



UK-US Defence Trade Co-operation Treaty

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In June 2007 then President George W. Bush and then British Prime Minister Tony Blair, signed a Treaty (Cm 7213, Session 2006-07) which would establish a two-way framework for defence trade co-operation between the United States and the UK. The objective of the treaty is to enhance interoperability between the UK and US' respective Armed Forces, support combined military or counter-terrorism operations, and reduce the current barriers to the exchange of defence goods, services, related technical data and the sharing of classified information in support of co-operative defence research, development and production and in certain defence and security projects where the UK or the US is the end-user.

The Treaty is not yet in force as it still remains subject to ratification by the US Senate. The treaty was ratified in the UK in early 2008.

At the beginning of September 2007 Australia signed a similar agreement with the United States. That treaty is also yet to be ratified by the US. Further information is available at:

http://www.defence.gov.au/publications/Treaty_QandA.pdf

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1 Background – The US Arms Export Control Regime

The two primary components of the US arms export control system are the *Arms Export Control Act* and the International Traffic in Arms Regulations (ITAR).¹ Section 38 of the Act gives statutory authority to the President to promulgate Regulations regarding the export and import of defence articles and services. The items so designated constitute the United States Munitions List. Under Executive Order 11958, as amended, that authority has been delegated to the Secretary of State. The detailed regulations are contained in ITAR, which is primarily administered by the Directorate of Defense Trade Controls in the State Department. ITAR covers the various aspects involved in the control of arms exports, including the registration of manufacturers and exporters and the administrative procedures for obtaining licences to export. They also provide for the regulation of arms brokering activities, and specify the penalties for non-compliance.

There are a number of safeguards established within the US arms export regime aimed at placing some degree of control over the export of military technologies and intellectual property, including Congressional prior approval of proposed sales of defence equipment over a certain value,² end-use monitoring and the licensing of arms brokers.

Between 2006 and 2008 the US State Department processed 13,000 licences for the export of military goods and services to the UK, at an approval rate of 99.9%. In April 2008 a US State Department official suggested that defence trade treaties concluded with the UK and Australia would eliminate the need for about 70% of the export licences that companies must currently obtain.³

¹ The AECA can be accessed at: <http://pmdrtc.state.gov/aeca.htm> and the ITAR regulations can be accessed at: http://pmdrtc.state.gov/itar_index.htm

² Under the AECA Congress only has the right to be notified of FMS, DCS and equipment leases where the value of the transfer is above \$14m for major defence equipment or \$50m for general defence items. Congress is also only notified about the Transfer of Excess Defence Articles that are defined as significant military equipment or are valued at \$7m or more.

³ "Treaties may cut number of export licences", *Defense News*, 4 April 2008

2 Attempts to Secure an ITAR Waiver for the UK

In May 2000 the Clinton Administration approved the US Defense Trade Security Initiative (DTSI) which constituted an attempt to harmonise export licensing procedures and to shorten the time needed to process US licences for NATO allies, Australia, Japan and, as of June 2001, Sweden. The DTSI represented the first major post-Cold War revision of US export controls and was intended to increase efficiency, encourage interoperability between NATO allies and facilitate trans-Atlantic industrial joint ventures.⁴

In January 2001 the UK and the US released a joint statement on the progress of implementation of DTSI.⁵ As outlined by that statement, one of the UK's main objectives was to secure an exemption from ITAR with regard to the export of unclassified equipment and services. Although proposed texts on an ITAR waiver were reportedly agreed in June 2003,⁶ the US Congress has, since then, consistently refused to approve a full waiver for the UK. Opposition to granting the waiver has been most prominent in the House of Representatives which placed greater emphasis on securing legislative provisions to safeguard the primacy of the US domestic manufacturing base, so-called 'Buy America' legislation.⁷

However during conference negotiations on the *Defense Authorization Act for Fiscal Year 2005*, in October 2004 concessions were agreed between the Senate and the House to allow preferential treatment to be given to the UK and Australia with respect to export applications for ITAR-controlled items.⁸ Yet it has been widely acknowledged that there is a lack of clarity over precisely what this provision means or indeed how it should be implemented.⁹

3 Purpose of the Defence Trade Co-operation Treaty

The unwillingness of the US Congress to approve an ITAR waiver for the UK in the seven years since the DTSI was signed has been met with frustration and criticism in the UK. In the last few years it has become particularly pertinent with reference to the Joint Strike Fighter programme. Many have expressed concern over the long-term ability of the UK to retain operational sovereignty over its fleet of JSF aircraft due to the UK's lack of full access to JSF technology and associated intellectual property, including sensitive technologies such as stealth and low observable technology and computer software access codes for the avionics systems.¹⁰

The Treaty, Command Paper 7213 of Session 2006-07¹¹ was presented to Parliament in the third week of September 2007. Recognising the principles established under the General Security Agreement between the UK and the US which was signed in 1961,¹² the Treaty sets out the parameters for establishing a two-way framework for defence trade co-operation

⁴ A summary of the main elements of the DTSI initiative is available at: <http://www.fas.org/asmp/campaigns/control/ps000524d.html>

⁵ A copy of that statement is available at: http://www.fas.org/asmp/campaigns/control/US_UK_statement.htm

⁶ HC Deb 2 June 2003, c39W

⁷ The US Senate on the other hand has been largely supportive of a UK ITAR waiver, having attempted on several occasions to introduce it into defence authorisation legislation.

⁸ Section 1225, *Defense Authorization Act for Fiscal Year 2005*

⁹ See Quadripartite Committee reports HC873, Session 2005-06 and HC145, Session 2004-05

¹⁰ See: Defence Select Committee

¹¹ Available from the Foreign and Commonwealth Office at:

http://www.fco.gov.uk/Files/kfile/378820_CMND_7213.pdf. The Explanatory notes are also available at: <http://www.fco.gov.uk/servlet/Servlet?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029396041&a=KArticle&aid=1188493283179>

¹² This agreement has never been published.

between the United States and the UK. The intention of the framework is to enhance interoperability between the UK and US' respective armed forces, support combined military or counter-terrorism operations, and reduce the current barriers to the exchange of defence goods, services, related technical data and the sharing of classified information in support of co-operative defence research, development and production and in certain defence and security projects where the UK or the US is the end-user. As such, the Treaty will be broader in scope than the general provisions that would have been granted by an ITAR waiver.

However, it is worth noting that the Treaty only establishes the parameters for the defence trade co-operation framework. The specific details necessary for the operation of the Treaty are set out in Implementing Arrangements which, although initially intended to be contained in a further treaty,¹³ were established as a Memorandum of Understanding on 14 February 2008.¹⁴

Introducing these measures in the form of a treaty has been regarded as a means of circumventing the potential opposition of the US House of Representatives, as has been witnessed in the past with regard to the ITAR issue, as US treaties only require the approval of the Senate (see below).

A treaty of this nature is also not without precedent. In 1958, for example, the UK and the US concluded a 'Mutual Agreement for Co-operation on the Uses of Atomic Energy for Mutual Defence Purposes'.¹⁵ The Agreement, which enables exchanges of technical information and allows the UK to draw on US warhead designs, has come to be regarded in the UK as the cornerstone of the British nuclear weapons programme.

3.1 Parameters of the Treaty

Under the parameters as set out in Cm 7213, the Treaty will:

- Establish an approved 'community' of companies and individuals in the UK and US given security clearance to work on projects and operations involving technology transfer between the US and UK (Articles 4 and 5). British Government facilities, Government personnel, companies and individuals qualifying for inclusion in this community will be set out in the Implementing Arrangements. Companies that fall outside of this 'approved community' will, however, be required to continue applying for export licences under the current arrangements.
- Remove the requirement for every piece of defence technology on the US Munitions List, including classified goods, that are exported to companies within the 'approved community' in the UK, to be granted an individual export licence, or undergo any other type of written authorisation¹⁶ (Articles 6 and 7). The Treaty also allows for the subsequent transfer of those articles within the approved community without further US authorisation. Members of the approved community will not be obliged to use the mechanisms provided under this Treaty, however, and may continue to use current

¹³ See the FCO Explanatory Memorandum on the UK/US Defence trade Cooperation Treaty: <http://www.fco.gov.uk/en/about-the-fco/publications/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2007a/us-defence>

¹⁴ A copy of the US-UK Memorandum of Understanding is available from the US State Department website at: <http://www.state.gov/documents/organization/101208.pdf>

¹⁵ For more detail on the MDA and the recent 10-year extension of the provision relating to the transfer of materials, see Library Standard Note SN/IA/3147, *UK-USA Mutual Defence Agreement*.

¹⁶ This would imply that Congressional prior approval would not be required.

US licensing practices for exporting defence goods and services from the US into the UK if they so wish.

The Treaty recognises that the transfer of defence goods and services from the US to the UK under these new provisions will mirror the current practice for authorising UK defence exports to the US, the majority of which are undertaken through open, as opposed to individual, licensing arrangements.¹⁷ The commitment to maintaining these arrangements for UK exports to the US are set down in Article 8.

However, it is worth noting that the Treaty does not cover the export to the UK of defence articles intended for use by other nations, nor certain highly-sensitive technologies. Those defence articles which will be exempted from the provisions of this treaty will be set out in the Implementing Arrangements (Article 3). Therefore, at present it is unclear what those exempted technologies might be, although there have been suggestions that they are likely to include low-observable technology and countermeasures, anti-tamper technology and communication security technology.¹⁸ It has been also been suggested that military equipment worth more than \$25m and sales of spare parts or services worth more than \$100m will still require Congressional approval thereby raising questions among commentators over the potential scope of these exempted items.¹⁹

On the whole, it is expected that these treaty provisions will benefit collaborative UK-US programmes and speed up the export of commercially-off-the-shelf (COTS) equipment purchased by the UK in order to meet Urgent Operational Requirements (UOR).

- Establish safeguards against unauthorised disclosures by preventing defence articles, services and related technical data exported to the approved community in the UK from being re-exported or transferred outside of that community without subsequent approval by both Governments. Certain exceptions to this provision, such as those goods or services being used in support of the UK's deployed Armed Forces, will be mutually agreed and set down in the Implementing Arrangements (Article 9). In the UK, these provisions will be administered by the MOD under the auspices of the Official Secrets Act.²⁰
- Establish a detailed process for recording the movement of goods under the provisions of this Treaty.
- Establish an enforcement regime whereby any conduct falling outside the terms of this Treaty and its Implementing Arrangements will be subject to applicable licensing requirements and any criminal, civil or administrative penalties or sanctions as set out in the Implementing Arrangements. Each party will be obliged to investigate any

¹⁷ Further information on open licensing is available at: <http://www.dti.gov.uk/europeandtrade/strategic-export-control/licensing-rating/licences/oiel/index.html> and <http://www.dti.gov.uk/europeandtrade/strategic-export-control/licensing-rating/licences/ogels/index.html>

¹⁸ Defence Industries Council, *US-UK Defence Trade Co-operation Treaty – Key Elements*

¹⁹ See "US proposed treaty would not skirt Congress", *Defense News*, 12 July 2007

²⁰ The Defence Industries Council considers this to be significant as the OSA covers any unauthorised transmission of classified items, irrespective of where it happens geographically or of the nationality of the recipient, whereas the Export Controls Act apply only to the physical transmission of items outside of the UK. The DIC suggests that this step is "justified as an enabler for an improvement in the flow of sensitive material between the UK and US (Defence Industries Council, *US-UK Defence Trade Co-operation Treaty – Key Elements*)

suspected violations and inform the other party of the result of such investigations. Each party shall also have the right to conduct end-use monitoring of exports or transfers conducted under this Treaty (Article 13).

- Under Article 17 both parties will consult at least once a year on the co-operative aspects of export controls, and review the operation of this Treaty. Any disputes arising out of, or in connection with the Treaty are to be resolved on a bilateral basis and will not be referred to any court, tribunal or third party (article 18). Both Parties have the right to withdraw from the Treaty if it considers that its national interests have been jeopardised (Article 21).

3.2 Implementing Arrangements

The Implementing Arrangements for this treaty had been the subject of intense negotiation. Under contention were the criteria for inclusion in the approved community; how access to sensitive information by non-British nationals would be controlled and how extensive the list of excluded technologies should be. While the UK wanted the approved community to be as inclusive as possible, the US in contrast called for restrictive policies to be imposed. In its December 2007 report, while supporting ratification of the treaty, the Defence Select Committee noted:

We share the ambition of industry that the Approved Community should be as inclusive as possible. The current List X, the group of establishments that have been cleared by the UK Government as being able to handle classified material, is tried and tested and forms a solid foundation on which to build eligibility for inclusion in the UK Approved Community. In our view a UK Approved Community which was drawn more tightly—by excluding SMEs or major foreign-owned defence companies—would seriously blunt the effectiveness of the Treaty. UK defence companies owned by overseas companies form a significant part of the UK defence industry and have a large footprint in the UK economy: they are in practice regarded by the MoD as UK defence companies. If European-owned UK defence companies were barred from membership of the Approved Community, it would create a two tier industry and would risk discouraging European collaboration.²¹

Initially the US administration refused to publish details of the Implementing Arrangements (IA) which led the US Senate Foreign Relations Committee in May 2008 to conclude that it could not recommend the treaty for approval until the IA had been considered. While supporting the general principles of the treaty, the Chairman of the Senate Foreign Relations, then Senator Joseph Biden commented:

These Implementing Arrangements would govern some of the most critical aspects of the treaties including enforcement and the scope of the treaties' application [...]

The Administration must illuminate provisions of the treaties and Implementing Arrangements that lack specificity. The Foreign Relations Committee will want the fullest possible understanding of how these treaties will work.²²

The main concern of the committee was that the Senate could not alter a treaty once it had been ratified and as such argued that the IA should also be subject to the ratification process.

²¹ Defence Select Committee, *UK/US Defence Trade Cooperation Treaty*, HC 107, Session 2007-08

²² Opening Statement of the Chairman of the Senate Foreign Relations Committee, *Congressional Testimony*, 21 May 2008

Despite the Administration's initial refusal to publish the IA, the State Department has subsequently released a Memorandum of Understanding which sets these IA out.²³ With regard to the main points of the treaty, the IA establish the following:

- Approved Community – British Government facilities accredited pursuant to the signing of the UK-US General Security Agreement, and related to the scope of this treaty will be made available in a list to the United States Government. A process for notifying additions and deletions to this list will be established by the participants and administered by the Ministry of Defence and the US Department of Defense.

A list of non-governmental UK entities and facilities to be included in the 'approved community' will be established on the basis of assessment against the following criteria (section 7):

- The entity or facility must be on HM Government's "list X" of approved facilities
- Foreign ownership, control or influence (the IA do not however specify the limits of FOCI)
- Previous convictions or current indictments for violations of either US or British export control laws or regulations
- The US export licensing history of the entity or facility
- National security risks, including interactions with countries proscribed by UK or US laws or regulations (such countries could include Cuba, Venezuela or China which are subject to more restrictive arms export policies in the US than in the UK).

Upon application by a company for inclusion in the approved community an eligibility review will be conducted by both the MOD and the US DoD who will mutually determine whether that company can be included or not. The approved community list will be published periodically.

Companies may be subsequently removed (after a 30 day period of consultation) from the list if either the UK or US feels that the inclusion of a particular company contravenes its national interests.

- Access – access to articles exported under the terms of the treaty will only be granted to serving members of the Armed Forces and those individuals who have an appropriate level of security clearance and on a 'need to know' basis (section 7). Consideration whether to grant an individual access will also depend on national security considerations including the ties of an individual to countries or entities of concern.
- Technologies exempt from the Treaty – rather than provide a list of technologies, which many analysts and political figures alike had hoped for, section four of the IA commit the US and UK to establish and maintain a list of articles which will be exempted from the scope of the treaty. Following consultation between both parties those lists will be combined, with any proposed changes, and those articles which can

²³ A copy of the US-UK Memorandum of Understanding is available from the US State Department website at: <http://www.state.gov/documents/organization/101208.pdf>

be publicly identified will be published periodically. Other technologies listed will remain classified. Where the US does choose to exclude technologies, exporters will still be able to apply for individual US export licences under the existing system.

The IA also establish procedures for the marking and classification of handled goods that fall under the scope of this treaty; the necessary approvals process for re-transfer and re-export of goods; goods exported under the US Foreign Military Sales programme and a compliance monitoring and enforcement regime.

It is worth noting that the UK's existing export control system will remain in force alongside the treaty, meaning that exports to the US under the treaty will still need to meet the Government's export control criteria.²⁴

4 Ratification Procedures

In order for the Treaty to take effect it has to be ratified by both the UK and the US Senate.²⁵

4.1 Procedure in the UK

At present treaties in the UK are ratified by the Foreign Secretary or his/her representative, acting on behalf of the Crown under the Royal Prerogative. Parliament does not have a direct role in treaty ratification but there can be parliamentary activity relevant to it. Starting in the 1920s, and used continuously since the 1930s, there has been a constitutional practice (not a law) known as the Ponsonby Rule which requires that treaties subject to ratification should be laid before Parliament for 21 sitting days before ratification, both for information and to give Parliament an opportunity (not always taken) to debate them.²⁶

The Defence Select Committee conducted an enquiry into the principles of the treaty at the end of 2007 and prior to its ratification in the UK. In its final report the Committee concluded:

The US export control system, as currently administered, discourages collaboration between UK and US industry and inhibits the swift supply of urgently needed equipment to our Forces in theatres of operation. Given how closely UK and US Forces cooperate in theatre, this is clearly in the interests of neither the UK nor the US.

We, like many others, considered that an ITAR waiver might be a way of preserving the close relationship between the UK and the US. The Treaty offers an alternative route. We have scrutinised the Treaty and we conclude that the principles it sets out offer the opportunity for the UK and US to strengthen further and deepen their defence relationship and allow greater levels of cooperation and interoperability. Industry on both sides of the Atlantic firmly supports the Treaty and we believe the Treaty accords with the Government's Defence Industrial Strategy.

The extent and nature of the benefits to the Government and the defence industry in the UK will depend on the Implementing Arrangements. In the expectation that the UK

²⁴ Defence Select Committee, *Government response to the Committee's third report*, HC 375, Session 2007-08. Further information on the UK's export control criteria is available in Library Standard Note SN/IA/2729, [UK Arms Export Control Policy](#)

²⁵ The provisions of the Treaty will be self-executing in the United States whereby it will not require implementing legislation in order for its provisions to have effect in domestic law. However, it will still require ratification by the US Senate.

²⁶ The Treaty ratification process in the UK was examined by the Public Administration Select Committee in a report in 2004 (ref: HC422, Session 2003-04). Proposals for a green paper on constitutional change were announced on 3 July 2007, which envisaged the possibility of giving Parliament a role in the treaty ratification process.

and the US will agree satisfactory Implementing Arrangements, we support the UK's ratification of the UK/US Defence Trade Cooperation Treaty.²⁷

4.2 Procedure in the United States

In the US, under Article II, Section 2, Clause 2 of the US Constitution, the President "shall have the power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." The role of the Senate, therefore, is to approve ratification by the President, rather than to ratify the treaty itself. When the President submits a treaty to the Senate, it is referred to the Committee on Foreign Relations. The Committee has the options of ordering the treaty reported back to the Senate – favourably, unfavourably, or without recommendation – or of declining to act on the treaty. If the Committee votes to report the treaty, the Senate is required to go into executive session. It then considers the text of the treaty itself, as it would consider the text of a bill in legislative session. The treaty is amendable, with amendments proposed by the Foreign Relations Committee considered first.

Once the process of debate and amendment is complete, the Senate takes up a resolution of ratification, by which it formally gives its advice and consent, empowering the President to proceed with ratification. This resolution typically states that: "Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification" of the treaty in question, with any amendments incorporated. No further amendments may be introduced once the Senate has moved to the process of considering the resolution of ratification, although Senators may still attach reservations, declarations, statements or understandings that can affect the interpretation or implementation of the treaty.²⁸

A number of treaties have been killed by the Senate, often having been blocked in Committee. The Comprehensive Nuclear Test Ban Treaty (CTBT) was rejected in October 1999 following a vote in the Senate of 48 for and 51 against. Generally, there is no role for the House of Representatives, except when the President chooses to submit the treaty to Congress as a joint resolution due to concerns that it might not command a two-thirds majority in the Senate. A joint resolution requires only a simple majority for approval, but must be adopted by both Houses in identical form.

5 Progress in Ratification

The UK ratified the treaty in early 2008. However the treaty and its implementing arrangements will not enter into force until the treaty has also been ratified in the US.

Initial opinions on successfully getting the treaty through the Senate were mixed. President of Cevasco International, Frank Cevasco, was reported as saying in July 2007:

If the treaty popped out today for a vote, it would probably fail [...] success will require substantial advance work and a lot of hand-holding with a lot of members and their staffs. The administration will have to commit itself to this – that's the key.²⁹

James Townsend, Head of the Atlantic Council's International Security Programme also commented:

²⁷ Defence Select Committee, *UK/US Defence Trade Cooperation Treaty*, HC 107, Session 2007-08

²⁸ Sources: '[Senate Consideration of Treaties](#)', *CRS Report for Congress* by the US Congressional Research Service, 10 April 2003; *Congressional Quarterly's Guide to Congress*, 5th Edition, 2000.

²⁹ "UK-US trade treaty facing uncertain future", *Defense News*, 9 July 2007

I'm amazed they're proposing to do this by treaty. It's a bold move. If it works, it will break a logjam on the defense exports process. It will bring into play a lot of folks on the Hill – staffers and others – who have been playing a role on trade for years and years and will want to influence the outcome. I'm not sure at this point where this is going to go.

Following the refusal of the Senate Foreign Relations Committee to approve ratification of the treaty without an examination of the Implementing Arrangements in May 2008, hopes that the treaty would be ratified in the US were dealt a further blow in September after the committee concluded that there was not enough time remaining prior to the presidential for the committee to overcome its concerns about the treaty and the IA. At issue was whether the treaties would conflict with existing US arms export laws and therefore whether amendments to the *Arms Export Control Act* would be required.³⁰ The Committee subsequently deferred consideration of the treaty into the next Congress. Responding to the delay in the Senate Shadow Defence Procurement Minister, Gerald Howarth, commented:

We've been pressing for this for two years now and it's a pretty poor show that congress has failed to accord more support to its number one ally. It sends the wrong signals. The British government has been hugely supportive of the US government.³¹

As outlined above, one of the main reasons for proceeding on a treaty basis was to avoid legislation and thereby the involvement of the House of Representatives which has historically been opposed to the principles of the treaty and a greater advocate of “Buy America” policies.

At present it is unclear how the US administration, and subsequently Congress, intends to proceed. The new administration of Barack Obama has not yet expressed a view on either its support or opposition to the treaties. In theory if the administration failed to support the treaty then it could be withdrawn from Congress. Indeed some analysts have expressed concern that recent efforts by the new US administration to implement several “Buy America” policies in response to the global economic crisis may have a detrimental effect on support for the treaties.³² However, other commentators have looked to the support for the principles of the treaties by Vice President Biden, in his previous role as Chairman of the Senate Foreign Relations Committee, as an indication of the likely support of the new US government.

In early February 2009 the Society of British Aerospace Companies (SBAC) called for the ratification of the treaties to be prioritised by the new US administration and specifically called upon the US State Department to satisfy the concerns of the Senate Foreign Relations Committee in order to allow the ratification process to go forward.³³

Immediate progress is considered unlikely however. Greg Suchan, Former US Deputy Assistant Secretary of State for Defence Trade has argued that ratification by the autumn of 2009 may be overly optimistic suggesting that “we're going to face a lengthy transition” before the process of ratification consideration begins again. He went on to conclude however that “It's too good an idea to drop. After there's a sort of lull following the establishment of the new US administration, I hope they will turn to it properly”.³⁴

³⁰ See “defence treaty delay to hit UK”, *The Financial Times*, 22 September 2008

³¹ *ibid*

³² See “Buy America plan raises fears for trade treaty”, *Jane's Defence Weekly*, 11 February 2009

³³ SBAC press release, 3 February 2009

³⁴ See “Stalled trade treaties too good to drop”, *Jane's Defence Industry*, 30 September 2008