



Department of Justice

STATEMENT OF

JAMES A. BAKER
ASSOCIATE DEPUTY ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

ON

THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF
AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT
BRITAIN AND NORTHERN IRELAND CONCERNING DEFENSE TRADE
COOPERATION (TREATY DOC. 110-7)

AND

THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF
AMERICA AND THE GOVERNMENT OF AUSTRALIA CONCERNING DEFENSE
TRADE COOPERATION (TREATY DOC. 110-10)

PRESENTED

DECEMBER 10, 2009

Statement of
James A. Baker
Associate Deputy Attorney General
Department of Justice
Before the
Committee on Foreign Relations
United States Senate
At a Hearing On

The Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation (Treaty Doc. 110-7)

and

The Treaty Between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation (Treaty Doc. 110-10)

December 10, 2009

Senator Kerry, Ranking Member Lugar, and members of the Committee, my name is James A. Baker, and I am an Associate Deputy Attorney General, with responsibility for national security matters. Thank you for inviting the Department of Justice (“the Department”) to testify at this hearing on ratification of two treaties: 1) the Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation (June 21 and 26, 2007), S. Treaty Doc. 110-7 (“U.S.-UK Treaty”); and 2) the Treaty Between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation (Sept. 5, 2007), S. Treaty Doc. 110-10 (“U.S.-Australia Treaty”) (collectively, the “Treaties”). I am pleased to discuss the Department’s role in the fight against illegal export of sensitive technology and how the Department would enforce the provisions of the two Treaties to try to prevent such diversion.

I would like to emphasize one point regarding the Treaties from the Department’s perspective. That is, the export regime established by the Treaties can be created without the need for any implementing legislation. The President has full authority under the Treaties and existing law to create the regime, including the authority to prohibit certain export activities. Indeed, with relatively minor regulatory amendments, we will have sufficient legal authorities to prosecute criminally, and to take administrative action against, persons and companies who violate the requirements of the regime, including diverting defense articles beyond participants in the regime.

The Threat of Illegal Acquisition of Restricted U.S. Technology

With the United States producing the most advanced technology in the world, it has become a primary target of illicit technology acquisition schemes by foreign states, criminals, and terrorist groups. The U.S. Government, defense sector, private companies and research institutions are routinely targeted as sources of arms, technology and other materials. The items sought from America in these illegal schemes are as diverse as missile technology, nuclear technology, night vision systems, assault weapons, trade secrets, technical know-how, and fighter jet parts.

Foreign governments are aggressive in illegally acquiring sensitive U.S. technology. They have been observed directly targeting U.S. firms; employing commercial firms in the U.S. and third countries to acquire U.S. technology; and recruiting students, professors, and scientists to engage in technology collection.

China and Iran pose particular export control concerns. The majority of U.S. criminal export prosecutions in recent years have involved restricted U.S. technology bound for these nations. In Fiscal Year (“FY”) 2008, for example, roughly 43 percent of all defendants charged in criminal export cases were charged with illegally exporting restricted materials to Iran or China. In total, Iran ranked as the leading destination for illegal exports of restricted technology in the prosecutions brought in FY 2008, as well as those in FY 2007.

Illegal exports of U.S. goods bound for Iran have involved such items as missile guidance systems, Improvised Explosive Device (“IED”) components, military aircraft parts, night vision systems and other materials. Illegal exports to China have involved rocket launch data, Space Shuttle technology, missile technology, naval warship data, Unmanned Aerial Vehicle or “drone” technology, thermal imaging systems, military night vision systems and other materials.

The improper transfer of such goods poses direct threats to U.S. allies, U.S. troops overseas and to Americans at home. Such transfers also undermine America’s strategic, economic and military position in the world.

The National Export Enforcement Initiative

Keeping U.S. weapons technology and other restricted materials from falling into the wrong hands is a top counter-intelligence priority of the Department. Spearheaded by the National Security Division’s Counterespionage Section, the National Export Enforcement Initiative is the Department’s primary mechanism for achieving this objective by combating illegal exports of restricted military and dual-use technology from the United States. Led by a career prosecutor, the initiative is designed to enhance prosecution of these crimes and to deter illicit activity.

The cornerstone of the initiative has been the ongoing formation of multi-agency Counter-Proliferation Task Forces in U.S. Attorneys' offices around the country. Today, there are more than 20 Counter-Proliferation Task Forces or working groups operating nationwide, some straddling more than one judicial district, that include the Federal Bureau of Investigation, the Department of Homeland Security's U.S. Immigration and Customs Enforcement, the Department of Commerce's Bureau of Industry and Security, the Pentagon's Defense Criminal Investigative Service, Naval Criminal Investigative Service, and Air Force Office of Special Investigations, and other agencies as well. The Task Forces have built on prior inter-agency efforts used in districts where officers from these and other agencies pool data and jointly pursue cases. Under the leadership of U.S. Attorneys, the task forces foster coordination critical to the success of export control.

Because export control cases involve complex statutory and regulatory schemes, sophisticated technology, international issues, and, often classified information, training for prosecutors and agents has been a critical focus of the initiative. To date, the initiative has resulted in enhanced training for more than 1,000 agents and prosecutors involved in criminal and foreign counterintelligence investigations. The Department, along with other agencies, has also created the Technology Protection Enforcement Group ("TPEG"), an inter-agency Headquarters-level working group, to enhance export control coordination among law enforcement agencies and between law enforcement agencies and the Intelligence Community.

With the creation of new task forces and the enhanced training and coordination among agencies, the number of criminal export prosecutions has grown nationwide. In its first full year of operations, during FY 2008, the National Export Enforcement Initiative resulted in criminal charges against more than 145 defendants, compared to roughly 110 defendants charged in FY 2007. Charges brought in these cases include violations of the Arms Export Control Act ("AECA"), the main export control statute, but also the International Emergency Economic Powers Act, the export control provision of the USA PATRIOT Improvement and Reauthorization Act of 2005, the Trading with the Enemy Act, and other statutes.

The Export Control Regime and the Treaties' Safe Harbors

The Arms Export Control Act governs international defense cooperation, including the sale and export of weapons, and is used to prevent foreign powers and entities from acquiring weapons of mass destruction and sensitive technologies. The AECA authorizes the President to establish a munitions list and to create a licensing regime to control the export of defense articles and defense services. Through Executive Order 11958, the President delegated this authority to the Secretary of State who, through the office of the Deputy Assistant Secretary for Defense Trade Controls and Managing Director of Defense Trade Controls, Bureau of Political-Military Affairs, issued the International Traffic in Arms Regulations ("ITAR") setting up a licensing regime and export regulations. Under the ITAR, persons engaged in the business of manufacturing or exporting defense articles and defense services must register with the

Department of State and obtain a license prior to exporting defense articles or providing defense services.

The Treaties establish Approved Communities of governmental agencies and private companies that may export or import defense articles without such licenses. In brief, the Treaties allow approved private companies in the UK and Australia to obtain certain defense articles and defense services from the United States without the otherwise required export license from the Department of State. The safe harbors that will be available under regulations promulgated pursuant to the Treaties will also permit members of an Approved Community to transfer defense articles on the U.S. Munitions List to another Approved Community member without having to obtain a license.

The Implementing Arrangements provide the specifications related to the implementation of the Treaties, including how items exported under the Treaties will be protected and how entities may become members of the Approved Community. These provisions were negotiated following signature of the Treaties. The Implementing Arrangements also establish procedures for the U.S. and UK and U.S. and Australia to share records and conduct audits and investigations. The Implementing Arrangements contemplate that, following ratification of the Treaties, the United States would promulgate regulations to clarify the scope of the safe harbors and ensure that conduct falling outside the designated safe harbors will be subject to the AECA's civil and criminal enforcement regime.

Enforcing the Treaties

A transaction that fully complies with the safe harbor established by regulations promulgated pursuant to the Treaties would not be subject to criminal or civil penalties under AECA. Conversely, a transaction falling outside the designated safe harbors would remain fully subject to the civil and criminal enforcement measures under the AECA. As the Department has stated previously, no new authorizing legislation would be required to prosecute such a violation.

Because the Treaties are self-executing, they are "equivalent to an act of the legislature" for purposes of federal law. *Medellin v. Texas*, 128 S. Ct. 1346, 1356 (2008). Upon ratification of the Treaties, therefore, the President would have the authority to issue regulations pursuant to the Treaties themselves to create exemptions from the applicable licensing requirements of the AECA and ITAR. These regulations would thus establish the designated safe harbors contemplated by the Treaties and establish requirements for qualification for the safe harbor.

In addition, the President would have authority to promulgate regulations under section 38(a)(1) of the AECA to make conduct falling outside the designated safe harbors subject to the enforcement regime of the AECA. These regulations would be promulgated pursuant to the "broad statutory delegation" in section 38 of the AECA to control the import and the export of defense articles and defense services. *B-West Imports, Inc. v. United States*, 75 F.3d 633, 636 (Fed. Cir. 1996). It is the Department's understanding that these regulations will track those to

be promulgated under the Treaties and would thus establish conditions for persons exporting or transferring pursuant to the Treaties, and an export or transfer that fails to satisfy those conditions would be enforceable through both criminal and civil sanctions.

Conclusion

Thank you for the opportunity to discuss the Department of Justice's role in enforcing export controls and its relation to the Treaties. I look forward to answering your questions.