into force through amendments to the current Weapons of Mass Destruction (Prevention of Proliferation) Act 1995 (WMD Act). The name of this act will be amended to better reflect the objective of the act. In conjunction with legislation to implement the treaty, Australians also bringing forward 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. These provisions will also be included in the amended WMD Act. As legislation is being specifically enacted for the treaty there is no existing record for prosecutions under the treaty. However, Australia does have a strong and long established history of working with

the United States in security matters and of bringing prosecutions for violations of its laws.

For the United Kingdom, HMG can take action against an entity where U.K. laws have been breached.

b. Sections 38(c) and 38(e) of the Arms Export Control Act contains the applicable criminal and civil penalty provisions. Parts 120.19, 127.1(a)(1), 127.1(a)(3), and 127.1(a)(6) of the ITAR address violations of the regulations including unauthorized exports, re-transfers, and brokering.

c. Related U.S. laws would include Federal laws prohibiting conspiracy, false statements, and other generally applicable Federal criminal laws.

d. The phrasing in this section reflects the concerns of HMG regarding the extraterritorial application of U.S. law in the United Kingdom. The HMG defers to the U.S. on its interpretation of its laws and accepts that the U.S. considers such acts to be violations of U.S. law. HMG also agrees that acts that are contrary to the terms of the treaty or its implementing arrangements will also likely be violations of the Official Secrets Act and considered a criminal offense by the United Kingdom.

e. British law would be violated, under the OSA, the Export Control Act or other legislation such as those concerned with firearms.

f. The United Kingdom does not contest that such acts would be contrary to the terms of the treaties and a violation of the AECA. While the United Kingdom, like most countries, has concerns about the extraterritorial application of laws on its own citizens, it has made it clear that since such violations will also likely be violations of the Official Secrets Act they would investigate such cases as well as a breach of their security laws. See the answer to Question No. 77 for extradition purposes. The prosecution of alleged offenders by the U.S., in the U.S., is a matter for the U.S. authorities.

g. The security requirements stipulated in the General Security Agreements with the U.K. and Australia provide for reciprocal visits by security personnel. U.S. security representatives, after prior consultation, are permitted to visit each government, to discuss and view firsthand their laws, policies, regulations, practices and procedures related to personnel security, information/document security, physical security, industrial security, export controls and automated information system security. Each visit also entails visits to both government (military) and defense industry facilities to observe security implementation to determine whether classified information provided by the U.S. is being adequately protected.

Question No. 83. Article 13(3) of each treaty states that each Party "shall promptly investigate *all* [emphasis added] 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." But section 10(3)(f) of both implementing arrangements states that the other government may inform the United States Government "as appropriate" of violations of the treaty, material or otherwise, reported by an approved community member.

a. Would the United States Government ever consider it to be appropriate for the United Kingdom/Australia Government not to inform the United States Government of at least a material violation of the treaty?

b. Will the United States Government ultimately be informed of all violations of the treaty reported to the other government, perhaps as part of discussions between the Principals or the Management Board?

Answer. a. The USG would never consider it appropriate to not be informed of material violations.

b. All violations are expected to be reported to the USG.

Question No. 84. Article 13(4) states that, "The Parties shall cooperate, as appropriate, with respect to . . . prosecutions or actions" related to alleged violations of procedures established pursuant to this treaty. What concerns led to the inclusion of the words "as appropriate" in this provision?

Answer. The language chosen was intended to reflect the inherent complexity involved in such investigations and prosecutions involving two countries with different legal structures.

Question No. 85. Article 13(5) states that the Parties "may conduct post-shipment verifications and end-use or end-user monitoring of exports and transfers." Will this provision result in more post-shipment verifications and end-use monitoring than is currently the case, or less?

a. What U.S. programs and resources will be utilized to effect such verifications and monitoring?

b. What legal authority is there to use the State Department's Blue Lantern program with regard to defense articles that are exported or transferred pursuant to these treaties, rather than pursuant to the Arms Export Control Act or under an exemption that complies with section 38(j) of that act?

c. What legal authority is there to use the Defense Department's Golden Sentry program with regard to defense articles exported under the Foreign Military Sales Program after they have transitioned to the treaty processes pursuant to Article 3(3)?

d. Investigations under the Blue Lantern program often stem from information obtained in the export licensing process, such as unusual routing of an arms shipment. Since exports and transfers will not require any export licenses, what triggers will prompt post-shipment verifications and end-use or end-user monitoring under the treaties?

Answer. a. The provision establishing an end-use verification program for treaty exports was drafted to create controls comparable to those found in the Department's Blue Lantern program for licensed exports. While no formal goal has been established for the number of checks to be performed, it is anticipated that the program will likely encompass more exports than are currently done for the United Kingdom and Australia where relatively few checks are done per year.

b-c. The executive branch will use the authority of the treaty and its implementing arrangements for this program.

d. The methodology developed for the Blue Lantern program will be adapted to accommodate exports under the treaty. While no specific export licenses will be required, exports and transfers under the treaty will be limited to approved community members. The new verification program will track that approach in its design—focusing on the exports and transfers of particular members of the approved community, verifying recordkeeping and marking requirements are being met and that such exports and transfers conform to terms of the treaty. Initially, targeting of such checks may be driven by a number of factors, including the sensitivity of the technologies involved, the volume of export activity, and the Parties involved in the transaction. While approved community members must keep records of their exports, it is important to remember that data on many shipments under the treaty will be available through the Automated Export System (AES). The methodology and the targeting of such checks will no doubt evolve over time as the Department and the Treaty Partners gain experience with the program.

Question No. 86. For each of the years 2003–2007, please provide the number of persons charged and those found guilty under each Treaty Partner's export control laws and indicate how many convictions resulted in jail sentences and how many merely in monetary fines. Please also provide the number of administrative actions that Treaty Partner agencies have taken against firms involving export control violations (i.e., comparable to the actions of the Departments of State and Commerce in programs for civil violations) and the penalties and remedial compliance measures that resulted from such cases.

Australia:

The Australian Government has advised the State Department of the following:

The Australian Department of Defence, in conjunction with the Australian Customs Service, has dual responsibility for the administration of Australia's export controls for defense and dual-use technology. The export controls are administered through the Customs Act 1901 and associated legislation. Both Defence and Customs operate in an environment of improving the level of voluntary compliance by the exporting community. As noncompliance manifests itself in a variety of ways, ranging from simple error, to indifference, to intentional disregard both agencies have in place strategies that reduce the likelihood and/or consequence of an unlawful export.

There have been 65 denials for export approval of defense and dual-use goods under the Customs Act, and 3 notices prohibiting supply of goods or provision of service under the Weapons of Mass Destruction Act.

Over 1,524 flags have been created on the Customs cargo system used by exporters to report their goods to Customs. These flags are indicators to exporters that the goods do, or may, require a permit for the shipment to occur lawfully. Since 2004, at least 53 profiles have been created on the Customs cargo system to identify at-risk exports. There have been over 500 matches against the profiles resulting in 26 disruptions where the goods were held pending resolution of concerns about the export. Seventy warning letters have been issued where a breach of an export control was identified but prosecution or seizure action was not undertaken. There are currently 26 cases being investigated for breaches of export controls. There have

been three prosecutions for export control violations—outcomes were fines and no imprisonment.

A significant focus for the Department of Defence (Defence Export Control Office—DECO) is the provision of marketing material, workshops and seminars that aim to educate industry on export controls. Almost 1,000 individuals, representing over 174 companies and various agencies within the Department of Defence have attended DECO Practitioners Workshops. Since 2004, at least 115 companies have been outreached by DECO Officers to discuss the export control environment while information kits, which provide further information, have been forwarded to a further 50 companies. Mail-outs to industry have been undertaken with over 1,400 letters sent to universities and industry; 651 employees, representing 151 companies have been provided ITAR training. DECO also produces a biannual newsletter which is sent out to approximately 1,600 recipients and is available for download from the DECO Web site.

United Kingdom:

The U.K. Government has advised the State Department of the following:

Between 2003 and 2007, the following prosecutions under the Customs and Excise Management Act (CEMA) 1979, for the breach of a prohibition enacted under the Export Control Act 2002 took place:

Year	Prosecutions—jail sentence	Prosecutions—Fines
2003–2004		1
2004–2005	1	
2005–2006		2
2006–2007		4
2007–2008	2	1

In addition, Her Majesty's Revenue and Customs conducted the following seizures of goods controlled on the U.K. Strategic Export Control list:

Year	*No. of seizures*
2003–2004	63
2004–2005	37
2005–2006	34
2006–2007	44

The Export Control Organisation (ECO), part of the Department for Business, Enterprise and Regulatory Reform, carry out compliance checks on companies using Open General and Open Individual Export Licences. Below are details of the number of compliance checks carried out in each year 2003–2007.

Year	*No. of compliance visits*
2004	567
2005	522
2006	578
2007	664
2008 to date	294

In the vast majority of cases where compliance problems are identified, these are due to technical errors (e.g. form filling). Followup compliance checks are carried out wherever problems are identified to ensure they have been rectified. ECO also have a system of warning letters for noncompliant companies and can remove a company's right to use open licenses for exports.

Evasion of export controls or unlicensed shipments are extremely rare and are always referred to Her Majesty's Revenue and Customs for investigation.

Question No. 87. Under what laws of each Treaty Partner, in addition to those laws already applicable to export control violations, will it be possible to prosecute companies, as opposed to individuals, that engage in illegal re-exports or re-transfers of defense articles?

a. In 2003–2007, how many prosecutions (and how many convictions) of companies were there by each Treaty Partner?

Answer.

Australia:

The Australian Government has advised the State Department of the following:

Under Australia's Customs Act (Regulation 13E), which controls the export of goods on the Defence and Strategic Goods List, both companies and individuals can

be prosecuted. Also, Australia's WMD Act, when it is amended to implement the treaty, also will allow for the prosecution of companies as well as individuals.

a. In Australia, all three prosecutions during the 2003–2007 timeframe were of individuals.

United Kingdom:

The U.K. Government has advised the State Department of the following:

a. It is possible to prosecute companies other than under the export control provisions. The offense committed would depend on the circumstances but most commonly would include breaches of the Export Control Act (i.e. where treaty material has been exported from the U.K. without meeting the requirements of the Treaty Open General Export Licence (which will be based on the terms of use of the treaty)), theft offenses or firearms offenses under the U.K. Firearms Control legislation. The most likely prosecution route would be under the export control provisions. A company could also find itself losing "List X" status, which would mean not being able to conduct future business in the Defense and Security field in the U.K. In addition, where a British citizen or person based in the U.K. arranges an illegal transfer that doesn't actually pass through the U.K., that individual would have committed an offense under the Trade in Goods (Control) Order 2003.

a. HMG does not hold centrally figures for all prosecutions/convictions of companies during the period referred to, are aware of three convictions of companies for export control violations.

Question No. 88. In 2003–2007, how many prosecutions (and how many convictions) were there by each Treaty Partner for violations relating to "Restricted" information?

Answer.

Australia:

The Australian Government has advised the State Department of the following:

There were no prosecutions or convictions during this period. All breaches identified and investigated were dealt with administratively.

United Kingdom:

The U.K. Government has advised the State Department of the following:

There were six convictions under the Official Secrets Act in the past 10 years. None of these related solely to releases of RESTRICTED material.

Question No. 89. What are the British and Australian regulations regarding transmission of "Restricted" information over the Internet or on open phones? Will the U.S. Government impose a similar prohibition on the U.S. Community regarding defense articles? Will the British and Australian rules be loosened for communications within each approved community?

a. Could the absence of such controls for U.S. persons impair prosecutions of U.K. or Australian individuals who fail to appropriately protect "Restricted" items?

b. Would the imposition of such controls, in either direction, pose a serious burden for companies in the approved community working on unclassified projects?

Answer. In the U.K., the transmission of RESTRICTED information over the Internet is prohibited under both the U.K. Manual of Protective Security and the Ministry of Defence Security Manual as is the discussion of RESTRICTED material over unprotected telephone lines. Under the treaty, the Official Secrets Act (OSA) is used to protect treaty material within the U.K. or in the possession of U.K. Forces in operational theatres or on training. The OSA applies to all persons in the U.K., regardless of nationality. A U.S. person who fails to appropriately protect RESTRICTED material would therefore be in breach of the OSA. Outside the U.K. (under the treaty this means in the U.S. or in the possession of U.S. Forces in operational theatres or on training), treaty material is protected under the International Traffic in Arms Regulations (ITAR), if it is handled contrary to the procedures established pursuant to the treaty as promulgated in the regulations.

Under the terms of the U.S.–U.K. Industrial Security Agreement, the U.K. MOD and U.S. DOD agreed in 2003 that U.K. RESTRICTED material need not be protected in the U.S. at the U.S. CONFIDENTIAL level (as had previously been the case) unless specifically requested. The guidance and rules relating to this agreement (which define the protections U.S. contractors and personnel are expected to provide to U.K. RESTRICTED material) will apply to treaty material, limiting the burden that approved community companies would have otherwise faced. In addition, U.K. RESTRICTED material being exported from the U.K. under the treaty must receive MOD F680 clearance first—this will check that the recipient of the export is suitable to receive the treaty material. Material classified at higher levels

will continue to be protected in the U.S. under the terms of the General Security Agreement.

The U.S.–Australian Industrial Security Agreement imposes similar controls as the U.K. Industrial Agreement. However, the Australian GSA and Industrial Security Agreement require that Australian RESTRICTED information in the United States be protected as if it is U.S. CONFIDENTIAL. This is a more stringent requirement than for protection of U.K. RESTRICTED in the United States. Facility clearances are required for each U.S. industrial facility that maintains Australian RESTRICTED information and security clearances are required for the personnel that access the Australian RESTRICTED information in the facility.

a. There is no potential for impairment of prosecutions of U.K. or Australian individuals since a common standard of protection already exists.

b. The Department of Defense has concluded that these controls will not pose a serious burden.

Question No. 90. Both treaties speak of "implementing arrangements," suggesting there would be more than one such arrangement. But only one such arrangement, per treaty, has been submitted. Do you expect to negotiate more than one implementing arrangement with these Treaty Partners? If so, when do you expect those to be concluded?

Answer. We do not anticipate additional implementing arrangements for these treaties.

Question No. 91. The letter of submittal by the Secretary of State to the President on the treaty with the United Kingdom indicates that the implementing arrangements "may be entered into as Executive Agreements."

a. Does the executive branch intend to submit the implementing arrangement to Congress under the Case-Zablocki Act? If not, please explain why.

b. Does the executive branch regard the implementing arrangements as executive agreements, binding under international law?

c. Does either the United Kingdom or Australia regard its implementing arrangement with the United States to be an international agreement, binding under international law?

d. If only portions of the implementing arrangements are intended to be binding, please explain the criteria for determining whether a provision is binding, state whether the Treaty Partners agree with those criteria, and provide an exhaustive list, for each implementing arrangement, of the provisions that are intended by the Parties to be binding.

Answer. The office of the State Department's Legal Adviser has advised me of the following:

a. The implementing arrangement was not concluded as a separate international agreement, but rather as an arrangement under the treaty. This implementing arrangement is explicitly called for by the terms of the treaty. For the foregoing reasons, the arrangement is not considered an "international agreement" within the meaning of the Case-Zablocki Act. The administration has provided the arrangement to the Senate in the context of seeking Senate approval of the treaty and does not intend to submit it to Congress under the Case-Zablocki Act.

b. The provisions of the implementing arrangements that the treaties explicitly require the Parties to follow will be binding under international law. Those provisions of the arrangements that address administrative or procedural matters that are not explicitly required by the treaties would not have legally binding status under international law.

c. The United Kingdom and Australia regard the implementing arrangements the same way we do, as described in our answer to Question "b" above.

d. The answers to Questions "b" and "c" above identify the criteria and the position of the United Kingdom and Australia. As discussed in the negotiation of the implementing arrangements, each government expects that its Treaty Partner will comply with all of the provisions of the applicable treaty and implementing arrangement. To avoid the suggestion that compliance with certain provisions of the implementing arrangements is not essential, an exhaustive list of provisions that are binding under international law was not developed by the Parties. Should any Treaty Partner fail to comply with a particular provision of an implementing arrangement, both Treaty Partners will work to remedy the situation. The administration remains prepared to answer any questions that the committee may have regarding particular provisions of the implementing arrangements. For example, the administration, in response to a question during the May 21 hearing, stated that section 10(3)(f) of the implementing arrangement with the United Kingdom regard-

ing notification of material violations would be a binding obligation by virtue of article 13(3) of the treaty.

Question No. 92. What are the precedents for the Senate including other documents in the definition of a treaty when it gives its advice and consent to ratification?

Answer. As stated in the President's Letter of Transmittal, including its enclosures, the administration is seeking advice and consent to ratification to the treaty only. The implementing arrangement was provided for the Senate's information. Therefore, the administration is not seeking that the Senate include "other documents in the definition of a treaty when it gives its advice and consent to ratification" in this case. In terms of precedents, the Senate has given its advice and consent to related instruments in a single resolution where the President has requested such advice and consent.

Question No. 93. What is the purpose of Article 14(2)? Does it envisage that most, if not all, of the previously exported items in the United Kingdom and Australia that have licenses could move to an exempt status, if they now would qualify for export pursuant to the treaties?

Answer. Article 14(2) is intended to provide a mechanism for items already exported to move to the processes established under the treaties. We envisage that some items will be moved to the processes established under the treaties, but do not expect that all will be eligible, or that all recipients of these items will want to move them to the processes established under the treaties.

Question No. 94. Does the executive branch believe that an amendment to either treaty requires the advice and consent of the Senate?

Answer. Generally, the administration anticipates that amendments to either of these treaties would be submitted to the Senate for its advice and consent.

Question No. 95. Article 20 states that the treaties shall enter into force "upon an exchange of notes confirming that each Party has completed the necessary domestic requirements to bring this treaty into force." Please list the "necessary domestic requirements" that will pertain for the United States and for each Treaty Partner, and provide your best estimate of how long it will take to satisfy those requirements in each case.

a. Will exports of defense articles under each treaty be permitted before all relevant U.K. and Australian laws are amended and regulations are promulgated in each country? If so, why?

Answer. The United States must obtain the advice and consent of the Senate, and prepare instruments of ratification. We must also finalize lists of approved community members, projects and programs that qualify for exports under the treaty, and finalize the list of items exempt from the treaties. We must finalize regulations issues in accordance with the treaties. The National Industrial Security Program Operating Manual must be updated. Customs and Border Protection and the U.S. Census Bureau must update their procedures and guidelines to reflect the new export authority.

For the United Kingdom, the following will need to be in place before the treaty can come into force are:

- Agreement on treaty lists—authorized Operations, Programs, U.K. Projects and Treaty exemptions, and these lists published.
- Approved community in place, including application process, company vetting procedures, ongoing assurance program and relevant changes to the U.K. Manual of Protective Security and associated rules and guidance.
- Changes to the U.K. export control regulations to be complete, including associated guidance, processes and training.
- Changes to the MOD "release of classified material" process (F680) to be complete, including associated guidance, processes and training.
- Necessary staff within the approved community to hold the correct security clearances.
- Clear Government-Government and Government-Industry communication channels for the treaty established.
- Personnel, in both Government and Industry to have received appropriate training on the treaty.
- Guidance on the treaty provided to relevant U.K. Government departments and U.K. Industry.
- Successful validation of all new processes and procedures to show they are fit for purpose.

Australia's domestic treaty approval process requires that:

- The treaty be tabled in the both Houses of Parliament for 20 joint sitting days together with a National Interest Analysis which notes the reasons why Australia should become a Party;
- The treaty be scrutinized by the Joint Standing Committee on Treaty (JSCOT) while it is tabled in Parliament. JSCOT is responsible for making recommendations to the Parliament on whether binding treaty action should be taken. However, JSCOT recommendations do not have legal force and are not binding on the Australian Government;
- Any new legislation to give effect to Australia's rights and obligation under the treaty be enacted.

The above requirements apply to the Australia-U.S. Defense Trade Cooperation Treaty (Treaty). The treaty was tabled in Parliament on 14 May 2008 and JSCOT held a public hearing on the treaty 16 June 2008. It takes approximately 4 months from the date of the hearing of a treaty for JSCOT to make its recommendation for that treaty. New legislation is required to give effect to Australia's rights and obligations under the treaty. It is envisaged that the proposed new legislation will be tabled in Australian Parliament in the spring 2008 session (i.e., August to December 2008) and it is expected that this new legislation will be proclaimed by mid-2009. Following a decision by JSCOT and the enactment of the necessary new legislation, the Australian Government could then take binding treaty action to bring the treaty into force.

a. No.

[EDITOR'S NOTE.—Attachments submitted by Acting Under Secretary Rood to accompany the responses of several of the above questions follow:]

AGREEMENT

BETWEEN

THE GOVERNMENT OF THE

UNITED STATES OF AMERICA

AND

THE GOVERNMENT OF AUSTRALIA

CONCERNING SECURITY MEASURES

FOR THE PROTECTION OF CLASSIFIED INFORMATION

Preamble

THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF AUSTRALIA (hereinafter referred to as "the Parties")

HAVING a mutual interest in the protection of classified information;

HAVE AGREED as follows:

ARTICLE 1
Commitment to the Protection of Classified Information

Each Party shall protect classified information received directly or indirectly from the other Party according to the terms set forth herein and in accordance with its laws and regulations.

ARTICLE 2
Definition of Classified Information

For the purpose of this Agreement, classified information is defined as information that is generated by or for the Government of the United States of America or the Government of Australia or that is under the jurisdiction or control of one of them, and which requires protection in the interests of national security of that government and that is so designated by the assignment of a security classification by that government. The information may be in oral, visual, electronic, or documentary form, or in the form of material including, equipment or technology.

ARTICLE 3
Marking of Classified Information

Classified information shall be marked as follows:

A. For the United States of America, classified information is marked CONFIDENTIAL, SECRET, or TOP SECRET. For Australia, it is marked RESTRICTED, CONFIDENTIAL, PROTECTED, SECRET, HIGHLY PROTECTED or TOP SECRET.

B. The corresponding national security classifications are:

In Australia	In the United States of America
TOP SECRET	TOP SECRET
SECRET or HIGHLY PROTECTED	SECRET

CONFIDENTIAL or PROTECTED RESTRICTED	CONFIDENTIAL No US equivalent, but shall be protected as if it is CONFIDENTIAL, unless otherwise advised by the Government of Australia

C. Each Party shall stamp, mark or designate the name of the originating government on all classified information received from the other Party. The information shall be stamped, marked or designated with a national security classification marking of the recipient Party no lower than the corresponding classification specified by the originating government that will afford a degree of protection at least equivalent to that afforded to it by the releasing Party.

ARTICLE 4
Protection of Classified Information

No individual shall be entitled to access to classified information received from the other Party solely by virtue of rank, appointment, or security clearance. Access to the information shall be granted only to those individuals whose official duties require such access and who have been granted a personnel security clearance in accordance with the prescribed standards of the Parties. The recipient Parties shall ensure that:

A. The recipient Party shall not release the information to a government, person, firm, institution, organization or other entity of a third country without the prior written approval of the releasing Party;

B. The recipient Party shall afford the information a degree of protection equivalent to that afforded it by the releasing Party;

C. The recipient Party shall not use or permit the use of the information for any other purpose than that for which it was provided without the prior written approval of the releasing Party;

D. The recipient Party shall respect private rights, such as patents, copyrights, or trade secrets, which are involved in the information;

E. Each facility or establishment that handles information shall maintain a registry of the clearance of individuals at the facility or establishment who are authorized to have access to such information;

F. Accountability and control procedures shall be established to manage the dissemination of and access to the information; and

G. The recipient Party shall comply with any additional limitations on the use, disclosure, release and access to the information which may be specified by the originating Party.

ARTICLE 5
Personnel Security Clearances

1. The determination on the granting of a personnel security clearance to an individual shall be consistent with the interests of national security and shall be based upon all available information indicating whether the individual is of unquestioned loyalty, integrity, trustworthiness, and excellent character, and of such habits and associates as to cast no doubt upon his or her discretion or good judgement in the handling of classified information.

2. Each Party shall conduct an appropriate investigation, in sufficient detail to provide assurance that the above criteria have been met with respect to any individual of its nationality to be granted access to classified information received from the other Party.

3. Before a representative of a Party releases classified information to an officer or representative of the other Party, the receiving Party shall provide to the releasing Party an assurance that the officer or representative possesses the necessary level of security clearance and requires access for official purposes, and that the information will be protected by the receiving Party.

ARTICLE 6
Release of Classified Information to Contractors

Prior to the release to a contractor or prospective contractor of any classified information received from the other Party, the recipient Party shall:

A. Ensure that such contractor or prospective contractor and the contractor's facility have the capability to protect the information;

B. Grant to the facility an appropriate facility security clearance;

C. Grant appropriate personnel security clearances for all individuals whose duties require access to the information;

D. Ensure that all individuals having access to the information are informed of their responsibilities to protect the information in accordance with applicable laws and regulations;

E. Carry out periodic security inspections of cleared facilities to ensure that the information is protected as required herein; and

F. Ensure that access to the information is limited to those persons who have a need to know for official purposes.

ARTICLE 7
Responsibility for Classified Information

Each Party shall be responsible for all classified information of the other Party while the information is under its jurisdiction and control. While in transit, the transiting Party shall be responsible for all classified information until custody of the information is formally transferred to the other Party.

ARTICLE 8
Responsibility for Facilities

Each Party shall be responsible for the security of all government and private facilities and establishments where classified information of the other Party is kept and shall assure for each such facility or establishment that qualified individuals are appointed who shall have the responsibility and authority for the control and protection of the information.

ARTICLE 9
Storage of Classified Information

Classified information shall be stored in a manner that assures access only by those individuals who have been authorized access pursuant to Articles 4 and 5 of this Agreement.

ARTICLE 10
Transmission

Classified information shall be transmitted between the Parties through government-to-government channels or channels mutually approved in advance in writing by the governments. The minimum requirements for the security of the information during transmission shall be as follows:

A. **Documents**

(i) Documents or other media containing classified information shall be transmitted in double, sealed envelopes, the innermost envelope bearing only the classification of the documents or other media and the organizational address of the intended recipient, the outer envelope bearing the organizational address of the recipient, the organizational address of the sender, and the registry number, if applicable.

(ii) No indication of the classification of the enclosed documents or other media shall be made on the outer envelope. The sealed envelope shall then be transmitted according to the prescribed procedures of the Parties.

(iii) Receipts shall be prepared for packages containing classified documents or other media that are transmitted between the Parties, and a receipt for the enclosed documents or media shall be signed by the final recipient and returned to the sender.

B. **Classified Material**

(i) Classified material, including equipment, shall be transported in sealed, covered vehicles, or be securely packaged or protected in order to prevent identification of its details, and kept under continuous control to prevent access by unauthorized persons.

(ii) Classified material, including equipment, which must be stored temporarily awaiting shipment shall be placed in protected storage areas. The areas shall be protected by intrusion-detection equipment or guards with security clearances who shall maintain continuous surveillance of the storage areas. Only authorized personnel with the requisite security clearance shall have access to the storage areas.

(iii) Receipts shall be obtained on every occasion when classified material, including equipment, changes hands en route, and a receipt shall be signed by the final recipient and returned to the sender.

C. **Electronic Transmissions.** Classified information transmitted by electronic means shall be encrypted.

ARTICLE 11
Visits

1. Visits by representatives of one Party to facilities and establishments of the other Party, that require access to classified information, or where a security clearance is required to permit access, shall be limited to those necessary for official purposes. Authorization shall only be granted to representatives who possess a valid security clearance.

2. Authorization to visit the facilities and establishments shall be granted only by the Party in whose territory the facility or establishment to be visited is located or by government officials designated by that Party. The visited Party, or its designated officials, shall be responsible for advising the facility or establishment of the proposed visit, and the scope and highest level of classified information that may be furnished to the visitor.

3. Requests for visits by representatives of the Parties shall be submitted through the Embassy of the United States in Canberra , in the case of United States visitors, and through the Embassy of Australia in Washington D.C., in the case of Australian visitors.

ARTICLE 12
Security Visits

Implementation of the security requirements set out in the Agreement can be advanced through reciprocal visits by security personnel of the Parties. Accordingly, security representatives of each Party, after prior consultation, shall be permitted to visit the other Party, to discuss and observe the implementing procedures of the other Party in the interest of achieving reasonable comparability of the security systems. Each Party shall assist the security representatives in determining whether classified information received from the other Party is being adequately protected.

ARTICLE 13
Security Standards

1. On request, each Party shall provide the other Party with information about its security standards, procedures and practices for safeguarding of classified information.

2. Each Party shall promptly notify the other Party of any proposed changes to its laws and regulations that would affect the protection of classified information under this Agreement. In such case, the Parties shall consult to consider possible amendments to this Agreement. In the interim, such classified information shall continue to be protected as described herein, unless otherwise approved in writing by the originating Party.

ARTICLE 14
Reproduction of Classified information

When classified documents or other media containing classified information are reproduced, all original security markings thereon shall also be reproduced or marked on each copy. Such reproduced documents or media shall be placed under the same controls as the original document or media. The number of copies shall be limited to that required for official purposes.

ARTICLE 15
Destruction of Classified Information

1. Classified documents and other media containing classified information received from the other Party shall be destroyed by burning, shredding, pulping, or

other means preventing reconstruction of the classified information contained therein.

2. Classified material, including equipment, containing classified information shall be destroyed so that it is no longer recognizable and so as to preclude reconstruction of the transmitted classified information in whole or in part.

ARTICLE 16
Downgrading and Declassification

1. The Parties agree that classified information should be downgraded in classification or should be declassified as soon as information requires a lower degree of protection or no further protection against unauthorized disclosure.

2. The originating Party has complete discretion concerning downgrading or declassification of its own classified information. The recipient Party shall not downgrade the security classification of classified information received from the other Party without the prior written consent of the originating Party.

ARTICLE 17
Loss or Compromise

The originating Party shall be informed immediately of all losses or compromises, as well as possible losses or compromises, of its classified information, and the recipient Party shall initiate an investigation to determine the circumstances. The results of the investigation and information regarding measures taken to prevent recurrence shall be forwarded to the originating Party.

ARTICLE 18
Disputes

Disagreements between the Parties arising under or relating to this Agreement shall be settled through consultations between the Parties and shall not be referred to a national court, to an international tribunal, or to any other person or entity for settlement.

ARTICLE 19
Costs

Each Party shall be responsible for meeting its own costs incurred in implementing this Agreement.

ARTICLE 20
Succession

1. The "Security Agreement" between the Department of Defense of the United States of America and the Department of Defence of Australia which came into effect on 29 August 1950, as amended, the United States-Australian Arrangements for facilitating Disclosure of Classified Military Information to Commonwealth Nations which came into effect on 29 August 1950 and the "General Security of Information Agreement" between the Government of Australia and the Government of the United States of America concluded by an exchange of notes dated 2 May 1962, as amended, ("the 1950 and 1962 Security Agreements") shall terminate on the date that this Agreement enters into force.

2. Following termination, any information which was protected in accordance with "the 1950 and 1962 Security Agreements" shall continue to be protected in accordance with this Agreement. Any reference in an existing agreement or arrangement between the Parties to one or more of "the 1950 and 1962 Security Agreements" shall be considered to be a reference to this Agreement.

ARTICLE 21
Entry into Force, Amendment and Termination

1. Following signature by both Parties, this Agreement shall enter into force on the date that the Government of Australia notifies the Government of the United States of America through the diplomatic channel that all domestic procedures as are necessary to give effect to this Agreement in Australia have been satisfied.

2. Amendments and Supplemental Annexes to the present Agreement shall be made by mutual written agreement of the Parties.

3. The Parties or any department or agency of the Parties, within the limits of their responsibilities and authorities, may mutually determine implementing arrangements regarding classified information in general or that are specific to those departments or agencies.

4. This Agreement shall not apply to information for which special arrangements or agreements may be required, such as atomic energy information that the United States designates as 'Restricted Data'.

5. Either Party may terminate this Agreement by notifying the other Party in writing, ninety days in advance of its intention to terminate the Agreement.

6. Unless terminated in accordance with paragraph 4, this Agreement shall remain in force for a period of twenty five years and shall be automatically extended in five year increments thereafter.

7. Notwithstanding the termination of this Agreement, all classified information provided pursuant to this Agreement shall continue to be protected in accordance with the provisions set forth herein.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate at Canberra this twenty-fifth day of June 2002

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

FOR THE GOVERNMENT OF AUSTRALIA

EMBASSY OF THE
UNITED STATES OF AMERICA

Canberra, June 25, 2002

No. 81

Excellency:

I have the honor to refer to the Agreement between the Government of Australia and the Government of the United States of America concerning security measures for the protection of classified information ("GSOIA") and to express the following understandings of the United States, which are intended to aid the interpretation of the GSOIA based on the parties' discussions during the negotiations.

The Parties confirm that the phrase "classified information received from the other Party" wherever it appears in the text of the Agreement is

His Excellency

Alexander Downer

Minister for Foreign Affairs of Australia,

Canberra

intended to mean classified information, in the broadest sense, provided directly or indirectly by one Party to the other Party, or to an officer or other representative of the Parties, including classified information jointly generated by the Parties. The phrase is intended to cover classified information that is provided to the recipient Party for its own purposes or for the purposes of passing to a contractor of the originating Party.

It is the intention of the Parties that, in Article 2, "generated by or for the Government of the United States or the Government of Australia or that is under the jurisdiction or control of one of them and which requires protection in the interests of national security of that government" be read as descriptive of the nature of the information with which the Agreement is concerned. It will be information of this nature that will be assigned a security classification. The Parties confirm, however, that they will protect classified information in accordance with the terms of the Agreement on the basis only that it is designated by the assignment of a security classification. No questioning of the nature of the information will be required or will be made to invoke the protections of the Agreement.

The Parties note that the term "personnel security clearance" wherever it appears in the text refers for the purposes of the Government of Australia to a "personal security clearance".

In respect of the requirements for security clearances in the Agreement, the Parties acknowledge the special status of elected representatives at the federal level, and confirm their intention to continue to apply their current practices to them.

It is the intention of the Parties that protection of private rights, such as patents, copyrights or trade secrets, is an issue to be dealt with in detail separately from the Agreement. While the Parties in Article 4 D confirm their commitment to respect private rights, how this commitment will be manifested will depend upon separate detailed agreements or arrangements and the laws of the Parties. The extent of knowledge of a recipient Party of such rights may also be relevant.

I would appreciate your Excellency confirming that the understandings described above are also the understandings of the Government of Australia.

Accept, Excellency, the renewed assurance of my highest consideration.

Thomas Schieffer

N° LGB 02/100

Excellency:

I have the honour to refer to your Note of 25 June 2002 the text of which is copied below.

"I have the honour to refer to the Agreement between the Government of Australia and the Government of the United States of America concerning security measures for the protection of classified information ("GSOIA") and to express the following understandings of the United States, which are intended to aid the interpretation of the GSOIA based on the parties' discussions during the negotiations.

The Parties confirm that the phrase "classified information received from the other Party" wherever it appears in the text of the Agreement is intended to mean classified information, in the broadest sense, provided directly or indirectly by one Party to the other Party, or to an officer or other representative of the Parties, including classified information jointly generated by the Parties. The phrase is intended to cover classified information that is provided to the recipient Party for its own purposes or for the purposes of passing to a contractor of the originating Party.

It is the intention of the Parties that, in Article 2, "generated by or for the Government of the United States or the Government of Australia or that is under the jurisdiction or control of one of them and which requires protection in the interests of national security of that government" be read as descriptive of the nature of the information with which the Agreement is concerned. It will be information of this nature that will be assigned a security classification. The Parties confirm, however, that they will protect classified information in accordance with the terms of the Agreement on the basis only that it is designated by the assignment of a security classification. No questioning of the nature of the information will be required or will be made to invoke the protections of the Agreement.

The Parties note that the term "personnel security clearance" wherever it appears in the text refers for the purposes of the Government of Australia to a "personal security clearance".

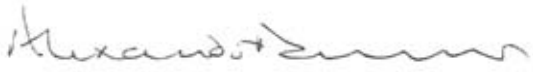
In respect of the requirements for security clearances in the Agreement, the Parties acknowledge the special status of elected representatives at the federal level, and confirm their intention to continue to apply their current practices to them.

It is the intention of the Parties that protection of private rights, such as patents, copyrights or trade secrets, is an issue to be dealt with in detail separately from the Agreement. While the Parties in Article 4 D confirm their commitment to respect private rights, how this commitment will be manifested will depend upon separate detailed agreements or arrangements and the laws of the Parties. The extent of knowledge of a recipient Party of such rights may also be relevant.

I would appreciate your Excellency confirming that the understandings described above are also the understandings of the Government of Australia."

I affirm that the understandings described above are also the understandings of the Government of Australia

Accept, Excellency, the assurances of my highest considerations.



Alexander Downer
Minister for Foreign Affairs

CANBERRA
25 June 2002

April 14, 1961

Excellency:

I have the honor to refer to recent discussions between representatives of our respective Governments concerning the desirability of extending to all classified information exchanged between our two Governments the same principles which our Governments have agreed to apply in safeguarding classified information covered by the Security Agreement by the Parties to the North Atlantic Treaty, approved by the North Atlantic Council on January 6, 1950, and the Basic Principles and Minimum Standards of Security, approved by the Council on March 2, 1955 (NATO Document C-M(55)15(Final)), and the Security Agreement between the United States and United Kingdom Chiefs of Staff approved in August 1948.

Recognizing that

The Honorable

Sir Harold Caccia, G.C.M.G., K.C.V.O.,

British Ambassador.

Recognizing that protection of all classified information communicated directly or indirectly between our governments is essential to the national safety and security of both our countries, I have the honor to suggest the following mutual understanding for the protection of such information, namely, that the recipient:

a. Will not release the information to a third Government without the approval of the releasing Government.

b. Will undertake to afford the information substantially the same degree of protection afforded it by the releasing Government.

c. Will not use the information for other than the purpose given.

d. Will respect private rights, such as patents, copyrights, or trade secrets which are involved in the information.

Nothing in the arrangement proposed in this note shall be held to impair existing agreements and arrangements for safeguarding classified military information or to apply to information for which special provision has been made, such as atomic energy information which the United States designates as Restricted Data. Subject to this qualification, the arrangement proposed in this note would apply to all information furnished by the United States Government

and classified "Confidential", "Secret", or "Top Secret" and to such information designated by Her Majesty's Government in the United Kingdom as coming within the purview of this arrangement.

The details regarding channels of communication and the application of the foregoing principles would be the subject of technical arrangements between appropriate agencies of our respective Governments.

If the foregoing is acceptable to your Government, I propose that this note and your reply to that effect, designating the types of information your Government wishes covered, shall be regarded as placing on record the mutual understanding reached between the Governments on this matter which shall become effective as from the date of your reply.

Accept, Excellency, the renewed assurances of my highest consideration.

For the Secretary of State:

Ivan B. White

Annex of General Security Procedures

1. Official information given a security classification by either of our two Governments or by agreement of our two Governments and furnished by either Government to the other through Government channels will be assigned a classification by appropriate authorities of the receiving Government which will assure a degree of protection equivalent to or greater than that required by the Government furnishing the information.

2. The recipient Government will not use such information for other than the purposes for which it was furnished and will not disclose such information to a third Government without the prior consent of the Government which furnished the information.

3. With respect to such information furnished in connection with contracts made by either Government, its agencies, or private entities or individuals within its territory with the other Government, its agencies, or private entities or individuals within its territory, the Government of the country in which performance under the contract is taking place will assume responsibility for administering security measures for the protection of such classified information in accordance with standards and requirements which are administered by that Government in the case of contractual arrangements involving information it originated of the same security classification. Prior to the release of any such information which is classified CONFIDENTIAL or higher to any contractor or prospective contractor, the Government considering release of the information will undertake to ensure that such contractor or prospective contractor and his facility have the capability to protect the classified information adequately, will grant an appropriate facility clearance to this effect, and will undertake, in accordance with national practice, to grant appropriate security clearances for all personnel whose duties would require access to the classified information.

4. The recipient Government will also:

a. Insure that all persons having access to such classified information are informed of their responsibilities to protect the information in accordance with applicable laws.

b. Carry out security inspections of facilities within its territory which are engaged in contracts involving such classified information.

c. Assure that access to such classified information at facilities described in subparagraph b is limited to those persons who require it for official purposes. In this connection, a request for authorization to visit such a facility when access to the classified information is involved will be submitted to the appropriate department or agency of the Government where the facility is located by an agency designated for this purpose by the other Government, and the request will include a statement of the security clearance and official status of the visitor and of the necessity for the visit. Blanket authorizations for visits over extended periods may be arranged. The Government to which the request is submitted will be responsible for advising the contractor of the proposed visit and for authorizing the visit to be made.

5. Costs incurred in conducting security investigations or inspections required hereunder will not be subject to reimbursement.

6. Classified information and material will be transferred only on a government-to-government basis.

7. The Government which is the recipient of material produced under contract in the territory of the other Government undertakes to protect classified information contained therein in the same manner as it protects its own classified information.

BRITISH EMBASSY,
WASHINGTON.

April 14, 1961.

Sir,

I have the honour to refer to your Note of today's date regarding protection of classified information exchanged between our two Governments.

The proposals made therein are acceptable to Her Majesty's Government in the United Kingdom.

The types of information designated by my Government to which the arrangements would apply are all information furnished by Her Majesty's Government in the United Kingdom and classified "Confidential", "Secret" or "Top Secret".

I avail myself of this opportunity to renew to you, Sir, the assurances of my highest consideration.

/ David Ormsby-Gore

The Honorable Dean Rusk,
Department of State,
Washington, D.C.

Agreement between the United States and the United Kingdom amending the agreement of April 14, 1961 relating to the safeguarding of classified information, with annex. Effected by exchange of notes at London December 19, 1983. Entered into force December 19, 1983.

EMBASSY OF THE
UNITED STATES OF AMERICA

London, December 19, 1983.

No. 83

Excellency:

I have the honor to refer to recent discussions between representatives of our respective governments concerning the desirability of amending the United States - United Kingdom General Security Agreement of April 14, 1961.

Recognizing the importance of safeguarding all classified information that we share, I have the honor to suggest the following changes be made to paragraphs 1 and 6 of the Annex of General Security Procedures which is an enclosure to the United States - United Kingdom General Security Agreement of April 14, 1961:

Paragraph 1, change to read:
"Official information given a security classification by either of our two Governments, or by agreement of our two Governments, and furnished by either Government to

His Excellency

The Rt. Hon. Geoffrey Howe, Q.C., M.P.,

Secretary of State for Foreign and

Commonwealth Affairs

Foreign and Commonwealth Office,

London, S.W. 1.

the other through channels authorized by each, will be assigned a classification by the appropriate authorities of the receiving Government which will assure a degree of protection equivalent to or greater than that required by the Government furnishing the information."

Paragraph 6, change to read:
"Classified information and material will be transferred only on a Government-to-Government basis unless otherwise authorized by a security agreement for industrial operations between the Ministry of Defence and the Department of Defense of the U.S."

If the foregoing is acceptable to Your Excellency's Government, I propose that this note and Your Excellency's reply to that effect shall be regarded as placing on record the mutual understanding reached between the governments on this matter which shall become effective as from the date of Your Excellency's reply.

Accept, Excellency, the renewed assurances of my highest consideration.

Charles H. Price

EMBASSY OF THE UNITED STATES OF AMERICA
LONDON

Security Department

Foreign and Commonwealth Office

London SW1A 2AH

XQ 4/8/3

19 December, 1983

His Excellency
The Honourable Charles H Price II
Ambassador Extraordinary and Plenipotentiary
American Embassy
Grosvenor Square
LONDON W1A 1AE

Your Excellency

I have the honour to refer to your Note of today's date regarding an amendment to the United States-United Kingdom General Security of Information Agreement of 14 April 1961. The proposals made therein are acceptable to Her Majesty's Government in the United Kingdom.

I have the honour to convey to your Excellency the assurance of my highest consideration

(for the Secretary of State)

AGREEMENT BETWEEN
THE GOVERNMENT OF THE UNITED STATES OF AMERICA
AND
THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

REGARDING THE SHARING OF FORFEITED
OR CONFISCATED ASSETS OR THEIR EQUIVALENT FUNDS

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as "the Parties"),

CONSIDERING the commitment of the Parties to co-operate on the basis of their Agreement Concerning the Investigation of Drug Trafficking Offences and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking which entered into force on April 11, 1989; the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which entered into force on February 20, 1990 for the United States and June 28, 1991 for the United Kingdom of Great Britain and Northern Ireland; and their bilateral Treaty on Mutual Legal Assistance in Criminal Matters, which entered into force on December 2, 1996;

CONSIDERING FURTHER the 2000 United Nations Convention against Transnational Organized Crime, opened for signature at Palermo from December 14, 2000; as well as the relevant Recommendations of the Financial Action Task Force;

DESIRING to improve the effectiveness of law enforcement in both countries in the investigation, prosecution, and suppression of crime and in the tracing, freezing, seizure, and forfeiture or confiscation of assets related to crime; and

DESIRING also to create a framework for sharing the proceeds of the disposition of such assets;

HAVE AGREED as follows:

ARTICLE 1

INTERPRETATION

For the purposes of this Agreement:

(a) references to "forfeiture" or "confiscation" shall mean any action under national law resulting in -

i) in the case of the United States of America, a judgment which extinguishes title to assets of any description related to, or proceeding from crime, or a sum which amounts to the value of such assets, and the vesting of such title in the government pursuing the action; and

ii) in the case of the United Kingdom of Great Britain and Northern Ireland, a confiscation order which is made by a court and which is not, or is no longer, capable of being the subject of any form of appeal proceedings;

(b) "co-operation" (other than references in the title of the Judicial Co-operation Unit of the Home Office) shall mean any assistance, including intelligence, operational, legal or judicial assistance, and shall include the enforcement of a forfeiture or confiscation order of the other Party, which has been given by one Party and which has contributed to, or significantly facilitated, forfeiture or confiscation in the territory of the other Party;

(c) references to "assets" shall mean assets which are in the possession of a Party, and which comprise the net proceeds realised as a result of forfeiture or confiscation, after deduction of the costs of realisation;

and the provisions of this Agreement are to be interpreted accordingly.

ARTICLE 2

CIRCUMSTANCES IN WHICH ASSETS MAY BE SHARED

In any case in which a Party is in possession of forfeited or confiscated assets, and it appears to that Party ('the Holding Party') that co-operation has been given by the other Party, the Holding Party may, at its discretion and in accordance with domestic laws, share those assets with that other Party ('the Co-operating Party').

ARTICLE 3

REQUESTS FOR ASSET SHARING

1. A Co-operating Party may make a request for asset sharing from the Holding Party in accordance with the provisions of this Agreement when its co-operation has led, or is expected to lead, to a confiscation or forfeiture. In any case, a request for asset sharing shall be made within one year from the date of entry of the final order of forfeiture/confiscation, unless otherwise agreed between the Parties in exceptional cases.

2. A request made under paragraph 1 of this Article shall set out the circumstances of the co-operation to which it relates, and shall include sufficient details to enable the Holding Party to identify the case, the assets, and the agency or agencies involved.

3. On receipt of a request for asset sharing made in accordance with the provisions of this Article, the Holding Party shall -

(a) consider whether to share assets as set out in Article 2 of this Agreement, and
(b) inform the Party making the request of the outcome of that consideration.

4. In appropriate cases where there are identifiable victims, consideration of the rights of victims may take precedence over asset sharing between the Parties.

ARTICLE 4

SHARING OF ASSETS

1. Where the Holding Party proposes to share assets with the Co-operating Party, it shall:

(a) determine, at its discretion and in accordance with its domestic law, the proportion of the assets to be shared which, in its view, represents the extent of the co-operation afforded by the Co-operating Party; and

(b) transfer a sum equivalent to that proportion to the Co-operating Party in accordance with Article 5 of this Agreement.

2. The Parties agree that it may not be appropriate to share where the value of the realised assets or the assistance rendered by the Co-operating Party is de minimis.

ARTICLE 5

PAYMENT OF SHARED ASSETS

1. Unless otherwise mutually agreed, any sum transferred pursuant to Article 4 (1) (b) of this Agreement shall be paid -

(a) in the currency of the Holding Party, and
(b) by means of an electronic transfer of funds or cheque.

2. Payment of any such sum shall be made -

(a) in any case in which the United States of America is the Co-operating Party, to the United States of America, and sent to the pertinent office or designated account of the Department of Justice or the Department of Treasury as specified in the request;

(b) in any case in which the United Kingdom of Great Britain and Northern Ireland is the Co-operating Party, to the Home Office Accounting Officer, and sent to the Head of the Confiscation Policy Section, Judicial Co-operation Unit, Home Office;

or to such other recipient or recipients as the Co-operating Party may from time to time specify by notification for the purposes of this Article.

ARTICLE 6

IMPOSITION OF CONDITIONS

Unless otherwise mutually agreed, where the Holding Party transfers any sum pursuant to Article 4(1)(b) above, it may not impose on the Co-operating Party any conditions as to the use of that sum, and in particular may not require the Co-operating Party to share the sum with any other state, government, organisation, or individual.

ARTICLE 7

CHANNELS OF COMMUNICATION

All communications between the Parties pursuant to the provisions of this Agreement shall be conducted through the Central Authorities designated pursuant to Article 2 of the Treaty on Mutual Legal Assistance in Criminal Matters and, where appropriate, as specified as follows:

(a) on the part of the United States of America, the Office of International Affairs, Criminal Division, United States Department of Justice. In addition, the United Kingdom may transmit requests for asset sharing directly to the pertinent component agency of the United States Department of Justice or the United States Department of the Treasury;

(b) on the part of the United Kingdom of Great Britain and Northern Ireland, the International Policy Team, Judicial Co-operation Unit, Home Office;

or by such other nominees as the Parties may from time to time for their own part specify by notification for the purposes of this Article.

ARTICLE 8

TERRITORIAL APPLICATION

This Agreement shall apply:

(a) in relation to the United Kingdom

(i) to England and Wales, Scotland and Northern Ireland;

(ii) to any territory for the international relations of which the United Kingdom is responsible and to which this Agreement shall have been extended, subject to any modifications agreed between the Parties. Such extension may be terminated by either Party by giving six months written notice to the other through the diplomatic channels; and

(b) in relation to the United States of America, to federal proceedings resulting in a forfeiture order and occurring in any state of the United States of America, the District of Columbia, or any commonwealth, territory or possession of the United States of America.

ARTICLE 9

ENTRY INTO FORCE

This Agreement shall enter into force upon signature by both Parties. This agreement supersedes the exchange of letters dated January 20, 1992, and May 26, 1992, between the Secretary of State for the Home Department the Right Honourable Kenneth Clarke QC MP and the Attorney General of the United States William P. Barr, which are hereby revoked.

ARTICLE 10

TERMINATION OF AGREEMENT

Either Party may terminate this Agreement, at any time, by giving written notice to the other Party. Termination shall become effective six months after receipt of the notice.

In witness whereof the undersigned, being duly authorised by their respective governments, have signed this Agreement.

Done in duplicate at Washington, this 31 day of March, 2003.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

FOR THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

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