

Testimony of
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Chairman Shays, Congressman Kucinich, Members of the Committee:

Thank you for the opportunity to testify on the role of export controls in preventing the spread of missile technology, particularly critical cruise missile and unmanned aerial vehicle (UAV) technology.

Summary

The Bureau of Industry and Security (BIS) within the Department of Commerce is responsible for administering controls on U.S. dual-use exports for reasons of national security, foreign policy, nonproliferation, and short supply. BIS vigorously administers and enforces these controls to stem the proliferation of weapons of mass destruction and the means of delivering them, to halt the spread of weapons to terrorists or countries of concern, and to further important U.S. foreign policy objectives. BIS works closely with the Departments of Defense, State, and Energy, the Central Intelligence Agency, the Department of Homeland Security's Bureau of Immigration and Customs Enforcement, and the Department of Justice in implementing the dual-use export control system. The U.S. export control program is quite successful in stemming the proliferation of and access to missile technology by those countries and individuals that would use it against us.

As you requested, this testimony will address how the Department of Commerce

mitigates the proliferation risks posed by cruise missile and unmanned aerial vehicle (UAV) technology with a focus on how these issues relate to the recently released General Accounting Office Report (GAO) entitled, “Nonproliferation: Improvements Needed to Better Control Technology Exports for Cruise Missiles and Unmanned Aerial Vehicles” (GAO-04-179). We appreciate the work the GAO put into this report and are taking steps to address the specific issues raised in the report. As I explain below, however, we do not believe that the report fully analyzed the significance of the threat posed by attempts to construct cruise missiles and UAVs from uncontrolled parts or the compliance issue. More importantly, GAO does not contend that the growing worldwide capacity to produce cruise missiles and UAVs stems from improper exports of U.S. goods and technology.

Nonetheless, Commerce is taking action on GAO’s recommendations. We had already begun a review of the missile catch-all controls in the Export Administration Regulations (EAR). Based on that review, Commerce is in the process of considering possible options for revising these controls. In addition, the Department will undertake an assessment of compliance with conditions on licenses to export dual-use technology related to cruise missiles and UAVs.

The Threat of Cruise Missiles and UAVs

The paramount concern of BIS is the national security of the United States. Our nation faces significant threats, both from terrorist groups and from countries seeking to acquire weapons of mass destruction (WMD) and the means to deliver them. Export controls cannot solve these problems alone, but they do have a crucial role in denying terrorists and proliferators some of the tools they need for their hostile operations. As we have seen in recent weeks with the revelations regarding transfer of controlled technology by certain parties in Pakistan, and the past efforts to develop weapons programs in Libya, the threat is real.

However, our national security is not best served by denying every export license application. Although U.S. national security requires us to restrict the export of sensitive commodities, it also requires a strong U.S. industrial base. The United States has a critical national security interest in the economic strength of its suppliers of key technologies, such as in the aerospace industry. If U.S. companies are unable to compete in important export markets due to excessive controls, and as a result are forced to exit those product lines, the United States would not only lose that production capability and be forced to rely on foreign suppliers, we would also lose much of our ability to control exports of those items. Moreover, the U.S. military depends on U.S. industry in order to maintain and extend our technological advantage. So we must not lose sight of the impact of overly broad or restrictive export controls on the industrial base, which increasingly supplies our military, in this country. It is critical that export controls enhance both our national security and economic interests.

I. U.S. Dual-Use Export Controls Relating to Cruise Missiles and UAVs

A. The Missile Technology Control Regime

Export controls are most effective when they are implemented on a multilateral basis. The Missile Technology Control Regime (MTCR) is the primary multilateral control regime that addresses exports of items which can be used in cruise missiles and UAVs.¹ The MTCR has 33 member countries, including many of the key manufacturers and exporters of cruise missiles and UAVs. The MTCR has a control list, or “Annex,” of items (goods and technologies) which all

¹ We note that the MTCR is not the only international regime that works to prevent missile proliferation. The Wassenaar Arrangement, the multilateral export control regime responsible for controls on conventional weapons and related items with both civilian and military (dual-use) applications, has recently imposed complementary controls on the export of UAVs. The Department of Commerce implements these controls over many non-military UAVs having either: a) an autonomous flight control and navigation capability (*e.g.*, an autopilot with an inertial navigation system); or b) the capability of controlled-flight out of direct vision range involving a human operator (*e.g.*, televisual remote control).

In addition, the Australia Group is considering controlling the export of certain aerosol sprayers, including those capable of being used on UAVs, to deliver a significant downwind

members control according to the MTCR guidelines. The MTCR Guidelines and Annex serves as the basis for the dual-use missile technology controls administered by the Department of Commerce.

The MTCR has been responsive in addressing newly emerging technologies, the application of new uses for old items, and requests for the imposition of additional controls. The Department of Commerce, along with the Departments of State and Defense, actively participates in the interagency Missile Annex Review Committee (MARC). The MARC is responsible for reviewing internal and foreign proposals for modifying existing MTCR control parameters or assessing proposals for new MTCR controls. For the most part, MTCR members are receptive to U.S. proposals to control new items or modify existing entries on the MTCR's control list.

The MTCR is now even more focused on stemming the spread of missile systems capable of delivering weapons of mass destruction. For example, the MTCR recently:

- * amended its Guidelines to address concerns regarding terrorism. The new Guidelines make clear that the MTCR is intended to limit the risk of controlled items and their technology falling into the hands of terrorist groups and individuals.
- * adopted new definitions for missile "range" and "payload" to sharpen the regime's focus on missile systems with WMD delivery capability. The definitions require members to use consistent criteria in interpreting the range and payload of a particular system, thereby ensuring proper control over systems which may be modified to meet "Category I" parameters (systems capable of carrying a 500 kilogram payload at least 300 kilometers).
- * expanded controls to include short-range UAVs, which could have applicability in spreading chemical and biological agents. Recognizing the potential threat posed by systems

respirable hazard of pathogenic micro-organisms or toxins.

designed or modified to dispense aerosols, capable of carrying a particulate or liquid greater than 20 liters, and having certain flight control and navigation capabilities, the MTCR placed controls over these UAVs.

* broadened its approach to export controls by recently adopting “catch-all” controls to ensure that individual exports of items not currently controlled that are intended for WMD delivery systems are prohibited, regardless of the commodity’s control status. This measure, adopted at the September 2003 MTCR Plenary in response to a U.S. proposal, significantly strengthens the regime by broadening its scope beyond listed items to end-uses. While most MTCR members, including the United States, already have domestic catch-all controls, having MTCR catch-all controls provides enhances the stature of catch-all controls as part of the international standard for all countries’ export control system. It also adds impetus to members’ implementation of their own catch-all controls.

Thus, continuing to work within the MTCR framework is essential to the success of our missile nonproliferation goals.

B. U.S. Implementation of Missile Technology Export Controls

Consistent with its MTCR commitments, the United States implements a comprehensive export control program intended to prevent the proliferation of sensitive items to countries and programs of concern. The Department of State has export licensing jurisdiction for defense articles and services covered by the U.S. Munitions List. The Department of Commerce has export licensing jurisdiction for dual-use items (items with civilian and military applications) enumerated on the Commerce Control List (CCL), as well as items not on the CCL but subject to the EAR. The Department of Commerce also has jurisdiction over certain WMD and missile-related activities of U.S. persons.

The Department of Commerce uses a number of tools to prevent the proliferation of items under its jurisdiction related to cruise missiles and UAVs. First, the CCL contains a list of all items controlled for Missile Technology (MT) reasons. These MT items represent the equipment and technology that the MTCR has agreed are of proliferation concern and not already controlled as munitions items.

Under the EAR, an exporter must submit a license application to export any item controlled for MT reasons to any country in the world (except Canada). In 2003, Commerce reviewed 565 license applications for items controlled for MT reasons. The Department of Defense, State, and Energy, as well as Commerce, review all approved license applications for MT items. The reviewing departments apply the MTCR Guidelines and additional criteria, consider available intelligence and law enforcement information, and determine if the transaction would pose an unacceptable risk of diversion or provide a material contribution to a missile program of concern. In addition, the interagency Missile Technology Export Control Committee (MTEC) meets once a week to review all pending missile technology license applications. In this process, all end-users identified on an export license application for MT items are vetted for proliferation concerns by the intelligence community. The process for interagency review of export license applications submitted to the Department of Commerce established by Executive Order 12981, as amended, ensures the positions of the reviewing departments are fully considered before an export license is approved.

The U.S. controls on exports that could support WMD and missile programs go well beyond the MTCR Annex items. Under our catch-all controls, exporters also are required to obtain a license for the export of any item, even a non-controlled item, if they know or are informed that the item will be used in or by certain countries for prohibited nuclear activities, chemical or biological weapons programs, or the design, development, or production of missiles, or facilities engaged in such activities. These catch-all controls, set forth in Part 744 of the EAR, seek to prevent the export of any item that could be used in an MTCR-class missile program of concern, including cruise missiles and UAVs, and ensure there is no “gap” in the application of

export controls for proliferation reasons. Last year, the relevant departments reviewed 479 license applications submitted under the missile catch-all controls.

In addition, the EAR contains an Entity List that identifies specific end-users in countries throughout the world that pose a proliferation concern. Many of these end-users have been listed because of missile proliferation concerns. For most end-users identified on the Entity List, a license is required for all exports subject to the EAR.

The catch-all controls also go beyond control of items and extend to the activities of U.S. persons. Under the EAR, U.S. persons may not perform any contract, service, or employment knowing it will directly assist in chemical and biological weapons or missile activities in or by certain countries. For instance, a U.S. person was criminally convicted of violating this requirement by failing to apply for a license to broker the transmission of material to be used as missile propellant in Iraq.

Finally, our controls also target terrorists. The EAR prohibits exports and reexports of any items to persons designated by the Department of the Treasury as Specially Designated Global Terrorists, Specially Designated Terrorists, or Foreign Terrorist Organizations. The Department of Commerce also maintains an extensive system of unilateral anti-terrorism controls, in addition to the controls imposed on exports of MT items. These controls are intended to keep even low-level technologies out of the hands of the most dangerous actors in the proliferation marketplace.

It is also important to note our outreach program to U.S. industry. The government alone cannot protect our security interests in this globalized world. It is essential that the public and private sector combine their strengths to confront the threats to our economic and national security. The Department of Commerce has an extensive outreach program to inform U.S. industry of their export obligations and explain the scope of export controls to all exporters. Most U.S. companies are strongly committed to protecting our national security and they therefore seek to achieve excellent compliance with our laws. It is therefore imperative that

those who could supply sensitive items to end-users of concern understand their obligations and the importance of compliance.

Thus, in addition to implementing our international commitments under the MTCR, the United States has in place a comprehensive program of additional measures to prevent the proliferation of missile systems capable of delivering WMD to countries of concern or terrorists.

B. Strengthening Commerce Department Export Controls

The GAO recommended that the Department of Commerce review the sufficiency of the EAR's catch-all controls to address missile proliferation by nonstate actors. The GAO based this recommendation on the claim of an individual in New Zealand who asserted he could construct a cruise missile using uncontrolled U.S. parts and components. As exports of uncontrolled items to this individual would not generally require a license from the United States unless the U.S. exporters knew or were informed that the item was destined for WMD or missile programs in countries of concern, or otherwise informed by the government that a license was required, the GAO deemed this to be a "gap" in our controls.

This circumstance is much more theoretical than real. Based on a review of this individual's website (GAO's source), this individual has not flown a complete working cruise missile and appears to be using an experimental pulse jet engines that does not appear to be suitable for powering a cruise missile. None of the lower level technology items identified on his website are appropriate for the development and guidance of a cruise missile capable of meeting MTCR performance levels of a 300 km range and a 500 kg payload capability, let alone a working missile of lower capability. In addition, New Zealand is an MTCR partner country and is firmly committed to the regime's guidelines. It appears, from this individual's website, that the government of New Zealand has taken action concerning this effort. Thus, while this example may raise domestic law enforcement issues for New Zealand, it appears to be much more of a theoretical proliferation concern than an example of a practical "gap" in export controls.

Nonetheless, Commerce is acting on GAO's recommendation regarding our catch-all controls. Even prior to GAO's recommendation, we had begun a review of the missile catch-all controls in the Export Administration Regulations (EAR). Based on that review, Commerce is in the process of considering possible options for revising these controls.

C. Export Control Enforcement

BIS's Export Enforcement team, along with the Department of Homeland Security's Bureau of Immigration and Customs Enforcement, and the Federal Bureau of Investigation, enforce controls on dual-use exports. These agencies, through investigations of suspected violations of law and regulations, and the interdiction of suspected illicit shipments, have provided the necessary evidence to successfully prosecute both criminal and civil cases on export violations. Our multilateral controls also provide a strong framework for cooperative enforcement efforts overseas when such efforts call for an international approach.

One issue raised by the GAO was that the U.S. government has difficulty enforcing the missile technology "catch-all" control because it must prove the exporter's knowledge of the law in order to impose civil penalties on an unauthorized export. For these knowledge-based licensing requirements, in civil enforcement cases, it is only necessary to show that an exporter knew or was "aware of a high probability" that an item was destined for a missile proliferation activity. It is not necessary to show, in such cases, "knowledge of the law" or "the intent to violate it."

The GAO also raised the issue of the number of Department of Commerce visits to assess the end-use of licensed missile-related items. In particular, the GAO identified 20 cruise missile or UAV related licenses the GAO believed met Department of Commerce criteria for end-use visits and noted visits had been carried out on only 2 of those 20 transactions. There are two principal points to consider in assessing this concern. First, the licensing process serves to establish that an item is being exported to an appropriate end-use and end-user. In approving a license, the U.S. government will consider a wide range of information about the end-user, including the end-user's past licensing history, input from the intelligence community, and pre-license checks. In brief, by the time an export is approved, the U.S. government has a substantial degree of confidence that the item will not be diverted to an inappropriate end-use. For this reason, it is not necessary, and would be an inefficient use of limited resources, to conduct on-site end-use visits for a high percentage of export licenses.

Second, the Department of Commerce, like any enforcement agency, has a limited amount of resources that it must target on the highest priorities. The GAO report correctly notes that criteria established by Commerce with regard to technologies and countries enable the most effective use of post-shipment verifications and pre-license checks. There is an established protocol that includes a number of variables that help determine whether such an action should be initiated: information about the parties to the transaction, the proposed end-use, the ultimate destination, previous licensing history, and known end-user concerns. This protocol contributes to our ability to effectively enforce end-use and end-user controls on missile technology within limited available resources.

As GAO notes in their report, the same guidance on targeting end-use checks for selection also includes factors that mitigate the need for selection for an end-use check. In the 18 cases where a post-shipment verification (PSV) was not selected as necessary, 7 of these 18 had favorable end-use checks previously completed on the consignees involved (in some cases Commerce had multiple favorable end-use checks on the consignees) and another 3 involved

large well known U.S. subsidiaries as the overseas consignee where the U.S. exporter was the parent company. In yet another case, the MTEC (an interagency committee that reviews all sensitive MT export transactions) agreed to approve the case with a condition that any follow-on licenses would receive both a pre-license check and government to government assurances. In another case, the MTEC approved the case with a condition of government to government assurances prior to export. Finally, 5 cases involved an export of technology - not commodities. Technology transfers are typically not selected for PSVs because PSVs have limited utility in detecting the diversion of technology as opposed to physical items. In the evaluation of a technology transfer license, numerous factors are considered during the interagency review process in determining whether the export should be approved or denied, such as the security control program, workforce analysis, business ownership and partnerships, and indigenous capabilities. The remaining check was not completed for other reasons.

Although the Department believes its current program for conducting end-use checks is appropriate, it will undertake an assessment of compliance with conditions on licenses to export dual-use technology related to cruise missiles and UAVs as recommended by GAO

Conclusion

The Department of Commerce believes the issue of missile proliferation has never been as important to our national security interests as it is now. A comprehensive export control system is already in place to protect our national security. As noted above, the Department of Commerce is committed to enhancements to that system as needed to ensure it continues to protect our national security.