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An Overview Of The New U.S.-UK Defense Trade Cooperation Treaty: A Potential For Relaxed ITAR Controls On Exports To The UK

On June 26, 2007, the governments of the United States and the United Kingdom signed a Defense Trade Cooperation Treaty (the Treaty) to ease export licensing requirements for defense trade between the two countries. Should the Treaty be ratified, it would eliminate license requirements for a number of defense articles, technical data and defense services subject to the export control jurisdiction of the U.S. International Traffic in Arms Regulations (ITAR), 22 CFR §§ 120–130, for which the U.S. or UK government is the end user. However, there are important limits on the Treaty's scope, and many operative details of the Treaty remain to be negotiated and included in future "implementing arrangements." By some accounts, those elements may not be finalized for another year.

The ambiguities surrounding the Treaty may affect the approval process in the U.S. Senate, which must provide its advice and consent on the Treaty. Nevertheless, the Treaty is expected to significantly revise the current defense trade controls framework between the U.S. and the UK.

Background of the Treaty—Interest in country-specific license exemptions goes back at least to the Clinton administration's Defense Trade Security Initiative of 2000 and is shared by the Bush administration. The Treaty, the text of which has not been publicly released, marks the revival of a battle the administration fought and lost in 2004 when conferees stripped the 2005 Defense Department Authorization bill of Senate language giving the president power to waive license requirements for defense article exports to the UK and Australia. At that time, the administration struck bilateral executive agreements

liberalizing defense trade with both countries. To be valid, however, such agreements had to meet certain conditions of the Arms Export Control Act (AECA), such as U.S. Government veto power over reexport authorizations by the UK and Australian governments. The executive agreements did not meet some of those standards. Consequently, a statutory waiver of AECA requirements was necessary for the agreements to become operational, and the administration could not obtain the waiver because of opposition in the U.S. House of Representatives.

By proceeding via a treaty rather than an executive agreement, the Bush administration can forego approval from the House. Moreover, many lawmakers who opposed efforts to implement a broad licensing exemption for the UK are no longer serving. Although Senate passage of the Treaty seems likely, some senators have voiced concern, and it is unclear exactly to what extent and when Senate approval will be obtained.

Substantive Provisions of the Treaty—If ratified, the Treaty would significantly change the ITAR for exports to the UK. The Treaty would create a transatlantic defense trade community within which defense articles for certain purposes could circulate license-free, identify governmental end uses and defense articles eligible for such free circulation, provide strict controls on reexport and retransfer, and heighten cooperative export control enforcement activities between the U.S. and UK.

The Treaty would not, however, create a comprehensive license-free policy for UK exports. It is subject to several notable limitations that make it narrower than, for example, the current ITAR license exemption for Canada (in 22 CFR § 126.5), and many companies subject to ITAR license requirements could be wholly excluded from its benefits.

U.S. Exports to Approved UK Entities: The Treaty would establish a framework to create two "communities," one in each nation, consisting of private and public entities eligible to exchange defense articles for certain categories of end uses. Eligible UK recipients would include (1) UK government facilities accredited pursuant to the classified 1961 General Security Agreement between the UK and U.S.; (2) additional UK government personnel with a need to know and who meet other criteria to be determined in subsequent implement-

ing arrangements; and (3) specifically identified non-governmental entities and their employees, to be agreed upon by the UK and U.S. The U.S. Government would retain the discretion to remove non-governmental UK entities from the approved parties list if it considers such removal to be in its national interest.

U.S. Government entities and non-governmental ITAR registrants would be free to provide to the above-referenced UK parties eligible defense articles and defense services without ITAR license requirements, provided that the goods and services are used for purposes defined in the Treaty. The UK already permits exports of defense articles and related services to the U.S. without a license, and the Treaty would codify this policy.

Eligible Items and End Uses: The Treaty's benefits would extend only to particular defense articles and defense services, to be defined in implementing arrangements, and to U.S. end uses or certain specified UK end uses. The permissible UK government end uses pertain to (a) joint military and counterterrorism operations; (b) combined security research and development, production, and support programs; and (c) other mutually agreed upon UK Government projects.

For covered projects, the Treaty would substantially reduce ITAR licensing requirements, which permit U.S. exporters to ship defense articles under specific licenses, but require prediction of precise dates and items before the authorizations may be obtained. Nevertheless, much remains to be defined in subsequent implementing arrangements. There is some speculation, for instance, that eligible defense articles and services will not include U.S. Munitions List items that do not qualify as "significant military equipment" under ITAR § 121.1. If so, a broad range of ITAR-controlled products and related services, including certain fully automatic firearms, drone technology, advanced radar and numerous types of military electronics, will not qualify for export under the Treaty.

The Treaty also could allow for the license-free servicing of equipment for articles used in certain countries subject to § 126.1 restrictions, such as Iraq and Afghanistan, if the products are for U.S. or UK end uses. This responds to complaints by UK officials of waiting for State Department approvals of important repair-related military equipment in Iraq and Afghanistan. Further, the Treaty would leave in place current ITAR congressional notification requirements, which require Congress to be informed of, and given the opportunity to veto, licenses authorizing exports to the UK of major defense equipment valued at \$25 million or more, or defense articles and defense services valued at \$100 million or more.

Notably, the Treaty would not alter the acquisition process for the UK under the Foreign Military Sales program. Neither would the Treaty affect any U.S. licensing requirements pertaining to non-ITAR export control laws and regulations, including the Export Administration Regulations, the Nuclear Regulatory Commission export regulations and the U.S. economic sanctions regulations.

Enhanced Security for Defense Articles Exported to the UK: Currently, ITAR-controlled and other sensitive U.S.-origin technologies in the UK are protected largely by private contract. Under the Treaty, such items would be treated as "classified" under the UK Official Secrets Act and would be subject to marking, transmission, storage and handling procedures under the U.S.-UK General Security Agreement. This would necessitate various enhanced internal controls at UK companies—to be detailed in implementing regulations—and would subject companies to criminal liability for serious violations.

Exports, Reexports and Retransfers: The Treaty would permit retransfers of eligible U.S.-origin defense articles among eligible UK recipients. However, all retransfers and reexports to destinations outside the UK, or for recipients or end uses that are beyond the Treaty's scope, would require specific authorizations from both the UK and U.S. governments.

Cooperative Enforcement and Cross-Border Coordination: Both nations would be obligated to cooperate and investigate suspected Treaty violations. The relevant procedures for this will be defined in subsequent implementing arrangements. Both parties also would inform each other of developments in civil, criminal and administrative matters relating to the Treaty. To help enforce compliance with Treaty requirements, the agreement would require community members to keep records of the movement and nature of exported articles and services, and both governments would have access to these records to assist with oversight and enforcement.

Ratification and Implementation: Prospects—There is little doubt that the Treaty will pass through the UK Parliament in a timely manner and with minimal resistance. It is unclear whether similar treatment will be afforded by the U.S. Senate. This is in part due to complaints that the Bush administration did not work to generate congressional support or consult Congress before the Treaty was signed. Some members of Congress are concerned that the Treaty is too vague, given the range of issues left to implementing arrangements. Another concern is that the UK represents a serious diversion risk, an issue that contributed to the admin-

istration's inability to obtain AECA waiver authority in 2004. Also present is the fear of setting a precedent for other countries to seek special treatment under the ITAR; currently, only Canada enjoys a broad ITAR licensing exemption.

Together, these factors likely will delay Treaty implementation until at least 2008 and may substantially affect implementation. However, the State Department has indicated that it is working with the UK on implementing arrangements, so the Treaty that the Senate ultimately considers could be more refined than the text signed by President Bush and Prime Minister Blair in June. If the Senate approves the Treaty, it must be ratified by the president before the State Department will amend the ITAR to reflect the Treaty's terms, subject to finalization of all implementing arrangements between the U.S. and UK governments.

Conclusion—The U.S.-UK Treaty could facilitate defense trade and military cooperation between the two countries, but it should not be viewed as a broad license exemption for UK exports. Much remains to be determined in the bilateral implementing arrangements, and congressional concerns need to be addressed. Potentially affected companies should monitor these issues, and look for the U.S. Senate to take the Treaty under advisement later this year.



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