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One Hundred Eighth Congress
Congress of the United States
Committee on International Relations
House of Representatives
Washington, DC 20515

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February 10, 2004

The Honorable Colin L. Powell
Secretary of State
U.S. Department of State
2201 C. Street, N.W.
Washington, D.C. 20520

Dear Mr. Secretary:

Thank you for your letter dated November 25, 2003, concerning State's proposal to exempt commercial exports of weapons technology to the United Kingdom and Australia, in which you expand upon your views in two areas of the several we discussed in our November 21st meeting: "what we give up," and our Government's policy and rights regarding re-exports of U.S. weapons technology.

We note that, during the meeting, there were a number of other issues we briefly discussed regarding your Department's proposal to exempt commercial exports of weapons technology from the license requirements of U.S. law. These include: (1) the Administration's failure to provide explicit assurances that would rule out additional license exemptions for other countries; (2) the inclusion of many dangerous weapons in the exemption proposal under the "low sensitivity" rubric; (3) the absence of foreign controls comparable in scope and effectiveness to those of the United States (the original rationale for these negotiations); and (4) the attenuation generally of U.S. Government safeguards and control, which also has implications for our law enforcement interests. There are also other concerns raised by your Department's proposal that the Committee will detail in the forthcoming report we mentioned during our meeting.

Mr. Secretary, we believe that agreeing to an exemption in this area would "give up" a great deal more than the ability to screen freight forwarders, although surrender of this responsibility is a serious matter *per se*. Your Department's proposal would suspend virtually the entire U.S. Government system of scrutiny and control that otherwise precedes the export of weapons technology from the United States. Suspension of the U.S. system was the approach adopted for Canada. We saw what happened there when a "who's who" of rogue governments readily exploited the lax regulatory environment to obtain U.S. weapons technology. When enacting the Security Assistance Act of 2000, well prior to 9/11, Congress explicitly cautioned the Executive Branch not to establish a "Canada-like" exemption with the United Kingdom (UK) and Australia, given the additional risks associated with unlicensed military cargo that would travel far greater distances via commercial air and sea freight. It is not obvious to us why suspending this system now makes sense in the post-9/11 security environment.

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The statutory framework you would suspend requires the identification of all parties (i.e., the applicant, the freight forwarders, the intermediate consignees and the end user) on a license application for the very purpose of preventing the participation of ineligible, unreliable or suspect persons. This framework should not be so lightly discarded on the grounds that you will have improved computer tools to detect violations after they have occurred. Similarly, we are concerned on prudential grounds with the sentiment that computer checks on all parties may be dispensed with because "not all" unscrupulous middlemen are on State's computerized "watch list." This line of argument will be of little consolation if U.S. weapons are diverted through the involvement of a person known to be engaged in criminal activities, whose role was not discovered until after the fact because routine computer checks were not conducted.

Regarding the specific points you raise about the Automated Export System ("AES"), the requirement for exporters to identify freight forwarders and intermediate consignees 24 hours prior to shipment does not provide an alternative means to screen those parties. Rather, the exemption arrangements would substantially negate a critical purpose of AES coverage of weapons exports: preventing unauthorized shipments. This is because Department of Homeland Security (DHS) personnel at U.S. ports of exit would be unable to compare persons identified through AES with those already screened on an approved export license (because there is no such license). What DHS personnel will have under a best-case scenario are the names of uncleared freight forwarders and intermediate consignees identified by the exporter (which also would not be cleared), and no ability to cross-check the names against a non-existent license. When you take away the export license, you take away one of the key tools used by DHS personnel to verify compliance: You eliminate their ability to operate on the basis of near real-time, agency-wide integrated information in performance of their targeting and inspection duties. What we are "giving up" is most of our ability to effectively stop the illegal export of munitions prior to their actual shipment.

Instead, DHS personnel would be left to improvise when targeting military cargo for inspection – just as they have been with the license exemption for Canada (where State guidance to DHS has not been forthcoming despite a critical GAO report issued nearly two years ago). DHS personnel already have their hands full preventing the entry of dangerous materiel into our country. While DHS is working hard to "close the front door" to dangerous imports, State's proposals would "open the back door" to dangerous exports.¹

The second area discussed in your letter concerns U.S. Government re-export policy, and the longstanding requirement embodied in our laws that U.S. consent be obtained before our weapons technology may be transferred to another government or used for purposes not previously authorized. We are concerned that neither of the proposed arrangements contains any commitment for the UK or Australia to seek the prior written consent of the U.S. Government

¹ Similarly, after receiving assurance from State on July 25th that federal costs would be less, it was disappointing to learn in the waning days of our session that the proposed arrangements could *increase* or *significantly increase* the workload on DHS (depending on the volume of exempt military cargo) and require additional inspectors, as well as additional funding for AES programming changes. Since the exemption would cover "most" permanent exports to the UK and Australia (State's analysis) -- and since this could approach \$3 billion per annum or 20 percent of all U.S. weapons technology licensed for permanent export worldwide -- the funding requirements could be substantial.

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before they re-export or re-transfer U.S. weapons technology to a third party. The Department has suggested that the arrangements could be interpreted in order to imply this commitment, but the words are simply not there. Nor has the Department proffered that it would insist on such commitments, as it did with Canada, through an exchange of diplomatic notes. Notwithstanding this omission, the United States would be bound – in language that is very clear – not to seek third party re-export or re-transfer assurances in the future from either the UK or Australia. Since both governments now are required under U.S. law or regulation to pledge to seek U.S. Government consent prior to any re-export or retransfer on a case-by-case basis whenever there is any significant sale of U.S. weapons licensed commercially to them, and for all sales to them by the Department of Defense (and, as you point out, have consistently honored those commitments), we do not agree with your assertion that the negotiated arrangements “are a clear improvement over the status quo” and exceed anything we have obtained from the UK in the past.

In the case of Australia, the Committee has assumed this omission was an unintentional oversight, but the Department has not moved to correct this, raising concern that there may be more involved. Concerning the UK, it is extremely difficult to understand why our close ally will not extend to the U.S. Government for our controlled weapons technology the same right of prior written consent it granted in a treaty arrangement with France, Germany and other European Union (EU) partners to protect their commercial or market-sensitive information. In the same treaty, the UK also granted its EU partners – but also withheld from the United States – the right of inter-governmental consultation before authorizing re-exports by private companies to non-parties. These two principles in the treaty with the UK and its EU partners (prior consent and prior consultation before private exports are authorized) have been cornerstones of U.S. arms export control policy for many years. The Committee is concerned there could be very significant implications for U.S. re-export policy worldwide if other governments were to view the watered-down commitments State has mustered in the proposed agreements with the UK and Australia as a precedent for their own weapons dealings with us (and there is little reason to think they would not).

Your letter emphasizes that, without the exemption arrangements, the U.S. Government will continue to have no legal commitment whatsoever from these governments concerning re-transfers of U.S. weapons technology within their borders. This is so because neither government has agreed to amend its law to control such domestic re-transfers of U.S. weapons technology, one of the requirements of the Security Assistance Act of 2000. This said, the alternative approach which State negotiated in the proposed exemptions does not provide any realistic means for the U.S. to monitor or verify compliance with in-country transfer commitments, which would not be enforceable under the UK’s (and likely also Australia’s) criminal laws, and which, in critical respects, are reflected only in oral commitments (e.g., a prospective UK amendment of its order on general licenses) or papers the Department has not made available to the Committee (e.g., the draft contract with UK firms). Further, the ability of the State Department to audit the compliance of foreign defense industries with such commitments is, frankly, not particularly strong.

On this point, we view the trade-off you propose regarding re-exports controls and U.S. Government rights – to give up government-to-government obligations (which were not forfeited even under the Canadian exemption) in return for very limited (and essentially unenforceable) in-country re-transfer restrictions – to be an outcome that neither meets the requirements of the law

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we enacted in 2000 nor serves our national interests. We believe that a requirement for legally binding government-to-government commitments on re-export controls is a *sine qua non* for the benefit of a license exemption. While we welcome the emphasis the Department places on in-country re-transfers, we also note the Department opposed provisions in H.R. 1950 earlier this year that would have clarified State's authority for such transfers in the United States and has not made any revision to its regulations since 9/11 to expand control in any area over intra-U.S. transfers of weapons technology to foreign persons as part of an overall U.S. Government response to the war on terror (e.g., domestic transfers to foreign persons of chemical and biological warfare agents).

As we said in our meeting with you, it should be no surprise, given our general views on the merits of license exemptions, that we seek explicit assurances from you that the Administration will not propose additional candidate countries for such exemptions. We seek such assurances because various infirmities with the negotiated arrangements arise precisely because the United States offer of a country exemption has not provided a "powerful incentive" (the stated rationale for the exemption policy) for these countries to strengthen their military export control systems to a level comparable in scope and effectiveness with that of the United States. This development impeaches the original justification for the exemption policy and the extension of the policy to other countries. With respect to the latter, we are troubled by the Administration's legislative request (presented when we took up the State authorization bill in April) to waive all restrictions in U.S. law for negotiating exemptions with any country, not just the UK and Australia. If these agreements are inadequate with our closest allies – as we believe they clearly are – they would be dangerous in the extreme as models for other countries. It is one thing to lower the bar for our closest allies; seeking blanket authority to lower it for any other country is beyond our comprehension.

At the very least, the Department should have put these negotiations on hold while it consulted with Congress to determine a proper course. Instead, the decision was made to wrap up the negotiations and present Congress publicly with an unsatisfactory result of requiring a new law which, if enacted, would jeopardize U.S. interests, but which, if not enacted, would disappoint our closest allies. Such an approach underestimates the importance of the underlying issues to the United States and the incalculable significance of our military ties to both countries. This is the type of dilemma – caught between cliffs and shoals – that Congress looks to the State Department to navigate away from, not to approach dangerously.

We are also concerned with the continued characterization of the U.S. weapons technology that would be exposed to increased risk of diversion as being of "low sensitivity." We think this description is misleading and does not enhance the credibility of the proposal. More accurately, the exemptions would involve a vast assortment of lethal weapons, including those that have figured prominently in past terrorist attacks, such as shoulder-fired missiles (often referred to as man-portable air defense systems, or "MANPADS"), bombs, military explosives, mortars, large caliber ammunition, flight trainers, and the like.² While these items may not

² Most of the U.S. weapons technology implicated in the ongoing criminal investigation of a London-based Iranian front company (i.e., Multicore, Ltd.) would be exempt, as would be the shoulder-fired missiles involved in the FBI's recent arrest of a UK national (and his indictment in December) on charges related to brokering the sale of these missiles to terrorists for use in shooting down commercial airliners.

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present a significant technological challenge on the battlefield to our armed forces, a conventional battlefield is not where and how our enemies in the war on terror are waging their attacks. Given the experience with Canada, we are very concerned that such items could fall into dangerous hands and be used against American interests at home or abroad, or against those interests of our friends and allies, as a direct result of the reduced oversight inherent in your Department's proposal.

Certainly, President Bush did not consider such items to be of "low sensitivity" when he launched the "STAR" ("Secure Trade in the APEC Region") initiative with other APEC leaders, in which "strict export controls" over MANPADS is now one of several key elements. The Department's proposal to relax export controls over such dangerous munitions when exported to our major military ally in APEC (i.e., Australia) seems incongruous with a call by the President and other APEC leaders for strict domestic export controls. Such proposals by State reinforce the perception we underscored for you in our recent meeting that U.S. arms export control policy has become unhinged from U.S. nonproliferation and counterterrorism policy through its singular focus on export control reform initiatives conceived in the previous administration, before 9/11.

In sum, we are persuaded that the risks of diversion and exploitation of U.S. weapons technology have increased since the attacks on New York and Washington of September 11, 2001. The same weapons technology that you believe is important for interoperability purposes can as quickly and more securely be made available to our close allies by establishing priorities in our licensing processes, a step that places exports to countries that fight alongside our forces in the war on terrorism at the head of the line, licensing exports to them within a few days, rather than weeks or months. We have authorized all the resources you need to do this. Unfortunately, your Department opposes this step for reasons we do not understand, but which we suspect may relate to its reluctance to exclude exemption arrangements for other countries and to justify support for its export control reform agenda.

In this regard, State's opposition to establishing priority for the UK and Australia in our licensing process has created glaring inconsistencies in the execution of our arms export control program, and unnecessarily impedes legitimate exports by our defense industry to our closest allies. For example, it is inexplicable why approximately 850 export license applications for the UK and Australia in 2002, which would not even require a license under your proposal, required lengthy, inter-agency referral to the Department of Defense for national security reviews (according to data which State provided to the Committee last summer). Such referrals typically add four to six weeks to the process (eight days versus 48 days according to State's published time lines for fiscal year 2003). This number is made even more startling by the fact that approximately 60 percent of those licenses for the UK and Australia contained provisos (i.e., conditions and limitations) when they were eventually approved.

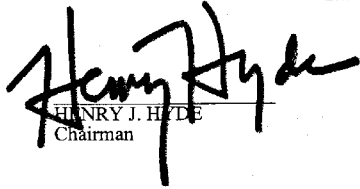
Since the very same weapons technology has been made available to Canadian industry without restrictions for years, the national security or foreign policy rationale for maintaining such a lengthy and onerous policy toward the UK and Australia is not readily apparent, nor is the Department's opposition to provisions in H.R. 1950 that would establish an expedited licensing process for the UK and Australia, ensuring that their exports are licensed quickly and securely. We do not understand why it is necessary to present the UK and Australia with a Hobson's choice between no license and one that takes 48 days to obtain.

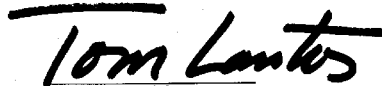
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Mr. Secretary, we sincerely appreciate your personal involvement in this matter. We have now met personally to discuss these issues and have traded written views touching on most of the major issues. We remain prepared to work with the State Department to achieve a resolution to these issues in the expectation that State is willing to make changes needed to protect fundamental U.S. interests and to limit its exemption policy to the UK and Australia. Thus far, we are still hopeful our concerns will be resolved.

With best wishes, we remain

Sincerely,


HENRY J. HYDE
Chairman


TOM LANTOS
Ranking Democratic Member

