

Appendix 9

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Congress of the United States
 Committee on International Relations
 House of Representatives
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June 25, 2003

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

Dear Mr. Secretary:

Thank you for the material that was furnished to the Committee on International Relations by letter dated June 4, 2003, from Assistant Secretary Paul V. Kelly, concerning the proposal to exempt Australia and the United Kingdom from arms export license requirements.

In order to aid in the Committee's further analysis of this material, I request the Department's written responses to the questions attached hereto. It would be helpful to receive the responses as soon as possible in order to set the stage for a detailed discussion with Department officials pursuant to Deputy Secretary Armitage's request for such a meeting.

Sincerely,



HENRY J. HYDE
 Chairman

Enclosure:
 As stated

COMMITTEE ON INTERNATIONAL RELATIONS

Subject: Initial Questions Concerning Department of State's June 4, 2003
Document Submission Relating to ITAR Waivers for Australia and the
United Kingdom

General Policy Matters

(1) Since the U.S. arms export license process has consistently produced any necessary licenses for export of most unlicensed low sensitivity items (understood for this purpose to mean export applications not requiring staffing to other offices) to Australia and the UK within a 10-day period for the past two years, would the Department provide a concise statement regarding the problem it is trying to fix through these arrangements? Would it also address in that statement how any gains it perceives that may serve to justify associated risks to law enforcement, homeland security and other U.S. interests (e.g., prior consent to re-transfers) presented by these alternative arrangements to traditional forms of control under United States law and regulations?

(2) Is the Department prepared to state a definitive position at this time concerning whether it will explore additional country exemptions in the future or terminate the policy (as opposed to a "pause" or moratorium) with exemptions for Australia and the UK?

(3) Please furnish the Committee with all intelligence reports since January 1, 2001, that relate to the diversion or planned diversion of any defense articles and defense services involving the UK or Australian persons or companies.

(4) Does the Department intend to vet all eligible foreign end users for Australia and the UK with the intelligence community and law enforcement agencies? If so, has the Department obtained any commitments from these agencies to conduct the necessary checks?

(5) What are the projected costs to the U.S. Government and to U.S. industry of the procedures mandated in the proposed UK and Australia arrangements?

Scope of Waiver and Controls Lists

(6) Deputy Secretary Armitage's letter to the Chairman dated May 20, 2003, states: "These agreements will create a community of trusted and closely regulated defense companies that will be able to receive low-sensitivity unclassified defense exports ... without a license" (emphasis added). Section 47(9) of the Arms Export Control Act states that "significant military equipment"

means articles "(A) for which special export controls are warranted because of the capacity of such articles for substantial military utility or capability; and (B) identified on the United States Munitions List." Would the Department agree that references to "unclassified low sensitivity" items could not reasonably be understood as encompassing items designated under U.S. law and regulation as significant military equipment? If so, will the Department revise its June 4th submission concerning the scope of waiver, in keeping with Deputy Secretary Armitage's assurance, to remove all SME items and furnish the Committee with a revised document reflecting this change? If the Department declines to make this change, please explain why and revise the June 4th submission to annotate all items currently designated as SME?

(7) A January 18, 2001, joint statement released by the UK MOD concerning the January 17 visit of Baroness Symons to Washington says "...the United States has stated that it is prepared to revise its International Traffic in Arms Regulations to permit the export to qualified companies in the United Kingdom of most unclassified defence technology without a license." Is this statement still accurate? Since unclassified technology generally accounts for more than 98 percent of all munitions licenses in a given year, what percent of licensed defense trade to Australia and the UK in fiscal year 2002 would have been unlicensed had the country exemptions proposed by the Department been in place?

(8) For those U.S. Munitions List items to be exempt pursuant to the arrangements with the UK and Australia, please identify for each country: (i) those items routinely referred to the Department of Defense under current guidelines; (ii) the percent of those items referred to Defense that result in a Defense recommendation for approval without conditions and the percent for approval under specified conditions (i.e., "provisos"); and (iii) the percent of all items referred to Defense for Australia and the UK that result - (A) in unconditional approvals, and (B) in conditional approvals.

(9) Please furnish the Committee with: (i) the expert level analysis relating to comparability of the Australian and UK control lists with the U.S. Munitions List upon which the Department is basing its conclusion regarding the statutory criteria; (ii) a copy of the ADSGL; (iii) confirmation that neither list requires additions to make them congruent to the USML; (iii) a list of all USML items controlled by the UK as dual-use items and the UK licensing policy for each of these items (e.g., no license required ("NLR") worldwide, NLR for EU, etc.); and (iv) a copy of Annex IV to Council Regulation (EC) No. 1334/2000.

(10) Please confirm: (i), as stated in a May 5, 2000, letter previously made available to the Committee from former Secretary Cohen to former Secretary Albright, that all items controlled under the MTCR, Nuclear Suppliers Group and the Australia Group, will continue to require export licenses, and (ii) that the scope of waiver document furnished to the Committee on June 4th excludes all such items. If the scope of waiver includes such items and the Department's position is to maintain their inclusion, please revise the document to annotate these items and indicate by which regime they are controlled.

(11) Please also confirm, as stated in the same letter from Secretary Cohen, that access under both arrangements will be "only by nationals of each country."

(12) As the proposed scope of waiver provided to the Committee on June 4th appears to exclude any and all items from Category I and Categories XIII-XXI of the USML, would the Department please confirm that such items are excluded or amend the June 4th submission. Please also confirm that only those items identified in Category XII of the June 4th submission are included and that there were no inadvertent omissions.

(13) Please confirm, or amend the June 4th submission accordingly, that the following areas will be excluded in their entirety for Australia and the UK (in addition to those items specified for exclusion to Canada at § 126.5(b)(1)-(20), for which the Committee is also seeking confirmation of exclusion):

- all defense services (except as may be specified in the agreements);
- all U.S. defense industry employment by Australian or British nationals;
- all transfers that may occur outside of Australia or the United Kingdom, as the case may be, including in the United States, by any means of exempt U.S. defense items to qualified Australian or UK persons or entities;
- all classified material or information;
- all defense items requiring prior notification to Congress; and
- all permanent and temporary imports into the United States.

Law Enforcement Interests

(14) As the UK MOU on law enforcement developed by DOJ appears to rest on dual criminality as a predicate to UK cooperation, please explain how a civil contract between a UK government agency and a private British person or entity compels UK government cooperation on law enforcement matters under the arrangement?

(15) Relatedly, please explain the legal basis on which the UK government could compel the timely cooperation of a private British person or entity under a civil contract, other than through civil injunctive relief granted by an English court or another judgment in favor of HMG, and whether the UK Government has an established record of success in relying on this type of legal arrangement for these specific matters, or whether the proposed arrangement is essentially novel and untested?

(16) Has the State Department obtained Justice Department advice or opinion with respect to whether the contractual scheme envisaged in this arrangement presents any complications to U.S. civil enforcement actions against UK persons or entities on the grounds of strict liability, double jeopardy or otherwise?

(17) The Committee understands the exemption for Canada currently has more than 2,000 locations in Canada eligible to receive U.S. defense articles exempt from licensing. How many locations are anticipated for the UK and Australia? Is there any ceiling?

(18) In light of GAO's report concerning lessons to be learned in the Canada exemption, has the Department sought the opinion of the Department of Homeland Security ("DHS") regarding the impact of the proposed waivers on U.S. Customs' inspections responsibilities, and whether there is any additional burden involved that would detract from other Customs priorities or for which additional resources by Customs will be needed? If so, please describe DHS' response. Has the Department updated its guidance to Customs concerning Canada since the GAO report?

(19) Given the absence of any successful record of prosecution in the United States involving illegal export activities in instances where no license was required under regulation, has the Department queried U.S. law enforcement agencies, including the Justice Department and U.S. Attorneys, to determine if there are any charges (i.e., criminal counts) associated with ongoing law enforcement investigations that would be adversely affected by establishment of the waivers?

U.S. Government Consent Requirements

(20) Please explain the reason(s) given by the UK Government for its unwillingness to provide in this arrangement a legally binding commitment to the U.S. Government with regard to the necessity of prior written consent for third party transfers and changes in end use?

(21) Please explain why the arrangements contain no legally binding commitments by either the UK or the Australian government concerning non-transfer and end use and the requirement for the U.S. Government's prior written consent over these matters as they pertain to U.S. defense items where the governments, themselves, are the recipients (as distinct from where their private defense companies are recipients and what may be required of them pursuant to these arrangements).

(22) Since the Department appears not to have obtained any legally binding commitments from Australia or the UK to seek the prior written consent of the U.S. government for third party transfers or changes in end use regarding their own use and disposition of U.S. defense items, please explain the rationale for the Department's acceptance of language in Article 5 of the negotiated Australian text and in Article 5 of the UK MOU that delineates areas for which USG authorization shall not be required. Please include in this rationale the basis in U.S. law for accepting such a prohibition absent any level of assurance from either government.

(23) Concerning Article 5 of the UK MOU (and, in certain instances, comparable provisions in the Australia text), please provide the Committee with a considered legal analysis of the scope and meaning of the U.S. commitments. For example --

-- What does "in this context" mean? Does this have a specific meaning or is it meant to imply that the preceding commitments by the UK are being undertaken as part of a larger set of commitments that includes the U.S. undertakings in paragraph 5(a)-(e)?

-- From whom is the U.S. Government barred from seeking re-export or retransfer authorization - UK recipients or any other government from which the UK may wish to acquire US origin defense items?

-- Does the prohibition applicable to the United States in the first clause of Article 5(a) extend to all US defense items (whether sold, licensed or exempt) and to any government or person that might retransfer US defense articles to the UK?

-- if so, how is this permitted under U.S. law?

-- What does the second clause of article 5(a) mean in referring to the "capability" or "effectiveness" of the UK's armed forces? Does this mean that the U.S. Government would forfeit its right to consent to retransfer of US origin defense items from any other third party including any third government in circumstances in which the UK deems it necessary to its "effectiveness"?

-- Similarly, what is the scope of the U.S. commitment with respect to "any forces directly cooperating with those (UK) forces"? Could this be understood to mean that, at any future point, any third country armed forces fighting with the UK in any future conflict (whose identity, time or place are not required to be made known under this commitment?) could similarly determine that the acquisition from of U.S. origin defense items is covered by this prohibition by reason of "capability" or "effectiveness"?

-- Does Article 5(b) forfeit United States rights with respect to the use of US defense articles or services by countries to which the United States maintains an arms embargo? How is this consistent with certain U.S. laws which prohibit the export (including temporary export) of U.S. defense articles, such as, for example, the launch from the PRC of a British or European scientific satellite (e.g., arguably, an "official" UK purpose), containing USML controlled components?

-- Please explain the legal basis for negotiating such overly broad prohibitions on United States rights, which under current law are intended to be asserted and protected -- and in certain instances required to be asserted and protected.?

(24) What is the basis in United States law for a private U.S. exporter, rather than the USG, to provide approval for third party transfers pursuant to these arrangements? Has the Department sought advice or opinion from the Justice Department regarding whether any such approvals are enforceable under United States law?

UK Agreement

(25) Please describe the changes, if any, in UK law or regulation that the UK Government has agreed to make specifically in response to the U.S. proposal for an ITAR waiver (as distinct from changes that are being made in fulfillment of EU, G-8 or other UK commitments unrelated to the ITAR waiver, such as implementation of certain changes recommended by Lord Scott).

(26) Does the Department have a draft of the civil contract the UK would use with qualified firms it will share with the Committee at this time? Can the Department describe any requirements it has provided, or will provide, to the UK?

(27) Please explain the meaning of the term "UK persons and entities" and describe its legal and practical application under the proposed agreement, including insofar as it may concern access to U.S. defense items by UK citizens, UK dual-nationals, EU nationals, and other third party foreign nationals, including employees of UK entities?

(28) Given the Parliamentary record of concern that the UK arms export process may not have a well-developed system for monitoring of its arms exports (beyond ad hoc queries to British Embassies relating to "use" for human rights monitoring purposes), please explain the basis for the Department's affirmative conclusion of comparability on this point, as well as the Department's understanding as to the scope and criteria of the DTI watch list compared with that of the United States.

(29) Please explain why the UK does not plan to control export of armaments manufactured in another country under UK-licensed production arrangements and how the Department factored this into its overall assessment of comparability, if it all?

(30) Please advise whether UK implementation of the draft agreement will include an order to revoke or amend all existing open licenses concerning the requirement to obtain U.S. Government consent to retransfers or change in use?

(31) Similarly, please advise whether the UK will publish an order to prevent incorporation of U.S.-origin defense items into dual-use end items or systems, and any related issues regarding the application of de minimus or "transformation" of technology rules that may be applicable to the preservation of United States interests?

(32) Please address whether Article 1(a) excludes a situation where a defense item is incorporated into a dual-use item and, therefore, subject in most instances to EU dual-use rules? If not, please explain how U.S. Government consent rights are protected?

(33) Also concerning Article 1(a), are there any "other instruments" in place or envisaged at this time? If so, please describe.

(34) Since Article 2 provides for U.S. development and maintenance of a list of UK persons and entities, what is the reason for not subjecting those persons and entities to U.S. jurisdiction pursuant to a written arrangement directly with the U.S. Government (as opposed to the contractual arrangement envisaged with the UK government)?

(35) Why is there no counterpart in the UK arrangement to Article 5(a)(i) of the Australia agreement, which excludes use of general licenses and exemptions for satisfying U.S. retransfer consent?

Australia Agreement

(36) Please explain whether changes to Australia's export control laws and regulations relating to military exports will include:

(i) Control over brokering of conventional weapons and, if so, whether GOA control will extend to Australians wherever located or more closely resemble the UK approach?;

(ii) Control over defense services relating to conventional weapons and, if so, whether the control will be as extensive as that of the United States; e.g., extend to technical assistance, as well as licensed production; include conduct associated with publicly available information, etc., or is more likely to resemble the limited approach taken by the UK in this area?;

(iii) Control over transfers of conventional weapons technology "by any means," or likely to be reflective of the limited approach to "intangibles" taken by the UK (e.g., emails, facsimile messages and reading documents over the telephone)?;

(iv) Control over all exports of goods produced in a foreign country under licensed production or manufacturing arrangements?; and

(v) other areas relevant to comparability?

(37) Given Australia's apparent decision not to control internal (i.e., in-country) transfers of defense items and since its defense industry is increasingly foreign owned or controlled (e.g., foreign acquisitions of OPTUS, Ltd. and Australian Defence Industries or "ADI"), please explain whether an ITAR waiver agreement (if approved by the Congress):

(i) could undermine some or all of the legal arrangements in place between the U.S. Government and third-country foreign firms relating to end use controls of U.S. controlled defense items?; and

(ii) whether the proposed ITAR agreement could be an impediment to establishing future such arrangements in the event of additional third country industry acquisitions?

(38) Concerning Article 5(a)(i), what incorporated items are not subject to Australian legal jurisdiction? Why are such items not excluded from the agreement?

(39) In article 4.1.3 of the MOU concerning qualification of Australian recipients, why does the GOA retain the sole right to revoke eligibility of a person or entity from receiving US defense items without a license? How does such an arrangement protect U.S. interests and how is this consistent with appropriate exercise of the authority provided to the Secretary regarding suspension or revocation of licenses in section 42 of the Arms Export Control Act?