

# ACA | Arms Control Association

December 9, 2009

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,



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