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DEFENSE TRADE COOPERATION TREATIES IMPLEMENTATION ACT OF 2010

SEPTEMBER 23, 2010.—Ordered to be printed

Mr. KERRY, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany S. 3581]

The Committee on Foreign Relations, having had under consideration the bill S. 3581, to implement certain defense cooperation trade treaties, reports favorably thereon, with an amendment in the nature of a substitute and an amendment to the title, and recommends that the bill, as amended, do pass.

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I. PURPOSE

The purpose of this bill is to provide a statutory basis for the President to implement 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 (Treaty Doc. 110–7) and the Treaty between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, done at Sydney, September 5, 2007 (Treaty Doc. 110–10). This is necessary to ensure that violations of the treaties, of their implementing arrangements, or of regulations issued pursuant to them would be subject to the criminal and civil sanctions enumerated for certain offenses under the Arms Export Control Act (22 U.S.C. 2751 et seq., hereinafter "the AECA"). The bill also ensures the application to activities under the treaties of existing AECA provisions relating to, inter alia, the approval of third-country transfers, a ban on incentive

payments, and a reporting requirement in the event that a United States person is discriminated against, in the license-free defense trade regime created under the treaties, on the basis of race, religion, national origin, or sex. In addition, the bill requires legislative approval before certain changes to implementing arrangements to the two treaties may enter into effect for the United States.

II. COMMITTEE ACTION

The Treaty with the United Kingdom Concerning Defense Trade Cooperation was signed on June 21 and 26, 2007, and was received in the Senate and referred to the Committee on Foreign Relations on September 20, 2007 (Treaty Doc. 110–7). A nearly identical treaty with Australia was signed on September 5, 2007, and was received in the Senate on December 3, 2007 (Treaty Doc. 110–10).

The committee held a public hearing on the treaties on May 21, 2008. Senator Biden chaired the hearing. Testimony was received from the Honorable John C. Rood, Acting Under Secretary of State for Arms Control and International Security. On July 3, 2008, Senators Biden and Lugar also submitted in writing questions for the record to the Honorable Michael B. Mukasey, Attorney General of the United States, and the Honorable Michael Chertoff, Secretary of Homeland Security. The transcript of that hearing and the text of the executive branch's answers for the record are provided in S. Hrg. 110–651.

On December 10, 2009, the committee held another public hearing on the treaties. Senator Kerry chaired the hearing. Testimony was received from the Honorable Andrew Shapiro, Assistant Secretary of State for Political-Military Affairs, and the Honorable James A. Baker, Associate Deputy Attorney General. On December 17, 2009, Senator Lugar submitted questions for the record to the Honorable John Merton, Assistant Secretary of Homeland Security for Immigration and Customs Enforcement, and Mr. Jayson P. Ahern, Acting Commissioner for Customs and Border Protection. The transcript of that hearing and the text of the executive branch's answers for the record are included in the executive report on the treaties.

Among the issues discussed in the committee's hearings and correspondence with the executive branch was whether implementing legislation should be enacted to clarify the treaties' operation in U.S. law and to provide authorities related to their enforcement. On July 14, 2010, Senator Lugar introduced S. 3581, the Defense Trade Treaty Implementation Act of 2010. Although the executive branch originally envisioned that the treaties would be self-executing, and thus would not require implementing legislation, the executive branch subsequently revised this position and accepted that the treaties would be implemented through legislation. On September 20, 2010, the Department of State transmitted to the committee an answer for the record stating the administration's revised position that, "the Treaties are not self-executing. They will be implemented through legislation and regulations thereunder."

On September 21, 2010, the committee considered the treaties and ordered them favorably reported by a voice vote, with a quorum present and without objection. The committee recommended a resolution of advice and consent to ratification for each treaty. At the same meeting, the committee considered S.

3581, adopted by voice vote a Kerry amendment in the form of a substitute, and by a voice vote ordered the amended bill favorably reported.

III. SECTION-BY-SECTION ANALYSIS

Section 1. Short Title.

This Act may be cited as the "Defense Trade Cooperation Treaties Implementation Act of 2010."

Section 2. Exemptions From Requirements.

Section (2)(a) of the bill would amend section 3(b) of the AECA (22 U.S.C. 2753(b)), to include in the list of items for which the President's advance consent to a transfer to a third party is not required, those transfers that are permitted by one of the treaties without that advance consent. Section 3(a) of the AECA requires, among other things,[1] that before agreeing to sell or lease a defense article or defense service to any country or international organization, the recipient must agree that it will not, without the advance consent of the President, (1) transfer title to or possession of the defense article or related training or other defense service to anyone not an officer, employee, or agent of that country or international organization, and (2) not use or permit the use of such article or related training or other defense service for purposes other than those for which it was furnished. Section 505(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2314) contains a similar requirement prior to providing defense articles or related training or defense services on a grant basis. Section 3(b) of the AECA in turn exempts from those advance Presidential consent requirements certain types of retransfers of defense articles and services from the original recipient countries to a third party.

This provision is intended to make clear that transfers of title or possession permitted by the treaties are exempt from the AECA's advance Presidential consent requirements. For defense articles, services, and related technical data originally exported pursuant to the treaties, Article 7 of each treaty would permit transfers among members of that treaty's approved community of entities and individuals, including non-governmental entities. Such transfers would not require the consent of the United States Government. (Transfers to entities outside of each treaty's approved community, includ-

[1] Section 3(a) requires, in full that "No defense article or defense service shall be sold or leased by the United States Government under this Act to any country or international organization, and no agreement shall be entered into for a cooperative project (as defined in section 27 of this Act), unless-

(1) The President finds that the furnishing of defense articles and defense services to such country or international organization will strengthen the security of the United States and promote world peace;

(2) The country or international organization 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 (as defined in section 27 of this Act), to anyone not an officer, employee, or agent of that country or international organization (or the North Atlantic Treaty Organization or the specific member countries (other than the United States) in the case of a cooperative project) 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;

(3) The country or international organization shall have agreed that it will maintain the security of such article or service and will provide substantially the same degree of security protection afforded to such article or service by the United States Government; and

(4) The country or international organization is otherwise eligible to purchase or lease defense articles or defense services.

ing to another recipient country, would continue to require advance U.S. consent.) In addition, Article 3(3) of each treaty permits the application of the treaty to defense articles, services, and related technical data that were originally exported pursuant to the Foreign Military Sales (FMS) program (that is, the program of government-to-government sales established under the AECA). As a result, the treaties would permit the UK or Australian Governments to transfer to other members of each treaty's approved community defense articles, services, and related technical data that had originally been transferred under the FMS program.

Subsection (b) of this section would add new subparagraph (C) to section 38(j)(1) of the AECA (22 U.S.C. 2778(j)(1)) to exempt the treaties from a certain requirement in the AECA, and to establish limitations on the scope of each treaty. Section 38(j)(1)(A) establishes that the President may use the regulatory authority of the AECA to exempt a country from the licensing requirements of the AECA only if the United States has concluded a bilateral agreement with the foreign country that meets certain requirements as stipulated in section 38(j) of the AECA. The committee recommends that the Senate give its advice and consent to ratification of the treaties, which were not designed to meet the requirements established by section 38(j)(1)(A). The new clause (C)(i) would exempt the treaties with the United Kingdom and Australia from these requirements.

The provision would also limit the scope of defense articles, services, and related technical data for which license-free exports and transfers under the treaties could be conducted. In its presentation of the treaties to the Senate, the executive branch expressed its intention to exempt from each treaty's scope certain defense articles, services, and related technical data that it regarded as too sensitive to be transferred license-free, including 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 committee welcomes the assurances from the executive branch in this regard. Furthermore, the resolutions of advice and consent to ratification for each treaty that the committee has recommended would require as a condition of advice and consent that the executive branch notify the Committee on Foreign Relations in the Senate and the Committee on Foreign Affairs in the House of Representatives 30 days in advance of including within each treaty's scope a defense article, service, or related technical data that had previously been exempt from each treaty's scope.

Nevertheless, the committee believes that there are certain items that are so sensitive that Congress should explicitly exclude them from the scope of the defense trade cooperation treaties. In particular, the committee believes that certain defense articles, defense services, and related technical data that are controlled in accordance with various international nonproliferation regimes must not be included in any license-free defense trade regime. The committee recognizes that the controls under these regimes may in some cases be subject to periodic technical changes by the participating governments of those regimes, which may result in technical updates to the lists of items controlled by those regimes.

In particular, the new clause (C)(ii) would require that certain items listed on the Missile Technology Control Regime (MTCR) Annex (as that term is defined in section 74(a)(4) of the AECA (22 USC 2797c (a)(4)) be exempted from the scope of the treaties. New subclauses I and II would exempt from the treaties' scope all items in Category I of the MTCR Annex, while new subclause III would exempt from the treaties MTCR Category II defense articles and defense services that are for use in rocket systems (but not those items in Category II that are for use in unmanned aerial vehicles).

In referencing certain items controlled under United States Munitions List (hereinafter "USML") Category XIV, a new subclause IV would require the President to exempt from the scope of the treaties:

- Chemical agents currently listed in USML Category XIV(a), which include certain nerve agents, vesicant agents, and incapacitating agents that are among the chemicals listed on Schedules 1 and 2 in the Annex on Chemicals of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the Chemical Weapons Convention);
- Biological agents and biologically derived substances specifically developed, configured, adapted, or modified for the purpose of increasing their capability to produce casualties in humans or livestock, degrade equipment or damage crops, controlled under USML Category XIV(b);
- Equipment and its components, parts, accessories, and attachments, as controlled under USML Category XIV(f)(1), specifically designed or modified for military operations and compatibility with military equipment, for the dissemination, dispersion or testing of the chemical agents, biological agents, tear gases and riot control agents, and defoliants listed in USML Categories XIV(a), (b), (d), and (e), as well as tooling and equipment specifically designed or modified for the production of such equipment, components, parts, accessories, and attachments;
- Modeling or simulation tools specifically designed or modified for chemical or biological weapons design, development or employment, controlled under USML Category XIV(i); and
- Technical data as it relates to all of the items above.

By referencing USML Category XVI(a) and (b), proposed subclause IV would require the President to exempt from the scope of the treaties any article, material, equipment, or device, controlled under the USML, which is specifically designed or modified for the use in the design, development, or fabrication of nuclear weapons or nuclear explosive devices, as well as any article, material, equipment, or device controlled under the USML which is specifically designed or modified for use in the devising, carrying out, or evaluating nuclear weapons tests or any other nuclear explosions (including for modeling or simulating the employment of nuclear weapons or the integrated operational use of nuclear weapons). Subclause IV would also exempt from the scope of the treaties specifically designed or modified components and parts, accessories, attachments, and associated equipment for such items, as well as

directly related technical data and defense services. The committee notes that the proposed subclause IV would not necessarily exempt from the scope of the treaties nuclear radiation detection and measurement devices specifically designed or modified for military applications.

Finally, this section would require that the United States exempt from the scope of the treaties those defense articles and defense services that the United Kingdom or Australia cannot adequately protect and control on its control lists. Again, the executive branch has stated that it intends to exempt such items from the scope of the treaties, but the committee recommends formalizing this statement in law.

Section 3. Enforcement.

Section (3)(a) would amend section 38(c) of the AECA (22 U.S.C. 2778(c)) to ensure that any person who willfully violates the treaties will be subject to the criminal penalties established by section 38(c). Subsection (a) would also make clear that a violation of any rule or regulation issued pursuant to the AECA to implement or enforce the treaties would also be a violation of section 38(c). (The executive branch intends to amend the International Traffic in Arms Regulations (22 CFR Chapter I, Subchapter M, Parts 120–130; hereinafter "ITAR"), which are issued under the authority of section 38(a)(1) of the AECA, to specify requirements to export, reexport, transfer, retransfer, or otherwise dispose of defense articles and defense services pursuant to the treaties.) The committee believes that this provision is required to provide authority to prosecute those who violate the treaties' terms. The Justice Department relies on section 38(c) as the basis for its criminal prosecutions of export control offenses under the AECA.

Subsection (b) would amend section 38(e) of the AECA to further make clear that the authorities to levy civil penalties for violations of the AECA and regulations promulgated thereunder would also include carrying out functions under the AECA with respect to the export of defense articles and defense services exported or imported pursuant to the treaties. The committee believes that it is important, as with criminal penalties under section 38(c), to ensure that the President will have the authority to use the civil enforcement measures provided by the AECA to enforce regulations promulgated to implement and enforce the treaties.

Subsection (c) would add a new paragraph (4) to section 38(f), which would make clear that the limitations established in section 38(f)(2) on the exemption of a foreign country from the licensing requirements of the AECA would not apply with respect to the treaties, provided the President promulgates regulations to implement and enforce the treaties under sections 38 and 39 of the AECA. As noted above, the executive branch has indicated in testimony to the committee that it intends to promulgate regulations under the authority provided by the AECA to specify requirements to export, reexport, transfer, retransfer, or otherwise dispose of defense articles and defense services pursuant to the treaties.

As currently written, section 38(f)(2) (22 USC 2778(f)(2)) would require the President to notify the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives 30 days prior to authorizing a country-wide ex-

emption from the licensing requirements of the AECA. Pursuant to section 38(f)(2)(B), the notification is to include a description of the scope of the exemption, as well as a determination by the Attorney General that the bilateral agreement establishing the exemption accomplishes certain things, namely:

> that the bilateral agreement concluded under subsection (j) requires 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 this Act, including the efforts on the part of countries and factions engaged in international terrorism to illicitly acquire sophisticated United States defense items.

As with the exception to section 38(j)(1)(A) of the AECA that would be added by section 2 of this bill, the committee, in recommending that the Senate gives its advice and consent to ratification of the treaties, has already considered this issue. Amending section 38(f) in this way will make clear that the determination required by section 38(f)(2) is not necessary to authorize an exemption for the United Kingdom and Australia from the licensing requirements of the AECA in order to give effect to the treaties. The committee is satisfied that the bill contemplated by the committee in conjunction the amendments to the ITAR that will be promulgated to implement and enforce the treaties makes this certification unnecessary.

Section 39A of the AECA (22 U.S.C. 2779a) prohibits any United States supplier of defense articles or services "sold or licensed" under the AECA, as well as any employee, agent, or subcontractor thereof, from making any incentive payments (as that term is defined by section 39A(d) of the AECA) for the purpose of satisfying, in whole or in part, any offset agreement with that country. Any person who violates that prohibition is then subject to civil penalties. Because defense articles and services that are exported to the United Kingdom or Australia pursuant to the treaties would not require a license to be issued by the State Department, United States suppliers of such defense articles or services could potentially make incentive payments in connection with exports under the treaties that would be barred for exports that were licensed pursuant to the AECA. Subsection (d) would therefore amend section 39A(a) to ensure that suppliers of defense articles or services exported pursuant to the treaties would be barred from making incentive payments to satisfy part or all of an offset agreement with the United Kingdom and Australia.

Section 4. Congressional Notification.

With certain exceptions, section 3(d)(3)(A) of the AECA requires the President to notify Congress 15 or 30 days (depending on the recipient country) prior to approving transfers to third parties of defense articles or services above certain thresholds of value, "the [original] export of which has been licensed or approved under section 38" of the AECA. The AECA then states that the President may not consent to the transfer to the third party if there is enacted a joint resolution prohibiting the transfer. The AECA estab-

lishes expedited procedures for Senate consideration of a joint resolution to block the transfer.

Article 9 of each treaty requires that, with certain limited exceptions, the approval of the United States Government must be obtained before defense articles or defense services may be either retransferred to an entity in the same country that is not a member of that treaty's approved community or reexported to an entity outside of the UK or Australia. Because defense articles and services exported pursuant to the treaties would not be licensed or specifically approved pursuant to the section 38 (or would be transitioned into coverage by the treaty from an existing license or approval, as the treaties permit), current law would not require the President to notify Congress in advance of consenting to such retransfers or reexports of defense articles or services outside of the treaties' approved communities. Congress would in such a case lose the opportunity to prohibit retransfers or reexports outside of the approved communities defense articles that had been exported pursuant to the treaties (or that had been transferred into the treaty regime). The bill therefore would amend section 3(d)(3)(A) of the AECA to ensure that the President must notify Congress in advance of approving a transfer, provided it meets the same value thresholds applied to all other such transfers, of treaty-covered defense articles or services outside of the treaties' approved communities. This amendment would also ensure that a joint resolution prohibiting such a retransfer or reexport would enjoy the same expedited procedures provided for such resolutions to prohibit transfers of items originally licensed under the AECA.

Section 5(c) of the AECA (22 U.S.C. 2755(c)) requires the President to notify the Speaker of the House of Representatives and the Chairman of the Committee on Foreign Relations promptly in any instance in which a U.S. person is prevented by a foreign government on the basis of race, religion, national origin, or sex, from participating in the performance of any sale or licensed transaction under the AECA. Subsection (b) of this section would amend section 5(c) of the AECA to make clear that such report must also be submitted in any case in which a U.S. person is prevented from carrying out an export or import under the treaties for the same discriminatory reasons.

Section 25(a) of the AECA (22 U.S.C. 2765(a)) requires that the President annually submit a report forecasting the sales and licensed commercial exports that are eligible to be exported, and that are expected, in the coming year. Subsection (c) would amend this reporting requirement to ensure that defense articles and services that are expected to occur using the treaties' license-free mechanisms are also included in this annual report.

Under section 36(c) of the AECA, for a direct commercial sale from a U.S. private company over a certain threshold of value to the United Kingdom or Australia, Congress must be formally notified 15 calendar days before the executive branch may issue a license for such an export. Licensed sales involving defense articles that are firearms controlled under category I of the USML and valued at $1 million or more must also be formally notified to Congress for review 15 days prior to the license for export being approved. After having been notified, Congress has an opportunity to enact a joint resolution prohibiting the proposed license for export.

As with a joint resolution prohibiting a transfer to a third party of a previously exported defense article or service, the AECA establishes expedited procedures that would govern consideration of such a joint resolution in the Senate. Section 36(d) similarly requires the President to notify Congress 15 days in advance of licensing the manufacture of any item of significant combat equipment in the UK or Australia, and it similarly establishes expedited procedures for the consideration of any joint resolution prohibiting such license. In both cases, the President must provide certain information about the proposed license when notifying the Congress of the pending license.

Because exports pursuant to the treaties are not licensed or specifically approved under the AECA, the President would not be required to provide the advance notification ordinarily required. The executive branch assured the committee that it would endeavor to provide some measure of advance notification. But a key purpose of the treaties is to expedite defense trade cooperation with these two allies. Subsection (d) would therefore amend sections 36(c) and 36(d) of the AECA require the President to notify the Congress 15 days in advance of an export pursuant to the treaty that would have met the thresholds established by the AECA. The notification is to include information ordinarily provided in such notifications. The amendment would not, however, provide for expedited procedures for a joint resolution prohibiting such a sale.

Section 39(a) of the AECA (22 U.S.C. 2779(a)) (a separate section from the section 39A discussed above) directs the Secretary of State to require adequate and timely reporting on political contributions, gifts, commissions and fees paid, or offered or agreed to be paid, by any person in connection with, among other things, commercial sales of defense articles or services "licensed or approved" under the AECA. Again, because exports of defense articles or services pursuant to the treaties are not licensed or specifically approved under the AECA, the committee recommends amending section 39(a) to ensure that exports pursuant to the treaties are covered in the same way. The committee believes that this amendment is particularly important because section 38(c) of the AECA subjects persons who violate section 39 to criminal prosecution.

Section 5. Limitation on Implementing Arrangements.

Each of the treaties left various aspects of the treaty regime to separate "Implementing Arrangements," which were concluded at a later date. Paragraph 1 of Article 14 of each treaty provides, in part: "The Implementing Arrangements may be amended or supplemented as mutually determined by the Parties."

Unlike the treaties themselves, the executive branch did not submit the Implementing Arrangements to the Senate for its advice and consent. Rather, the executive branch provided the texts of the Implementing Arrangements to the Senate for its information only. The executive branch later was explicit in an answer to a question for the record that it was not seeking the Senate's advice and consent to the ratification of the Implementing Arrangements as part of the treaties. The Implementing Arrangement for the U.S.-UK Treaty was signed on February 14, 2008, in Washington, and was provided to the committee shortly thereafter; the Implementing Arrangement for the U.S.-Australia Treaty was signed on March 14,

2008. (While each treaty makes reference to "implementing arrangements," the executive branch stated in an answer to a question for the committee record that it did not anticipate additional Implementing Arrangements for the treaties.) Copies of both Implementing Arrangements are appended at the end of this report.

Because changes to the Implementing Arrangements could have significant impacts on the nature and scope of the treaty regime, the committee believes that it would be inappropriate to permit such changes to be made without Congressional approval. Accordingly, the bill would require that any amendment to either of the Implementing Arrangements for these treaties, other than an amendment that addresses an administrative or technical matter, may enter into effect only if the Congress adopts, and there is enacted, legislation approving the entry into effect of that amendment for the United States.

Paragraph (b)(2) contains a list of amendments to specific provisions within the U.S.-UK and U.S.-Australia Implementing Arrangements that, if such amendment had the effect described in the list, would not be considered merely administrative or technical, and would therefore require the enactment of legislation to allow such amendment's entry into effect. The list is illustrative only. Any amendment to the Implementing Arrangements that is not technical or administrative must receive legislative approval before it may enter into effect for the United States, regardless of whether the amendment falls into one of the specific categories contained in the list.

Subsection (c) would require the President to notify the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs in the House of Representatives 15 days prior to the entry into effect of any technical or administrative amendment to one of the Implementing Arrangements. This provision would also permit the President to waive this requirement, and instead notify the committees within five days after an amendment came into effect, if the President determines and certifies to the committees that immediate entry into effect of such an administrative or technical amendment is important to maintain the viability and effectiveness of the treaty.

Two conditions must exist for the exception to apply. First, an amendment to an implementing arrangement must be solely administrative or technical in nature. Second, bringing that amendment into effect immediately must be important to maintaining the viability and effectiveness of one of the treaties. The committee does not expect that solely administrative or technical amendments to the implementing arrangements will ordinarily be so significant as to impact the viability and effectiveness of one of the treaties. Accordingly, the committee expects that this exception will seldom be invoked. If exercised, the exception would delay by 20 days the date by which the President is required to notify the relevant Congressional committees of the entry into effect of an administrative or technical amendment. The exception does not apply to any amendments that address matters other than administrative or technical matters, including any amendments of the sort described in subsection (b). Pursuant to subsection (a), such amendments will require legislative approval before they may enter into effect for the United States.

Section 6. Implementing Regulations.

This section gives the President the authority to issue regulations pursuant to the AECA to implement and enforce the defense trade cooperation treaties with the United Kingdom and Australia. It specifies that such regulations must be consistent with other applicable provisions of the AECA as amended by the bill, and with the terms of any resolution of advice and consent adopted by the Senate with respect to either treaty.

Section 7. Rule of Construction.

This section clarifies the intended scope in U.S. law of this bill and the defense trade cooperation treaties with the United Kingdom and Australia. Nothing in this Act, the U.S.-UK Treaty (and any implementing arrangement thereto), the U.S.-Australia Treaty (and any implementing arrangement thereto), or in any regulation issued to implement either treaty, shall be construed to modify or supersede any provision of law or regulation other than the AECA, as amended by this Act, and the ITAR. Thus, for example, regulations administered by the Bureau of Alcohol, Tobacco and Firearms regarding the importation of firearms will not be superseded.

IV. Cost Estimate

Rule XXVI, paragraph 11(a) of the Standing Rules of the Senate requires that committee reports on bills or joint resolutions contain a cost estimate for such legislation. To date, the committee has not received the Congressional Budget Office cost estimate.

V. Evaluation of Regulatory Impact

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the committee has considered the regulatory impact of this bill. The bill is intended to implement two defense trade cooperation treaties that will, if ratified, provide the opportunity for some U.S. arms exporters to export defense articles and defense services to certain entities in the United Kingdom and Australia without having to obtain an arms export license or other prior U.S. Government approval. By so doing, the treaties and this bill will ease somewhat the regulatory burdens imposed by the AECA (22 U.S.C. 2751 et seq.) and the ITAR (22 CFR Chapter I, Subchapter M, Parts 120–130).

VI. Changes in Existing Law

In compliance with Rule XXVI, paragraph 12 of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman).

THE ARMS EXPORT CONTROL ACT

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Chapter 3. Military Export Controls

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SEC. 3. ELIGIBILITY.—(a) * * *

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(d)(1) * * *

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(3)(A) Subject to paragraph (5), the President may not give his consent to the transfer of any major defense equipment valued (in terms of its original acquisition cost) at $14,000,000 or more, or of any defense article or defense service valued (in terms of its original acquisition cost) at $50,000,000 or more, the export of which has been licensed or approved under section 38 of this Act *or has been exempted from the licensing requirements of this Act pursuant to section 38(j) of this Act*, unless before giving such consent the President submits to the Speaker of the House of Representatives and the Chairman of the Committee on Foreign Relations of the Senate a certification containing the information specified in subparagraphs (A) through (E) of paragraph (1). Such certification shall be submitted—

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SEC. 36. REPORTS ON COMMERCIAL AND GOVERNMENTAL MILITARY EXPORTS; CONGRESSIONAL ACTION.—(a) * * *

* * * * * * *

(c)(1) Subject to paragraph (5), in the case of 187 an application by a person (other than with regard to a sale under section 21 or section 22 of this Act) for a license for the export of any major defense equipment sold under a contract in the amount of $14,000,000 or more or of defense articles or defense services sold under a contract in the amount of $50,000,000 or more, (or, in the case of a defense article that is a firearm controlled under category I of the United States Munitions List, $1,000,000 or more) 191 before issuing such license the President shall transmit to the Speaker of the House of Representatives and to the chairman of the Committee on Foreign Relations of the Senate an unclassified numbered certification with respect to such application specifying (A) the foreign country or international organization to which such export will be made, (B) the dollar amount of the items to be exported, and (C) a description of the items to be exported. Each such numbered certification shall also contain an item indicating whether any offset agreement is proposed to be entered into in connection with such export and a description of any such offset agreement. In addition, the President shall, upon the request of such committee or the Committee on Foreign Affairs of the House of Representatives, transmit promptly to both such committees a statement setting forth, to the extent specified in such request a description of the capabilities of the items to be exported, an estimate of the total number of United States personnel expected to be needed in the foreign country concerned in connection with the items to be exported and an analysis of the arms control impact pertinent to such application, prepared in consultation with the Secretary of Defense and a description from the person who has submitted the license application of any offset agreement proposed to be entered into in connection with such export (if known on the date of transmittal of such statement). In a case in which such articles or services are listed on the Missile Technology Control Regime Annex

and are intended to support the design, development, or production of a Category I space launch vehicle system (as defined in section 74), such report shall include a description of the proposed export and rationale for approving such export, including the consistency of such export with United States missile nonproliferation policy. A certification transmitted pursuant to this subsection shall be unclassified, except that the information specified in clause (B) and the details of the description specified in clause (C) may be classified if the public disclosure thereof would be clearly detrimental to the security of the United States, in which case the information shall be accompanied by a description of the damage to the national security that could be expected to result from public disclosure of the information.

* * * * * * *

(5) In the case of an application by a person (other than with regard to a sale under section 21 or 22 of this Act) for a license for the export to a member country of the North Atlantic Treaty Organization (NATO) or Australia, Japan, or New Zealand that does not authorize a new sales territory that includes any country other than such countries, the limitations on the issuance of the license set forth in paragraph (1) shall apply only if the license is for export of—

(A) major defense equipment sold under a contract in the amount of $25,000,000 or more; or

(B) defense articles or defense services sold under a contract in the amount of $100,000,000 or more.

(6) An export pursuant to a treaty referred to in section 38(j)(1)(C) of this Act to which the provisions of paragraph (1) would apply absent an exemption granted under section 38(j)(1) of this Act shall not take place until 15 days after the President has submitted a certification with respect to such export in a similar manner, and containing comparable information, as required under paragraph (1).

(d)(1) In the case of an approval under section 38 of this Act of a United States commercial technical assistance or manufacturing licensing agreement 201 which involves the manufacture abroad of any item of significant combat equipment on the United States Munitions List, before such approval is given, the President shall submit a certification with respect to such proposed commercial agreement in a manner similar to the certification required under subsection (c)(1) containing comparable information, except that the last sentence of such subsection shall not apply to certifications submitted pursuant to this subsection.

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(6) An export pursuant to a treaty referred to in section 38(j)(1)(C) of this Act to which the provisions of paragraph (1) would apply absent an exemption granted under section 38(j)(1) of this Act shall not take place until 15 days after the President has submitted a certification with respect to such export in a similar manner, and containing comparable information, as required under paragraph (1).

* * * * * * *

SEC. 38. CONTROL OF ARMS EXPORTS AND IMPORTS.—(a) * * *

(c) Any person who willfully violates any provision of [this section or section 39, or any rule or regulation issued under either sec-

tion] *this section, section 39, a treaty referred to in subsection (j)(1)(C), or any rule or regulation issued under this section or section 39, including any rule or regulation issued under this section to implement or enforce a treaty referred to in subsection (j)(1)(C) or an implementing arrangement pursuant to such treaty*, or who willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined for each violation not more than $1,000,000,220 or imprisoned not more than ten years, or both.

* * * * * * *

(d) * * * [Repealed—1979]

(e) In carrying out functions under this section with respect to the export of defense articles and [defense services,] *defense services, including defense articles and defense services exported or imported pursuant to a treaty referred to in subsection (j)(1)(C),* the President is authorized to exercise the same powers concerning violations and enforcement which are conferred upon departments, agencies and officials by subsections (c), (d), (e), and (g) of section 11 of the Export Administration Act of 1979, and by subsections (a) and (c) of section 12 of such Act, subject to the same terms and conditions as are applicable to such powers under such Act, except that section 11(c)(2)(B) of such Act shall not apply, and instead, as prescribed in regulations issued under this section, the Secretary of State may assess civil penalties for violations of this Act and regulations prescribed thereunder and further may commence a civil action to recover such civil penalties, and except further that the names of the countries and the types and quantities of defense articles for which licenses are issued under this section shall not be withheld from public disclosure unless the President determines that the release of such information would be contrary to the national interest. Nothing in this subsection shall be construed as authorizing the withholding of information from the Congress. Notwithstanding section 11(c) of the Export Administration Act of 1979, the civil penalty for each violation involving controls imposed on the export of defense articles and defense services under this section may not exceed $500,000.

(f)(1) The President shall periodically review the items on the United States Munitions List to determine what items, if any, no longer warrant export controls under this section. The results of such reviews shall be reported to the Speaker of the House of Representatives and to the Committee on Foreign Relations and the Committee on Banking, Housing, and Urban Affairs of the Senate.The President may not remove any item from the Munitions List until 30 days after the date on which the President has provided notice of the proposed removal to the Committee on International Relations of the House of Representatives and to the Committee on Foreign Relations of the Senate in accordance with the procedures applicable to reprogramming notifications under section 634A(a) of the Foreign Assistance Act of 1961. Such notice shall describe the nature of any controls to be imposed on that item under any other provision of law.

(2) The President may not authorize an exemption for a foreign country from the licensing requirements of this Act for the export

of defense items under subsection (j) or any other provision of this Act until 30 days after the date on which the President has transmitted to the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate a notification that includes—

(A) a description of the scope of the exemption, including a detailed summary of the defense articles, defense services, and related technical data covered by the exemption; and

(B) a determination by the Attorney General that the bilateral agreement concluded under subsection (j) requires 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 this Act, including the efforts on the part of countries and factions engaged in international terrorism to illicitly acquire sophisticated United States defense items.

(3) Paragraph (2) shall not apply with respect to an exemption for Canada from the licensing requirements of this Act for the export of defense items.

(4) Paragraph (2) shall not apply with respect to an exemption under subsection (j)(1)(A) to give effect to a treaty referred to in subsection (j)(1)(C) (and any implementing arrangements to such treaty), provided that the President promulgates regulations to implement and enforce such treaty under this section and section 39.

* * * * * * *

(j) REQUIREMENTS RELATING TO COUNTRY EXEMPTIONS FOR LICENSING OF DEFENSE ITEMS FOR EXPORT TO FOREIGN COUNTRIES.—

(1) REQUIREMENT FOR BILATERAL AGREEMENT.—

(A) IN GENERAL.—The President may utilize the regulatory or other authority pursuant to this Act to exempt a foreign country from the licensing requirements of this Act with respect to exports of defense items only if the United States Government has concluded a binding bilateral agreement with the foreign country. Such agreement shall—

(i) meet the requirements set forth in paragraph (2); and

(ii) be implemented by the United States and the foreign country in a manner that is legally-binding under their domestic laws.

(B) EXCEPTION *FOR CANADA*.—The requirement to conclude a bilateral agreement in accordance with subparagraph (A) shall not apply with respect to an exemption for Canada from the licensing requirements of this Act for the export of defense items.

(C) EXCEPTION FOR DEFENSE TRADE COOPERATION TREATIES.—The requirement to conclude a bilateral agreement in accordance with subparagraph (A) shall not apply with respect to an exemption from the licensing requirements of this Act for the export of defense items to give effect to any of the following defense trade cooperation treaties, provided that the treaty has entered into force pursuant to Article II, Section 2, clause 2 of the Constitution of the United States:

(i) 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 June 21 and 26, 2007 (and any implementing arrangement thereto).

(ii) The Treaty Between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, done at Sydney September 23, 2007 (and any implementing arrangement thereto).

VII. U.S.-UK IMPLEMENTING ARRANGEMENT

United States Department of State

Washington, D.C. 20520

FEB 19 2008

Dear Mr. Chairman:

I am enclosing a copy of the Implementing Arrangement Pursuant to 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, which was signed in Washington on February 14, 2008. The Treaty was signed in Washington and London on June 21 and 26, 2007. It was submitted to the Senate for advice and consent to ratification on September 20, 2007, and is printed in Senate Treaty Document 110-7, 110th Congress, 1st Session.

I am enclosing this Implementing Arrangement for the information of the Senate at the time it considers 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 for advice and consent to ratification.

Sincerely,

Jeffrey T. Bergner
Assistant Secretary
Legislative Affairs

Enclosure:
As stated.

The Honorable
Joseph R. Biden Jr., Chairman,
Committee on Foreign Relations,
United States Senate.

United States Department of State

Washington, D.C. 20520

FEB 19 2008

Dear Senator Lugar:

I am enclosing a copy of the Implementing Arrangement Pursuant to 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, which was signed in Washington on February 14, 2008. The Treaty was signed in Washington and London on June 21 and 26, 2007. It was submitted to the Senate for advice and consent to ratification on September 20, 2007, and is printed in Senate Treaty Document 110-7, 110th Congress, 1st Session.

I am enclosing this Implementing Arrangement for the information of the Senate at the time it considers 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 for advice and consent to ratification.

Sincerely,

Jeffrey T. Bergner
Assistant Secretary
Legislative Affairs

Enclosure:
As stated.

The Honorable
Richard G. Lugar,
Committee on Foreign Relations,
United States Senate.

IMPLEMENTING ARRANGEMENT PURSUANT TO 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

The Government of the United States of America (hereinafter "the United States Government") and the Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter "Her Majesty's Government") (hereinafter "the Participants"):

Having entered into 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 21 and 26 June 2007 (hereinafter "the Treaty");

Recalling that Article 14(1) of the Treaty requires the Participants to conclude implementing arrangements for the Treaty;

Recognizing that this Implementing Arrangement is a means by which the Participants will implement the legally binding obligations of the Treaty;

Recognizing that pursuant to Article 13(2) of the Treaty, any conduct falling outside the terms of the Treaty, including this Implementing Arrangement, and any regulations promulgated to implement the effect of such terms on existing law remains subject to applicable licensing requirements and implementing regulations, including any criminal, civil, and administrative penalties or sanctions contained therein;

Recognizing the principles established under 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, as amended, and implementing arrangements thereto (hereinafter "the GSA"); and

Recognizing the principles established under the Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States relating to the Principles Governing Cooperation in Research and Development, Production, Procurement, and Logistics Support of Defense Capability, signed 13 and 16 December 2004;

Have reached the following understandings:

Section 1
Definitions

(1) Terms used in this Implementing Arrangement that are defined in the Treaty will have the same definition as in the Treaty. In addition, the following definitions will apply to this Implementing Arrangement:

(a) "Delivery" means the movement of Defense Articles to a member of the United Kingdom Community pursuant to a Foreign Military Sales program Letter of Offer and Acceptance where such Defense Articles are outside of the customs jurisdiction of the United States of America and are subject to the control of Her Majesty's Government in accordance with Foreign Military Sales program shipping practices.

(b) "Management Board" means the board established pursuant to Section 12(3).

(c) "Management Plan" means the plan identified in Section 12(3)(f).

(d) "Principals" means the persons designated by each Participant pursuant to Section 12(1).

(e) "Project" means (i) specific acquisition efforts by Her Majesty's Government mutually determined pursuant to Section 2(3) to research, develop, test, evaluate, produce, support, or sustain Defense Articles for worldwide use by Her Majesty's defense and security organizations, or (ii) specific defense or security operations mutually determined pursuant to Section 2(3).

(2) Reference to government departments or agencies, including individual posts or officials therein, will be deemed to be to their successors in the event of reorganization.

(3) References to numbered Articles refer to Articles of the Treaty.

(4) Terms capitalized in this Implementing Arrangement, and their variants, will have the meaning established in this Section.

Section 2
Operations, Programs, and Projects

(1) In furtherance of Article 3(1)(a), the Participants will develop, establish, maintain, and publish information concerning combined military and counter-terrorism operations, including lists of such operations, using the following procedures:

(a) The United States Department of Defense (hereinafter "U.S. DoD") and the United Kingdom Ministry of Defence (hereinafter "UK MOD") will develop and maintain a list of combined military operations, and revisions thereto, based on the criteria used by the U.S. DoD and the UK MOD to establish and document such operations; and

(b) The U.S. DoD and the UK MOD will also consult with their respective government's authorities responsible for counter-terrorism operations to develop and maintain a list of combined counter-terrorism operations based on the criteria used by the Participants to establish and document such operations.

(2) In furtherance of Article 3(1)(b), the Participants will develop, establish, maintain, and publish information concerning existing or future potential cooperative security and defense research, development, production, and support programs, including lists of such programs, using the following criteria:

(a) Such programs must fall under one or more valid United States cooperative program legal authorities confirmed by the United States Government and accepted by Her Majesty's Government;

(b) There must be a valid cooperative program international agreement or arrangement documented and in force or effect between the United States Government and Her Majesty's Government, which includes agreements or arrangements between their subordinate organizations;

(c) All bilateral United States - United Kingdom cooperative program relationships within the overall context of a multilateral cooperative program must be documented in a United States - United Kingdom bilateral international agreement or arrangement to fall within the scope of the Treaty;

(d) The cooperative program international agreement or arrangement must involve Defense Articles that fall within the scope of the Treaty; and

(e) Cooperative program international agreements or arrangements that focus on the research, development, production, and support of Defense Articles exempt from the scope of the Treaty will be excluded, unless otherwise mutually determined for any program that also involves Defense Articles not exempt from the scope of the Treaty.

(3) In furtherance of Article 3(1)(c), the Participants will develop, establish, maintain, and publish information concerning mutually determined specific security and defense Projects, including lists of such Projects where Her Majesty's Government is the end-user, based on the following criteria:

(a) The purpose of the Project must be focused on meeting the needs of Her Majesty's Government, rather than on security and defense exports to third parties;

(b) The Project must involve Defense Articles that fall within the scope of the Treaty; and

(c) Projects that focus on the research, development, production, and support of Defense Articles exempt from the scope of the Treaty will be excluded, unless otherwise mutually determined for any Project that also involves Defense Articles not exempt from the scope of the Treaty.

(4) The lists of operations, programs and Projects referred to in this Section, which have been mutually determined by the UK MOD and the U.S. DoD, will be subject to approval by the United States Department of State and the UK MOD.

(5) The approved lists of operations, programs and Projects that may be publicly identified will be published in accordance with Sections 12 and 13.

(6) The approved lists of operations, programs and Projects that may not be publicly identified will be maintained for reference via secure channels.

(7) Exports of Defense Articles from the United States Community in support of the operations, programs and Projects identified in the approved lists that may not be publicly identified may be carried out by the British Embassy in Washington in accordance with procedures developed by the British Embassy and the Directorate of Defense Trade Controls of the United States Department of State.

Section 3
United States Government End-Use

In furtherance of Article 3(1)(d), the Participants will employ the following procedures concerning Defense Articles required for United States Government end-use:

(1) United States Government end-use requirements that fall within the scope of the Treaty will be based on the following criteria:

(a) Only those United States Government end-use requirements identified pursuant to a United States Government solicitation or contract will be considered to fall within the scope of Article 3(1)(d);

(b) Only United States Government solicitations or contracts that allow for responses or participation of the United Kingdom will be considered to fall within the scope of Article 3(1)(d). Such solicitations or contracts will specifically provide that United Kingdom Approved Community members are permitted to respond or participate using the procedures established pursuant to the terms of the Treaty;

(c) United States Government solicitations or contracts will specifically provide that only Defense Articles that are not exempt from the scope of the Treaty may be Exported or Transferred in support of the solicitation or contract; and

(d) United States Government solicitations or contracts that relate to the research, development, production, and support of Defense Articles exempt from the scope of the Treaty will be excluded, unless otherwise mutually determined for any solicitation or contract that also involves Defense Articles not exempt from the scope of the Treaty.

(2) In addition to the criteria described in paragraph (1) of this Section, Approved

Community members responding to United States Government solicitations will be subject to the following requirements:

(a) Prior to contract award, Approved Community members responding to a United States Government solicitation may only Export or Transfer Defense Articles that specifically respond to the stated requirements of that solicitation. Once under contract, Approved Community members may Export or Transfer Defense Articles that specifically respond to the stated requirements of the contract;

(b) Approved Community members will maintain records relating to any Export, Transfer, Re-export, or Re-transfer of a Defense Article for a period of at least five years, including records regarding intangible items or technical data; and

(c) Approved Community members will agree in writing prior to the Export or Transfer of a Defense Article that they:

(i) Will mark, identify, transmit, store, and handle any Defense Articles provided for the purpose of responding to such solicitations, as well as any Defense Articles provided with or developed pursuant to their responses to such solicitations, in accordance with the Treaty, this Implementing Arrangement, and corresponding United States Government and Her Majesty's Government regulations including, but not limited to, the marking and classification requirements described in Section 10;

(ii) Will comply with the Re-transfer or Re-export provisions of the Treaty, this Implementing Arrangement and corresponding United States Government and Her Majesty's Government regulations, including, but not limited to, the Re-transfer and Re-export requirements described in Section 9; and

(iii) Acknowledge that any conduct that falls outside or in violation of these Implementing Arrangements, including, if any Defense Articles are Re-transferred or Re-exported in violation of the procedures established in this Section, pursuant to the terms of the Treaty, including any Re-transfer or Re-export to a prospective subcontractor that is not an Approved Community member, remains subject to applicable licensing requirements of Her Majesty's Government and the United States Government, including any criminal, civil, and administrative penalties or sanctions contained therein.

(3) Approved Community members may obtain information regarding United States Government solicitations for United States Government end-use requirements that meet the criteria specified in paragraph (1) of this Section as follows:

(a) Publicly available U.S. DoD solicitations may be found on United States Government website www.fedbizopps.gov (or successor in the event of website changes); and

(b) A list of other publicly available United States Government solicitations will be published in accordance with Sections 12 and 13.

(4) Approved Community members may obtain information regarding contracts for United States Government end-use requirements that meet the criteria specified in paragraph (1) of this Section through the United States Government contracting officer(s) responsible for contract management and administration of the applicable contract(s).

(5) Solicitations or contracts for United States Government end-use requirements that meet the criteria specified in paragraph (1) of this Section that may be not publicly identified will be maintained by the Participants for reference via secure channels in accordance with the Sections 12 and 13.

(6) Exports of Defense Articles from the United States Community in support of United States Government end-use requirements that may not be publicly identified may be carried out by the British Embassy in accordance with procedures developed and approved by the British Embassy and United States Department of State, Directorate of Defense Trade Controls.

Section 4
Defense Articles Exempt from the Scope of the Treaty

(1) In furtherance of Article 3(2), the Participants will develop, maintain, and publish information concerning Defense Articles that are exempt from the scope of the Treaty.

(2) The UK MOD will develop and maintain a list of Defense Articles to be exempted from the scope of the Treaty, including revisions thereto. Her Majesty's Government's list will be updated as needed.

(3) The U.S. DoD will develop and maintain, and the United States Department of State will approve, a list of Defense Articles to be exempted from the scope of the Treaty, including revisions thereto. The United States Government list will be updated as needed.

(4) The lists referred to in paragraphs (2) and (3) of this Section will be combined to constitute the list of Defense Articles exempt from the scope of the Treaty. The Participants will consult prior to the combination of the lists and any proposed changes thereto.

(5) The list of Defense Articles exempt from the scope of the Treaty that may be publicly identified, including updates thereto, will be published periodically in accordance with Sections 12 and 13.

(6) Information concerning the list of Defense Articles exempt from the scope of the Treaty that may not be publicly identified, including updates thereto, will be maintained by the Participants, and shared via secure channels, as appropriate.

(7) With respect to Defense Articles added to the list of Defense Articles exempt from the scope of the Treaty, the Participants will establish policies and procedures to require members of the Approved Community that have Exported, Transferred or received such Defense Articles pursuant to the Treaty to immediately, or as soon as reasonably practicable, notify the Participants and apply to the appropriate Participant for an export license or other appropriate authorization for such Defense Articles. Upon such notification and, where appropriate, application, the appropriate Participant will, on an expedited basis, either issue a license or other authorization for such Defense Articles or provide other written guidance and direction regarding the disposition of such Defense Articles. Pending such action, the Participants will require any member of the Approved Community in possession of such Defense Articles Exported or Transferred pursuant to the Treaty to not Transfer such Defense Articles without an appropriate license or other authorization, and to continue to abide by its obligations as a member of the Approved Community.

Section 5
United States Foreign Military Sales

(1) Defense Articles acquired by Her Majesty's Government via the United States Foreign Military Sales (FMS) Program and transferred to Her Majesty's Government pursuant to Letters of Offer and Acceptance (LOAs), or equivalent agreements or arrangements, may be treated as if they were Exported pursuant to the Treaty once Delivery to Her Majesty's Government occurs. Defense Articles exempt from the scope of the Treaty at the time an LOA is executed should be contained in separate lines in the LOA and identified with an appropriate special note in the LOA terms and conditions.

(2) Prior to any initial Transfer of Defense Articles the following requirements will apply:

(a) Her Majesty's Government must determine that the Transfer 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; and

(b) The Defense Articles will be marked or otherwise identified in accordance with the Treaty and this Implementing Arrangement.

(3) Upon Transfer, such Defense Articles will be marked, identified, transmitted, stored and handled in accordance with the Treaty and this Implementing Arrangement.

(4) Her Majesty's Government will maintain a register of FMS items that are subsequently Transferred under the Treaty within the Approved Community.

(5) Terms of the FMS LOA unrelated to the provisions implemented under the Treaty will govern. Procedures for transition of Defense Articles acquired and Delivered under the FMS Program that fall within the scope of the Treaty will be established in the Management Plan, as appropriate, based on the principles outlined in this Section.

Section 6
United Kingdom Community Exports and Transfers

In furtherance of Article 8, Her Majesty's Government will ensure that all Defense Articles not exempt from the scope of the Treaty are authorized for export, including Transfers, from the United Kingdom by a member of the Approved Community to the United States Community under Her Majesty's Government's system of open and blanket authorizations and any successor mechanisms to such authorizations. HMG will, as necessary, ensure that system is updated to fulfill this requirement upon the Treaty's entry into force. The Management Board will, as necessary, address issues arising from the implementation of this Section.

Section 7
Approved Community

Government Members of the United Kingdom Community

(1) In furtherance of Article 4(1)(a), the UK MOD will maintain a list of Her Majesty's Government authorities with facilities that are both accredited by Her Majesty's Government pursuant to the GSA and related to the scope of the Treaty. This list will be made available to the United States Government.

(2) The Participants will develop a process for notifying additions to and deletions from the list. This process will be administered by the UK MOD and the U.S. DoD.

Nongovernmental Members of the United Kingdom Community

(3) In furtherance of Article 4(1)(c), the Participants will implement a process to establish and maintain a list of nongovernmental United Kingdom entities and facilities that will be included in the United Kingdom Community. The process will be administered by the UK MOD and the United States Department of State, based on the eligibility criteria and process steps identified below.

(4) The following are the criteria that the nongovernmental United Kingdom entities and facilities will be assessed against, for inclusion on the List referred to in Article 4(1)(c):

(a) That the entity or facility must be on Her Majesty's Government's "List X" of approved facilities;

(b) Foreign ownership, control or influence;

(c) Previous convictions or current indictment for violations of United States or United Kingdom export control laws or regulations as considered by the United States Government;

(d) Previous convictions for violations of United States or United Kingdom export control laws or regulations as considered by Her Majesty's Government;

(e) The United States export licensing history of the entity or facility; and

(f) National security risks, including interactions with countries proscribed by United Kingdom or United States laws or regulations.

(5) A nongovernmental United Kingdom entity or facility may apply to the UK MOD for inclusion in the United Kingdom Community.

(6) Where a nongovernmental entity applies for inclusion in the United Kingdom Community, the UK MOD and the United States Department of State will conduct an eligibility review based on the criteria described in paragraph (4) of this Section and will mutually determine whether to include that entity in the United Kingdom Community.

(7) The list of United Kingdom Community members, including revisions thereto, will be published by the UK MOD and the United States Department of State periodically in accordance with Sections 12 and 13.

(8) The UK MOD will inform nongovernmental United Kingdom entities and facilities of the results of their application.

(9) If one Participant considers that removal of a nongovernmental United Kingdom entity or facility from the United Kingdom Community may be in its national interest:

(a) It will advise the other Participant, and that Participant will have 24 hours to provide mitigating information concerning the entity or facility.

(b) At the end of 24 hours, unless decided otherwise, the Participant will formally notify the other Participant of its desire that the entity or facility be removed from the United Kingdom Community. Upon such notification, the entity or facility will then be suspended from the United Kingdom Community pending a final decision on removal by the Participants.

(c) The Participants will consult within 30 days of notification regarding removal of an entity or facility. Consultation may include measures to be applied during the suspension period and any remedial measures to be imposed in lieu of removal.

(d) If after such consultation either Participant believes that such entity or facility should be removed from the Approved Community it will be so removed. Otherwise any suspension will be rescinded and any appropriate remedial measure may be imposed.

(10) Her Majesty's Government will require nongovernmental United Kingdom entities or facilities applying for inclusion in the United Kingdom Community to acknowledge in writing that they will be bound by the Manual of Protective Security, as amended, in accordance with Section 10, and acknowledge the conditions identified in paragraph 4(b) of Section 11.

Access

(11) Access to Defense Articles Exported under the Treaty will be granted only to serving members of Her Majesty's Armed Forces and those individuals who have:

(a) An appropriate security clearance at least at the United Kingdom "Security Check" level; and

(b) A need to know.

(12) When considering whether to grant an individual, other than a serving member of Her Majesty's Armed Forces, access to Defense Articles, the Participants will consult where national security considerations, including close ties to countries or entities of concern, to either Participant arise. Such access will not be granted until mutually determined by the Participants. The list of countries or entities of concern will reflect the laws and regulations of both Participants. The Participants will keep each other informed of relevant national security considerations. The Management Board representatives will promulgate such considerations within their respective organizations as required for the operation of the Treaty.

Section 8
Transition from Licenses or Other Authorizations

(1) Members of the United States Community wishing to make a transition from the requirements of a United States Government export license or other authorization to the processes established under the Treaty and this Implementing Arrangement must surrender the existing license or other authorization and notify the United States Department of State, Directorate of Defense Trade Controls of their intentions.

(2) Members of the United Kingdom Community wishing to make a transition from the requirements of a United States Government export license or other authorization to the processes established under the Treaty and this Implementing Arrangement will obtain authorization from the United States Department of State, Directorate of Defense Trade Controls, either directly or through the original United States exporter, using

procedures established by the Participants before the items may be considered as Defense Articles Exported under the Treaty.

Section 9
Re-transfers and Re-exports

(1) All Re-transfers or Re-exports of Defense Articles will require authorization by Her Majesty's Government, except where identified in paragraph (12) of this Section. Authorization will be requested through the UK MOD process for the approval of the release of classified material (F680). In reviewing a request for authorization, the UK MOD will require supporting evidence that includes United States Government approval of the proposed Re-transfer or Re-export. The existence of UK MOD authorization to release is also a consideration in reviewing export license applications that may be required under the export control process of Her Majesty's Government.

(2) The UK MOD will update the F680 process to ensure the requirement in paragraph (1) of this Section is clear for requests relating to Defense Articles originally Exported or treated as if they were Exported under the Treaty. Her Majesty's Government will also update its procedures relating to Defense Articles originally Exported or treated as if they were Exported under the Treaty to:

(a) As part of the export control procedures, seek confirmation that F680 authorization has been obtained; and

(b) Make it a condition of relevant open licenses that F680 clearance must be obtained.

(3) Her Majesty's Government will require a United Kingdom Community member seeking to Re-transfer or Re-export to first approach the United States Department of State, Directorate of Defense Trade Controls, directly or through the original exporter, to obtain United States Government approval.

(4) For Re-transfers, the F680 process must be followed when seeking permission for the Re-transfer of Defense Articles.

(5) For Re-exports, the F680 process must be followed when seeking permission for the Re-export of Defense Articles as well as any procedures that may be required under the export control process of Her Majesty's Government. Her Majesty's Government's audit procedures will check that relevant open license conditions have been met, including checks to ensure F680 process clearance has been obtained as required.

(6) In the event of authorization from Her Majesty's Government, the proposed Re-transfer or Re-export may take place. The Defense Articles thereafter will be considered to fall outside of the Scope of the Treaty and will be governed by the applicable terms of

any license or authorization granted by the United States Government and, as appropriate, Her Majesty's Government, in place of the terms of the Treaty.

(7) In the event that an entity seeking Her Majesty's Government approval for Re-transfer or Re-export is unable to demonstrate to the UK MOD that it has obtained United States Government approval, the UK MOD will not give authorization for the proposed release of classified material, and therefore, will not give authorization for the proposed Re-transfer or Re-export.

(8) In the event that United States Government consent for a proposed Re-export has not been obtained, Her Majesty's Government will consult the United States Government, in accordance with procedures established by the Management Board, on the export license application, assessing it against Her Majesty's Government's Consolidated EU and National Arms Export Licensing Criteria.

(9) Any reincorporation or redevelopment of a Defense Article does not eliminate the requirement to obtain UK MOD authorization for a proposed Re-transfer or Re-export of such Defense Article, under the processes described above.

(10) Re-transfer or Re-export of Defense Articles without the approval of the UK MOD will be considered by the Participants to be a breach of the procedures established pursuant to the terms of the Treaty.

(11) Where Defense Articles are Re-transferred or Re-exported, markings and classifications arising solely from the Treaty will be withdrawn.

(12) Further to paragraph (1) of this Section, the following exceptions to the Re-transfer and Re-export authorization provisions of the Treaty and this Implementing Arrangement will apply pursuant to Article 9(1):

(a) Re-exports of Defense Articles from nongovernmental entities of the United Kingdom Community to United Kingdom Armed Forces deployed outside the Territory of the United Kingdom conducting operations, including training, as mutually determined and listed pursuant to Sections 2(1) and 2(3), via United Kingdom Armed Forces transmission channels, or other transmission channels approved by the Principals or Management Board; and

(b) Re-exports of Defense Articles from nongovernmental entities of the United Kingdom Community to Approved Community members operating in direct support of United Kingdom Armed Forces deployed outside the Territory of the United Kingdom conducting operations, including training, as mutually determined and listed pursuant to Sections 2(1) and 2(3), via United Kingdom Armed Forces transmission channels, or other transmission channels approved by the Principals or Management Board.

(13) The Participants have mutually determined that the following exceptions to the Export and Transfer authorization provisions of the Treaty and this Implementing Arrangement will apply:

(a) Exports or Transfers of Defense Articles from nongovernmental entities of the United States Community to United Kingdom Armed Forces deployed outside the Territory of the United Kingdom conducting operations, including training, as mutually determined and listed pursuant to Sections 2(1) and 2(3), via United Kingdom Armed Forces transmission channels, or other transmission channels approved by the Principals or Management Board; and

(b) Exports or Transfers of Defense Articles from nongovernmental entities of the United States Community to Approved Community members operating in direct support of United Kingdom Armed Forces deployed outside the Territory of the United Kingdom conducting operations, including training, as mutually determined and listed pursuant to Sections 2(1) and 2(3), via United Kingdom Armed Forces transmission channels, or other transmission channels approved by the Principals or Management Board.

(14) Regardless of location, Approved Community members will ensure that Defense Articles provided pursuant to paragraphs (12) and (13) of this Section will be marked, identified, transmitted, stored and handled in accordance with the Treaty and this Implementing Arrangement.

Section 10
Marking and Classification

(1) The Participants will mutually determine policies and procedures necessary to implement Article 6, Article 11, and the GSA. These policies and procedures will be reflected in the Participants' regulations and guidance. Such policies and procedures issued by the Participants will require that all Defense Articles Exported or Transferred under the scope of the Treaty be marked, identified, transmitted, stored and handled as provided below:

(a) All Defense Articles Exported or Transferred will be marked or identified prior to such movement, as follows: For Exports and Transfers of Defense Articles classified for purposes other than the Treaty, the standard marking or identification will read CLASSIFICATION LEVEL USML//REL USA and GBR Treaty Community// unless a revision to this standard identifier is determined by the Management Board. For Exports and Transfers of other Defense Articles, the standard marking or identification will read RESTRICTED USML //REL USA and GBR Treaty Community// unless a revision to this standard identifier is determined by the Management Board;

(b) Where Defense Articles are returned to the United States Community, any Defense Articles classified as RESTRICTED purely for the purposes of the Treaty will revert to an unclassified state and any markings associated with this classification will be removed. Defense Articles with other classifications must continue to be protected in accordance with the GSA; and

(c) The standard marking and identification requirements for Defense Articles described herein will be implemented in each Participant's policies and procedures based on the following guidance:

(i) Tangible Defense Articles (including hardware, equipment, and software) will be individually labelled or, where such labelling is impracticable, will be accompanied by documentation (such as contracts, invoices, shipping bills, or bills of lading) clearly associating the Defense Articles with the appropriate markings as detailed above;

(ii) 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 individually labelled or, where such labelling is impracticable, will be accompanied by documentation (such as contracts, invoices, shipping bills, or bills of lading) or a verbal notification clearly associating the Defense Articles with the appropriate markings as detailed above; and

(iii) Other intangible Defense Articles, including defense services, will be accompanied by documentation (such as contracts, invoices, shipping bills, or bills of lading) clearly associating the Defense Articles with the appropriate markings as detailed above.

(2) The United States Government will promulgate regulations to reflect that the United States Government considers that any conduct falling outside the terms of the Treaty and procedures established pursuant to the terms of the Treaty, including Re-transfers and Re-exports of Defense Articles without the prior approval of the United States Government, is a violation of the United States Arms Export Control Act and International Traffic in Arms Regulations and subject to the applicable criminal, civil, and administrative penalties or sanctions of these and other applicable laws and regulations.

(3) Her Majesty's Government will modify relevant regulations and guidance, including the Manual of Protective Security, to detail the requirements for the handling of Defense Articles Exported to the United Kingdom under the Treaty, including requiring that:

(a) On receipt of Defense Articles that have been Exported to the United Kingdom Community, the recipient is to ensure that the appropriate standard markings detailed above have been applied. In the event that irregularities are found, Her

Majesty's Government will require the recipient to correct the marking and to notify the irregularity and action taken to the UK MOD. The UK MOD will report such notifications to the United States Government in order that corrective action can be taken with the United States exporter, in accordance with the GSA;

(b) All Defense Articles Exported to the United Kingdom Community will be marked, identified, transmitted, stored and handled in accordance with the Treaty;

(c) Defense Articles that are located within the United Kingdom, having been previously exported under a license or other export authorization, that are transitioned pursuant to Section 8, will be marked, identified, transmitted, stored, and handled in accordance with the Treaty, by the holding United Kingdom Community entity;

(d) United Kingdom Community members comply with additional recordkeeping and handling requirements for Defense Articles, including:

(i) Recording dates of receipt and details of the United States exporter;

(ii) Recording the location, incorporation, Transfer, Re-export, Re-transfer or destruction of the Defense Articles, to enable a full audit trail to be established regarding the handling of the Defense Articles;

(iii) Applying and maintaining appropriate markings or other identification and ensuring that these requirements are passed to any future recipient of the Defense Articles within the Approved Community;

(iv) Establishing and carrying out a self-audit regime to monitor the effectiveness of the application of relevant controls on the Defense Articles; and

(v) Maintaining such records for a minimum of 5 years and providing such records on request to Her Majesty's Government, which may be provided to the United States Government in accordance with the provisions described in Section 11;

(e) There are access controls appropriate to the level of classification of the Defense Articles and their status under the Treaty, including password protection for electronically held Defense Articles, and that such Defense Articles be contained on information systems that have been accredited in accordance with Her Majesty's Government standards and guidelines appropriate to the classification of the Defense Articles;

(f) Any material violations of the procedures established pursuant to the terms of the Treaty must be reported immediately, and all other violations must be reported as

soon as reasonably practicable, to Her Majesty's Government, which will notify the United States Government as appropriate; and

(g) Defense Articles not be Re-transferred or Re-exported without the prior authorization of both the United States Government and Her Majesty's Government, and be in compliance with the process for seeking such authorizations. Members of the United Kingdom Community may seek such authorizations from the United States Department of State, Directorate of Defense Trade Controls, directly or through the original United States exporter.

Section 11
Cooperation and Enforcement Measures

(1) The Participants will, subject to their respective laws and regulations, cooperate in the enforcement of the operation of the Treaty, including this Implementing Arrangement, and applicable national laws and regulations.

Mechanisms for cooperation

(2) The Participants will cooperate based on the following instruments that promote mutual cooperation and assistance:

(a) The GSA;

(b) The Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters signed in Washington on 6 January 1994;

(c) The Treaty on Extradition between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America signed in Washington on 31 March 2003;

(d) The Guidance for Handling Criminal Cases with Concurrent Jurisdiction in the United Kingdom and the United States approved by the Attorneys General of the United States and the United Kingdom on 18 January 2007;

(e) The Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America regarding Mutual Assistance and Cooperation between their Customs Administrations signed in Washington on 6 July 1989;

(f) The Agreement regarding the sharing of forfeited or confiscated assets or their equivalent funds signed in Washington on 31 March 2003; and

(g) Any further cooperation agreements or arrangements between the Participants.

Cooperation Measures

(3) The Participants, subject to their respective laws, will cooperate and assist one another as requested utilizing the most expeditious mechanisms available, including one or more of the following:

(a) Sharing information, documents, records, and evidence pertaining to Defense Articles that are Exported, Transferred, Re-Transferred, Re-Exported, or received under the Treaty;

(b) Conducting verifications, site visits, and inspections of Defense Articles that are Exported, Transferred, Re-transferred, or Re-exported including, where appropriate, mechanisms to conduct post-shipment verifications and end-use or end-user monitoring of Defense Articles;

(c) Conducting interviews and obtaining testimony, including permitting, where appropriate upon request, the other Participant's officers to participate;

(d) Locating and identifying persons or entities;

(e) Notifying the other Participant when a breach of the procedures established pursuant to the terms of the Treaty is suspected, detected, or reported;

(f) Identifying, tracing, freezing, seizing, and forfeiting Defense Articles and associated proceeds and instrumentalities relating to violations of the procedures established pursuant to the terms of the Treaty consistent with all mechanisms of cooperation between the Participants;

(g) Discussing forfeitures and the sharing of assets between Participants when appropriate; and

(h) Any other measures consistent with the laws of the respective Participant.

Promotion of Compliance Measures

(4) The Participants will undertake specific measures to support compliance with the procedures established pursuant to the terms of the Treaty, including:

(a) Providing guidance to their relevant law enforcement officials and prosecutors regarding the Treaty and Implementing Arrangements upon the Treaty entering into force; and

(b) Notifying applicants to, and members of, the United Kingdom Community, as a condition of entry into the United Kingdom Community, in writing with written return acknowledgement that:

(i) Information and statements provided to one Participant regarding Defense Articles Exported, Transferred, Re-transferred, or Re-exported may be

provided to the other Participant;

(ii) Defense Articles may not be Re-transferred or Re-exported without the prior approval of the Participants;

(iii) The United States Government considers any Re-transfer or Re-export of Defense Articles, without prior permission of the Participants, to be a violation of the United States International Traffic in Arms Regulations, Arms Export Control Act, and related laws;

(iv) United Kingdom Community members must maintain records with respect to all Defense Articles Exported, Transferred, Re-transferred, or Re-exported for a period of at least 5 years, including records regarding intangible items or technical data;

(v) United Kingdom Community members must, within five days of the event, provide written notification to Her Majesty's Government of a material change in a United Kingdom Community member, including a change in the senior officers; the establishment, acquisition or divestment of a subsidiary or foreign affiliate; a merger; a take-over; or a change of location. A United Kingdom Community member must provide Her Majesty's Government with written notification at least 60 days, or as soon as reasonably practicable, in advance of any intended sale or transfer to a foreign person of ownership or control of the United Kingdom Community member;

(vi) Any material violations of the procedures established pursuant to the terms of the Treaty must be reported immediately, and all other violations must be reported as soon as reasonably practicable, to Her Majesty's Government which will notify the United States Government as appropriate;

(vii) Any additional information, records, or documents relating to compliance with the procedures established pursuant to the terms of the Treaty, and this Implementing Arrangement, will be provided to Her Majesty's Government upon request of either Participant. United Kingdom Community members will also endeavor to obtain any additional information, records, or documents relating to compliance with the procedures established pursuant to the terms of the Treaty, and this Implementing Arrangement, held by a foreign subsidiary, parent or affiliated company upon request by either Participant;

(viii) No objection will be made by the United Kingdom Community member to any reasonable request by either Participant to undertake an investigation, review records, or inspect any premises in accordance with the established mechanisms of cooperation;

(ix) United Kingdom Community members will inform their employees and personnel who may be handling Defense Articles of these requirements; and

(x) In the case of removal from the United Kingdom Community, the nongovernmental United Kingdom entity or facility will continue to abide by the undertakings it assumed as part of the United Kingdom Community until such time as other appropriate United States Government licenses or arrangements are in place.

Coordination in investigations and prosecutions

(5) The overall objective of this part of this Section is, in each case, for the appropriate authorities of each Participant, in accordance with the relevant instruments and mechanisms for cooperation noted in paragraph (2) of this Section, to coordinate investigations and any proceedings that may follow.

(6) The Participants acknowledge that independent prosecutors may exercise their discretion in any individual case.

(7) The Participants will consider each case on its own facts and merits and where appropriate will coordinate to determine the best avenues of inquiry for resolving matters in light of the following principles:

(a) The Participants will closely consult at the outset, and at all other appropriate times, when a violation of either Participant's laws is suspected, to arrive at an investigative plan setting out where and how investigations may be most effectively pursued;

(b) The nationality of a particular individual or company of interest will not bar cooperation in an audit, request, investigation or prosecution;

(c) If an individual is involved in a violation of the procedures established pursuant to the terms of the Treaty, such conduct may constitute a violation of United States law, United Kingdom law, or both, and may subject such individual to extradition from one of the Participants to the other;

(d) When criminal prosecution is contemplated by the United States or the United Kingdom prosecuting authorities, they will consider:

(i) Where and how a prosecution should be initiated, continued, or discontinued;

(ii) The venue, based on such case-related factors as the location of the suspects and the availability of witnesses and evidence;

(iii) Whether, and if so how, different aspects of the case should be pursued in

different jurisdictions;

(iv) The consequences of the commencement of proceedings leading to conviction or acquittal in one jurisdiction on national security, further investigation, intelligence operations, or prosecution in the other jurisdiction; and

(v) How best to preserve prosecutors' options in both jurisdictions;

(e) Where sufficient evidence is obtained, and prosecution is the best option given the factors cited above, the appropriate authorities will endeavor to ensure the availability of witnesses and the availability and admissibility of evidence to be used. Where beneficial, the appropriate authorities will consider coordinating the timing of the related legal proceedings against different persons in their respective jurisdictions; and

(f) Each Participant reserves the right to pursue civil enforcement and criminal prosecution consistent with its national law and procedure notwithstanding action or inaction by the other Participant.

Section 12
Management

(1) Each Participant will designate one Principal to exercise executive-level guidance and oversight of the activities under the Treaty and this Implementing Arrangement. The United States Government Principal will be the Under Secretary for Arms Control and International Security, United States Department of State and Her Majesty's Government Principal will be the Chief of Corporate Services, Defence Equipment and Support.

(2) The Principals will meet at least annually. Additional meetings may be held at an appropriate level as mutually determined by the Principals.

(3) A Management Board consisting of one designated representative from each Participant will be established to exercise executive level authority and day-to-day management of all activities under the Treaty and this Implementing Arrangement for their respective Governments. The United States Government representative will be a Deputy Assistant Secretary for Political-Military Affairs, United States Department of State and Her Majesty's Government representative will be the Director General, Acquisition Policy, UK MOD. Other personnel of the Participants, as appropriate, may attend Management Board meetings, however, decisions will be made by the designated representatives of the United States Government and Her Majesty's Government. The functions, duties and responsibilities of the Management Board will include, without limitation:

(a) Advising the Principals on any matters that affect the operation of the Treaty, including this Implementing Arrangement;

(b) Reviewing and forwarding to the Principals for approval any proposed amendments to this Implementing Arrangement;

(c) Reviewing the operation of the Treaty, including this Implementing Arrangement;

(d) Providing reports of activities under the Treaty and this Implementing Arrangement to the Principals, as necessary;

(e) Approving publication of all lists referenced in this Implementing Arrangement;

(f) Approving a Management Plan that describes Treaty-related implementation efforts, to include identification of relevant points of contact; and

(g) Acting as their respective Participant's primary contact point, and establishing sources of information for Approved Community members, concerning the operation of the Treaty and this Implementing Arrangement.

Section 13
Publication

(1) The Participants will establish, maintain, publish, and provide information for the purposes of the Treaty and this Implementing Arrangement.

(2) For matters involving information that may be publicly identified, the Participants will coordinate efforts to establish and maintain websites available to the public including, but not limited to, the establishment of technical points of contact for website-related matters in order to achieve consistent, timely and accurate publication of information to the Approved Community.

(3) For matters involving information that may not be publicly identified, the Participants will establish mechanisms at the appropriate security levels to promote timely responses to inquiries from the Approved Community.

Section 14
Dispute Resolution

Any disputes arising out of or in connection with this Implementing Arrangement will be resolved through consultations between the Participants and will not be referred to any court, tribunal, or third party.

Section 15
Amendments

This Implementing Arrangement will only be amended by the written mutual determination of the Participants.

Section 16
Duration and Withdrawal

This Implementing Arrangement will come into effect on the date of entry into force of the Treaty and will remain in effect for as long as the Treaty remains in force.

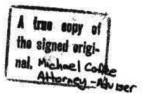
SIGNED in two originals at Washington on February 14, 2008.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

John Rood

FOR THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:

Nigel Sheinwald



VIII. U.S.-AUSTRALIA IMPLEMENTING ARRANGEMENT

United States Department of State

Washington, D.C. 20520

MAR 17 2008

Dear Mr. Chairman:

I am enclosing a certified copy of the Implementing Arrangement Pursuant to the Treaty between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, which was signed at Washington on March 14, 2008. The Treaty was signed at Sydney on September 5, 2007. It was submitted to the Senate for advice and consent to ratification on December 3, 2007, and is printed in Senate Treaty Document 110-10, 110th Congress, 1st Session.

I am enclosing this Implementing Arrangement for the information of the Senate at the time it considers the Treaty between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation for advice and consent to ratification.

Sincerely,

Jeffrey T. Bergner
Assistant Secretary
Legislative Affairs

Enclosure:
As stated.

The Honorable
Joseph R. Biden, Jr., Chairman,
Committee on Foreign Relations,
United States Senate.

United States Department of State

Washington, D.C. 20520

MAR 17 2008

Dear Senator Lugar:

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Sincerely,

Jeffrey T. Bergner
Assistant Secretary
Legislative Affairs

Enclosure:
As stated.

The Honorable
Richard G. Lugar,
Committee on Foreign Relations,
United States Senate.

IMPLEMENTING ARRANGEMENT PURSUANT TO THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF AUSTRALIA CONCERNING DEFENSE TRADE COOPERATION

The Government of the United States of America (hereinafter "the United States Government") and the Government of Australia (hereinafter "the Government of Australia") (hereinafter "the Participants"):

Having entered into the Treaty between the Government of the United States of America and the Government of Australia concerning Defense Trade Cooperation, done at Sydney September 5, 2007 (hereinafter "the Treaty");

Recalling that Article 14(1) of the Treaty requires the Participants to conclude implementing arrangements for the Treaty;

Recognizing that this Implementing Arrangement is a means by which the Participants will implement the legally binding obligations of the Treaty;

Recognizing that pursuant to Article 13(2) of the Treaty, any conduct falling outside the terms of the Treaty, including this Implementing Arrangement, and any regulations promulgated to implement the effect of such terms on existing law remains subject to applicable licensing requirements and implementing regulations, including any criminal, civil, and administrative penalties or sanctions contained therein;

Recognizing the principles established 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 of June 25, 2002, as may be amended, and implementing arrangements thereto (hereinafter "the GSA"); and

Recognizing the principles established under the Memorandum of Agreement between the Government of Australia and the Government of the United States concerning Reciprocal Defense Procurement of April 19, 1995;

Have mutually determined the following understandings:

Section 1
Definitions

(1) Terms used in this Implementing Arrangement that are defined in the Treaty will have the same definition as in the Treaty. In addition, the following definitions will apply to this Implementing Arrangement:

Australian Defence Articles	Defense Articles the initial movement of which is from the Territory of Australia

	to the United States, as defined in Article 8(7).
Delivery	The movement of Defense Articles to a member of the Australian Community pursuant to a Foreign Military Sales program Letter of Offer and Acceptance where such Defense Articles are outside of the customs jurisdiction of the United States of America and are subject to the control of the Government of Australia in accordance with Foreign Military Sales program shipping practices.
Management Board	The board established pursuant to Section 12(3).
Management Plan	The plan related to the Treaty and this Implementing Arrangement identified in Section 12(3)(f).
Principals	The persons designated by each Participant pursuant to Section 12(1).
Project	(i) Specific acquisition efforts by the Government of Australia mutually determined pursuant to Section 2(3) to research, develop, test, evaluate, produce, support, or sustain Defense Articles for worldwide use by Australian defense and security organizations, or (ii) specific defense or security operations mutually determined pursuant to Section 2(3).

(2) Reference to government departments or agencies, including individual posts or officials therein, will be deemed to be to their successors in the event of reorganization.

(3) References to numbered Articles refer to Articles of the Treaty, unless otherwise indicated.

(4) Terms capitalized in this Implementing Arrangement, and their variants, will have the meaning established in this Section.

Section 2
Operations, Programs, and Projects

(1) In furtherance of Article 3(1)(a), the Participants will develop, establish and maintain information concerning combined military and counter-terrorism operations including, but not limited to exercises and training, which includes the publication of lists of such operations, using the following procedures:

(a) The United States Department of Defense (hereinafter "U.S. DoD") and the Australian Department of Defence (hereinafter "ADOD") will develop and maintain a list of combined military operations, and revisions thereto, based on the criteria used by the U.S. DoD and the ADOD to establish and document such operations; and

(b) The U.S. DoD and the ADOD will also consult with their respective government's authorities responsible for counter-terrorism operations to develop and maintain a list of combined counter-terrorism operations based on the criteria used by the Participants to establish and document such operations.

(2) In furtherance of Article 3(1)(b), the Participants will develop, establish and maintain information concerning mutually determined cooperative security and defense research, development, production, and support programs, including the publication of lists of such programs, using the following criteria:

(a) Such programs must fall under one or more valid United States cooperative program legal authorities confirmed by the United States Government and accepted by the Government of Australia;

(b) There must be a valid cooperative program international agreement or arrangement documented and in force or effect between the United States Government and the Government of Australia, which includes agreements or arrangements between their subordinate organizations;

(c) All bilateral United States - Australian cooperative program relationships within the overall context of a multilateral cooperative program must be documented in a United States - Australian bilateral international agreement or arrangement to fall within the scope of the Treaty;

(d) The cooperative program international agreement or arrangement must involve Defense Articles that fall within the scope of the Treaty; and

(e) Cooperative program international agreements or arrangements that focus on the research, development, production, and support of Defense Articles exempt from the scope of the Treaty will be excluded, unless otherwise mutually determined for any program that also involves Defense Articles not exempt from the scope of the Treaty.

(3) 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 Government of Australia is the end-user, based on the following criteria:

(a) The purpose of the Project must be focused on meeting the needs of the Government of Australia, rather than on security and defense exports to third parties;

(b) The Project must involve Defense Articles that fall within the scope of the Treaty; and

(c) Projects that focus on the research, development, production, and support of Defense Articles exempt from the scope of the Treaty will be excluded, unless otherwise mutually determined for any Project that also involves Defense Articles not exempt from the scope of the Treaty.

(4) The lists of operations, programs and Projects referred to in this Section, which have been mutually determined by the ADOD and United States DoD, will be subject to approval by the U.S. Department of State and the ADOD. Procedures will be developed in the Management Plan to address urgent requirements for changes to the lists.

(5) The approved lists of operations, programs and Projects that may be publicly identified will be published in accordance with Sections 12 and 13.

(6) The approved lists of operations, programs and Projects that may not be publicly identified will be maintained for reference via secure channels.

(7) Exports of Defense Articles from the United States Community in support of the operations, programs and Projects identified in the approved lists that may not be publicly identified may be carried out by the Australian Embassy in Washington in accordance with procedures developed between the Australian Embassy and the Directorate of Defense Trade Controls of the U.S. Department of State and documented in the Management Plan.

Section 3
United States Government End-Use

In furtherance of Article 3(1)(d), the Participants will employ the following procedures concerning Defense Articles required for United States Government end-use:

(1) United States Government end-use requirements that fall within the scope of the Treaty will be based on the following criteria:

(a) Only those United States Government end-use requirements identified pursuant to a United States Government solicitation or contract will be considered to fall within the scope of Article 3(1)(d);

(b) Only United States Government solicitations or contracts open to foreign participation, including participation from Australian Community members, will be considered to fall within the scope of Article 3(1)(d), subject to Article 3(2). Such solicitations or contracts will specifically provide that Australian Approved Community members are permitted to respond or participate using the procedures established pursuant to the terms of the Treaty;

(c) United States Government solicitations or contracts will specifically provide that only Defense Articles that are not exempt from the scope of the Treaty may be Exported or Transferred in support of the solicitation or contract; and

(d) United States Government solicitations or contracts that relate to the research, development, production, and support of Defense Articles exempt from the scope of the Treaty will be excluded, unless otherwise mutually determined for any solicitation or contract that also involves Defense Articles not exempt from the scope of the Treaty.

(2) In addition to the criteria described in paragraph (1) of this Section, Approved Community members responding to United States Government solicitations will be subject to the following requirements:

(a) Prior to contract award, Approved Community members, in responding to a United States Government solicitation, may only Export or Transfer Defense Articles that specifically respond to the stated requirements of that solicitation. Once under contract, Approved Community members may Export or Transfer Defense Articles that specifically respond to the stated requirements of the contract;

(b) Approved Community members will maintain records, including all relevant commercial documents in any medium relating to the movement of Defense Articles as referenced in Article 12(1) and the movement of Australian Defence Articles, for a period of at least 5 years; and

(c) With regard to a United States Government solicitation, Approved Community members will agree in writing prior to the Export or Transfer of a Defense Article:

(i) To mark, identify, transmit, store, and handle any Defense Articles provided for the purpose of responding to such solicitations, as well as any Defense Articles provided with or developed pursuant to their responses to such solicitations, in accordance with the Treaty, this Implementing Arrangement, and related United States Government and Government of Australia regulations;

(ii) To comply with the Re-transfer or Re-export provisions of the Treaty, this Implementing Arrangement and related United States Government and Government of Australia regulations; and

(iii) To acknowledge that they are subject to administrative, civil, and criminal action and penalties pursuant to United States or Australian law if any Defense Articles are Re-transferred or Re-exported in violation of the procedures established pursuant to the terms of the Treaty, including any Re-transfer or Re-export to a prospective subcontractor that is not an Approved Community member.

(3) Approved Community members may obtain information regarding United States Government solicitations for United States Government end-use requirements that meet the criteria specified in paragraph (1) of this Section as follows:

(a) Publicly available U.S. DoD solicitations may be found on United States Government website www.fedbizopps.gov (or successor in the event of website changes); and

(b) A list of other publicly available United States Government solicitations will be published in accordance with the Sections 12 and 13.

(4) Approved Community members may obtain information regarding contracts for United States Government end-use requirements that meet the criteria specified in paragraph (1) of this Section through the United States Government contracting officer(s) responsible for contract management and administration of the applicable contract(s).

(5) Solicitations or contracts for United States Government end-use requirements that meet the criteria specified in paragraph (1) of this Section that may not be publicly identified will be maintained by the Participants for reference via secure channels in accordance with the Sections 12 and 13.

(6) Exports of Defense Articles from the United States Community in support of United States Government end-use requirements that may not be publicly identified may be carried out by the Australian Embassy in accordance with procedures developed and approved by the Australian Embassy and United States Department of State, Directorate of Defense Trade Controls.

Section 4
Defense Articles Exempt from Scope of Treaty

(1) In furtherance of Article 3(2), the Participants will develop, maintain, and publish information concerning Defense Articles that are exempt from the scope of the Treaty.

(2) The ADOD will develop and maintain a list of Australian Defence Articles to be exempted from the scope of the Treaty. The Government of Australia's list will be updated as needed.

(3) The U.S. DoD will develop and maintain, and the United States Department of State will approve, a list of Defense Articles to be exempted from the scope of the Treaty. The United States Government list will be updated as needed.

(4) The lists referred to in paragraphs (2) and (3) of this Section will be combined to constitute the list of Defense Articles exempt from the scope of the Treaty. The Management Board will consult prior to the combination of the lists and any proposed changes based on procedures established in the Management Plan.

(5) The list of Defense Articles exempt from the scope of the Treaty that may be publicly identified, will be published periodically in accordance with Section 13.

(6) Information concerning the list of Defense Articles exempt from the scope of the Treaty that may not be publicly identified, will be maintained by the Participants, and shared via secure channels, as appropriate.

(7) With respect to Defense Articles added to the list of Defense Articles exempt from the scope of the Treaty, the Participants will establish policies and procedures to require members of the Approved Community that have Exported, Transferred or received such Defense Articles pursuant to the Treaty to immediately, or as soon as reasonably practicable, notify the Participants and apply to the appropriate Participant for an export license or other appropriate authorization for such Defense Articles. Upon such notification and, where appropriate, application, the appropriate Participant will, on an expedited basis, either issue a license or other authorization for such Defense Articles or provide other written guidance and direction regarding the disposition of such Defense Articles. Except as otherwise provided in this Section, the Treaty will apply until a license or other authorization or other written guidance and direction is issued. Pending such action, the Participants will require any member of the Approved Community in possession of such Defense Articles Exported or Transferred pursuant to the Treaty to not Transfer such Defense Articles without an appropriate license or other authorization, and to continue to abide by its obligations as a member of the Approved Community.

Section 5
United States Foreign Military Sales

(1) Defense Articles acquired by the Government of Australia via the United States Foreign Military Sales (FMS) Program and transferred to the Government of Australia pursuant to Letters of Offer and Acceptance (LOAs), or equivalent agreements or arrangements, may be treated as if they were Exported pursuant to the Treaty once Delivery to the Government of Australia occurs. Defense Articles exempt from the scope of the Treaty at the time an LOA is executed should be contained in separate lines in the LOA and identified with an appropriate special note in the LOA terms and conditions.

(2) Prior to any initial Transfer of Defense Articles the following requirements will apply:

(a) The Government of Australia must determine that the Transfer 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; and

(b) The Defense Articles will be marked or otherwise identified in accordance with the Treaty and this Implementing Arrangement.

(3) Upon Transfer, such Defense Articles will be marked, identified, transmitted, stored and handled in accordance with the Treaty and this Implementing Arrangement.

(4) The Government of Australia will maintain a register of FMS items that are subsequently Transferred under the Treaty within the Approved Community.

(5) Terms of the FMS LOA will govern except for those provisions related to the implementation of the Treaty. Procedures for transition of Defense Articles acquired and Delivered under the FMS Program that fall within the scope of the Treaty will be established in the Management Plan, as appropriate, based on the principles outlined in this Section.

Section 6
Approved Community

Government Members of the Australian Community

(1) In furtherance of Article 4(1)(a), the ADOD will maintain a list of Government of Australia authorities with facilities that are both accredited by the Government of Australia pursuant to the GSA and related to the scope of the Treaty. This list will be made available to the United States Government.

(2) The Participants will develop a process for notifying additions to and deletions from the list. This process will be administered by the ADOD and the U.S. DoD.

Nongovernmental Members of the Australian Community

(3) In furtherance of Article 4(1)(c), the Participants will implement a process to establish and maintain a list of nongovernmental Australian entities and facilities that will be included in the Australian Community. The process will be administered by the ADOD and the United States Department of State, based on the eligibility criteria and the processes identified below.

(4) The following are the criteria that the nongovernmental Australian Community entities and facilities will be assessed against, for inclusion on the List referred to in Article 4(1)(c):

(a) That the entity or facility must be on the Government of Australia's list of approved facilities for handling of classified information and material;

(b) Foreign ownership, control or influence;

(c) Previous convictions or current indictment for violations of United States or Australian export control laws or regulations;

(d) The United States export licensing history of the entity or facility; and

(e) National security risks, including interactions with countries identified or proscribed by Australian or United States laws or regulations.

(5) A nongovernmental Australian entity or facility may apply to the ADOD for inclusion in the Australian Community.

(6) Where a nongovernmental Australian entity applies for inclusion in the Australian Community, the ADOD will conduct an initial eligibility review and the ADOD and the United States Department of State will then mutually determine the inclusion of that entity in the Australian Community based on the criteria described in paragraph (4) of this Section. For this purpose, the Participants will share as much information as possible.

(7) The Australian Community list, including revisions thereto, will be published by the ADOD and the United States Department of State periodically in accordance with Section 13.

(8) The ADOD will inform nongovernmental Australian entities and facilities of the results of their application.

(9) If one Participant considers that urgent removal of a nongovernmental Australian entity or facility from the Australian Community may be in its national interest:

(a) It will advise the other Participant, providing as much information as possible, and that Participant will have 24 hours to provide mitigating information concerning the entity or facility.

(b) At the end of 24 hours, unless decided otherwise, the Participant will formally notify the other Participant of its desire that the entity or facility be removed from the Australian Community list. Upon such notification, the entity or facility will be suspended, requiring it to operate under United States and Australian export licenses and not under the Treaty pending a final decision on removal from the Australian Community by the Participants.

(c) The Participants will consult within 30 calendar days of notification regarding removal of an entity or facility. Consultation may include measures to be applied during the suspension period and any remedial measures to be imposed in lieu of removal.

(d) If after such consultation either Participant believes that such entity or facility should be removed from the Australian Community list, it will be removed. Otherwise any suspension will be rescinded, although such rescission may be conditional upon compliance with remedial measures.

(10) The Government of Australia will require nongovernmental Australian entities or facilities applying for inclusion in the Australian Community to acknowledge in writing the blanket authorization conditions identified in Section 11.

Access

(11) Pursuant to Articles 4(1)(b) and 4(1)(d), the Government of Australia will ensure that all personnel within the Australian Community requiring access to Defense Articles pursuant to the Treaty will be:

(a) Cleared to at least the level of a Government of Australia RESTRICTED security clearance, which includes indicators such as identity, nationality, and police record; and

(b) Undergo an additional check for indicators of significant ties.

(12) Where this additional check gives rise to concerns of there being significant ties to a country proscribed under section 126.1 of the International Traffic in Arms Regulations of the United States, then the Government of Australia will conduct a dedicated assessment for significant ties at the same standard for that of a Government of Australia SECRET security clearance.

(13) When considering whether to grant an individual access to Defense Articles, the Participants will consult where national security considerations, including significant ties to countries or entities of concern, to either Participant arise. Such access will not be granted until mutually determined by the Participants. The Management Board representatives will promulgate such considerations within their respective organizations as required for the operation of the Treaty.

(14) The Participants acknowledge that no nationals of third countries who are not also Australian citizens will be permitted access to Defense Articles pursuant to the Treaty without the prior authorization of both the Government of Australia and the United States Government, unless otherwise detailed in the Management Plan.

Section 7
Transition from License or Other Authorizations

(1) Members of the United States Community wishing to make a transition from the requirements of a United States Government export license or other authorization to the processes established under the Treaty and this Implementing Arrangement will notify the United States Department of State, Directorate of Defense Trade Controls, of their intentions and surrender the existing license or other authorization. The Australian Community members affected by the transition and the Government of Australia will be notified in accordance with procedures detailed in the Management Plan.

(2) Members of the Australian Community wishing to make a transition from the requirements of a United States Government export license or other authorization to the processes established under the Treaty and this Implementing Arrangement will obtain authorization, from the United States Department of State, Directorate of Defense Trade Controls, either directly or through the original United States exporter, using procedures established by the Participants before the items may be considered as Defense Articles Exported under the Treaty. The Government of Australia will be notified in accordance with procedures detailed in the Management Plan.

Section 8
Australian Community Exports and Transfers

(1) The Government of Australia will allow Australian Defence Articles to be exported from the Australian Community to the United States Community without requiring the relevant member of the Australian Community to seek individual export licences for each export. To this end, the Government of Australia will issue blanket authorizations to members of the Australian Community.

(2) The Government of Australia will require the relevant member of the Australian Community, where required by the Australian Customs Service, to make an export declaration in the Customs Integrated Cargo System quoting the blanket authorization, and notify the Government of Australia of all exports of Australian Defence Articles effected by it.

(3) The Government of Australia will require relevant members of the Australian Community to mark all Australian Defence Articles to be exported to the United States Community with the standard marking "//AUSTRALIAN UNCLASSIFIED USML //REL AUS and USA Treaty Community//" unless a revision to this standard identifier is determined by the Management Board. For exports and transfers of classified Australian Defence Articles, the standard marking or identification will include the relevant Australian national security classification level and read "//AUSTRALIAN *CLASSIFICATION LEVEL* USML//REL AUS and USA Treaty Community//" unless a revision to this standard identifier is determined by the Management Board.

(4) The Government of Australia will require relevant members of the Australian Community to maintain records of all of their exports of all Australian Defence Articles and Transfers of all Defense Articles pursuant to the Treaty.

(5) The Government of Australia will require the relevant member of the Australian Community to satisfy itself that the recipient of an Australian Defence Article to be exported by the Australian Community, or a Defense Article to be Transferred by the Australian Community, is a member of the United States Community before the export or Transfer occurs by seeking written confirmation from the relevant member of the United States Community. The Government of Australia will further require the relevant member of the Australian Community to seek from the relevant member of the United States Community:

(a) The name under which the United States Community member is registered with the United States Department of State, Directorate of Defense Trade Controls; and

(b) Confirmation that the United States Community member will immediately advise of any change in its registration, eligibility, or status in the United States Community.

(6) The Government of Australia will require the relevant member of the Australian Community to liaise with the Australian Management Board representative before exporting Australian Defence Articles or Transferring Defense Articles, if the relevant member of the Australian Community is not satisfied with the information provided by the relevant member of the United States Community. The Participants acknowledge that the Australian Management Board representative may then liaise with his United States counterpart to verify the status of the relevant member of the United States Community.

(7) The Participants acknowledge that all Defense Articles Exported pursuant to the Treaty may be Transferred without members of the Approved Community needing to seek approval from either of the Participants, unless those Defense Articles are classified for purposes other than the Treaty, in which case the Defense Articles will be treated in accordance with the provisions of the GSA, and applicable provisions of Section 10.

(8) For Australian Defence Articles imported into the United States, the United States Government will require that such Australian Defence Articles be tracked and controlled in the United States as defense articles as defined under the United States International Traffic in Arms Regulations, even when such Australian Defence Articles are incorporated into other defense articles.

(9) For classified Australian Defence Articles exported to the United States Community, the Participants will provide advice and training to members of their respective Communities on handling requirements applicable to classified Australian Defence Articles, as contained in the Treaty, the GSA and Australian Department of Defence security and export policies.

(10) For Australian Defence Articles exported from the United States Community, the United States Government will:

(a) Maintain export control and brokering regulations, including civil and criminal penalties for any violation of those export control and brokering regulations by a member of the United States Community. The United States Community will be permitted to export Australian Defence Articles outside the Approved Community only in accordance with the United States Government's existing procedures for the export of Defense Articles.

(b) Consult with the Government of Australia on a list of countries with which the Government of Australia has significant national security and foreign policy concerns for the purpose of this paragraph. The list may include, but need not be limited to, countries with respect to which the Government of Australia:

(i) Has imposed bilateral sanctions;

(ii) May not export to because of foreign policy constraints; and

(iii) Has significant regional or international security issues.

(c) Obtain Government of Australia approval prior to export of classified Australian Defence Articles in accordance with the GSA.

Section 9
Re-transfers and Re-exports

(1) Except as provided in this Section, Defense Articles Exported under the Treaty may not be Re-transferred or Re-exported without the prior authorization of both the United States Government and the Government of Australia, and compliance with the process for seeking such authorizations. Members of the Australian Community may seek such authorizations from the United States Department of State, Directorate of Defense Trade Controls, directly or through the original United States exporter.

(2) The following processes apply to seeking authorization from the Government of Australia for the Re-transfer and Re-export of Defense Articles:

(a) The Government of Australia will require the relevant member of the Australian Community to notify it that a proposed Re-export or Re-transfer contains previously Exported Defense Articles, by making a declaration in the required form.

(b) The Government of Australia will require evidence of the approval of the United States Government before the Re-export or Re-transfer may be effected. This evidence may be either the conditions set out on the export's United States export license or by separate written notification; and

(c) If the relevant member of the Australian Community does not have written evidence that the United States Government approves the proposed Re-export or Re-transfer, the Government of Australia will not approve the application until such written evidence is obtained.

(3) In the event of authorization from the Government of Australia, the proposed Re-transfer or Re-export may take place. The Defense Articles thereafter will be considered to fall outside of the scope of the Treaty and will be governed by the applicable terms of any license or authorization granted by the United States Government and, as appropriate, the Government of Australia, in place of the terms of the Treaty.

(4) Any reincorporation or redevelopment of a Defense Article does not eliminate the requirement to obtain Government of Australia authorization for a proposed Re-transfer or Re-export of such Defense Article, under the processes described above.

(5) Re-transfer or Re-export of Defense Articles without the approval of the Government of Australia will be considered by the Participants to be a breach by the Approved Community member of the procedures established pursuant to the terms of the Treaty.

(6) Where Defense Articles are Re-transferred or Re-exported, markings and classifications arising solely from the Treaty will be withdrawn.

(7) Further to paragraph (1) of this Section, the following exceptions to the Re-transfer and Re-export provision of the Treaty and this Implementing Arrangement will apply pursuant to Article 9(1):

(a) Re-exports of Defense Articles from nongovernmental entities of the Australian Community to ADOD elements deployed outside the Territory of Australia conducting operations, including training, as mutually determined and listed pursuant to Sections 2(1) and 2(3), via ADOD transmission channels, or other transmission channels approved by the Principals or Management Board as described in Section 10; and

(b) Re-exports of Defense Articles from nongovernmental entities of the Australian Community to Approved Community members operating in direct support of ADOD elements deployed outside the Territory of Australia conducting operations, including training, as mutually determined and listed pursuant to Sections 2(1) and 2(3), via ADOD transmission channels, or other transmission channels approved by the Principals or Management Board.

(8) The Participants have mutually determined that the following exceptions to the Export and Transfer provisions of the Treaty, including this Implementing Arrangement, will apply:

(a) Exports or Transfers of Defense Articles from nongovernmental entities of the United States Community to ADOD elements deployed outside the Territory of Australia conducting operations, including training, as mutually determined and listed pursuant to Sections 2(1) and 2(3) via ADOD transmission channels, or other transmission channels approved by the Principals or Management Board; and

(b) Exports or Transfers of Defense Articles from nongovernmental entities of the United States Community to Approved Community members operating in direct support of ADOD elements deployed outside the Territory of Australia conducting operations, including training as mutually determined and listed pursuant to Sections 2(1) and 2(3) via ADOD transmission channels, or other transmission channels approved by the Principals or Management Board.

(9) In this Section, "ADOD transmission channels" includes electronic transmission of a Defense Article and transmission of a Defense Article by an ADOD contracted carrier or freight forwarder that merely transports or arranges transport for the Defense Article in this instance.

(10) Regardless of location, Approved Community members will ensure that Defense Articles provided pursuant to paragraphs (7) and (8) of this Section will be marked, identified, transmitted, stored and handled in accordance with the Treaty, including this Implementing Arrangement.

Section 10
Marking and Classification

(1) The Participants will mutually determine policies and procedures necessary to implement Article 6 and Article 11 in accordance with the GSA. These policies and procedures will be reflected in the Participants' regulations and guidance. Such policies and procedures issued by the Participants will require that all Defense Articles Exported or Transferred under the scope of the Treaty be marked, identified, transmitted, stored and handled as provided below:

(a) All Defense Articles Exported or Transferred will be marked or identified prior to such movement, as follows: For Exports and Transfers of Defense Articles, the standard marking or identification will read "//RESTRICTED USML //REL AUS and USA Treaty Community//" unless a revision to this standard identifier is determined by the Management Board. For Exports and Transfers of classified Defense Articles, the standard marking or identification will read "//*CLASSIFICATION LEVEL* USML//REL AUS and USA Treaty Community//" unless a revision to this standard identifier is determined by the Management Board;

(b) Where Defense Articles are returned to the United States Community, any Defense Articles classified as "//RESTRICTED USML//Rel AUS and USA Treaty Community//" for the purposes of the Treaty will be handled by the United States Community in accordance with existing procedures for controlled unclassified information. Defense Articles with other classifications must continue to be protected in accordance with the GSA; and

(c) The standard marking and identification requirements for Defense Articles described herein will be implemented in each Participant's policies and procedures based on the following guidance:

(i) Tangible Defense Articles (including hardware, equipment, and software) will be individually marked as indicated in paragraph 1(a) of this Section, and, where such marking is impractical, will be accompanied by documentation (such as contracts, invoices, shipping bills, or bills of lading) clearly identifying the Defense Articles as Treaty controlled using the marking as detailed in paragraph 1(a) of this Section;

(ii) 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 individually marked as indicated in paragraph 1(a) of this Section or, where such

marking is impractical, will be accompanied by documentation (such as contracts, invoices, shipping bills, or bills of lading) that will identify the Defense Articles as Treaty controlled using the marking in paragraph 1(a) of this Section. For oral communication, a verbal notification clearly associating the Defense Articles with the appropriate markings as detailed in paragraph 1(a) of this Section will be given; and

(iii) Other intangible Defense Articles, including defence services, will be accompanied by documentation (such as contracts, invoices, shipping bills, or bills of lading) clearly identifying the Defense Articles and their appropriate markings as detailed in paragraph 1(a) of this Section. For oral communication, a verbal notification clearly associating the Defense Articles with the appropriate markings as detailed in paragraph 1(a) of this Section will be given.

(2) The Participants will each promulgate regulations to reflect that any conduct falling outside the terms of the Treaty and the procedures established pursuant to the terms of the Treaty, including Re-transfers and Re-exports of Defense Articles without the prior approval of the relevant Participant will be a violation of the laws of Australia or the United States (or both). For the United States, these laws include the United States Arms Export Control Act and International Traffic in Arms Regulations, a violation of which may attract criminal, civil, and administrative penalties or sanctions of these and other applicable laws and regulations.

(3) The Government of Australia will modify relevant regulations and guidance to detail the requirements for the handling of Defense Articles Exported to the Australian Community under the Treaty, including requiring that:

(a) On receipt of Defense Articles that have been Exported to the Australian Community under the Treaty, the recipient is to ensure that the appropriate standard markings detailed above have been applied by the United States Community member. In the event that irregularities are found, the Government of Australia will require the recipient to correct the marking and to notify the irregularity and action taken to the ADOD. The ADOD will report such notifications to the United States Government in order that corrective action can be taken with the United States exporter, in accordance with Article 17 of the GSA;

(b) All Defense Articles Exported to the Australian Community under the Treaty, will be marked, identified, transmitted, stored and handled in accordance with the Treaty;

(c) Defense Articles that are located within the Territory of Australia, having been previously exported under a license or other export authorization, that are transitioned pursuant to Section 7, will be marked, identified, transmitted, stored and handled in accordance with the Treaty, by the holding Australian Community entity;

(d) Australian Community members comply with additional record keeping and handling requirements for Defense Articles, including:

(i) Recording dates of receipt and details of the United States exporter;

(ii) Recording the location, incorporation, Transfer, Re-export, Re-transfer or destruction of the Defense Articles, to enable a full audit trail to be established regarding the handling of the Defense Articles;

(iii) Applying and maintaining appropriate markings or other identification and ensuring that these requirements are passed to any future recipient of the Defense Articles within the Approved Community;

(iv) Establishing and carrying out a self-audit regime to monitor the effectiveness of the application of relevant controls on the Defense Articles; and

(v) Maintaining such records for a minimum of 5 years and providing such records on request to the Government of Australia, which may be provided to the United States Government in accordance with the provisions described in Section 11;

(e) There are access controls appropriate to the level of classification of the Defense Articles and their status under the Treaty, including password protection for electronically held Defense Articles and that information systems containing such Defense Articles have been accredited in accordance with the Government of Australia standards and guidelines appropriate to the classification of the Defense Articles; and

(f) Any material violations of the procedures established pursuant to the terms of the Treaty must be reported immediately, and all other violations must be reported as soon as reasonably practicable, to the Government of Australia which will notify the United States Government as appropriate.

Section 11
Cooperation and Enforcement Measures

(1) The Participants will, subject to their respective laws and regulations, cooperate in the enforcement of the operation of the Treaty, including this Implementing Arrangement and applicable laws and regulations.

Mechanisms for Cooperation

(2) The Participants will cooperate based on the following instruments that promote mutual cooperation and assistance:

(a) The Treaty on Extradition between the Government of Australia and the Government of the United States of America signed at Washington on May 14, 1974, as amended by the Protocol signed at Seoul on September 4, 1990 ('Extradition Treaty');

(b) The Memorandum of Understanding between the Government of Australia and the Government of the United States of America regarding Mutual Assistance between their Customs Services, signed at Brussels on June 23, 1992 ('Customs MOU');

(c) The Memorandum of Understanding between Australia and the United States concerning Cooperation in the Exchange of Financial Intelligence, signed at Paris on January 31, 1996;

(d) The Treaty between the Government of Australia and the Government of the United States of America on Mutual Assistance in Criminal Matters done at Washington on April 30, 1997 ('MLAT');

(e) The GSA; and

(f) Any further cooperation agreements or arrangements between the Participants.

Notification of Nongovernmental United States Entity

(3) The Government of Australia will consult with the United States Government in a timely manner about any concerns with a nongovernmental United States entity about its ability to protect Australian Defence Articles pursuant to Article 8(6).

(4) Following such consultations, the Government of Australia may issue directions to the Australian Community concerning future dealings with that nongovernmental United States entity.

(5) The Government of Australia may issue further directions to the Australian Community, as necessary, following further consultations with the United States Government.

Promotion of Compliance Measures

(6) The Government of Australia will require each non-governmental entity or facility applying to be included in the Australian Community to acknowledge the following standards in writing:

(a) Information and statements provided by that non-governmental entity to the Government of Australia regarding Defense Articles Exported, Transferred, Re-transferred, or Re-exported under the terms of the Treaty may be provided to the United States Government;

(b) Defense Articles may not be Re-transferred or Re-exported without prior approval;

(c) The Re-transfer or the Re-export of Defense Articles without prior approval constitutes a violation of Australian law as well as the United States International Traffic in Arms Regulations, Arms Export Control Act, and related laws and regulations;

(d) The non-governmental entity will maintain records with respect to all Defense Articles Exported, Transferred, Re-transferred, or Re-exported for a period of at least 5 years, including records regarding intangible items or technical data;

(e) The non-governmental entity must, within 5 working days of the event, provide written notification to the Government of Australia of any material change in that non-governmental entity. A material change may include a change in the senior officers; the establishment, acquisition or divestment of a subsidiary or foreign affiliate; a merger; a take-over; or a change of location. The non-governmental entity must provide the Government of Australia with written notification of any intended sale or transfer to a foreign person of ownership or control of that non-governmental entity at least 60 calendar days before the sale or transfer, or as soon as reasonably practicable, prior to such sale or transfer;

(f) Any material violations of the procedures established pursuant to the terms of the Treaty will be reported immediately, and all other violations must be reported as soon as reasonably practicable, to the Government of Australia;

(g) Any additional information relating to compliance with the terms of the Treaty requested by the Government of Australia, will be provided upon request. If the Government of Australia requests the non-governmental entity to provide information which is held by a foreign subsidiary, parent or affiliated company wherever located and related to compliance with the terms of the Treaty, that non-governmental entity will use its best endeavors to fulfil that request;

(h) The non-governmental entity will be subject to inspection and audit of records, premises and Defense Articles by the Government of Australia in accordance with Australian laws and regulations;

(i) In the case of removal from the Australian Community, the non-governmental entity will continue to abide by the same standards as the Australian Community until such time as other appropriate United States licenses or arrangements are in place; and

(j) The non-governmental entity will inform their employees and personnel who may be handling Defense Articles of these requirements.

(7) The Participants further determine that any failure by a member of the Approved Community to produce records as required will be subject to penalties or consequences under the laws, regulations and policies of the responsible Participant.

(8) Either Participant may request from the other Participant copies of records.

(9) Each Participant will use its best endeavors to respond promptly to the request of the other Participant within 30 calendar days.

(10) Each Participant will report on the status of requests received in the past 12 months during the annual consultations under Article 17.

(11) The requesting Participant accepts that the copies of Records provided under this paragraph will only be used for the purposes of Articles 12 and 13 and government use, including investigation, enforcement action, prosecution, civil or administrative proceeding. Such copies may not be disclosed for other purposes by the Participants without prior written permission, unless compelled to do so under the orders of the requesting Participant's courts, tribunals or legislature.

Cooperation Measures

(12) The Participants will cooperate in audits, inspections, and end-use verifications to ensure compliance with the procedures established pursuant to the Treaty. In this respect, the Participants will cooperate and assist one another following a request, or on their own initiative, utilizing the most expeditious mechanisms available, subject to the Participants' national laws and regulations and not inconsistent with any treaties or arrangements between the Participants. Such cooperation measures may include the following:

(a) Sharing information, documents, records and evidence pertaining to Defense Articles;

(b) Conducting verifications, site visits, and examinations of Defense Articles that are Exported, Transferred, Re-transferred, or Re-exported under the Treaty, including permitting, where appropriate, mechanisms to conduct post-shipment verifications and end-use or end-users monitoring of Defense Articles;

(c) Conducting interviews and taking the testimony or statements of persons, including permitting, where appropriate, the other Participant's representatives to participate;

(d) Locating and identifying persons or entities;

(e) Promptly notifying the other Participant when a material violation of the procedures established pursuant to the Treaty is suspected, detected, or reported;

(f) Identifying, tracing, freezing, or executing requests for searches and seizures of Defense Articles that are suspected to have been, or will be, Exported, Re-exported, Transferred, or Re-transferred in violation of the procedures established pursuant to the Treaty;

(g) Identifying, tracing, freezing, executing requests for searches and seizures of, or forfeiting, proceeds and instrumentalities related to suspected violations of the procedures established pursuant to the Treaty; and

(h) Discussing any forfeiture proceedings prior to the forfeiture.

Coordination of Investigations and Prosecutions

(13) The overall objective of this part of Section 11 is, in each case, for the appropriate authorities of each Participant, in accordance with the relevant instruments and mechanisms for cooperation noted in paragraph (2) of Section 11, to coordinate investigations and any proceedings that may follow.

(14) If a Participant suspects a violation of the procedures established under the Treaty, that Participant will:

(a) Investigate the alleged violation with a view to take appropriate action; and

(b) Notify the other Participant of the results of investigations where such investigations disclose a material violation as soon as practicable.

(15) Each Participant will cooperate with the other Participant with respect to investigations of suspected material violations of the procedures established pursuant to the Treaty conducted by an investigating Participant. Subject to the Participants' national laws and regulations, and not inconsistent with any treaties or arrangements between the Participants, the Participants accept the following guiding principles:

(a) That they will closely consult at the outset, and at all other appropriate times, where a violation of either Participant's laws concerning activities under the Treaty and related violations are suspected, to arrive at an investigative plan;

(b) That the nationality of a particular suspect, person, or company of interest will not bar cooperation in a request, investigation, and prosecution;

(c) That if an individual is suspected of violating the procedures established pursuant to the Treaty, such suspected violation may be of United States law, Australian law, or both, and may give rise to a request from one of the Participants to the other under the Extradition Treaty;

(d) The Participants will consult on possible prosecutions and keep each other informed of the progress of any prosecutions related to the Treaty. This may include consultation on:

(i) The venue of any prosecution and case-related factors such as the location of the suspects and the availability of witnesses and evidence;

(ii) The consequences for the other jurisdiction of commencing any proceedings on national security, further investigation, intelligence operations, or prosecutions; and

(iii) How best to preserve the options of prosecutors in both jurisdictions;

(e) That where sufficient evidence is obtained, and prosecution is the best option given the factors cited above, the appropriate authorities will cooperate to ensure the availability of witnesses and the availability and admissibility of evidence to be used. Where beneficial, the appropriate authorities will consider coordinating the timing of the related legal proceedings against different persons in their respective jurisdictions;

(f) That the Participants reserve the right to pursue criminal and civil actions, consistent with national laws and regulations; and

(g) That each Participant acknowledges that the decision to take action as a result of an investigation rests with each Participant pursuant to Article 13.

(16) The Participants acknowledge the independent role of prosecutors who may exercise their discretion in any individual case.

(17) The Participants will consult each other on any questions on the operation, implementation and administration of these Implementing Arrangements. The Participants will review the progress of any investigations arising from the provisions of the Treaty during routine consultations, and the consultations pursuant to Article 17.

Section 12
Management

(1) Each Participant will designate one Principal to exercise executive-level guidance and oversight of the activities under the Treaty and this Implementing Arrangement. The United States Government Principal will be the Under Secretary for Arms Control and International Security, United States Department of State and the Government of Australia Principal will be Deputy Secretary Strategy, Coordination and Governance, ADOD.

(2) The Principals will meet at least annually. Additional meetings may be held at an appropriate level as mutually determined by the Principals.

(3) A Management Board consisting of one designated representative from each Participant will be established to exercise executive level authority and day-to-day management of all activities under the Treaty and this Implementing Arrangement for their respective Governments. The United States Government representative will be a Deputy Assistant Secretary for Political-Military Affairs, United States Department of State and the Government of Australia representative will be the Head Strategic Policy Division, ADOD. Other personnel of the Participants, as appropriate, may attend

Management Board meetings, however, decisions will be made by the designated representatives of the United States Government and the Government of Australia. The functions, duties and responsibilities of the Management Board will include, but are not limited to:

(a) Advising the Principals on any matters that affect the operation of the Treaty, including this Implementing Arrangement;

(b) Reviewing and forwarding to the Principals for approval any proposed amendments to this Implementing Arrangement;

(c) Reviewing the operation of the Treaty, including this Implementing Arrangement and providing guidance to the agencies of the Participants;

(d) Providing reports of activities under the Treaty and this Implementing Arrangement to the Principals, as necessary;

(e) Approving publication of all lists referenced in this Implementing Arrangement;

(f) Promptly approving a Management Plan that describes Treaty-related implementation efforts, to include identification of relevant points of contact and setting out executive level procedures for the day-to-day management of the Treaty and this Implementing Arrangement; and

(g) Acting as their respective Participant's primary contact point and establishing sources of information for Approved Community members concerning the operation of the Treaty and Implementing Arrangement.

Section 13
Publication

(1) The Participants will establish, maintain, publish, and provide information, for the purposes of the Treaty and this Implementing Arrangement.

(2) For matters involving information that may be publicly identified, the Participants will coordinate efforts to establish and maintain websites available to the public including, but not limited to, the establishment of technical points of contact for website-related matters in order to achieve consistent, timely and accurate publication of information to the Approved Community.

(3) For matters involving information that may not be publicly identified, the Participants will establish mechanisms at the appropriate security levels to promote timely responses to inquiries from the Approved Community.

Section 14
Dispute Resolution

Any disputes arising out of or in connection with this Implementing Arrangement will be resolved through consultations between the Participants and will not be referred to any court, tribunal, or third party.

Section 15
Amendments

This Implementing Arrangement will only be amended by the written mutual determination of the Participants.

Section 16
Duration and Withdrawal

This Implementing Arrangement will come into effect on the date of entry into force of the Treaty and will remain in effect for as long as the Treaty remains in force.

SIGNED in two originals at Washington on March 14, 2008.

FOR THE GOVERNMENT OF
THE UNITED STATES OF AMERICA:

John Rood

FOR THE GOVERNMENT OF
AUSTRALIA:

Certified to be true copy of
signed original

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