

GAO

Report to the Committee on Foreign
Affairs, House of Representatives

May 2010

EXPORT CONTROLS

Observations on Selected Countries' Systems and Proposed Treaties



GAO

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Report Documentation Page

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Why GAO Did This Study

The U.S. government annually controls billions of dollars worth of U.S. arms and dual-use items exported to its allies and partners through a system of laws, regulations, and processes. Weaknesses in this system led GAO in 2007 to include export controls as part of a high-risk area and called for a reexamination, including evaluating alternative approaches. Increasing international collaboration on defense programs also makes it important to understand how other countries control exports. Proposed treaties would change the process for the export or transfer of certain U.S. arms to the United Kingdom and Australia.

Based on a request to review allies' export control systems and the proposed treaties, this report (1) identifies how selected allies' systems differ from the U.S. system, and (2) assesses how the proposed treaties will change controls on arms exports.

To conduct its work, GAO selected six countries—Australia, Canada, France, Germany, Japan, and the United Kingdom—based on factors such as whether they were major destinations for U.S. goods or significant arms exporters; conducted site visits in four countries; analyzed agency documentation on the foreign and U.S. systems and treaty related documents; and interviewed officials.

What GAO Recommends

GAO is not making recommendations in this report.

[View GAO-10-557](#) or [key components](#). For more information, contact Belva M. Martin at (202) 512-4841 or martinb@gao.gov.

EXPORT CONTROLS

Observations on Selected Countries' Systems and Proposed Treaties

What GAO Found

Just as in the United States, selected allies' export control systems have changed over time to address security interests and to satisfy international commitments. Significant structural and other differences exist between selected allies' export control systems and the U.S. system. Five of the six countries have a single agency in charge of administering export control regulations for arms and dual-use items. In the United States, the Department of State administers controls for arms and the Department of Commerce does so for dual-use items. This difference and others are evident in several major areas of the export control process—jurisdiction, licensing, enforcement, outreach, and performance assessments. For example, in licensing, France and the United Kingdom use a risk-based approach, allowing a company with a satisfactory compliance record and an established business case to export multiple shipments of less sensitive defense items to particular destinations or identified recipients under a single license. The U.S. export control system for arms is transaction based, generally requiring a license for each proposed arms export unless an exemption applies. Under this approach, exporters submit a separate license application to State for each destination when exporting arms to multiple parties. In another example of how the systems differ, four of the six countries have one agency in charge of enforcing export controls. In the U.S. system, multiple agencies have concurrent authority to enforce arms and dual-use export controls. Four countries have conducted performance assessments of their export control systems that resulted in significant changes. The United States has made several changes to improve certain aspects of its control system and, in April 2010, the Administration announced proposed reforms following an interagency review. While GAO did not assess the effectiveness of other countries' systems, the practices highlighted in this report may inform U.S. reform efforts to increase the efficiency while maintaining or improving the effectiveness of the U.S. system.

Two proposed Defense Trade Cooperation Treaties, one with the United Kingdom and the other with Australia, will establish significant changes in U.S. controls of certain arms exports and transfers. Case-by-case reviews prior to export or transfer of arms under the treaties will not be required. Instead, treaty parties will establish approved communities of entities, facilities, and personnel eligible to export, transfer, or receive certain arms without licenses. State officials told GAO the treaties represent a move from transactional licensing and towards a more risk-based approach. To ensure security, the treaties will utilize existing safeguards and implement new ones. For example, record keeping requirements and the requirement to obtain U.S. government approval to export or transfer its arms outside of the approved community will remain in use under the treaties. A new safeguard under the treaties will require community members in the United Kingdom and Australia to handle unclassified U.S. arms at an increased security level. Several implementation issues, however, have yet to be resolved regarding enforcement, congressional oversight, and participation by small- and medium-sized businesses in the United Kingdom and Australia.

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Abbreviations

BAFA	Federal Office of Economics and Export Control
BIS	Bureau of Industry and Security
DDTC	Directorate of Defense Trade Controls
DECO	Defence Export Control Office
DOD	Department of Defense
DTSA	Defense Technology Security Administration
EAR	Export Administration Regulations
ECO	Export Control Organisation
METI	Ministry of Economy, Trade, and Industry
NATO	North Atlantic Treaty Organization
OGEL	open general export licence
ITAR	International Traffic in Arms Regulations
USML	United States Munitions List

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United States Government Accountability Office
Washington, DC 20548

May 27, 2010

The Honorable Howard L. Berman
Chairman
The Honorable Ileana Ros-Lehtinen
Ranking Member
Committee on Foreign Affairs
House of Representatives

Each year, billions of dollars' worth of U.S. arms and dual-use items are exported to U.S. allies and strategic partners.¹ To advance national security, foreign policy, and economic interests, the U.S. government controls these exports through a system of laws, regulations, and processes, some of which were established during the Cold War. Since that time, globalization and terrorist threats have made it significantly more complex and challenging to control these exports. For over a decade, we have documented a series of weaknesses in the U.S. export control system, including poor coordination among the multiple federal agencies involved, which have led to jurisdictional disputes and enforcement challenges, and the lack of systematic assessment of the overall effectiveness of the export control system. These weaknesses, coupled with significant changes in the national security and global economic environments, led us in 2007 to designate the effective protection of technologies critical to U.S. national security interests—of which export control is a key component—as a high-risk area. While agencies have made several improvements in the export control system, we have called for a fundamental reexamination of the system and an evaluation of alternative approaches. In April 2010, the Administration announced proposed reforms following an interagency review of the entire U.S. export control system.

In addition, increasing international collaboration on defense development programs and exemptions from export control processes make it important to understand how other countries control exports. Further, proposed treaties, known as the Defense Trade Cooperation Treaties, will change the process for export or transfer of certain arms to the United

¹For the purposes of this report, the term arms refers to defense articles, defense services, and related technical data, as specified in 22 U.S.C. § 2778, and the term dual-use refers to items that have both commercial and military applications, such as high-performance computers, radars, and underwater television cameras.

Kingdom and Australia.² Based on your request, we examined selected allies' export control systems and the proposed treaties with the United Kingdom and Australia. Specifically, within the framework of the weaknesses that we previously documented in the U.S. export control system, we (1) identified how selected allies' export control systems differ from the U.S. export control system, and (2) assessed how the proposed Defense Trade Cooperation Treaties with the United Kingdom and Australia will change controls on arms exports.

To identify how selected allies' export control systems differ from the U.S. export control system, we selected six countries to include in our review—Australia, Canada, France, Germany, Japan, and the United Kingdom. We selected these countries based on several factors, including whether they were major destinations for U.S. arms and dual-use exports, members of international export control regimes, or significant arms exporters. While their defense export markets are individually much smaller than that of the United States, these selected countries provide examples of how some U.S. allies have designed and implemented their export control systems. We used the broad areas in the U.S. export control system where, in our prior work, we found weaknesses—jurisdiction, licensing, enforcement, outreach, and performance assessments—to guide our examination of other countries' systems. We analyzed background documentation on selected allies' export control systems to gain a broader understanding of each system. We submitted a structured question set to countries in our review and obtained related documentation, such as export control system annual reports and export guidelines. We also conducted site visits to Australia, France, Germany, and the United Kingdom and interviewed officials in charge of administering and enforcing export controls. To obtain current information on the U.S. export control system, we reviewed agency documents on changes to the system and interviewed officials from the Department of State's Directorate of Defense Trade Controls (DDTC), the Department of Commerce's Bureau of Industry and Security (BIS), and the Department of

²Treaty 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, June 21 and 26, 2007, S. Treaty Doc. No. 110-7; Treaty Between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, September 5, 2007, S. Treaty Doc. No. 110-10 (collectively the "treaties"). The treaties, as agreed to by the U.S. President, were received in the U.S. Senate and referred to the Committee on Foreign Relations on September 20, 2007 and December 3, 2007, respectively, which held a hearing on both on December 10, 2009. The treaties have yet to be ratified by the U.S. Senate.

Defense's (DOD) Defense Technology Security Administration (DTSA). The information on foreign countries' export control laws and regulations in this report does not reflect our independent legal analysis, but is based on interviews, questionnaires, and secondary sources such as analyses by foreign law specialists at the U.S. Library of Congress. We used the information gathered from our review of documents, structured question sets, site visits, interviews, and foreign law specialists' analyses as the basis for our comparison of the U.S.'s and foreign countries' systems. Our comparison does not include an assessment of the effectiveness of the selected countries' export control systems.

To assess how the proposed Defense Trade Cooperation Treaties with the United Kingdom and Australia will change controls on arms exports, we reviewed the treaties, the treaties' implementing arrangements, congressional testimony, and related documentation. We submitted a structured question set on the treaties and analyzed responses from the United Kingdom and Australia. We subsequently interviewed officials from State, the United Kingdom's Ministry of Defence, and Australia's Department of Defence on the treaties' implementation. Additional information on our scope and methodology may be found in appendix I.

We conducted this performance audit from January 2009 to May 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

The U.S. export control system for arms and dual-use items involves multiple federal agencies, but two agencies administer the regulatory framework—generally the Department of State administers controls for arms and the Department of Commerce does so for dual-use items, which have both military and civilian applications.³ In managing its respective system, each department is responsible for limiting the possibility of export-controlled items and technologies falling into the wrong hands while also allowing legitimate trade to occur. The two departments'

³Commerce also administers controls for some items that have solely civilian use. 15 C.F.R. § 730.3.

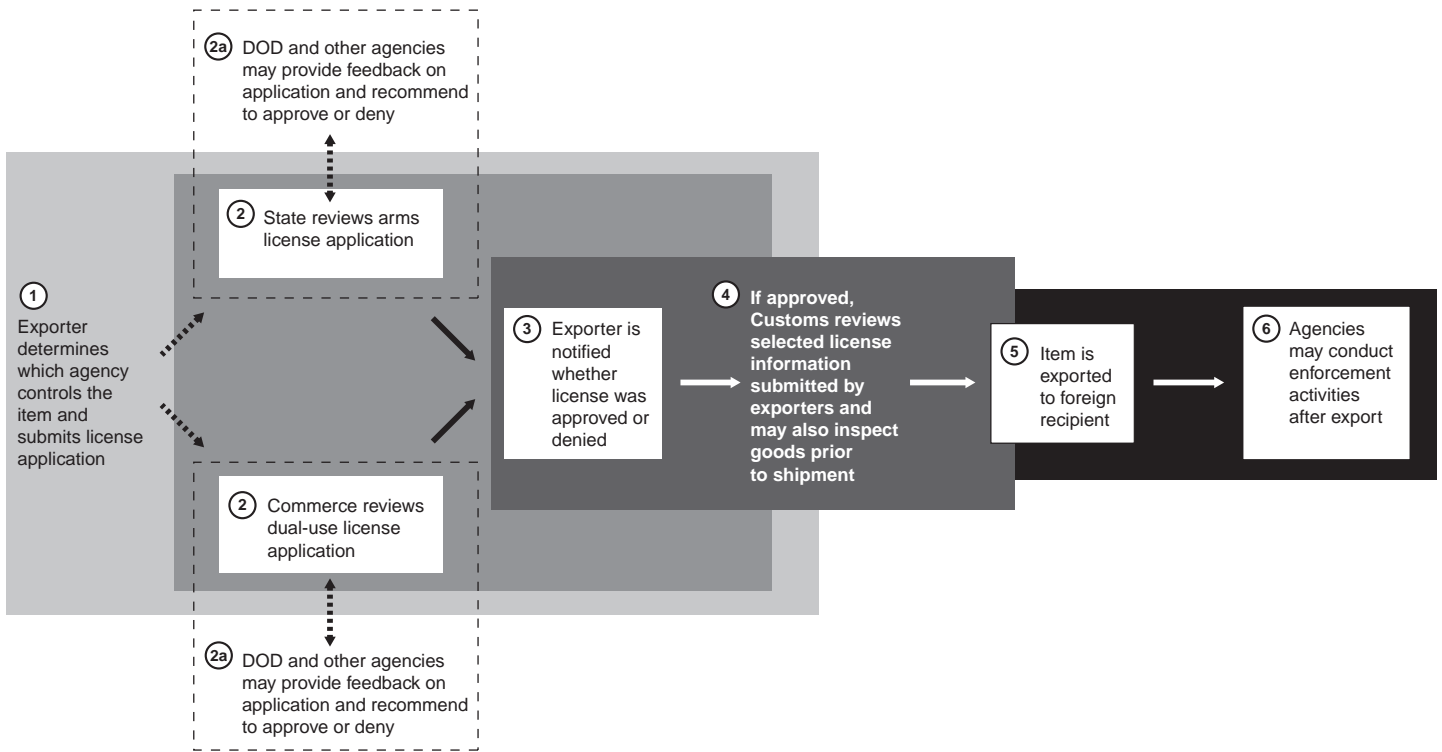
implementing regulations contain lists that identify the items and related technologies that each department controls, and establish requirements for exporting those items.⁴ In most cases, Commerce's controls over dual-use items are less restrictive than State's controls over arms. Commerce controls many commercially available items such as aircraft, computers, and telecommunications equipment, which generally do not require licenses prior to export. Conversely, State-controlled items generally require licenses for most destinations unless an exemption applies. Exporters generally are responsible for determining which department controls each item they seek to export and which regulatory requirements apply.⁵ Unless an exemption applies, exporters submit a license application if their items are controlled to either State or Commerce to receive approval to export, depending on which agency controls the item. When deciding whether to approve or deny an application, State and Commerce evaluate it against several factors, including an assessment of all parties to the transaction and how the recipient plans to use the item. As part of the application review process, State and Commerce consult with other agencies.⁶ State and Commerce also conduct outreach programs that are designed to increase companies' knowledge of export control regulations and to promote compliance. Figure 1 below outlines the major steps in the U.S. export control system.

⁴Commerce administers the dual-use export control system through requirements contained in the Export Administration Regulations (EAR), 15 C.F.R. § 730 et seq. These regulations include the list of dual-use items subject to specific controls, known as the Commerce Control List. The State Department administers the arms export control system through requirements contained in the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 120 et. seq. These regulations include the list of arms subject to specific controls, known as the United States Munitions List (USML).

⁵Exporters can make a commodity jurisdiction request to the Department of State in order to receive a determination as to whether a defense article or service is covered under the ITAR. State makes the determination in consultation with the Departments of Commerce and Defense, as appropriate. 22 C.F.R. §120.4. Exporters may also request an advisory opinion, classification, or a determination from Commerce as to whether an item, technology, or activity is subject to the EAR. 15 C.F.R. § 734.6.

⁶As provided for under Executive Order 12981, the Departments of Defense, Energy, and State have the authority to review any export license application submitted to the Department of Commerce, and Commerce may refer export license applications to other departments or agencies as appropriate. Exec. Order No. 12,981, 60 Fed. Reg. 62,981 (Dec. 5, 1995). These departments or agencies must notify Commerce as to the types of applications they do not wish to review, in the event that they determine that certain types of applications need not be referred to it. If there is disagreement among the agencies, the application goes through an interagency dispute resolution process.

Figure 1: Major Steps in the U.S. Export Control System



Source: GAO analysis of agencies' export control processes.

Responsibility for enforcing U.S. export control laws and their associated regulations largely rests with various agencies within the Departments of Commerce, Homeland Security, Justice, and State. These agencies engage in a variety of enforcement activities, including inspecting items prior to export, investigating possible export control violations, prosecuting alleged violations, and imposing appropriate criminal and civil penalties. Table 1 below details the roles and responsibilities in the U.S. arms and dual-use export control systems.

Table 1: Roles and Responsibilities in the U.S. Arms and Dual-Use Export Control Systems

Principal regulatory agency	Mission	Statutory authority	Implementing regulations
Commerce Department's Bureau of Industry and Security	Regulates and enforces controls on the export of dual-use items by weighing economic, national security, and foreign policy interests	Export Administration Act of 1979, as amended ^a	Export Administration Regulations
State Department's Directorate of Defense Trade Controls	Regulates export of arms by giving primacy to national security and foreign policy concerns ^b	Arms Export Control Act, as amended ^c	International Traffic in Arms Regulations
Other federal agencies^d			
Department of Defense	Provides input on which items should be controlled by State and which by Commerce, and may conduct technical and national security reviews of export license applications submitted by exporters to either State or Commerce		
Department of Homeland Security	Enforces arms and dual-use export control laws and regulations through border inspections and investigations ^e		
Department of Justice	Investigates suspected criminal violations in certain areas of counterintelligence, including potential export control violations, and prosecutes suspected violators of arms and dual-use export control laws ^e		

Source: GAO analysis of cited laws and regulations.

^aAuthority granted by the act lapsed on August 20, 2001. 50 U.S.C. app. § 2401 et. seq. However, Executive Order 13222, Continuation of Export Control Regulations, which was issued in August 2001 under the authority provided by the International Emergency Economic Powers Act (50 U.S.C. § 1702), continues the controls established under the act and the implementing Export Administration Regulations. Executive Order 13222 requires an annual extension and was recently renewed by Presidential Notice on August 13, 2009.

^bState also participates in the review of export license applications submitted to Commerce and provides input on which items should be subject to control under the Export Administration Regulations.

^c22 U.S.C. § 2751 et. seq.

^dThe Department of Energy participates in the review of export license applications submitted to Commerce and provides input on which items should be subject to control under the Export Administration Regulations.

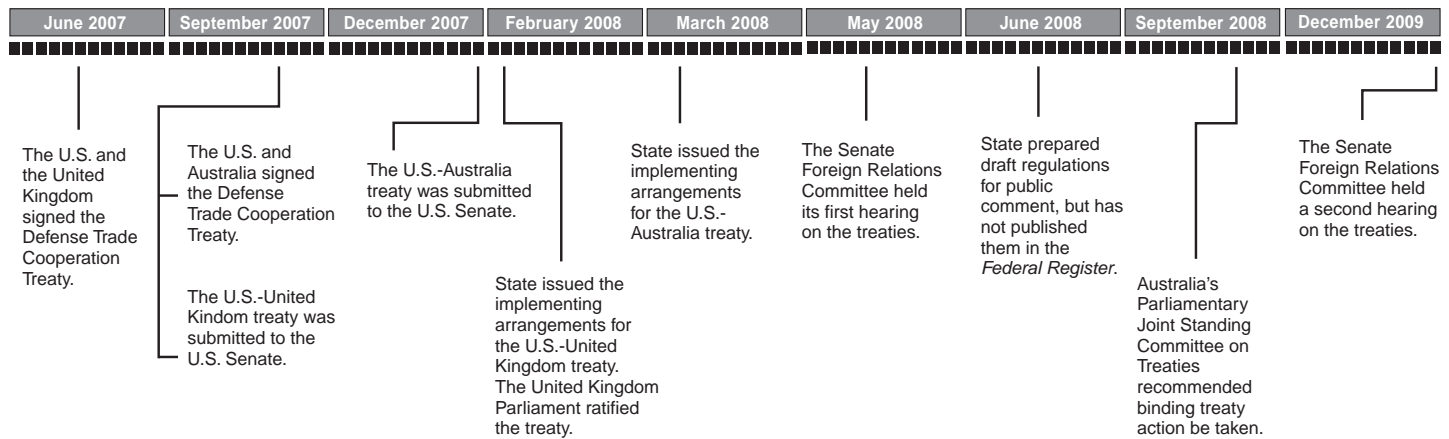
^eHomeland Security, Justice, and Commerce investigate potential dual-use export control violations. Homeland Security and Justice investigate potential arms export control violations.

In 2007, the United States signed separate Defense Trade Cooperation Treaties with the United Kingdom and Australia to provide for the license-

free export or transfer of selected arms under certain circumstances.⁷ The stated goals of each proposed treaty include enabling treaty parties to achieve fully interoperable forces, establishing a closer framework for security and defense cooperation among treaty parties, and leveraging the strengths of the security and defense industries in the treaty parties' countries. Only certain governmental and nongovernmental entities, facilities, departments, agencies, and personnel in each treaty party's country will be eligible to export, acquire, or transfer applicable exported arms under the treaties. The treaties will be applicable to exports and transfers in support of certain activities, and will not apply to arms that are identified as excluded from the scope of the treaties. Exporters are not required to use the treaties and will continue to have the option to apply for a license or other authorization to export or transfer treaty-eligible arms. Implementation of the treaties is currently on hold pending ratification by the U.S. Senate and Australia's Parliament, but has already been ratified by the United Kingdom's Parliament. A timeline of events related to the Defense Trade Cooperation Treaties is included below in figure 2.

⁷The treaties are applicable to defense articles—including articles, services, and related technical data—listed on the USML. Arms exports and transfers under the treaties must support certain activities, including (1) combined military or counter-terrorism operations; (2) cooperative security and defense research, development, production, and support programs; (3) mutually agreed upon security and defense projects where the United Kingdom or Australian government is the end-user; and (4) where the U.S. government is the end-user. The first three activities in this list will be described or identified in the treaties' implementing arrangements.

Figure 2: Events Related to the Defense Trade Cooperation Treaties



Source: GAO analysis of data from the United Kingdom, Australia, and U.S. Department of State.

Significant Differences Exist between Selected Countries' and U.S.'s Export Control Systems

Selected Countries Use Single Licensing Agency and Consolidated Control List to Determine Which Controls Apply

Five of the six countries in our review—Australia, Canada, Germany, Japan,⁸ and the United Kingdom—have a single agency in charge of regulating arms and dual-use items and use consolidated control lists to determine which controls apply. In the U.S. system, State administers controls for arms and Commerce does so for dual-use items and each maintains a list of controlled items. Just as in the United States, selected allies' export control systems have changed over time to address security

⁸Japan does not permit arms exports to other countries. However, in exceptional cases, Japan has allowed arms and military technologies to be exported to the United States in order to implement joint development and production related to ballistic missile defense systems. In these cases, exporters must apply for a license from the Ministry of Economy, Trade, and Industry (METI), which is the sole agency in charge of regulating arms and dual-use items.

interests and to satisfy international commitments. In Australia, the Defence Export Control Office (DECO) within the Australian Department of Defence serves as the single regulatory body for implementing both arms and dual-use export controls.⁹ Australian companies submit arms and dual-use export applications to DECO, which assesses each item against its Defence and Strategic Goods List to determine what controls apply. DECO also further evaluates the item against the Weapons of Mass Destruction (Prevention of Proliferation) Act 1995 to determine if it could be used in or assist a weapon of mass destruction program. Canada's Export Controls Division of the Department of Foreign Affairs and International Trade uses an overarching control list—known as the Export Control List—to evaluate export control permits for arms and dual-use items.¹⁰ Germany's Federal Office of Economics and Export Control (BAFA)¹¹ and the United Kingdom's Export Control Organisation (ECO)¹² manage export controls within single departments. Germany's BAFA receives arms and dual-use export license applications and also uses a

⁹There are a couple of exceptions to DECO's role in regulating arms and dual-use exports. The Department of Foreign Affairs and Trade is responsible for the domestic implementation of United Nations Security Council sanctions which, in some instances, place restrictions on defense and dual-use goods and associated services, where those goods or services are not specified as part of Australia's Defence and Strategic Goods List. The Department of Resources, Energy, and Tourism is responsible for issuing permits related to uranium and other nuclear goods.

¹⁰Canada's Export Control Division of the Department of Foreign Affairs and International Trade has sole responsibility for controlling the following on its Export Control List: non-nuclear-related dual-use items; items that are specially designed or modified for military purposes and those that present a strategic military concern; items that are used or could be used in systems capable of delivering chemical, biological or nuclear weapons; chemical substances, biological agents, and related items that could be used in the production of chemical and biological weapons; and strategic goods and technology, such as global navigation satellite systems, propulsion and space-related equipment, and ground control stations. The Department of Foreign Affairs and International Trade and the Canadian Nuclear Safety Commission share export control responsibility for nuclear and nuclear-related dual-use items. This report only addresses those items where Canada's Export Control Division has sole export control responsibility.

¹¹Germany's BAFA is part of the Federal Ministry of Economics and Technology.

¹²The United Kingdom's ECO is part of the Department for Business, Innovation, and Skills.

consolidated list to determine how the item should be controlled.¹³ In the United Kingdom, ECO receives arms and dual-use export applications and compares them to its consolidated list of strategic military and dual-use items that require export authorization. Japan's METI also has a single list that it uses to review applicable arms and dual-use controls for export license applications. These countries' systems may involve other agencies in the review of export licenses, but having one organization that processes both arms and dual-use export license applications also provides a single point of entry to the system for exporters who may be unsure of what controls apply to their exports.

France, however, is similar to the United States, in that it relies on more than one agency to regulate proposed arms and dual-use exports. For arms exports, France's system involves a two-step process whereby companies apply for prior approval to export and then submit an export license application. An interagency commission chaired by a body within the Prime Minister's office, known as the General Secretariat for National Defence, and which also includes the Ministries of Defence, Foreign Affairs, and Finance, evaluates companies' requests for prior approval to export.¹⁴ Export license applications are submitted to the Ministry of Defence and assessed by the Ministries of Defence, Foreign Affairs, and Finance, in coordination with the General Secretariat for National Defence. Dual-use exports are regulated through a separate process under France's Ministry of Economy, Industry, and Employment.

In the U.S. system, companies seeking to export arms and dual-use items generally are responsible for determining whether those items are regulated by Commerce or State and the applicable export requirements. Commerce maintains a list of controlled dual-use items known as the Commerce Control List and State's USML includes the arms that are subject to its regulations. If in doubt about whether an item is controlled by State, or when requesting that an item be transferred from State to

¹³Germany's consolidated Export List includes a section for arms and one for dual-use items. Some items in the arms section, contained in a specific list known as "war weapons," are subject to additional prohibitions and licensing requirements under the War Weapons Control Act, and are reviewed and approved by another part of the Federal Ministry of Economics and Technology. When applying for an export license to BAFA, applicants have to submit a copy of the war weapons license granted by the Federal Ministry of Economics and Technology if the export is subject to the War Weapons Control Act.

¹⁴The Prime Minister's office has delegated the authority to sign prior approvals to export to the General Secretariat for National Defence.

Commerce control, an exporter may request a commodity jurisdiction determination from State. If an exporter is uncertain of how an item is classified on the Commerce Control List, it may request a commodity classification where Commerce will provide the appropriate export control classification number. We previously reported that State and Commerce have disagreed on which department has jurisdiction over certain items and recommended that they develop procedures to improve coordination between the agencies within the existing structure of the U.S. system. In June 2009, the National Security Council issued new procedures for the commodity jurisdiction process. These procedures provide for improved interagency coordination and completion of commodity jurisdiction determinations or resolution of commodity jurisdiction disputes within 60 days.¹⁵ State officials reported that the new procedures have resulted in improvements in commodity jurisdiction processing times.

Selected Countries' License Types and Review Processes Differ from the United States

Several licensing system differences exist between the foreign countries in our review and the United States, including the use of risk-based license types, consultation with other government agencies and access to a single electronic licensing system in licensing reviews, the extent to which the birth countries of foreign employees are considered when making export license decisions, and the scope of the licensing effort.

Risk-Based License Types

France and the United Kingdom use a risk-based approach to allow a company with a satisfactory compliance record and an established business case to export multiple shipments of less sensitive defense items under a single license to particular destinations or identified recipients, known as an open individual export or global license. Germany uses a similar approach when granting a global license for military items exported as part of a government cooperation program. When granted one of these licenses, a company must have a program in place for monitoring its compliance with license requirements and maintain documentation of all transactions under the license. The United Kingdom and Germany also conduct inspections to assess companies' compliance with license requirements and Germany and France require companies to submit

¹⁵Specifically, the procedures provide that a commodity jurisdiction determination will be issued by State within 60 days of receipt from applicants, or if there is an interagency dispute it will be escalated to the National Security Council by the 50th day under the procedures. National Security Council, "Procedures on Commodity Jurisdiction Determinations" (June 18, 2009).

periodic reports on their exports. Specifically, the United Kingdom may issue an open individual export license that covers multiple shipments of specified goods to particular destinations or identified recipients. This license is generally valid for a period of 5 years. According to United Kingdom officials, there are usually no quantity or dollar-value limits associated with these licenses. The United Kingdom issued 176 open individual export licenses in 2008, and according to officials, two-thirds were for military goods.¹⁶ Recent open individual export licenses have included items involved in the removal of unexploded ordnance and items in support of another government's naval forces. French government officials stated that when a company would have to submit a significant number of export license applications for related goods or to several destinations, they issue a global license for exports of nonsensitive military goods to European Union members and other countries. These licenses are valid for 1 year and may be renewed. French officials stated that they have issued 101 global licenses since 2004. Germany's global export license—valid for 2 years with one extension for 2 more—authorizes multiple shipments of military items to recipients in North Atlantic Treaty Organization (NATO) or NATO-equivalent countries as part of government cooperation programs.¹⁷ In 2007, Germany issued 100 global export licenses. Furthermore, the European Union issued a directive on intracommunity transfers in 2009 relating to the simplification of transfers of defense-related products between European Union member states, including the use of general transfer licenses. Under this directive, whose provisions will be applicable as of June 30, 2012, member states, such as France, Germany, and the United Kingdom, will be able to establish general transfer licenses that authorize suppliers to transfer defense-related products to certified recipients within the European Union.¹⁸ In the case of Australia, a company may export unspecified quantities of defense and related goods to a single recipient using a military export license. These licenses are valid for 2 years, and Australian officials reported that they issued 87 in 2008.

¹⁶Open individual export licenses are also issued for other goods, such as dual-use items and clothing and equipment to protect journalists and aid agency workers in areas of conflict.

¹⁷NATO-equivalent countries refers to countries such as Australia, Japan, and New Zealand.

¹⁸United Kingdom officials stated that this directive does not override national legal requirements and the United Kingdom maintains the right to impose restrictions on re-transfers.

The U.S. export control system for arms is transaction based, generally requiring a license for each proposed arms export unless an exemption applies. For example, if a U.S. exporter wants to export arms to more than one destination, it generally must submit a separate license application to State for each destination.¹⁹ State, however, has developed three comprehensive export authorizations—for a major program, a major project, or a global project—that are similar to the open and global licenses used in other countries. They were developed as part of State’s Defense Trade Security Initiative to promote transnational defense cooperation with NATO member countries, Australia, Japan, and Sweden. The major program comprehensive authorization, for example, provides a single U.S. exporter with approval for a range of exports, including hardware, technical data, and defense services.²⁰ Since 2000, State has issued two comprehensive authorizations—one for the Eurofighter program and one for the Joint Strike Fighter program. According to State officials, companies have opted to not use these comprehensive authorizations because they were concerned about the difficulty of ensuring subcontractor compliance with arms export regulations.

State officials acknowledged the value of adopting open or global licenses, but told us that congressional reporting requirements cause them to treat each export as an individual transaction. For example, under the Arms Export Control Act, State must give written notification to Congress at least 15 days in advance of State’s intent to approve licenses for defense articles and services of \$100 million or more, or for major defense equipment of \$25 million or more, to NATO member countries or Japan, Australia, or New Zealand.²¹ State officials stated that they would not know when the value of defense articles and services or major defense

¹⁹State regulations allow exporters to request permission to export technical data to multiple countries within a single license application, but do not permit such requests for the export of hardware. Commerce has a special comprehensive license which authorizes multiple exports of eligible, preapproved Commerce-controlled dual-use items and services to preapproved recipients and eligible destinations. 15 C.F.R. Part 752. Commerce reported that it had issued a total of 12 special comprehensive licenses as of January 2010, including 1 in 2008 and 1 in 2009.

²⁰A major project authorization provides approval for a range of export activities associated with a foreign government’s commercial acquisition of defense technologies. A global project authorization covers all exports planned to occur under a government-to-government international agreement for a cooperative project.

²¹For other countries, State must give written notification to Congress at least 30 days in advance of State’s intent to approve licenses for defense articles and services of \$50 million or more, or for major defense equipment of \$14 million or more. 22 U.S.C. § 2776.

Consultation and Access to Single Electronic System in Licensing Reviews

equipment had hit the threshold for notification if they were to use open or global licenses.

Another licensing difference between the foreign countries in our review and the United States involves the agencies within a respective country that are consulted on arms license applications. In Germany, for example, where a Commerce-like agency is the export control regulatory body, economic perspectives are considered when evaluating arms and dual-use export applications. In Australia's and France's license review processes, agencies with economic perspectives are also included in the review of sensitive arms export license applications. Australia has established a formal group known as the Standing Interdepartmental Committee on Defence Exports to coordinate agency perspectives on sensitive arms and dual-use license applications.²² The committee has four permanent members, including the Department of Defence, the Department of Foreign Affairs and Trade, the Australian Trade Commission,²³ and representatives from the Department of the Prime Minister and Cabinet. Members provide advice to the Department of Defence's DECO for consideration in the approval or denial of an application. In France's system, the Ministries of Defence, Foreign Affairs, and Finance independently evaluate arms export license applications and, in coordination with the General Secretariat for National Defence, make recommendations to approve or deny.²⁴ For example, according to French officials, the Ministry of Finance considers the capacity of a foreign government to honor its financial commitments and the export's impact on sustainable economic growth.

To facilitate license consultations, some of the selected countries we reviewed have the capability for agencies to access a single electronic licensing system when reviewing licenses. For example, the United

²²Australian officials told us that applications are considered sensitive if they involve significant dual-use items, items with a direct military application, and items that may involve a weapon of mass destruction concern, a country of concern, or a country that is subject to sanctions.

²³The Australian Trade Commission is the government's trade and investment development agency and operates under the Department of Foreign Affairs and Trade.

²⁴According to French officials, in the case of very sensitive dual-use export license applications, an interagency commission, chaired by the Ministry of Foreign Affairs, meets to discuss them. The interagency commission consists of representatives from several ministries and organizations within the French government, such as the Ministries of Energy and Defence and the General Secretariat for National Defence.

Kingdom's SPIRE licensing system allows companies to submit export license applications electronically and permits all agencies involved in the export control application review process to access the system in order to review and comment on applications. The system also allows exporters to check the status of their applications electronically and to use completed applications as templates for future applications. As another example, French officials told us they developed the Interdepartmental Information System for Export Controls to facilitate consultation among the Ministries of Defence, Foreign Affairs, and Finance and the General Secretariat for National Defence on arms export license applications.²⁵ Other countries in our review—Canada, Germany, and Japan—have also developed electronic licensing systems to facilitate license reviews. However, unlike the United Kingdom's electronic system that permits all agencies involved in the license application review process to access the system, German officials told us that only BAFA, the agency responsible for regulating both arms and dual-use export controls, can access Germany's electronic licensing system. Similarly, Canada's system can only be accessed by the Department of Foreign Affairs and International Trade and the Canada Border Services Agency, but providing access to other agencies is a priority. Australian officials told us they are in the process of procuring an electronic system.

In the U.S. export control system, State primarily consults with DOD and other State offices on arms export applications,²⁶ whereas Commerce consults with DOD, State, and the Department of Energy on dual-use export applications. For arms export applications, DOD provides State with technical and national security reviews of proposed arms exports and other State offices provide it with assessments of possible foreign policy, human rights, and nonproliferation concerns. DOD and State offices also recommend whether the export license application should be approved or denied. State works with DOD and other State offices to reconcile conflicting recommendations. State officials told us, however, that they do not consult with Commerce in making license decisions because the Arms Export Control Act authorizes arms exports in furtherance of foreign policy and national security, but not for economic reasons. For dual-use

²⁵French officials also told us they are in the process of developing an electronic licensing system for dual-use applications.

²⁶DDTC's guidance for referring license applications mentions that State can also refer applications to the Department of Energy and the National Aeronautics and Space Administration.

export applications, Commerce officials told us they refer the applications to State's Bureau of International Security and Nonproliferation. State officials noted that this bureau is responsible for determining which other bureaus within State will review dual-use export applications, but this generally does not include referral to State's arms export license office.

While State and Commerce each have an electronic system in place to receive most export license applications and respond to applicants, DOD officials in charge of managing DOD reviews of export license applications told us they do not have access to these systems and therefore do not use them when providing advisory input. Instead, DOD has its own electronic system for providing advisory input to both State and Commerce. For example, State uses DTrade 2 for processing most arms export license applications, while DOD relies on USXports to provide State and Commerce with its technical and national security reviews of export license applications. DOD officials also said the lack of access to each other's electronic systems affects the U.S. government's ability to coordinate efficiently on export license applications or commodity jurisdiction requests. DOD and State have signed an agreement for State to adopt DOD's USXports system in order to improve communication and coordination in the export licensing process.

Importance of Nationality in Export License Decisions

In making arms and dual-use license decisions, the selected countries in our review generally do not consider the birth countries of foreign employees when deciding whether to grant access to controlled items, while this can be a factor for the U.S. Department of State. Specifically, Australian officials said they consider factors such as the sensitivity of the goods, destination, how the goods will be used, the recipient of the goods, and the exporter's compliance history. Australia and Canada have citizens who were born in ITAR-proscribed countries.²⁷ Australian officials told us that seeking information about an employee's national origin when responding to State Department export license data requests and then using that information to make employment-related decisions was prohibited by Australia's antidiscrimination laws. Canadian officials also told us that their companies have faced challenges with the State

²⁷The ITAR states it is the policy of the United States to deny licenses for exports of defense articles and services, destined for certain countries—including Belarus, Cuba, Iran, North Korea, Syria, and Venezuela. This policy also applies to countries with respect to which the United States maintains an arms embargo (e.g., Burma, China, Liberia, Sudan) or whenever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the United States. 22 C.F.R. § 126.1(a).

Department's consideration of nationality because companies have to balance their obligations under Canadian human rights law with State's licensing requirements.

In the U.S. system, State and Commerce use different approaches when considering a foreign person's nationality to make export control decisions. Commerce's policy on determining nationality for release of technology to a foreign national is generally based on a foreign person's most recent citizenship or permanent residence.²⁸ In contrast, in making export control decisions, State considers a foreign person's current citizenship status and his or her country of birth if there is indication of dual nationality, which occurs when the foreign person's country of birth is different from the country of citizenship.²⁹ Specifically, State may assess an applicant's foreign employees' nationalities when determining whether to approve an agreement between a U.S. company and a foreign company to share controlled data. According to State, if a foreign person's country of birth is different from the country where he or she currently resides in and holds citizenship from, it raises the issue of dual nationality and whether the individual has ties to his or her country of birth, which would indicate a degree of loyalty and allegiance to that country. Under these circumstances, the license would be considered on the basis that it could be an export to both countries.³⁰ If a person's country of birth is prohibited from receiving U.S. arms, as are China, Iran, and North Korea, State collects additional information to confirm that the individual has no significant ties to his or her country of birth. However, according to State, a person born in a country prohibited from receiving U.S. arms would not receive similar scrutiny before gaining access to export-controlled items or information if he or she were a U.S. citizen.

²⁸ Commerce's definition of an export includes the release of technology or software subject to the EAR in a foreign country or to a foreign national in the United States. EAR, 15 C.F.R. § 734.2(b)(2). The release to a foreign national in the United States is deemed to be an export to the home country or countries of the foreign national. This deemed export rule does not apply to persons lawfully admitted for permanent residence in the United States or persons who are protected individuals under the Immigration and Naturalization Act (8 U.S.C. § 1324b(a)(3)). EAR, 15 C.F.R. § 734.2(b)(ii).

²⁹ Under ITAR, a foreign person is defined as any person who is not a lawful permanent resident of the United States or who is not a protected individual, such as political refugees or political asylum holders. 22 C.F.R. § 120.16.

³⁰ State's guidance states that this normally does not present a problem unless the country of birth is a country where exports are prohibited under 22 C.F.R. § 126.1.

State officials told us the National Security Council was reviewing a State discussion paper on how State and Commerce have considered nationality in order to reconcile their different approaches. State took steps in December 2007 to mitigate the impact of its consideration of nationality by amending the ITAR. The amendment permits access to unclassified U.S. arms for a foreign signatory's third country³¹ or dual national employees under a technical assistance or manufacturing licensing agreement if those employees are nationals of members of NATO or European Union countries or Australia, Japan, New Zealand, or Switzerland.³² State has also entered into arrangements with several Canadian government agencies and the Australian Department of Defence to permit access to ITAR-controlled items for agency personnel that are dual nationals and possess at least a Canadian Secret-level security clearance or an Australian Department of Defence security clearance.³³ In March 2010, the Administration announced that it would seek to eliminate unnecessary obstacles for exporting products to companies with dual national and third-country national employees, and State officials told us they are working with other agencies and Congress on this issue.

Scope of the Licensing Effort

The countries in our review individually approved fewer arms and dual-use export licenses than the United States in 2008. The lower number of approved arms licenses is consistent with the smaller volume of defense trade in these countries in comparison to the United States.³⁴ Table 2 describes the number of arms and dual-use export licenses approved and

³¹For export control purposes, State's DDTC considers a third-country national to be an individual from a country other than the country which is the foreign signatory to the technical assistance or manufacturing license agreement. A third-country national may also be a dual national if he or she holds nationality from more than one country.

³²This ITAR amendment provides that all access must take place completely within the physical territories of the aforementioned countries or the United States. 22 C.F.R. § 124.16.

³³Under this arrangement, Australian Department of Defence personnel that are dual nationals cannot be nationals from the prohibited countries listed in ITAR section 126.1.

³⁴In March 2010, the Stockholm International Peace Research Institute reported that the United States was the largest supplier of major conventional weapons from 2005 to 2009, accounting for 30 percent of the global arms export market. By comparison, Germany, France, and the United Kingdom accounted for 11 percent, 8 percent, and 4 percent, respectively, of the global arms export market for major conventional weapons over the same period.

license officers and the average number of export licenses approved per officer in 2008 for the United States and selected countries in our review.³⁵

Table 2: United States' and Selected Countries' Arms and Dual-Use Export Licenses Approved, License Officers, and Average Licenses Approved per Officer in 2008

Countries	Number of export licenses approved	Number of license officers	Average number of export licenses approved per officer
Australia	2,929	17	172
Canada ^a	4,007	8	501
France ^b	14,576 ^c	63 to 68 ^c	214 to 231
Arms	12,576 ^c	50 to 55 ^c	229 to 252
Dual-use	2,000 ^c	13	154
Germany ^d	28,652 ^c	70 ^c	409
Japan ^e	10,000 ^c	30	333
United States	86,247	108	799
Arms ^f	68,302	52	1,314
Dual-use ^g	17,945	56	320
United Kingdom ^h	9,936	47 ^c	211

Source: GAO analysis of State, Commerce, and selected foreign countries' data.

^aThe licenses included in this table refer to those items where Canada's Export Control Division has sole export control responsibility. As noted previously, the Department of Foreign Affairs and International Trade and the Canadian Nuclear Safety Commission share export control responsibility for nuclear and nuclear-related dual-use items. This table does not include approved licenses for these items.

^bFrance provided us with the number of decisions reached on requests for prior approval to export arms, approved arms export licenses, the approximate number of arms export license amendments, and the approximate number of approved dual-use export licenses.

^cCountries provided us with an estimated number.

^dGermany provided us with the approximate number of licenses approved in 2008, but did not provide the number of license amendments.

^eThe Head Office of Japan's METI provided us with an estimated number of individual licenses approved annually by that office, which does not include the number of license amendments or information from their regional branch offices. As noted previously, since Japan only exports arms in exceptional cases most of these licenses would be for dual-use exports.

^fState officials reported they processed a total of 83,888 actions in 2008 with approximately 1,613 actions per license officer. Approximately 10,000 of the actions excluded from table 2 were applications that were not properly filled out by the exporter and were returned without action by State. We also excluded other actions such as applications for temporary imports, international import certificates, general correspondence requests (such as a request to remove or modify a license condition), and jurisdiction determination requests, as other countries did not provide similar data.

³⁵We also included license amendments in the count of total licenses approved where such data were available.

⁹Commerce's data on the number of export licenses approved are reported by fiscal year.

¹⁰The United Kingdom's 2008 Strategic Export Controls annual report included the number of approved export licenses, but United Kingdom officials reported that they do not keep track of the number of license amendments.

The total number of export licenses approved varied among the countries in our review. For example, in 2008, Australian officials reported approving 2,929 licenses, while German officials reported approving approximately 28,652. The total number of licenses approved in that same year was similar in the United Kingdom, France, and Japan, as officials reported approving approximately 10,000 to 15,000 licenses. In contrast, U.S. officials reported approving over 86,247 arms and dual-use licenses in 2008, an amount that exceeded the total number of licenses approved by all countries in our review combined. Furthermore, countries in our review generally devoted proportionately more resources than the United States toward license approval, averaging between 172 and 501 licenses per officer. In contrast, State approved 1,314 arms licenses per officer, while Commerce's ratio was comparable to Japan's at 320.

Three countries in our review—Canada, France, and the United Kingdom—and the United States all track average license processing times. For example, Canada reported in 2009 that its average processing time for selected countries with comparable export controls was 5 business days, and 20 business days for other countries. French officials reported that it took an average of 38 days to process an arms export license and an average of 18 days for a dual-use license in 2008. The United Kingdom noted that it processed 73 percent of its standard individual export licenses within 20 business days in 2008 and this license type accounted for the overwhelming majority of those issued by the United Kingdom. Other countries provided us their license processing goals or estimates. For example, Australian officials told us they had a goal of processing most applications within 15 business days and a goal of 35 business days for sensitive applications. Japanese officials reported that for cases where they have no particular concern, their average processing time was between a few days and 2 weeks. German officials told us it took 3 to 4 weeks on average to process an arms export license, and in some cases, licenses could be processed within a week. Recently, State took steps to restructure its workforce to reduce processing times and the number of open cases. For 2008, State officials reported an average license processing time of 16.5 calendar days down from an average of 43

calendar days in 2006.³⁶ Commerce averaged 27 days for its review of licenses.³⁷

Selected Countries Have a Single Agency in Charge of Enforcing Export Controls

Export enforcement is another area where the structural difference between the foreign countries and the U.S. is evident. Four of the six countries in our review have one agency in charge of enforcing export controls. Specifically, the customs department is the main enforcement body in Australia, France, Germany, and the United Kingdom. For example, United Kingdom officials reported Her Majesty's Revenue and Customs is the sole agency responsible for the enforcement of export controls and coordinates regularly with ECO and other United Kingdom agencies as appropriate, sharing intelligence, utilizing resources in coordinated risk assessment exercises, and conducting joint training seminars. Similarly, Australian officials told us that their Customs and Border Protection Service is the main enforcement body and coordinates closely with DECO, the intelligence community, and the Australian Federal Police to ensure that export controls are applied effectively and to conduct investigations of possible violations. United Kingdom and Australian officials reported that there are no significant challenges for their respective enforcement agencies in coordinating with export licensing and other agencies.

In Canada and Japan, enforcement responsibilities are shared between two agencies. Specifically, the Canada Border Services Agency and the Royal Canadian Mounted Police are responsible for the enforcement of export controls in Canada. Canada Border Services Agency officers must be satisfied that an exporter has fully complied with the provisions of their export control legislation before allowing the export of any goods and may exercise certain powers including search, detention, and seizure. The Royal Canadian Mounted Police are responsible for enforcing all laws between ports of entry along the U.S.-Canadian border, including those laws concerning the illegal export of controlled items. The Royal Canadian Mounted Police and the Canada Border Services Agency cooperate in the

³⁶State officials told us they calculate their average license processing time from the date they receive the application until it is returned to the applicant, and includes the time spent in obtaining other agencies' input, participating in interagency dispute resolution, and notifying Congress of particular transactions.

³⁷Commerce officials stated the average processing time for dual-use export applications includes the time that other agencies take to review and provide recommendations, but does not include time spent in the interagency dispute resolution process.

conduct of investigations related to possible criminal violations of export controls that occur along the U.S.-Canadian border. Canadian officials told us that their export control system has faced enforcement challenges similar to those we previously identified in the U.S. system. However, they also reported that Canada has taken steps to overcome these challenges by enhancing communication between enforcement agencies and improving training and outreach to enforcement agencies. In Japan, the Customs bureau is involved in enforcing export controls by determining at the border whether the items being exported are subject to controls and whether or not a license has been obtained. Japan's National Police Agency is in charge of conducting investigations when laws and regulations have been violated, including the primary law governing export controls.

In the U.S. system, export enforcement authorities are granted through a complex set of laws and regulations, which give concurrent jurisdiction to Commerce, Homeland Security, and Justice's Federal Bureau of Investigation to conduct investigations of potential violations of export control laws for dual-use items, and to Homeland Security and the Federal Bureau of Investigation to investigate potential arms violations. We previously reported that enforcement agencies faced several challenges in enforcing export control laws and regulations, such as coordinating investigations. Similar to Canada, in 2007, the Department of Justice established the National Export Enforcement Initiative, a cooperative effort among export enforcement and regulatory agencies to increase training, improve interagency coordination, and enhance prosecution. Additional coordination occurs through the Immigration and Customs Enforcement's National Export Enforcement Coordination Network. We view this as a positive step, but have not reviewed to what extent these initiatives have addressed the challenges identified in our prior work.

Some Countries Reported Extensive Outreach Programs

As in the United States, countries in our review have outreach programs. Two countries, the United Kingdom and Australia, have extensive outreach programs that are similar to Commerce's, but State's outreach effort is limited. These programs are generally designed to increase companies' knowledge of export control regulations and to promote compliance. Exporters need sufficient guidance to interpret regulations correctly, properly use exemptions, and protect critical technologies. The United Kingdom and Australia have staff dedicated to outreach activities, including four personnel in the United Kingdom's Export Control Training and Skills Academy, and four personnel within Australia's Treaty and Outreach Branch. With this dedicated staff, these organizations conduct

multiple seminars and workshops during the year throughout their respective countries. The United Kingdom conducted 38 seminars and training courses nationwide, attended by over 750 people from 300 organizations during 2008. Also in 2008, Australian officials reported providing 1-day workshops to 364 individuals from 140 companies throughout the country. Australian officials told us they attribute the recent increase in the number of dual-use applications, improvement in the overall quality of license applications, and an increase in the amount of voluntary disclosures of violations to their outreach efforts over the last few years. United Kingdom industry officials reported close collaboration with ECO in the development of publications, training seminars, and the SPIRE electronic licensing system.

The United Kingdom and Australia also reported providing formal training to government staff about export controls. ECO conducts the Staff and Partners Export Control Awareness School for staff across the United Kingdom's government, including the Foreign Office, Ministry of Defence, and Department for International Development that support the export licensing process. Australia's outreach includes an export control seminar for its Department of Defence staff and workshops for other government agencies, such as Foreign Affairs and Trade, Customs, and the Attorney General's Department, upon request.

The United Kingdom also has two Web-based search tools to help exporters identify the items that require export licenses. The Goods Checker can be used to search for items on the United Kingdom's Strategic Export Control List. The OGEL Checker helps users determine what items they can export using an open general export licence.³⁸ The United Kingdom reported that over 2,300 individuals from more than 30 countries registered to use these tools during 2008.

Other countries in our review have outreach programs that may include interaction between government officials and industry, publication of written material, and websites. For example, French officials conduct meetings with industry representatives to keep them informed of export control issues, and Japan reported providing training courses for industry.

³⁸An open general export licence (OGEL) allows the export or trade of specified controlled goods by any company, removing the need for exporters to apply for an individual license, provided the shipment and destinations are eligible and that certain conditions are met. ECO's compliance officers conduct periodic audits of exporters who hold open general export licences.

Also, both Canada and Germany publish handbooks on their export control systems. Finally, all of the countries in our review maintain websites that contain export control information. These websites vary in content, but may include the procedures for obtaining a license, control lists, and compliance guidelines.

In the United States, Commerce reported that it has 14 personnel that conducted a range of outreach activities in fiscal year 2008. For example, Commerce conducted 41 domestic and 7 international dual-use export control outreach seminars, an annual export controls and policy conference, and 33 presentations with public and private sector organizations, reaching over 8,000 people. Commerce also reported assisting approximately 53,000 business representatives through its telephone counseling program and providing dual-use export control training to approximately 150 government officials. In addition, Commerce reported that it launched an online training room with a series of introductory training modules, which were viewed more than 45,000 times, and developed four online seminars that reached over 550 participants. These online training modules and seminars help exporters identify which dual-use products need a license and cover other topics such as license applications, prohibited end users, and compliance programs.

State conducts speaking engagements at companies and conferences and hosts quarterly in-house seminars, but it does not maintain online training or have dedicated outreach staff. For example, State participates in training and outreach programs sponsored by a joint government and industry nonprofit organization.³⁹ State officials noted that they participated in 9 such events during 2008, reaching a total audience of 2,868 people. State officials also reported conducting 30 company visits which reached 1,625 people. These visits are designed to better understand how companies are implementing their export control programs and to assess whether these programs are in compliance with the Arms Export Control Act and ITAR. In addition, State's outreach program includes a response team that answers export control questions via phone and email, but these are contracted personnel and some of them work part-time. Furthermore, response team members spend much of their time determining the status of license applications. State officials

³⁹This organization, the Society of International Affairs, was formed in 1967 by the federal government and industry. Its purpose is to serve as a forum for the exchange of information—through events such as luncheons, conferences, and workshops—related to export and import licensing issues.

told us they lack resources for outreach as they focus on processing licenses and cannot use registration fees to fund staffing for outreach efforts.

Selected Countries Have Reported Conducting Performance Assessments

Most of the foreign countries we reviewed reported conducting broad performance assessments of their export control systems, while the United States has generally not done so in the past. For example, in 2007, the United Kingdom conducted a comprehensive review to evaluate the effectiveness of the export control regulations it enacted in 2004 in order to comply with a national policy of assessing major legislation 3 to 5 years after implementation.⁴⁰ In assessing the effectiveness of the regulations, the United Kingdom identified denied license applications that would have been approved prior to 2004. The review also noted areas for improvement, and ECO performed impact assessments to determine the potential costs and benefits of proposed regulatory changes. The review led to significant revisions in the system. For example, the United Kingdom revised its controls on trading goods by establishing a new three-tiered structure of goods with varying levels of control associated with each tier. The United Kingdom determined that the prior two-tiered structure was not the most effective because there was a category of goods that needed more control than the goods in the lower tier, but less than those in the upper tier. Small arms and light weapons, for instance, were placed in the new middle tier. This tier requires licenses for trading these items, but not for advertising them for sale. Furthermore, United Kingdom persons or companies anywhere in the world involved in trading upper- and middle-tier goods are required to obtain licenses. The regulations, and the changes that resulted from the review, were consolidated and issued under Export Control Order 2008. Officials stated that they expect to conduct a postimplementation review of this new order in 2012.

Australia, France, and Japan also reported conducting different types of assessments to identify ways to improve their export control systems. Australia's Government Solicitor completed a study in 2005 to evaluate the nation's export control legislation against those of other countries. We were unable to obtain a copy of this study because it was not publicly

⁴⁰The United Kingdom has an office called the Better Regulation Executive which works with government agencies to improve both new and existing regulations, and publishes guidance on postimplementation reviews.

releasable, but Australian officials told us that it identified several areas for improvement. In addition, the officials stated that Australia has proposed new legislation to strengthen its system in response to the study, which if passed, will introduce further controls on intangible goods and services such as software, and broaden the coverage of weapons of mass destruction activities to include the handling, operation, and movement of chemical and biological weapons and their associated delivery systems. Australian officials also stated that the government conducted a regulation impact study of the proposed legislation which determined that the changes would not impose unreasonable costs on industry. French officials told us the government conducted a national audit of its export control system and recently made changes to its processes for dual-use items. For example, they noted the establishment of the Dual-Use Export Control Office, staffed by officials from multiple ministries across the government. Another change was the creation of an interagency committee that meets approximately once a month to assess the most sensitive dual-use license applications. French officials stated that these changes were expected to improve the quality of their license assessments and to shorten license process times. In 2006, Japan formed a working group composed of government, industry, and academia to identify challenges in its export control system and develop concrete proposals to improve it. Japanese officials noted that as a result of this review, they strengthened requirements on intangible technology transfers and punitive measures for export violations, and introduced controls on brokering and transshipment. While Canada and Germany reported that they monitor their export control systems to identify areas for improvement, these countries did not report formal assessments of their systems.

We have previously reported that neither State nor Commerce have conducted systematic assessments to determine what corrective actions may be needed to ensure they are fulfilling their missions. In January 2008, the President signed directives to make improvements to existing processes in the State and Commerce export control systems. State officials told us the directives focused on improving current efficiencies rather than making fundamental changes. For example, one of the changes was for State to implement a 60-day licensing process. Changes to the Commerce system included a requirement to review and update the items covered by the Commerce Control List and to expand the list of foreign parties subject to greater licensing requirements. In August 2009, the President directed the National Economic Council and the National Security Council to conduct an interagency review of the entire U.S. export control system. The purpose of this review was to consider reforms to the system that would enhance the national security, foreign policy, and

economic security interests of the United States. In April 2010, the Administration outlined the reasons for reform, including that the U.S. export control system has a complicated structure involving multiple agencies with separate control lists, leading to jurisdictional confusion, and has hindered the ability of allies to cooperate with U.S. forces. The Administration also proposed a framework for moving to a single licensing agency, control list, enforcement coordination agency, and electronic licensing system.

Proposed Treaties Represent a Significant Change in Arms Export Control, and Several Issues Have Yet to Be Resolved

Exports and Transfers of Arms under the Treaties Will Not Require Licensing, but New and Existing Safeguards Will Be Applied

Under the proposed Defense Trade Cooperation Treaties, specified arms will not undergo the case-by-case review required by the U.S. licensing process when being considered for export or transfer.⁴¹ Instead, these arms will be exported and transferred license-free to certain governmental and nongovernmental entities, facilities, and personnel that constitute the approved community in each country. State officials told us the treaties represent a move from transactional licensing and towards a more risk-based approach. State has estimated that the treaties could remove the requirement to obtain a license for approximately two-thirds of the items that currently require licenses for both the United Kingdom and Australia, enabling it to focus its resources on other transactions.

According to United Kingdom officials, before entities, facilities, and personnel in the United Kingdom can become members of the approved community, they must first be accredited through existing defense security programs and processes, such as the United Kingdom's List X facility clearance program. Australian officials told us that Australian entities,

⁴¹As discussed earlier in this report, the treaties are applicable to defense articles—including articles, services, and related technical data—listed on the USML.

facilities, and personnel must first be on a list of those approved to handle classified information and material, similar to Australia's Defence Industry Security Program. Specifically, both countries will use existing protocols to conduct security clearance checks of facilities and information systems to verify that these facilities and systems meet minimum security standards and are equipped to handle treaty arms.⁴² In both countries, government personnel and nongovernmental entities' employees must have the appropriate security accreditation and a need to know. Government personnel and nongovernmental entities' employees, except for members of the United Kingdom armed forces, will also be evaluated to determine the extent to which they have close or significant ties to countries and entities of concern, among other factors.⁴³ Nongovernmental community members in the United Kingdom and Australia will require approval from both treaty parties—the United States and the United Kingdom and the United States and Australia, respectively. As part of the approval process for community membership, each government will consider multiple factors prior to approving a nongovernmental entity or facility, such as (1) the potential risk to national security, including interactions with countries proscribed by the respective treaty parties' laws or regulations; (2) the extent of foreign ownership, control, or influence; (3) prior convictions or current indictment for violations of arms-export laws or regulations; and (4) the entity's export licensing history in the United States. State officials told us that U.S. companies must be registered with State and eligible to export arms in order to be part of the U.S.'s approved community, but do not need to be approved by the United Kingdom and Australia. The proposed treaties provide for consultations between governments regarding either party's concerns about a nongovernmental entity or facility in the approved communities, which may lead to the removal of that entity or facility from the community. United Kingdom, Australian, and U.S. officials told us that prior to shipping any arm under the treaties there is a requirement to verify that the recipient is a member of an approved community.

⁴²State officials told us they do not intend to conduct additional security evaluations of facilities and personnel.

⁴³For approval for membership in Australia's community, personnel will be subject to an additional background check if the initial check gives rise to concern of significant ties to a country that is proscribed in U.S. regulations. Access will not be granted until mutually determined by the United States and Australia. Furthermore, for nationals of third countries who are not also Australian citizens, approval for membership in the Australian community will require U.S. and Australian authorization.

To ensure security, the treaties will use existing safeguards and implement new ones. For example, similar to current requirements for United Kingdom, Australian, and U.S. exporters, members of the approved communities will be required to maintain records of exports and transfers under the treaties for at least 5 years. Members of either the United Kingdom or Australian communities will be required to provide these records upon request to their respective governments. These records may also be provided to the United States. While previously exported treaty arms may be moved or transferred within the United Kingdom and Australian approved communities without prior written authorization of the U.S. government, the re-export and re-transfer of all treaty arms will require approval by treaty parties—similar to how arms re-exports and re-transfers are currently handled in the U.S. export control system.⁴⁴ For example, in order to re-export or re-transfer a treaty arm from Australia’s approved community, the exporter must first obtain approval from State and submit evidence of State’s approval to the Australian government. Once the re-export or re-transfer has been approved, the arm at issue will no longer be considered to be within the scope of the treaty, but will instead be subject to the applicable U.S. and Australian export controls. Treaty parties may continue to monitor how the approved community member is using the treaty arm and assist one another with these activities.

The proposed treaties include several new security measures. For example, they will require that U.S. unclassified arms be handled at an increased security level in the United Kingdom and Australia.⁴⁵ The United Kingdom will apply its Official Secrets Act (which governs the handling of classified material) to all treaty arms, including both U.S. unclassified and classified arms. Similarly, Australia will handle all treaty arms as classified. Exporters will be required to label treaty articles and indicate the level of classification. United Kingdom and Australian officials told us

⁴⁴Under the treaties, re-export and re-transfer refer to the movement of previously exported treaty arms from the approved United Kingdom and Australian communities. Specifically, re-export refers to exporting treaty arms to a location outside of the United Kingdom or Australia. Re-transfer refers to the movement of a treaty arm to a location within the United Kingdom or Australia.

⁴⁵U.S. classified arms exported and transferred under the treaties will continue to be treated as classified in the United Kingdom and Australia. U.S. material is classified if it is determined that the unauthorized release of the material could be expected to result in damage to U.S. national security. Classified information may only be accessed by individuals who have been cleared for access and have a need-to-know.

that they will modify existing compliance programs for the handling of classified materials to include coverage of treaty arms. For example, Australia plans to perform the same reviews and inspections that it regularly conducts under its Defence Security Compliance Program,⁴⁶ but it will also monitor compliance with the treaty's marking and handling requirements. According to United Kingdom officials, they plan on using the compliance protocols already set forth in its List X program, though activities specific to treaty compliance will not be laid out until the treaty is implemented. Furthermore, members of the United Kingdom and Australian approved communities will be required to conduct internal audits to monitor their compliance with treaty requirements, and nongovernmental members will be subject to oversight by their respective governments. According to United Kingdom and Australian officials, internal export compliance programs are currently encouraged in their systems, but are not required.⁴⁷

Several Implementation Issues Have Yet to Be Resolved

Enforcement

The proposed treaties require cooperation among treaty parties on enforcement of export controls, but plans to fully implement enforcement procedures have not been finalized. While compliance with the proposed treaties will provide an exemption from U.S. Arms Export Control Act licensing requirements, any conduct falling outside of the terms and procedures of the treaty will be subject to the Act, the ITAR, and applicable criminal, civil, and administrative penalties or sanctions. According to United Kingdom and Australian officials, enforcement of the proposed treaties will be as provided for in the United Kingdom's Official Secrets Act (including associated regulations and other legislation as appropriate) and Australia's proposed treaty implementing legislation. The treaties will require the United Kingdom and Australia to support U.S. enforcement efforts, including (1) promptly investigating suspected

⁴⁶Australia operates the Defence Security Compliance Program to monitor members' compliance with the Defence Industry Security Program discussed earlier.

⁴⁷In Australia, Defence Industry Security Program members, as part of the Defence Security Compliance Program, are required to have internal compliance programs. As mentioned previously, the United Kingdom's ECO conducts periodic audits of exporters who hold open individual or general export licences.

violations of treaty procedures; (2) notifying the United States of investigation results and prosecutions; and (3) cooperating in carrying out investigations. However, U.S. and United Kingdom officials told us they are still working to finalize regulatory changes to implement treaty enforcement procedures and Australian officials stated that its treaty implementing legislation is currently in draft form. The Justice Department testified in December 2009 that with relatively minor regulatory amendments the United States will have sufficient legal authorities to prosecute and take administrative action against those that violate treaty requirements. State officials told us the U.S. regulatory changes will not be finalized until the treaties are ratified because the ratification process could introduce additional requirements. Therefore, because the enforcement procedures of the treaty party countries have not been finalized, we could not assess how they will implement enforcement responsibilities to ensure sufficient international cooperation.

Congressional Notification

Congressional notification requirements under the Arms Export Control Act will not apply to arms exported or transferred to an approved party under the treaties. As previously discussed, the Arms Export Control Act requires State to notify Congress when a proposed arms export or transfer exceeds certain dollar thresholds. The Senate Foreign Relations Committee is considering legislation that would apply the requirements for congressional notification in the Arms Export Control Act to arms exported under the treaties. The treaties allow all party governments to provide their legislative bodies with appropriate legislative notifications, but do not detail specific notification procedures. State has committed to provide Congress with information on proposed exports that meet certain dollar-value thresholds, to notify Congress in advance of arms becoming eligible for export under the treaties, and to report on major treaty violations. However, these procedures have not been formalized by statute or regulation. Similar to regulations to enforce the treaties, State officials told us that congressional notification procedures will not be finalized until the treaties are ratified.

Small- and Medium-Sized Business Participation

Australian government officials and industry representatives in Australia and the United Kingdom have acknowledged that small- and medium-sized businesses may face challenges in participating in the treaties. For example, in the United Kingdom, small firms may not have List X-accredited facilities and may be limited in their ability to finance facilities that meet List X accreditation requirements. Similarly, small- and medium-sized companies in Australia may not be able to afford the information technology and security systems required for membership in Australia's approved community. Australian industry representatives noted that this

may discourage small- and medium-sized businesses from exporting and transferring arms under the treaties rather than through the existing licensing system. Australian government officials told us that one possible way to facilitate greater small- and medium-sized business participation would be to allow these companies to work in approved community members' facilities.

Concluding Observations

Over the last decade, we have identified a number of weaknesses in the U.S. export control system and have called for a fundamental reexamination of the system, including evaluating alternative approaches. Recently, the Administration announced proposed export control reforms following an interagency review, including its framework for moving to a single licensing agency, control list, enforcement coordination agency, and electronic licensing system. As the Administration moves forward with its proposals, it can consider how similar structures and practices are used in other countries' export control systems. It can also evaluate other practices used in these countries' systems, such as the use of risk-based licenses, for their potential applicability in the United States. While the proposed reform framework presents an opportunity to make improvements to enhance the national security, foreign policy, and economic interests of the United States, the challenge will be to increase the system's efficiency while maintaining or improving its effectiveness. In addition, the Administration noted that pending defense trade treaties with the United Kingdom and Australia are a part of proposed export control reforms. To ensure the treaties' successful implementation, several remaining issues, such as enforcement, will continue to be important as Congress deliberates the approval of the treaties and State develops plans for their execution.

Agency Comments and Our Evaluation

In written comments on a draft of this report, State officials acknowledged GAO's thorough and thoughtful treatment of the complexities involved with export controls. These officials made several comments with respect to the greater volume of export license applications that State approved, concluding that this greater volume reflects, among other things, State's more stringent controls compared to other countries. State also commented that its licensing officers process far more cases than their counterparts in other agencies and governments and do so more quickly. While we did not specifically review the effectiveness of other countries' controls, each of these countries is a member of several international export control regimes and considers national security interests in their license review process. Also, while State approves more licenses per

officer than other countries in our review, some countries use a risk-based licensing approach that allows multiple shipments of less sensitive items to be approved under a single license, potentially reducing the total number of licenses they review. As noted in our report, State generally requires a license for each proposed arms export. With respect to the proposed treaties, while State agreed that U.S. regulatory changes will not be finalized until the treaties are ratified, they noted that the U.S. government plans on how the treaty will be enforced have been clear. We agree that information on treaty enforcement has been made available, but as we state in the report, enforcement procedures of the treaty party countries have not been finalized and are subject to change until the treaty is ratified and regulations are implemented. State comments are included in their entirety in appendix II of this report. State, Commerce, and DOD also provided technical comments, which we have incorporated as appropriate.

We plan no further distribution of this report until 30 days from the report date. At that time, we will send copies of the report to the Secretary of State, the Secretary of Commerce, the Secretary of Defense, and interested congressional committees. We will also make copies available to others upon request. In addition, the report will be available at no charge on GAO's Web site at <http://www.gao.gov>.

If you or your staff have any questions on matters discussed in this report, please contact me at (202) 512-4841 or martinb@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix III.



Belva M. Martin
Acting Director
Acquisition and Sourcing Management

Appendix I: Scope and Methodology

To identify how selected allies' export control systems differ from the U.S. export control system, we selected six countries to include in our review—Australia, Canada, France, Germany, Japan, and the United Kingdom. Countries were selected based on several factors, including whether they were (1) major destinations for U.S. arms and dual-use items as determined by the number of licenses issued by the Department of State's Directorate of Defense Trade Controls and the Department of Commerce's Bureau of Industry and Security, (2) members of international export control regimes, or (3) major arms exporters. We also sought regional diversity among selected countries. We reviewed prior GAO reports to identify broad weaknesses in the U.S. export control system—jurisdiction, licensing, outreach, enforcement, and performance assessments—which we used to focus our comparison of the U.S. and other countries' systems. We analyzed background documentation to gain an understanding of each selected ally's export control system. We submitted a structured question set to each country and obtained related documentation, including data on the numbers of export license officers and licenses approved in 2008, export control system annual reports, and export guidelines. We also conducted site visits to Australia, France, Germany, and the United Kingdom and interviewed officials in charge of administering and enforcing export controls, and industry representatives. In addition, we interviewed European Union officials in Belgium to understand the relationship between the European Union's export control requirements and those of the United Kingdom, France, and Germany. We interviewed foreign embassy officials in the United States from each of the selected countries and contacted the supreme audit institution in each country to determine whether any audits had been conducted on the country's export control system. To obtain current information on the U.S. export control system, we reviewed agency documents on changes to the system and interviewed officials from State's Directorate of Defense Trade Controls, Commerce's Bureau of Industry and Security, and the Department of Defense's Defense Technology Security Administration. The information on foreign countries' export control laws and regulations in this report does not reflect our independent legal analysis, but is based on interviews, questionnaires, and secondary sources, such as analyses by foreign law specialists at the U.S. Library of Congress. We used the information gathered from our review of documents, structured question sets, site visits, interviews, and foreign law specialists' analyses as the basis for our comparison of the U.S.'s and foreign countries' systems. Our review does not include an assessment of the effectiveness of the selected countries' export control systems.

To assess the reliability of data on the number of export license officers and licenses approved in 2008, we discussed the data with knowledgeable officials, obtained written responses to questions about the data, and, where possible, verified the data with other published sources. We found the data to be sufficiently reliable for the purposes of providing a general indication of the size of each country's export control system.

To assess how the proposed Defense Trade Cooperation Treaties with the United Kingdom and Australia will change controls on arms exports, we reviewed the treaties, their implementing arrangements, and the list of items that were excluded from each treaty. We submitted a structured question set on the treaties to the United Kingdom and Australia and analyzed their responses. We subsequently interviewed officials from State's Directorate of Defense Trade Controls, the United Kingdom's Ministry of Defence, Australia's Department of Defence, and United Kingdom and Australian companies to clarify the treaties' provisions and to assess possible implementation challenges. We also analyzed congressional testimony, State Department responses to congressional questions for the record, and United Kingdom and Australian treaty related documentation.

We conducted this performance audit from January 2009 to May 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix II: Comments from the Department of State



United States Department of State

Chief Financial Officer

Washington, D.C. 20520

MAY 25 2010

Ms. Jacquelyn Williams-Bridgers
Managing Director
International Affairs and Trade
Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548-0001

Dear Ms. Williams-Bridgers:

We appreciate the opportunity to review your draft report, "EXPORT CONTROLS: Observations on Selected Countries' Systems and Proposed Treaties," GAO Job Code 120791.

The enclosed Department of State comments are provided for incorporation with this letter as an appendix to the final report.

If you have any questions concerning this response, please contact Robert Copley, Deputy Director, Bureau of Political-Military Affairs at (202) 663-2803.

Sincerely,

A handwritten signature in black ink that reads "James L. Millette".

James L. Millette

cc: GAO – John Neumann
PM – Andrew Shapiro
State/OIG – Tracy Burnett

Department of State Comments on GAO Draft Report

**EXPORT CONTROLS: Observations on Selected Countries' Systems
and Proposed Treaties**
(GAO-10-557, GAO Code 120791)

Thank you for allowing the Department of State to comment on the draft report "Export Controls: Observations on Selected Countries' Systems and Proposed Treaties." We appreciate the opportunity and wish to express appreciation for the GAO's thorough and thoughtful treatment of the complexities involved with this topic.

State would like to call particular attention to the information conveyed in Table 2 (Export Licenses Approved, License Officers, and Average Licenses Approved per Officer in 2008). The data reflects that the United States issues far more licenses for the export of arms than any other country in the survey. We note that this apparent disparity is driven by a number of factors, not least of which is the disparity in the relative size of the economies of the countries represented in the chart and the wars in Iraq and Afghanistan where U.S. forces represent by far the largest contingent of the coalition forces involved in those conflicts. The disparity is also likely a reflection of relatively more stringent licensing controls imposed by the U.S. on its exports, and particularly arms exports, resulting in greater need for export licenses in the U.S. It is noteworthy that France, the only other country on the chart that divides its numbers into dual- use and arms exports like the U.S. does, issued a slightly higher percentage of arms export licenses than did the U.S. during 2008. French arms exports constituted 86% of 2008 exports compared to 79% for the U.S. during the same period.

State would also like to thank the GAO for documenting through this report the extraordinary efficiency of State's licensing officers who process far more cases than their counterparts in other agencies and other governments, and do so more quickly. The report documents that the government of the United Kingdom (UK) issues 73% of its licenses within 20 *business* days whereas the U.S. issued 75% of its licenses within 20 *calendar* days. The U.S. issued nine times more licenses with only twice as many licensing officers. This report sheds important light on State's need for flexibility in the use of registration fees in order to be able to hire additional licensing officers and to provide a permanent outreach capability.

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Finally, State wishes to clarify one important aspect of the report's treatment of the question of enforcement of the proposed Defense Trade Cooperation Treaties with the UK and Australia. While the report is technically correct in stating that "U.S. regulatory changes will not be finalized until the treaties are ratified because the ratification process could introduce additional requirements," we must point out that the Treaties, their implementing arrangements, and definitions have been publically posted on our websites for over two years. Draft regulations have been shared with the Senate Foreign Relations Committee and re-drafted in light of their comments and in close cooperation with the Department of Justice. In other words, it has been quite clear for sometime how the U.S. Government will enforce the Treaties.

Appendix III: GAO Contact and Staff Acknowledgments

Contact

Belva M. Martin, (202) 512-4841 or martinb@gao.gov

Acknowledgments

In addition to the individual named above, John Neumann, Assistant Director; Jeff Hartnett; Stephen V. Marchesani; Marie Ahearn; Jessica Bull; Griffin Glatt; Brenna Guarneros; Ian Jefferies; Susan Neill; and Ramzi Nemo made contributions to this report.

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