Concerns Regarding Defense Trade Cooperation Treaties

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The U.S. arms export control system is widely and rightfully regarded as one of the best in the world. This regime of pre-license 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 UK 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 premises of 18 U.S. companies suspected of shipping 1000s 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 long-standing 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

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

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 US 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 pre-screened members of an approved community and only for an as-yet undisclosed list of "operations, programs and projects" that meet the needs of the UK or Australian governments. The implementing arrangements also lay out specific eligibility criteria against which prospective non-governmental British and Australian members of the approved community will be assessed, and limit access to items exported under the treaty to UK 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;

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[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.

"verifications, site visits and inspections" and "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., UK 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]

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[8] The ITAR does not require prior written approval for the retransfer of some US 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.

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 record-keeping, 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.
- 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 UK as part of that treaty do not fully satisfy these requirements.[12] But even if the UK 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

[11] *U.S. Weapons Technology at Risk*…, p. 21..
[12] See "U.S.-UK Defense Export Control Treaty Faces Hurdles in Congress," *Inside US Trade,* 13 July 2007.

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.**