

# Appendix 17A. US export controls

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## I. Introduction

The United States is the world's largest arms exporter, claiming nearly 57 per cent of the global arms market in 2003.<sup>1</sup> The USA has considerable influence over the global arms trade because of the size of its market share and its diplomatic, military and economic resources. It is therefore important to understand the US arms export control system. This appendix describes US arms export controls, summarizes recent changes to these controls and outlines key issues and debates.

Section II sets out the legislative and regulatory foundation of US arms export programmes and explains how these programmes are administered by the departments of State, Defense and Homeland Security. Particular attention is given to the processes used to review requests for arms sales. Section III describes US end-use monitoring policies and programmes. Section IV highlights the importance of oversight and transparency in arms export programmes through a brief overview of the roles played by the US Congress, civil society and the Government Accountability Office (GAO). Section V examines two particularly significant developments in US defence trade policy—International Traffic in Arms Regulations (ITAR) licensing exemptions and the 'global war on terrorism' launched by the Administration of President George W. Bush. Section VI discusses the future of US defence trade policy and export controls.

## II. Controlling exports of defence items and services

There are five main mechanisms through which US arms are transferred to other countries. The two most common are Foreign Military Sales (FMS), which are government-to-government deals, and Direct Commercial Sales (DCS), which are sales negotiated directly between US companies and foreign buyers. The other three are leases of military equipment, the transfer of excess defence items and emergency drawdowns of Department of Defense (DOD) stocks. The USA exports around \$20 billion in defence items and services through these five avenues each year.<sup>2</sup>

### Legislation, regulations and presidential directives

Most US arms sales are governed by the 1976 Arms Export Control Act and the 1961 Foreign Assistance Act.<sup>3</sup> The Arms Export Control Act authorizes the president to

<sup>1</sup> Grimmatt, R. F., US Congress, Congressional Research Service (CRS), *Conventional Arms Transfers to Developing Nations 1996–2003*, CRS Report for Congress RL32547 (US Government Printing Office: Washington, DC, 26 Aug. 2004).

<sup>2</sup> Grimmatt (note 1). The five-year moving average for US deliveries in 1999–2003 is \$20 billion.

<sup>3</sup> The 1961 Foreign Assistance Act (PL87-195) is available on the Internet site of the Federation of American Scientists at URL <<http://www.fas.org/asmp/resources/govern/faa01.pdf>>. The 1976 Arms Export Control Act (PL90-629) is available on the Internet site of the Federation of American Scientists at URL <<http://www.fas.org/asmp/resources/govern/aeca01.pdf>>.

sell and lease defence items, establishes limitations on the use of these items, prohibits their export to certain end-users and requires the establishment of export controls. It also contains several congressional reporting requirements, including a requirement to notify Congress in advance of any major arms sale.<sup>4</sup> Through Executive Order 11958,<sup>5</sup> the president delegates most of these functions to the Department of State and the DOD. The departments of Commerce and the Treasury are also given roles.

The Foreign Assistance Act sets out the processes and procedures for providing foreign aid, including military assistance, to foreign countries. Particularly relevant to arms exports are sections 502, 503, 506 and 516. Section 502 specifies the purposes for which defence items and services may be provided and prohibits their distribution to governments that engage in ‘consistent pattern[s] of gross violations of internationally recognized human rights’. Section 503 authorizes the president to provide military assistance to foreign countries, including loans and grants for the procurement of defence items and services. Sections 506 and 516 authorize two of the five major categories of US arms transfers—drawdowns and excess defence items.<sup>6</sup>

### *International Traffic in Arms Regulations*

Transfers of defence items and services are regulated by the International Traffic in Arms Regulations. The ITAR implement existing US laws, including the Arms Export Control Act. It lays out the rules, requirements and procedures for (a) registering manufacturers, exporters and brokers of defence items; (b) licensing the import and export of defence items, including technical data and classified defence items; and (c) manufacturing defence items abroad. The ITAR sets out the penalties for violating its rules and requirements, and identifies the countries and other entities that are prohibited from receiving US defence items and services. It also contains the US Munitions List (USML).

The USML identifies those items and services that are specifically designed or modified for a military application and that: (a) have no predominantly civil applications; or (b) have civil applications but also have ‘significant military or intelligence applicability’. Items with both military and civilian uses are controlled by the Department of Commerce.<sup>7</sup> The Department of State, with input from the DOD, determines which items are on the USML. All USML items are subject to the ITAR, and all commercial sales of these items—with a handful of exceptions—require an export licence from the State Department. The US Congress has an oversight role in that relevant congressional committees must be notified at least 30 days in advance of the removal of any item from the USML.

Questions about whether items are covered by the USML, and requests by US companies to have an item transferred from the USML to the Department of Com-

<sup>4</sup> For more information see Lumpe, L. and Donarski, J., *The Arms Trade Revealed: A Guide for Investigators and Activists* (Federation of American Scientists Arms Sales Monitoring Project: Washington, DC, 1998).

<sup>5</sup> Executive Order 11958 is available on the Internet site of the Federation of American Scientists at URL <<http://www.fas.org/asmp/resources/govern/eo-11958.htm>>.

<sup>6</sup> The 1961 Foreign Assistance Act (note 3).

<sup>7</sup> These items were formerly regulated by the Export Administration Act (EAA), administered by the Bureau of Industry and Security at the Department of Commerce. Since the EAA expired in 1994, dual-use items have been regulated by the International Emergency Economic Powers Act, which gives the president ‘temporary authority to continue controls and most enforcement activities’. Attempts to pass an updated version of the EAA in the first term of the Bush Administration failed.

merce's Commerce Control List (CCL), are settled by the Commodity Jurisdiction Procedure laid out in the ITAR. The State Department coordinates the determinations, which are made in consultation with the Department of Commerce, the DOD, other government agencies and the defence industry. State Department officials have the final say in any dispute, and only they can change the jurisdiction of an item.<sup>8</sup>

Over the past several years, defence industry groups and others have pushed for changes to the USML and the Commodity Jurisdiction Procedure in an attempt to expedite—or perhaps bypass—the State Department's licensing and review processes. Some analysts fear that these efforts will result in the deregulation of significant USML items but, thus far, changes to the USML have been minimal. The State Department's Directorate of Defense Trade Controls (DDTC) has published the results of its review of nine USML categories and only a handful of items have been removed.<sup>9</sup> However, revisions to several categories—including those categories of greatest concern to arms control analysts—have not yet been made public.

### *Presidential directives*

In addition to the abovementioned laws and regulations, the White House makes and amends defence trade policy through presidential directives. Executive Order 11958 delegated presidential authority over arms exports to the Departments of Defense, State, Commerce and Treasury. Presidential Decision Directive 34 set out President Bill Clinton's conventional arms export policy, which added commercial concerns ('[t]he impact on US industry and the defense industrial base') to the list of criteria used to guide decision making about arms exports.<sup>10</sup> Most recently, directives issued by the Bush Administration waived sanctions against India and Pakistan<sup>11</sup>—paving the way for hundreds of millions of dollars in arms sales to both countries—and authorized President Bush's comprehensive review of defence trade controls.<sup>12</sup>

## **The Department of State**

The State Department administers and regulates the export and temporary import of US defence items and services through its Political–Military Affairs Bureau. The Bureau's 130-person DDTC registers arms manufacturers, brokers and exporters; conducts individual reviews of over 50 000 requests for arms export licences that it

<sup>8</sup> US General Accounting Office (GAO), *Export Controls: Processes for Determining Proper Control of Defense-Related Items Need Improvement*, GAO-02-996 (GAO: Washington, DC, 20 Sep. 2002), p. 4. GAO reports are available in a searchable database at URL <<http://www.gao.gov/docsearch/repandtest.html>>. The GAO became the Government Accountability Office in July 2004.

<sup>9</sup> Amendments to the USML are published in the *Federal Register*, URL <<http://www.gpoaccess.gov/fr/index.html>>.

<sup>10</sup> The White House, Office of the Press Secretary, 'Fact sheet: criteria for decision-making on US arms exports', Washington, DC, 17 Feb. 1995, available at URL <<http://www.fas.org/asmp/resources/govern/whcrit.html>>. Presidential Decision Directive 34 remains US conventional arms policy because the Bush Administration has not published a new directive.

<sup>11</sup> See White House, Office of the Press Secretary, 'White House memo for the Secretary of State on waiver of nuclear-related sanctions on India and Pakistan,' 23 Sep. 2001, URL <<http://www.fas.org/terrorism/at/docs/2001/Ind-PakWaiver.htm>> and US Department of State, Office of the Spokesman, 'Fact sheet: sanctions on Pakistan and India', 28 Sep. 2001, URL <<http://www.fas.org/terrorism/at/docs/2001/Ind-PakSanctions.htm>>.

<sup>12</sup> The White House, Office of the Press Secretary, 'Fact sheet: Bush Administration review of defense trade export policy and national security', 21 Nov. 2002, URL <<http://www.fas.org/asmp/campaigns/control/DTPolicyReview%20-%20Revised.htm>>.

receives annually; and monitors the end-use of defence items licensed for export.<sup>13</sup> It also maintains the USML and enforces US and United Nations (UN) arms embargoes. The Office of Regional Security and Arms Transfers works with the DOD to review requests for government-to-government sales.

Companies that wish to export arms through the Direct Commercial Sales programme must first register with the DDTC. Even after a company has registered, it must still submit an individual licence application for most commercial sales. When the application is received by the DDTC, it is assigned to a licensing officer. The licensing officer checks to see if the applicant or other parties to the sale are on a watch list of debarred parties or other Arms Export Control Act violators and determines if an inter-agency review of the application is required. Cases that require inter-agency review (so-called staffed cases) are distributed to the relevant stakeholders, such as the DOD and the State Department regional bureaux, each of which provides feedback based on its expertise and unique perspective. Congress must also be notified if the application is for a major arms sale (i.e., a sale that exceeds specific dollar-value thresholds).<sup>14</sup> After input from the DOD and other State Department offices is received—and provided that Congress has raised no objections—the licensing officer reviews the sale once more:

in light of these comments to determine whether it is consistent with the foreign policy and national security interests of the United States and then approves or disapproves the request. Many exports are approved subject to specific provisions (called provisos). All exports of defence articles or services are subject to a requirement that the recipient not retransfer the item or change its end-use without the prior written consent of the United States Government.<sup>15</sup>

### *Issues and recent developments*

The most significant set of changes to US arms export policy since the end of the cold war is the Defense Trade Security Initiative (DTSI)—a collection of 17 proposals launched by the Clinton Administration in May 2000. The proposals are aimed at streamlining the licensing process and reducing the time needed to export defence items and services to some of the USA's closest allies (Australia, Japan, Sweden and the member states of the North Atlantic Treaty Organization, NATO). The DOD and the State Department argued that the changes would help 'make allied military forces more capable and interoperable with US forces' by eliminating some of the barriers to cooperative defence projects.<sup>16</sup> Proposals include the creation of a 'single, comprehensive export authorization to permit qualified US defence companies to exchange a broad set of technical data necessary for team arrangements, joint ventures, mergers, acquisitions, or similar arrangements with qualified foreign firms from NATO, Japan

<sup>13</sup> US Department of State, 'End-use monitoring of defense articles and defense services: commercial exports', Washington, DC, available at URL <[http://www.pmdtc.org/docs/End\\_Use\\_FY2003.pdf](http://www.pmdtc.org/docs/End_Use_FY2003.pdf)>.

<sup>14</sup> The dollar-value threshold for notifications of major defence equipment is currently \$14 million and thresholds for other sales are currently \$50 million. Major defense equipment is defined in the Arms Export Control Act as any item of significant military equipment on the US Munitions List having a non-recurring research and development cost of more than \$200 million.

<sup>15</sup> Senior State Department official, Correspondence with the authors, 26 Jan. 2005.

<sup>16</sup> Senior State Department official, Correspondence with the authors, 26 Jan. 2005.

or Australia',<sup>17</sup> and proposal no. 7, which expedites the review of licence applications for exports related to NATO's Defense Capabilities Initiative (DCI).

Several of the DTSI proposals have already been implemented and others are in progress. The State Department has implemented proposal no. 17, which calls for four-year reviews of the USML. In 2002 the department also approved the first use of a Global Project Authorization (GPA). The GPA, which was approved for the Joint Strike Fighter programme, allowed more than 400 defence companies in eight countries, including the USA, to cooperate on specific technologies based on a single authorization.<sup>18</sup> Progress on other proposals has been much slower. Efforts by the State Department to extend arms export licensing waivers to Australia and the United Kingdom have been blocked by opposition from Congress (see section VI below).

Promises to reform export controls were set aside by the Bush Administration after the 11 September 2001 terrorist attacks on the USA.<sup>19</sup> Only sporadic progress was made on defence trade initiatives during the rest of the first Bush term. The Bush Administration did launch a comprehensive review of defence trade controls—commonly referred to as NSPD-19 after the presidential order authorizing it. However, shortly after the review was announced, staffing and other resources were diverted to preparations for the invasion of Iraq. The administration reportedly presented preliminary results of the review to key congressional staff in the spring of 2004 but the results have yet to be made public.

The most important accomplishment of the Bush Administration during its first term was the organizational overhaul of the State Department's Office of Defense Trade Controls. The new Directorate of Defense Trade Controls: (a) created four new Offices (Policy, Licensing, Compliance, and Management); (b) doubled the number of licensing officers; (c) increased resources for compliance; and (d) introduced a new system for processing licences that imposes deadlines on licensing officers and a public outreach team to address industry complaints about transparency.<sup>20</sup> The DDTC is also completing work on a new electronic licensing system (D-Trade), which automatically checks all entities associated with an export against the watchlist and 'will allow staff to spend more time on the case rather than the case spending time in the mail room'.<sup>21</sup> Average processing times for staffed licence requests have dropped to within a few days of the 45-day target proposed by the Aerospace Industry Association—one of the most vocal critics of the licensing system.<sup>22</sup> State Department officials predict that full implementation of D-Trade will reduce processing times even further.<sup>23</sup>

<sup>17</sup> Stohl, R., Centre for Defence Information, 'US changes arms export policy', *Weekly Defense Monitor*, 1 June 2000.

<sup>18</sup> Armitage, R., 'Security cooperation in a post 9-11 world', Remarks at the 2002 Defense Security Cooperation Agency Conference, 17 Oct. 2002, Washington, DC, available at URL <<http://fas.org/asmp/campaigns/control/Armitage-DSCA-17oct02.html>>; and Senior State Department official, Correspondence with the authors, 26 Jan. 2005.

<sup>19</sup> Matthews, W., 'Powell leaves scant export-control legacy', *Defense News*, 22 Nov. 2004.

<sup>20</sup> Senior State Department official, Correspondence with the authors, 26 Jan. 2005.

<sup>21</sup> Senior State Department official, Interview with the authors, 10 Nov. 2004.

<sup>22</sup> Aerospace Industries Association, 'Proposed changes to the export control system', 25 July 2001, available at URL <[http://www.aia-aerospace.org/issues/subject/export\\_control\\_changes.pdf](http://www.aia-aerospace.org/issues/subject/export_control_changes.pdf)>.

<sup>23</sup> See US Department of State, Defense Trade Advisory Group, 'Minutes of the December 2003 plenary session of the Defense Trade Advisory Group', 17 Dec. 2003, URL <[http://pmdtc.org/dtag\\_index.htm](http://pmdtc.org/dtag_index.htm)>.

## The Department of Defense

The DOD plays several important roles in the export control process. It assists with the development of export control procedures and regulations for the State and Commerce departments' licensing review programmes, provides the State and Commerce departments with technical assessments of licensing requests and Commodity Jurisdiction Determinations, and participates in the four-year review of the USML. The DOD's biggest role, however, is to administer and implement Security Assistance Programs, including the FMS programme.

### *The Foreign Military Sales programme*

The FMS programme allows foreign governments and international institutions to acquire US defence items and services directly from the US Government, either from DOD stocks or under DOD-awarded contracts. The DOD uses a 'total package approach' to ensure that FMS purchasers can obtain the support items and services needed to integrate and maintain equipment.

Before a country can participate in the FMS programme, the president must certify that the prospective purchaser is eligible. The US Arms Export Control Act limits arms sales to countries where such a transfer would strengthen US national security. Potential recipients must also agree to: (a) use items only for authorized purposes; (b) provide security for the item that is comparable to that which it would receive in the USA; and (c) seek US permission before re-transferring the items. The US Government could suspend or terminate participation in the FMS programme if a country violates these requirements.<sup>24</sup>

Individual FMS transfers begin with a written request from an official representative of the purchaser government, a letter of request (LOR), for a specific defence item or service or for information about a potential purchase (e.g. the price and availability of US defence items or services). LORs are sent to the appropriate Military Department (MILDEP) or defense agency and copies are sent to various offices and agencies in the DOD and the State Department.

On receiving the LOR, the MILDEP or the Defense Agency becomes the implementing agency (IA) and begins shepherding the request through the FMS system. The IA checks to make sure that the potential recipient is eligible to receive the requested items and enters it as a Customer Request into the Defense Security Assistance Management System. The IA then compiles the information used to write a letter of offer and acceptance (LOA). The LOA is a government-to-government agreement and contains terms and conditions limiting the use and transfer of the items and services to be sold.

After the IA has drafted the LOA, it is normally sent to the Defense Security Cooperation Agency (DSCA). Final approval by the State Department is also sought at this point. After the State Department approves the sale, DSCA electronically countersigns the LOA and forwards it to the IA, which signs it and sends it to the purchaser. The authorization process is complete when the purchaser signs the LOA. The length of time taken to deliver the requested items and services depends on their

<sup>24</sup> Actions that can result in the suspension or termination of FMS programme eligibility include: (a) diverting economic aid to military spending; (b) aiding or abetting terrorists; (c) failing to combat narcotics trafficking; and (d) violating the terms of FMS agreements. For more information see US Department of Defense, 'Security Assistance Management Manual', DOD 5105.38-M, 3 Oct. 2003 (incorporating e-changes 18–23 Oct. 2004), chapter 4.2.4, URL <<http://www.dsca.mil/samm>>.

availability and complexity. Weapon systems and platforms that must be manufactured usually take the longest to be delivered.

Certain FMS requests are subjected to greater scrutiny. Requests for major defence equipment<sup>25</sup> require the preparation of a ‘Country Team Assessment’, whereby officials from the local embassy and Security Assistance Office (SAO) determine whether a potential sale is consistent with the purposes of the Arms Export Control Act and other export criteria. The assessment must also include an end-use monitoring and verification plan for ‘sensitive and advanced war-fighting technology’ and—if the request would introduce new military technology into the country or region—an assessment from the Combatant Commander concurring with the proposed sale.<sup>26</sup>

FMS requests that require Congressional notifications are also subjected to special scrutiny. DSCA must notify Congress of major arms sales up to 30 days in advance of signing the LOA, and Congress can block the sale by passing a joint resolution of disapproval (see section IV below). Sales that require congressional notification are subjected to intense review by the State Department as well. Before the request is forwarded to Congress, it is reviewed by officials from the State Department Legislative Affairs Office; the Office of the Undersecretary for Arms Control and International Security; the relevant regional bureau; the Bureau of Democracy, Human Rights and Labor Affairs, one of the four bureaux that comprise the Office of the Under Secretary for Global Affairs; and the office of the Undersecretary for Political Affairs. When applicable, the bureaux of Nonproliferation, Arms Control, and International Narcotics Control and Law Enforcement; and the National Security Council also review these requests.<sup>27</sup>

### *Issues and recent developments*

Since 1998, most significant changes to the FMS process have stemmed from former Deputy Secretary of Defense John Hamre’s ‘FMS Reinvention’, the primary aim of which was to reform administrative and financial processes. Nonetheless, the DOD has enacted several regulatory changes to the FMS process that have strengthened export controls. For example, it sought to improve compliance with the Missile Technology Control Regime (MTCR) by: (a) requiring technical reviews of each LOA to identify items controlled by the MTCR; (b) developing a course on MTCR guidelines for personnel who draft and review LOAs; and (c) adding several items—such as aerosol-dispensing unmanned air vehicles (UAVs)—to the MTCR technical annex.<sup>28</sup>

<sup>25</sup> See note 14.

<sup>26</sup> US Department of Defense (note 24), table C5. T1. Combatant Commanders are the commanders of the 10 unified combatant commands that are assigned operational control over US combat forces.

<sup>27</sup> There are additional reviews and use limitations that are too numerous to summarize adequately in this appendix. For more information see chapter 4 of the Security Assistance Management Manual (note 24).

<sup>28</sup> See Rimpo, B., ‘Foreign military sales and the Missile Technology Control Regime: a new focus for the future’, *DISAM Journal*, vol. 24, no. 4 (summer 2002), p. 156; and ‘Nonproliferation: assessing missile technology export controls’, Testimony of Lisa Bronson, Deputy Under Secretary of Defense for Technology Security Policy and Counterproliferation, before the Committee on Government Reform, Subcommittee on National Security, Emerging Threats and International Relations, House of Representatives, 108th Congress, 9 Mar. 2004, URL <<http://fas.org/asmp/campaigns/control/BronsonTestimony9march04.pdf>>. For a discussion of the MTCR see chapter 17.

### Other departments

In addition to the DOD and the Department of State, several other departments and agencies play various roles in the control of US arms exports. The intelligence community provides input on alleged diversions and unauthorized transfers. Similarly, the US Department of Justice and the US Attorneys prepare court cases against violators of arms export laws.<sup>29</sup> The Department of Homeland Security monitors arms shipments at the border and works closely with the State Department to enforce the Arms Export Control Act. Its agents collect and check export documents at the point of departure, inspect outgoing shipments of USML items, seize and detain unauthorized exports, and investigate possible violations of US export controls.<sup>30</sup> In 2004 the Department of Homeland Security's Immigration and Customs Enforcement (ICE), which is the lead investigative agency on violations of US arms export laws, worked on over 2500 investigations, brought 102 indictments and made 146 arrests.<sup>31</sup>

One of the most important recent initiatives by the Department of Homeland Security is 'Project Shield America', through which the department has stepped up investigations and prosecutions of illegal shipments of arms and dual-use items, compiled a list of weapons and other sensitive items of particular interest to terrorists and engaged in extensive outreach to US manufacturers and distributors of such items. ICE officials educate these firms about US export controls and teach them how to spot attempts by potential terrorists to acquire their products. Since 2001, ICE has completed more than 10 000 industry outreach visits.<sup>32</sup>

### III. End-use monitoring

The GAO defines end-use monitoring (EUM) as 'the procedures used to verify that foreign governments are using and controlling US defence items and services in accordance with US terms and conditions of the transfer'.<sup>33</sup> Like arms export licensing, end-use monitoring is implemented by numerous government agencies.

#### The Department of State

The State Department is responsible for monitoring the end-use of commercial exports, which it accomplishes through: (a) registering arms exporters and reviewing requests for arms export licences, as described above; (b) outreach to defence companies;<sup>34</sup> and (c) the Blue Lantern Program.

<sup>29</sup> US Department of State, Directorate of Defense Trade Controls, 'The Directorate of Defense Trade Controls and the defense trade function: an overview', URL <[http://pmdtc.org/docs/ddtc\\_overview.doc](http://pmdtc.org/docs/ddtc_overview.doc)>.

<sup>30</sup> US Department of State, Directorate of Defense Trade Controls, International Traffic in Arms Regulations, Part 127, Section 127.4, URL <<http://pmdtc.org/reference.htm>>.

<sup>31</sup> US Department of State, Immigration and Customs Enforcement, 'Fact sheet: select ICE arms and strategic technology investigations', Washington, DC, Dec. 2004.

<sup>32</sup> US Department of Homeland Security, US Customs and Border Protection, Remarks of Commissioner Robert C. Bonner: Safeguarding America, Washington, DC, 3 June 2002, URL <[http://www.customs.ustras.gov/xp/cgov/newsroom/commissioner/speeches\\_statements/jun032002.xml](http://www.customs.ustras.gov/xp/cgov/newsroom/commissioner/speeches_statements/jun032002.xml)>.

<sup>33</sup> US General Accounting Office (GAO), *Foreign Military Sales: Changes Needed to Correct Weaknesses in End-Use Monitoring Program*, GAO/NSIAD-00-208 (GAO: Washington, DC, Aug. 2000), p. 3 (see note 8).

<sup>34</sup> Recognizing that arms exporters are the 'first line of defense against illicit exports', the State Department developed and disseminated a set of 20 warning flags to be used by companies to spot



The Blue Lantern Program, which was established in 1990, consists of various end-use checks that State Department compliance and licensing officers can initiate in response to suspicious licence requests or reports of end-use violations. The checks are usually performed by personnel assigned to US consular and diplomatic posts with the assistance of host government officials.<sup>35</sup> There are two primary categories of Blue Lantern checks: (a) pre-licence checks and (b) post-shipment verifications. Each category contains three levels of checks.

#### *Pre-licence checks*

Pre-licence checks are used to check the reliability of the end-user and that the end-user will abide by end-use and retransfer provisions. These checks are divided into three levels:

1. A *level one check* is usually conducted in response to reliable information that a diversion may occur. A weapon's sensitivity or military value may also trigger this kind of check, which is often completed with the help of officials from foreign governments.

2. A *level two check* is carried out when significant reasons exist to undertake a check, usually because of past company violations or other reports.

3. A *level three check*, the least serious, is initiated in order to verify the bona fides of a given transaction, and is completed either by government officials or the companies involved in the export. Usually, the purpose is to check the reputation of the recipient company and the legality of it importing the defence item.<sup>36</sup>

#### *Post-shipment verifications*

Post-shipment verifications help to ensure that defence items are received by the authorized end-user and are being used in accordance with the provisions in the licence. Post-shipment verifications have three levels of priority:

1. A *level one check* is extremely rare and is initiated in cases where diversion or misuse has probably occurred. This type of check would be very complex and might involve US personnel in various countries.

2. The DDTC places the highest priority on *level two checks*, which are frequently based on information received after the issuance of a licence. Situations that might trigger level two checks include if end-use checks on previous licences issued by the DDTC established that a foreign recipient had been involved in illegal transactions, or if reports of diversions had been received. This type of check may also entail a visual inspection.

3. The most common post-shipment end-use checks, *level three checks*, are conducted when there are questions about an export but the concerns are not serious enough to deny the licence request. This concern could be because a company or entity named may not have been a party to a previous transaction, because the

potentially risky transfers. Burke, F., *How Little is Enough? US End-Use Monitoring and Oversight of the Weapons Trade* (Centre for Defence Information: Washington, DC, Jan. 2002).

<sup>35</sup> Burke (note 34).

<sup>36</sup> Burke (note 34), p. 53

defence item is particularly sensitive or because the item has been sent to a country where the potential for diversion is relatively high.<sup>37</sup>

Of the approximately 500 Blue Lantern checks performed each year, several dozen result in ‘unfavourable determinations’, that is, evidence of end-use violations. Penalties for such violations include denials or revocations of licences, hefty fines and debarment (i.e., ineligibility to export defence items).<sup>38</sup> In fiscal year (FY) 2004 the State Department performed 530 Blue Lantern checks, resulting in an unprecedented 93 unfavourable determinations.<sup>39</sup> Half the checks in FY 2004 were on exports destined for the western hemisphere and Europe, while East and South Asia accounted for 49 per cent of the unfavourable determinations.<sup>40</sup>

### *Issues and recent developments*

In January 2004, the GAO released a report critical of State Department end-use monitoring of cruise missile and UAV exports. The GAO determined that no post-shipment verifications had been conducted on the 480 licences for cruise missiles, UAVs or related items issued between FYs 1998 and 2002, and that only 4 post-shipment verifications were conducted on licences without conditions limiting how the export could be used. Of those four checks, three had resulted in unfavourable determinations.<sup>41</sup> The State Department argued that so few checks were conducted because the items were exported to friendly governments for their own defence forces. However, according to the GAO, the countries were also potential proliferation risks—‘129 of the 786 licences authorized the transfer of cruise missile and UAV-related items to countries such as Egypt, Israel, and India. These countries are not MTCR members, which indicates that they might pose a higher risk of diversion’.<sup>42</sup>

The State Department criticized the GAO report for downplaying the importance of the ‘licensing process as a whole’ in preventing diversions and unauthorized retransfers. The State Department argued that the report’s analysis was ‘flawed’ because it ‘took a snapshot of Blue Lantern activity without regard to past reviews of the parties to these exports and without regard to other checks performed during the license process’.<sup>43</sup> The GAO agreed with the State Department about the importance of pre-licence checks but also stressed their limitations. Pre-licence checks can confirm neither that the intended recipient received the export nor that the recipient complied with limitations on their use. The GAO further argued that the State Department performed few pre-licence checks on UAV and Cruise missile exports.

During a congressional hearing held shortly after the release of the GAO report, State Department official Robert Maggi called attention to recent steps taken by the USA to address the cruise missile proliferation threat. According to Maggi, the State Department clarified its controls on UAVs, updated US regulations to conform with

<sup>37</sup> Burke (note 34), pp. 54–55.

<sup>38</sup> Senior State Department official, Correspondence with the authors, 26 Jan. 2005.

<sup>39</sup> Senior State Department official, Correspondence with the authors, 28 Jan. 2005.

<sup>40</sup> Senior State Department official, Correspondence with the authors, 26 Jan. 2005.

<sup>41</sup> US General Accounting Office (GAO), *Nonproliferation: Improvements Needed to Better Control Technology Exports for Cruise Missiles and Unmanned Aerial Vehicles*, GAO-04-175 (GAO: Washington, DC, 23 Jan. 2004), p. 28 (see note 8).

<sup>42</sup> US General Accounting Office (note 41), p. 29.

<sup>43</sup> US General Accounting Office (note 41), p. 54.

the MTCR's range and payload parameters for UAVs,<sup>44</sup> and initiated 18 Blue Lantern checks on UAV-related cases in FY 2004.<sup>45</sup>

## The Department of Defense

The DOD's EUM activities cover exported items throughout their life cycle—from 'cradle to grave'. These activities can be divided into three categories—pre-sale, in-transit and post-transfer.

### *Pre-sale processes*

The DOD's first line of defence against unauthorized use or retransfer of items exported via the FMS programme is the pre-sale system of certifications, checks and notifications summarized in Section II. DOD officials interviewed for this appendix repeatedly underlined the importance of pre-sale processes for preventing unauthorized end-use. In the words of one official, 'before [the] LOA has even been signed, there is an enormous amount of upfront work that is done to take a look at what the article is, whose going to get it [and] why they want it'.<sup>46</sup>

### *In-transit processes*

The risk of in-transit diversion is addressed through regulations on the transportation of FMS items. In all cases, the mode of shipment must be identified in the LOA and, if the recipient uses a freight forwarder,<sup>47</sup> the freight forwarder must be licensed and registered with the State Department.<sup>48</sup> Special requirements apply to the shipment of classified items and sensitive arms, ammunition and explosives (AA&E).<sup>49</sup> For example, shipments of certain sensitive AA&E must be: (a) transported in special containers that are checked, locked and sealed by two agents of the shipper; (b) inspected in transit; and (c) processed through military-operated or DOD-approved air and ocean terminals.<sup>50</sup>

<sup>44</sup> Statement by Robert W. Maggi, Directorate of Defence Trade Controls, US Department of State before the Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform, House of Representatives, 9 Mar. 2004, available at URL <<http://fas.org/asmp/campaigns/control/MaggiTestimony9march04.pdf>>.

<sup>45</sup> Senior State Department official, Correspondence with the authors, 28 Jan. 2005.

<sup>46</sup> Department of Defense officials, Interviews with the authors, 28 Oct. 2004.

<sup>47</sup> The US Defense Logistics Management Standards Office defines a freight forwarder as '[a]ny agent designated by a foreign country to receive, process and transship security assistance program matériel/documentation'. US Department of Defense, Military Assistance Program Address Directory (MAPAD), report no. DoD 4000.25-8-M, URL <<http://www.dla.mil/j-6/dlms/eLibrary/Manuals/MAPAD/mapad.asp>>.

<sup>48</sup> Written Statement of Lt. Gen. Tome H. Walters Jr, USAF Director, Defense Security Cooperation Agency before the Committee on Government Reform, Subcommittee on National Security, Emerging Threats, and International Relations, House of Representatives, 9 Mar. 2004, URL <<http://fas.org/asmp/campaigns/control/WaltersTestimony9march04.pdf>>.

<sup>49</sup> Sensitive arms, ammunition and explosives include certain small arms and light weapons, ammunition, explosives and other items such as night vision goggles that 'pose a special danger to the public if they fall into the wrong hands'.

<sup>50</sup> US Department of Defense, Assistant Secretary of Defense for Command, Control, Communications and Intelligence, 'Physical security of sensitive conventional arms, ammunition, and explosives', 12 Aug. 2000, pp. 35–36, available at URL <[http://www.dtic.mil/whs/directives/corres/pdf/510076m\\_0800/p51007m.pdf](http://www.dtic.mil/whs/directives/corres/pdf/510076m_0800/p51007m.pdf)>.

*Post-shipment processes*

Ensuring that recipients comply with use and retransfer terms after they take possession of defence items is accomplished through the Golden Sentry end-use monitoring programme. Golden Sentry officials work with the Combatant Commands, SAOs and foreign governments to establish inventory and reporting procedures, monitor compliance with end-use requirements and investigate possible end-use violations. There are two levels of end-use monitoring: 'routine' and 'enhanced'. Routine EUM is performed when the recipient is a 'presupposed trusted partner' and is completed in conjunction with other activities. Enhanced EUM is reserved for particularly sensitive items (e.g., communication security equipment, night vision devices, cruise missile and UAV technologies as well as STINGER, AIM-120, JAVELIN, and TOW II-B missiles), defence items provided through grant assistance programmes and transfers of defence items in 'sensitive political situations'.<sup>51</sup>

A cornerstone of the Golden Sentry programme is the system of in-country visits used to 'assess and evaluate' EUM compliance. These visits are divided into three categories: (a) EUM familiarization visits; (b) EUM Tiger Team visits; and (c) EUM investigation visits. DSCA uses familiarization visits to help host nations and the US officials working with them to develop EUM compliance plans and to lay the groundwork for Tiger Team visits. Tiger Team visits are used to assess compliance by SAOs and host nations with end-use requirements. Investigation visits are conducted in response to possible or actual violations of US end-use laws.<sup>52</sup>

Finally, the DOD works with host governments to develop plans for the disposal of defence items at the end of their life cycle. US personnel monitor the disposal to ensure that it complies with US Government standards—and are required to report any failures to comply with these standards.

*Issues and recent developments*

The DOD end-use monitoring system has changed significantly over the past five years. The most notable development is the establishment of the Golden Sentry programme, which is expanding its size and activities each year. Since DSCA hired the programme's first full time staff member in June 2002, Golden Sentry has added a full time contractor and another full time civilian employee, and has allocated funding for three more civilian employees in 2005. Five Tiger Team assessment visits have been conducted—two in 2003 and three in 2004. There were also five familiarization visits in 2004, including three visits that were supported by the Defense Threat Reduction Agency's On-Site Inspection Directorate. A Golden Sentry handbook is being produced, and upgrades to DSCA's Security Cooperation Information 'Portal' will reportedly allow officials to track sensitive items from initial shipment to final disposal. Also noteworthy is a recent policy memorandum that provides—in great detail—deadlines, checklists and other guidance for Tiger Team inspections. The procedures for inspecting Stinger missiles are particularly detailed.<sup>53</sup>

<sup>51</sup> US Department of Defense, Defense Security Cooperation Agency, 'End use monitoring responsibilities in support of the Department of Defense Golden Sentry EUM Program', Policy Memorandum no. 02-43, Washington, DC, 4 Dec. 2002.

<sup>52</sup> For more information on the 3 types of visits see US Department of Defense, Defense Security Cooperation Agency, 'Golden Sentry end-use monitoring (EUM) visit policy', Policy Memorandum no. 04-11, Washington, DC, 2 Apr. 2004.

<sup>53</sup> 'Our goal is to establish similar standards for all defence articles that encompass the Enhanced EUM category'. Senior defense official, Communication with the authors, 4 Nov. 2004.

Despite these and other accomplishments, the DOD is, in the words of former DSCA Director Tome Walters, ‘still in the process of fully putting [Golden Sentry] procedures in place throughout the Security Assistance Community’.<sup>54</sup> Two studies conducted by the GAO in 2004 highlight some of the challenges that still confront the programme. The first study, which focuses on US efforts to control US missile technology exports, found no evidence of DOD end-use checks, ‘routine or otherwise’, on the 500 cruise missiles and related items approved for export between 1998 and 2002.<sup>55</sup> The second report revealed problems with record keeping and inventory inspections of exported Stinger missiles.<sup>56</sup> DSCA has taken steps to implement the GAO’s recommendations, including adding cruise missiles and UAVs to the list of exports subject to enhanced EUM, creating a course on the requirements of the MTCR as it applies to US missile and UAV exports, and working towards the establishment of a centralized electronic database for tracking Stinger and other enhanced EUM items throughout their lifecycle.<sup>57</sup>

## IV. Oversight and transparency

### The role of the US Congress

The Arms Export Control Act assigns Congress the task of overseeing defence export controls and the licensing process. Of particular importance is Section 36, which requires the DOD and the Department of State to formally notify Congress of potential arms sales that exceed certain dollar-value thresholds.<sup>58</sup> The Arms Export Control Act also gives Congress the power to block a proposed sale, although the barriers to doing so are nearly insurmountable. According to David Fite, a veteran staff member of the US House of Representatives Committee on International Relations:

[I]t is extremely difficult for Congress to legally prevent any sale. In order to do so, both chambers must pass identical joint resolutions of disapproval within the specified time periods. . . . In the Senate, a resolution of disapproval must come to the Senate floor for consideration, and will automatically be discharged from the SFRC [Senate Foreign Relations Committee] within five days, whether or not the SFRC acts upon it. In the House, however, a resolution of disapproval may never be brought up for consideration, as there is no procedure in the Arms Export Control Act for automatic discharge from the International Relations Committee to the House floor. If such a resolution were reported out of the International Relations Committee, it would proceed quickly to consideration by the House as a privileged matter. In any case, simple majority passage by both chambers would be insufficient to disapprove a sale. The joint resolution . . . must be signed into law by the president—whose administration is proposing the sale in the first place. Therefore, a resolution of disapproval

<sup>54</sup> Written Statement of Lt. Gen. Tome H. Walters Jr (note 48).

<sup>55</sup> According to the General Accounting Office, ‘the [Golden Sentry] program director stated that he was unaware of any end-use monitoring checks, routine or otherwise, for transferred US cruise missiles over the period of our review’. US General Accounting Office (note 41), p. 27.

<sup>56</sup> US General Accounting Office (GAO), *Further Improvements needed in US Efforts to Counter Threats from Man-Portable Air Defense Systems*, GAO-04-519 (GAO: Washington, DC, 13 May 2004), see note 8.

<sup>57</sup> Written Statement of Lt. Gen. Tome H. Walters, Jr (note 48).

<sup>58</sup> State Department official, Correspondence with authors, 1 Feb. 2005. Relevant House and Senate Committees are given an indefinite period of time in pre-official notification consultations to review the sale and ask questions.

must pass both chambers, within 15 or 30 days, by two-thirds majority to be able to override an expected presidential veto.<sup>59</sup>

Nonetheless, if Congress has serious objections to a sale, the administration rarely pursues it.<sup>60</sup> According to Fite, ‘Congress’ real oversight authority for arms sales lies in its ability to pass legislation affecting the manner by which new sales are considered and to take actions that will raise the political cost of the sale itself’.<sup>61</sup> There are many recent examples of Congress prohibiting potentially problematic arms sales, and publicizing the executive branch proposals. Throughout the 1990s, Congress inserted a provision in the annual foreign affairs appropriations legislation that prohibited the transfer of Stinger Missiles to the Gulf States, except to replace old missiles. Congress can also deter through the threat of punishment, as exemplified by House of Representatives Chairman Henry Hyde’s use of Committee hearings to thwart the Bush Administration’s arms export reform initiatives (see section V).

### **Public reporting of arms transfers**

Each year, the State Department, DOD and the Library of Congress compile detailed reports on US arms transfers and arms export programmes. Many of these reports are made available to the public through the issuing agencies’ Internet sites. Others are acquired by non-governmental organizations (NGOs), either informally—through their government contacts—or under the Freedom of Information Act. Data provided in these reports are supplemented by the dozens of congressional notifications of major arms sales issued each year.

Together, government reports and congressional notifications provide a solid overview of US defence exports. Using the DOD’s FMS Facts Book, for example, it is possible to determine the dollar value of all FMS sales worldwide, regionally and to individual countries in a given year. The annual ‘655 report’ provides a summary—broken down by USML category—of defence items and services exported (or licensed for export) to each country.<sup>62</sup> Congressional notifications provide the most detailed snapshot of individual arms transfers, but only for the small percentage of sales that exceed the dollar-value thresholds.

### *Issues and recent developments*

Since 2000, most significant changes to reporting requirements have come in the form of adjustments to the dollar-value thresholds for congressional notifications of major arms sales. As mentioned above, these notifications are among the most detailed public sources of government information on FMS and direct commercial

<sup>59</sup> Fite, D., ‘A View from Congress’, eds. T. Gabelnick and R. Stohl, *Challenging Conventional Wisdom: Debunking the Myths and Exposing the Risks of Arms Export Reform* (Federation of American Scientists and Centre for Defence Information: Washington, DC, 2003), p. 155.

<sup>60</sup> State Department official, Correspondence with the authors, 1 Feb. 2005.

<sup>61</sup> Fite (note 59), p. 155.

<sup>62</sup> The US administration is required by Congress to prepare an annual report on military assistance, military exports and military imports known as the ‘Section 655’ report—after the section of the Foreign Assistance Act which contains the requirement. The report provides the most detailed official accounting available of specific US weapon systems exported or licensed for export to governments or private buyers around the world. The DOD and the State Department each prepare their own portion of the 655 report. See US Department of State, Report by the Department of State Pursuant to Sec. 655 of the Foreign Assistance Act, available on the Internet site of the Federation of American Scientists, URL <<http://www.fas.org/asmp/profiles/worldfms.html#655reps>>.

sales—the two largest US arms transfer programmes. The notifications process itself, however, is viewed by some as an impediment to the expeditious and predictable delivery of US defence items. In response to such complaints, Congress increased the dollar-value threshold for notifications of sales to NATO members, Australia, Japan and New Zealand in 2002.<sup>63</sup> In 2003 the SFRC tried unsuccessfully to raise thresholds for notifications to all countries.

Had the Committee's proposal been enacted into law, notification thresholds for all countries would have increased from \$14 million to \$50 million for major defence equipment, and from \$50 million to \$100 million for other sales.<sup>64</sup> Had the Senate's proposed thresholds been in place in 2001, Congress would not have been notified of the 2001 sale to Jordan of 110 Javelin anti-tank missile systems—a weapon system that the DOD has singled out for special end-use monitoring. Like the ITAR licensing waivers (see below), opposition from the House of Representatives to the Senate-backed changes is probably sufficient to sideline them for the foreseeable future.

Also notable are the findings of a January 2005 report from the Government Accountability Office on data reliability problems with the State Department's section of the annual 655 report. The problems were discovered during a GAO inquiry into reports that Stinger missiles—which may only be sold through the FMS programme—had been licensed for commercial export by the State Department. The GAO found no evidence of commercial sales of Stinger missile systems. Instead, it concluded that State Department data entry employees had erroneously coded licences for Stinger components (which can be sold commercially) as licences for complete missile systems into the State Department's licensing database.<sup>65</sup> According to the GAO, the errors highlight database design problems, inaccurate reporting practices and miscoding practices that 'call into question the overall reliability of the commercial licensing data in the Section 655 report'.<sup>66</sup>

The State Department disputes GAO claims that the errors were indicative of broader problems with the data. Nonetheless, State Department officials claim that their new D-Trade electronic licensing system addresses many GAO concerns, particularly those related to miscoding. D-Trade may improve transparency in other ways as well. State Department officials claim that by linking D-Trade to the US Customs Service, which collects data on arms transfers at the time of shipment, the department will 'greatly enhance [its] knowledge of what defense goods are actually being exported'.<sup>67</sup> If they are able to convert this improved awareness of commercial

<sup>63</sup> The 2002 Security Assistance Act, Foreign Relations Authorization Act, Fiscal Year 2003, PL 107—228, 107th Congress, 2nd Session, 30 Sept. 2003, URL <[http://fas.org/asmp/resources/govern/107th\\_hr1646pl.pdf](http://fas.org/asmp/resources/govern/107th_hr1646pl.pdf)>.

<sup>64</sup> Foreign Assistance Authorization Act, Fiscal Year 2004, Section 1161, 108th Congress, 1st Session, 29 May 2003, URL <<http://fas.org/asmp/resources/govern/108th/s1161rs.htm>>.

<sup>65</sup> The State Department acknowledged the data entry errors for Stinger missiles but claimed that they 'were not numerically significant enough to undermine the overall data reliability in the [655] report.' The Government Accountability Office (GAO) countered that the records for the 200 000 other license applications received for the years reviewed were 'subject to the same opportunity for miscoding and misreporting'. US GAO, *State Department Needs to Resolve Data Reliability Problems that Led to Inaccurate Reporting to Congress on Foreign Arms Sales*, GAO-05-156R (GAO: Washington, DC, 28 Jan. 2005).

<sup>66</sup> US Department of State (note 62), p. 7.

<sup>67</sup> US Department of State, Directorate of Defense Trade Controls, 'Status of US interagency review of US export licensing and technology transfer policy', Remarks by Lincoln P. Bloomfield Jnr, Assistant Secretary for Political-Military Affairs, to the Conference on 'transatlantic defense industrial cooperation: challenges and prospects', Brussels, Belgium, 18 July 2003, URL <[http://pmdtc.org/speech\\_inter\\_review.htm](http://pmdtc.org/speech_inter_review.htm)>.

arms shipments into data on *deliveries* of commercial sales, their annual report on commercial arms transfers would be much improved.

Finally, Congress enacted two new reporting requirements for exports of small arms and light weapons (SALW). The first requires the State Department to include a summary of commercial sales of semi-automatic weapons in the annual Congressional Budget Justification for Foreign Operations. The second is an amendment to the Arms Export Control Act that requires congressional notifications for commercial sales of firearms valued at \$1 million or more.

### **The role of the Government Accountability Office**

No organization is more essential to the preservation of transparency and accountability in US arms transfer programmes than the Government Accountability Office. The GAO is an independent, non-partisan agency that investigates and reports on congressional and executive branch agencies and processes. Its 3300 employees publish approximately 1000 reports each year that contain several thousand recommendations for strengthening and reforming the government process.<sup>68</sup> The GAO claims that 83 per cent of the recommendations it has made over the past four years have been implemented,<sup>69</sup> some with dramatic results. Recommendations contained in an August 2000 report, for example, helped prompt DSCA to establish the Golden Sentry EUM programme.<sup>70</sup>

The GAO is often the only source of timely, in-depth analysis on critically important but highly technical defence trade issues—issues that are unlikely to be adequately researched by other government agencies or civil society. The GAO is uniquely suited for this role because of its access to government data and personnel, its large staff and budget, and its mandate to engage in research that is too resource-intensive and esoteric for most journalists and private researchers. It is hard to imagine, for example, a newspaper editor approving a request by a reporter to spend 11 months studying the differences in processing times for export licences between the Commerce and State departments. The GAO report on this topic debunked myths about the State Department's licensing system, thereby helping to balance a largely one-sided debate on export control reform.<sup>71</sup>

### **The role of civil society**

US data on arms are among the most transparent and most widely available in the world. Thousands of pages of data and information on all aspects of the US arms export process are available online to anyone with Internet access. However, only a handful of US academics and NGOs have adopted the arms trade as a key component of their work. These individuals and organizations provide an essential public service. They provide journalists, policy makers and the general public with clear and succinct explanations of defence trade policy and arms export data. They also educate

<sup>68</sup> US General Accounting Office (GAO), *Performance Plan: Fiscal Year 2005*, GAO-04-776SP (GAO: Washington, DC, May 2004), URL <<http://www.gao.gov/sp.html>>.

<sup>69</sup> US Government Accountability Office, 'GAO at a Glance', URL <<http://www.gao.gov/about/gg glance.html>>.

<sup>70</sup> GAO official, Interview with the authors, Nov. 2004.

<sup>71</sup> US General Accounting Office (GAO), *Export Controls: State and Commerce Department License Review Times are Similar*, GAO-01-528 (GAO: Washington, DC, 1 June 2001), see note 8.



policy makers about the human rights, security and economic implications of US arms export policies.

One of the largest US NGO efforts on the arms trade in recent years was the campaign, led by the Council for a Livable World, Demilitarization for Democracy, the Federation of American Scientists and the Friends Committee on National Legislation, to enact a US arms trade code of conduct. It was intended that the code would prevent US arms being exported to governments that are undemocratic, abuse citizens' human rights, engage in armed aggression or fail to contribute data to the UN Register of Conventional Arms.<sup>72</sup> Several years of sustained effort culminated in the passage of the 1999 International Arms Sales Code of Conduct Act. This provision—which was passed as part of an appropriations bill—required the president to enter into negotiations on an international code of conduct on arms sales within 120 days of the bill's enactment. However, little has been done to implement the requirement.

Since the code of conduct campaign, civil society has focused primarily on media outreach, data gathering and dissemination and, in the parlance of Washington insiders, 'under-the-radar-screen tinkering' with arms export laws, regulations and policies. Examples include consultation and advocacy on behalf of small arms export control legislation, drawing congressional attention to potentially problematic arms sales, exposing behind the scenes policy reforms and ensuring that publicly available reports continue to be produced and to remain unclassified.

## V. Current issues in US defence trade policy and arms export controls

### **The ITAR waivers process and debate**

Since 2000, policy makers have proposed several significant changes to the arms export licensing system—many of which are linked to the Clinton Administration's Defense Trade Security Initiative. None of these proposals has generated more controversy or political friction than the extension of ITAR licensing waivers to Australia and the UK. The battle over the waivers illustrates the capacity of individual congressional leaders to thwart policy proposals that they strongly oppose.

ITAR licensing waivers allow persons or entities in the USA that are registered with the State Department to export certain defence items licence-free to countries with which the USA has negotiated bilateral agreements. In order to qualify, US law requires that the country's export controls be 'at least comparable' to US controls in several specific ways. Australia and the UK were selected to be the initial participants in the arrangement because of the general compatibility of their foreign policy and the perceived comparability of their export controls with those of the USA.

In 2003 the State Department completed three years of negotiations on the arrangements with the Australian and British Governments. The resulting agreements permitted US firms to ship certain defence items licence-free to a list of vetted Australian and British companies. In exchange, Australia and the UK agreed to make adjustments to their export controls. The agreements did not fully comply with US law, however, and the State Department sought 'legislative relief' from Congress in the form of a new law that would have amended the Arms Export Control Act to exempt both countries from US requirements. Initial attempts to pass the amendment

<sup>72</sup> For more information on the campaign see Lumpe and Donarski (note 4).

were thwarted by two powerful Congressmen who outflanked the Bush Administration in a high stakes game of election year political chicken.

In early 2003, Richard Lugar, chair of the SFRC, led the first attempt to provide the legislative relief sought by the Bush Administration. His committee's version of the 2003 foreign aid authorization bill contained language that exempted Australia from the ITAR licensing waiver requirements. Smooth passage of the bill required that Senator Lugar's counterpart in the House of Representatives, Henry Hyde, include similar language in his committee's version of the bill. Hyde's version of the bill was silent on the ITAR waivers, requiring mandatory expedited processing of licence requests for Australia and the UK instead. A showdown between the House and the Senate over the differences in the two bills was avoided only because the full Senate failed to pass Lugar's bill.

In 2004 the argument over licensing exemptions reached fever pitch as all sides turned up the rhetorical and political heat.<sup>73</sup> In an unusual move, Senate Committee on Armed Services Chairman John Warner inserted the ITAR waivers amendment language into the DOD authorization bill—a bill over which Hyde had no immediate jurisdiction. However, Duncan Hunter, Senator Warner's counterpart in the House of Representatives, effectively blocked the passage of Warner's amendment by inserting a blanket prohibition on licensing exemptions for significant military equipment into his committee's version of the bill. Hyde, Hunter and Congressman Tom Lantos also released a scathing critique of the licensing exemptions that caught the attention of the media and angered proponents of licensing exemption agreements. The trade journal *Defense News* published an unusually acerbic commentary piece in which they attacked Hunter, Hyde and two of Hyde's staffers by name.<sup>74</sup> Shortly afterwards, the British Government sent a 'stinging' letter to Secretary of Defense Donald Rumsfeld that reportedly threatened to limit US firms' access to British markets if the ITAR exemptions were not granted.<sup>75</sup>

Ultimately, however, Hyde had the better election-year hand. In July, he and Hunter scheduled a joint hearing on 'the Role of Arms Export Policy in the Global War on Terror'. The threat of a 'public hammering of the Pentagon and other officials at the hands of senior members of their own party during an election year'<sup>76</sup> proved too much for the White House and, hours before the hearing was scheduled to begin, the administration agreed to temporarily shelve the ITAR exemptions and other defence trade initiatives if Hyde and Hunter would cancel the hearing.<sup>77</sup>

Proponents of the ITAR waivers agreements with Australia and the UK—and legislative relief from Arms Export Control Act requirements—argue that the exemptions would strengthen export controls by allowing State Department licensing officers to 'concentrate more on high-risk exports' and by prompting foreign governments to strengthen their export controls on US items. An example of the latter is the British Government's commitment to require proof of US Government retransfer consent before allowing British companies to retransfer defence items containing US

<sup>73</sup> Commenting on the intensity of the battle over the exemptions, one analyst said 'I've never seen such bad blood between the White House, the State Department and the House in this all-Republican crowd. If one says "black", the other is going to say "white"'. Donnelly, J., 'GOP splits over liberalization of military technology rules', *Congressional Quarterly*, 25 Oct. 2004.

<sup>74</sup> 'A very low blow', *Defence News*, 14 June 2004, p. 50.

<sup>75</sup> Matthews, W., 'Waffling on trade waivers for the UK', *Defence News*, 2 Aug. 2004, p. 8.

<sup>76</sup> Matthews (note 75).

<sup>77</sup> Matthews (note 75).

components.<sup>78</sup> ITAR waiver proponents also claim that continued failure to grant the exemptions would be diplomatically, militarily and financially damaging. Commenting on the European attitude to the battle over the British ITAR exemptions, the editorial staff at *Defense News* observed that '[o]fficials from across the world said they were closely watching the US stance toward Britain. If Washington is unwilling to treat its closest ally with respect, it is best to keep America at arm's length'.<sup>79</sup>

Critics of the waiver agreements claim that they only increase the risk of arms export diversions and send the wrong message to US allies and the rest of the world. Routine State Department checks on parties to a transfer, which are part of the licensing process, are not performed on exports shipped under the waivers. While recipients would be limited to Australian and British companies vetted by the US Government, other parties to the deal (e.g., freight forwarders and intermediate consignees)<sup>80</sup> would no longer be reviewed by a trained licensing officer prior to shipment.<sup>81</sup> This reduction in US Government scrutiny, critics argue, 'will almost certainly enlarge risks of diversion'.<sup>82</sup> Furthermore, the Australian and British ITAR waiver agreements do not deliver all of the improvements to their export controls required by US law. Hyde bemoaned the absence of legally binding government-to-government commitments on re-export controls, which his office called a 'sine qua non for the benefit of a licensing exemption'.<sup>83</sup> Finally, critics charge that the exemption agreements—the 'single largest deregulatory measure related to armaments involving any country in modern history'—could be used by other arms exporters as a 'pretext for relaxation of control over their sensitive exports'.<sup>84</sup>

### **The role of arms sales and export controls in the war on terrorism**

Since 11 September 2001, the Bush Administration has made extensive use of both arms exports and arms export controls in its global war on terrorism. This approach has resulted in dramatic increases in arms transfers to particular countries and significant national and international efforts to curb the availability and utility of weapon systems sought by terrorists.

In the past three years, military aid and arms sales to the so-called frontline states in the Bush Administration's war on terrorism have increased by several orders of magnitude. The biggest beneficiary has been the Pakistani Government. Prior to 11 September 2001, arms exports and military aid to Pakistan were prohibited by nuclear non-proliferation and anti-military coup provisions in US law. President Bush waived these sanctions in exchange for Pakistan's cooperation in the war against the Taliban and the hunt for Osama bin Laden. Since 2001, Congress has appropriated \$1 billion dollars for Pakistan in Foreign Military Financing—funds provided specifi-

<sup>78</sup> US House of Representatives, Committee on International Relations, *US Weapons Technology at Risk: the State Department's Proposal to Relax Arms Export Controls to Other Countries* (US Government Printing Office: Washington, DC, 2004), pp. 104, 110–11.

<sup>79</sup> 'Don't take UK for granted', *Defence News*, 26 July 2004.

<sup>80</sup> The US Census Bureau defines an intermediate consignee as 'the party in a foreign country who receives and then delivers the merchandise to the ultimate consignee'. US Census Bureau, Foreign Trade Division, Questions & answers relating to the shipper's export declaration, URL <<http://www.census.gov/foreign-trade/regulations/forms/qna.html>>.

<sup>81</sup> For a more detailed synopsis of Hyde's argument, see his 10 Feb. 2004 letter to Secretary of State Colin Powell in US House of Representatives (note 78), appendix 16.

<sup>82</sup> US House of Representatives (note 78), p. 18.

<sup>83</sup> US House of Representatives (note 78), p. 160.

<sup>84</sup> US House of Representatives (note 78), p. 9.

cally for the purchase US defence items and services.<sup>85</sup> Pakistan has used these funds to buy hundreds of millions of dollars' worth of US weaponry, including Phalanx anti-ship missile systems, surveillance and military transport aircraft, radar, TOW-2A anti-tank missiles and riot control equipment.<sup>86</sup> The connection between these weapons and anti-terrorism is often unclear. The US weapon that Pakistan covets most, however, is the F-16 combat aircraft. The USA sold 28 of these aircraft to Pakistan in the 1980s and was scheduled to deliver 71 more when President George H. W. Bush cut off arms transfers in 1990 in response to Pakistan's ongoing efforts to develop nuclear weapons. Pakistani requests for the aircraft, which have been incessant since the resumption of arms sales in 2001, had been rebuffed by the Bush Administration. However, an F-16 sale to Pakistan was confirmed in March 2005, when it was also announced that F-16s would be supplied to India.<sup>87</sup>

While Pakistan is the largest recipient of war on terrorism-related military aid, other countries have also benefited. Since the ban on arms transfers to India was lifted, India has entered into contracts for US defence items and services worth over \$200 million.<sup>88</sup> Several other frontline states, including Djibouti, Kenya and the Philippines, have seen huge increases in their foreign military financing.<sup>89</sup> This aid—and the arms sales it funds—has both immediate and long term benefits for the DOD and US companies. It serves the immediate goal of bolstering the recipient country's capacity to engage in counter-terrorism activities. Foreign Military Financing for Djibouti, for example, was appropriated specifically for the purchase of 'vehicles, small craft and patrol vessels, communications equipment, fencing, guard towers, and night vision goggles . . . [to] help Djibouti secure its borders and coastline from the increased threat of terrorism'.<sup>90</sup> Many weapon systems, particularly sophisticated platforms such as aircraft, require regular investment in new parts, maintenance, and upgrades. These requirements tether the purchaser to the US defence-industrial complex—creating opportunities for the DOD to expand defence cooperation with the recipient and generating years of revenue for US companies.

Since 11 September 2001, the USA has taken several important steps to improve controls on weapons that are particularly deadly in the hands of terrorists. These steps include banning commercial sales of 12.7 mm sniper rifles,<sup>91</sup> and improving export controls on components for UAVs.<sup>92</sup> However, the weapons that have received the most attention from policymakers are shoulder-fired surface-to-air missiles (i.e. man-portable air defence systems, MANPADS).<sup>93</sup> The spectre of a successful attack on

<sup>85</sup> US Department of State (note 13).

<sup>86</sup> Prosser, A. and Stohl, R., 'The need for arms transfer restraint', *Defense News*, 29 Nov. 2004, URL <<http://www.defensenews.com/story.php?F=524118&C=commentary>>.

<sup>87</sup> Baker, P., 'Bush: US to sell F-16s to Pakistan, reversal, decried by India, is coupled with fighter-jet promise to New Delhi', *Washington Post* (Online edn), 26 Mar. 2005, p. A01, URL <<http://www.washingtonpost.com/wp-dyn/articles/A800-2005Mar25.html>>.

<sup>88</sup> US Department of Defense, Defense Security Cooperation Agency, 'Foreign military sales, foreign military construction sales and military assistance: facts as of September 30 2003,' available on the Internet site of the Federation of American Scientists at URL <[http://www.fas.org/asmp/profiles/facts\\_book\\_2003.pdf](http://www.fas.org/asmp/profiles/facts_book_2003.pdf)>.

<sup>89</sup> For a more complete overview of war on terrorism-related US arms sale trends, including data on over 20 countries, see the Centre for Defence Information's arms trade series, available at URL <<http://www.cdi.org>>.

<sup>90</sup> US Department of State (note 13), p. 239.

<sup>91</sup> Federation of American Scientists, 'America's war on terrorism: arms transfers', URL <<http://fas.org/terrorism/at/index.html>>.

<sup>92</sup> Written Statement of Lt. Gen. Tome H. Walters, Jr (note 48).

<sup>93</sup> US General Accounting Office (note 56).

commercial aircraft by terrorists wielding these weapons has resulted in one of the largest and most comprehensive US campaigns to strengthen national and international controls on a particular weapon system in history.

At the international level, the USA has spearheaded intergovernmental efforts to tighten controls on the export of MANPADS, improve stockpile security and increase cooperation between national law enforcement agencies. These efforts have resulted in agreements of various kinds among members of the Asia–Pacific Economic Cooperation, the Group of Eight, the Organization for Security and Co-operation in Europe and the Wassenaar Arrangement.<sup>94</sup> The USA has also worked with several countries on a bilateral basis to secure MANPADS storage facilities and destroy nearly 10 000 surplus missiles. Finally, the USA has strengthened its own end-use monitoring of exported Stinger missile systems, and is exploring the possibility of equipping US commercial aircraft with infra-red countermeasures—a programme that could cost billions of dollars.<sup>95</sup> The significance of these actions extends beyond their impact on the availability of MANPADS to terrorists. By increasing the awareness of the threat from SALW more generally, US MANPADS threat reduction efforts are laying the groundwork for policy initiatives with the potential to curb the illicit trafficking in other forms of SALW.

## VI. The future of US defence trade controls

Shortly after the events of 11 September 2001, the Bush Administration asked Congress to approve section 505 of the 2001 Anti-Terrorism Act<sup>96</sup>—one of the most brazen challenges to congressional oversight of the arms trade in decades. The provision would have allowed the president to export arms to any country—even those countries that were otherwise ineligible—if doing so would further the war on terrorism. Even though the administration ultimately withdrew the provision just days after sending it to Congress, arms control advocates feared that it portended a significant shift in US defence trade policy.<sup>97</sup> Since then, however, there have been only a small number of significant changes. The speed with which the policy system regained its equilibrium after 11 September 2001 is a testament to the vitality and durability of the ‘checks and balances’ in the US federal government. The same checks and balances that prevented executive branch overreach in 2001—fiercely independent congressional leaders, an energetic civil society and an attentive media—are probably sufficient to prevent dramatic changes to US arms export controls in the near future.

This is not to rule out the possibility of changes to the current system. There are major policy initiatives in the pipeline that could result in significant legislative or regulatory adjustments. However, any significant changes will be hard won, achieved incrementally and limited to areas in which there is consensus among the various players in the policy-making community. Thus, paradigmatic shifts in defence trade policy and the arms export control system are unlikely.

<sup>94</sup> For details of the G8, the Organization for Security and Co-operation in Europe and the Wassenaar Arrangement, and a list of their members, see the glossary in this volume.

<sup>95</sup> Federation of American Scientists, ‘Issue brief 1: MANPADS proliferation’, URL <<http://fas.org/asmp/campaigns/MANPADS/MANPADS.html>>.

<sup>96</sup> 2001 Anti-Terrorism Act, HR 2975, 107th Congress, 1st Session, URL <[http://www.epic.org/privacy/terrorism/ata2001\\_text.pdf](http://www.epic.org/privacy/terrorism/ata2001_text.pdf)>.

<sup>97</sup> Arms Transfers Working Group, ‘Waivers of arms sales restrictions’, Letter to Congress, 28 Sep. 2001, available at URL <<http://fas.org/asmp/atwg/letters/ATWG-terrorism.htm>>.