



## Keeping it in the Family: The US-Defense Treaty

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**L**ike most Americans, I tend to view British folks as family. Despite some minor misunderstandings in 1776 and 1812, we've been the beneficiaries of a remarkable national friendship, enjoyed in peace and strengthened in war. Quite apart from my own British ancestry, my immediate family reflects both conditions: my uncle Alfred died in East Anglia in 1944 while flying his B-24 bomber. My own experience is far more pacific (and decidedly less sacrificial): I am both a proud graduate of Durham University and a British solicitor. I count both my education and my professional standing as prized possessions. I tend to view any friction between Britain and the US with grief and hope that our special relationship will continue forever. In America, I am by no means unusual.

And so, cousins, that's why I was pleased to learn that Tony Blair and George Bush had signed the US-UK Defense Trade Cooperation Treaty last June. Although the exact details have yet to be fleshed out, the treaty is designed to speed the export of US technologies to be used by British defense forces and provide for closer cooperation in defense research. Currently, the US Directorate of Defense Trade Controls (within the State Department) requires individual licenses for each and every military export to Britain. Even lesser exports experience tortuous delays at the hands of the US Bureau of Industry and Security, a part of the Department of Commerce. By contrast, similar British exports to the US military are freely licensed. A slight imbalance, what?

But this new treaty comes in the nick

of time, as the frustrations expressed by the UK Defense Ministry with US export policy were working up to a serious family row. Let's hope the US Congress does the right thing and ratifies the treaty without delay. Given the current political environment in Washington, however, one can only hope. But what does the treaty do? Let's take the high points.

In brief, the treaty will cover the transmission of US technical data, software, equipment and services that are controlled by the US Munitions List to the British government and to authorized UK-based contractors, and the retransfer of these articles within a "trusted community" in the UK. Note, however, that the treaty only covers items on the Munitions List. It does not cover other controlled items that fall outside the List, specifically, so-called "dual use" technology. Keep this point in mind as we descend to the bowels of the US export law and policy.

Now, just what is the US Munitions List? Well, the US Arms Export Control Act governs export of all military weaponry and related services. Under AECA, the Directorate of Defense Trade Controls (within the State Department) oversees a "Munitions List" consisting of defense "articles" and "services" that are inherently military in design and character. DDTC operates subject to "ITAR", the International Trafficking in Arms Regulations. ITAR is the beast that baffles all exporters and together, AECA, ITAR the DDTC often create an immovable barrier to family cooperation. So, if you happen to

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## Defense Treaty (con'd)

have an ICBM that you want to export, apply directly to DDTC.

At a more fundamental level, the Munitions List also includes certain “software” and “firmware” that are military-based. No items on the list can be exported or re-exported without approval of DDTC. Under this scheme – and much to the displeasure of the UK defense establishment - there are no generally available licenses for exporters. Everything is a special case and must be cleared by DDTC. As a side note, the Clinton Administration moved certain key technologies off the Munitions List over to the jurisdiction of the US Commerce Department. The Chinese military thereafter found US encryption, missile and satellite technologies very useful indeed and considered their campaign contributions as money well spent.

But under the Treaty, items may be transmitted to authorized recipients (which the Treaty calls an “approved community”) without individual export licensing by either the US or UK governments. The same items can be transmitted within the approved community to anyone having a “need to know”. Both governments are “end users” but exports or re-exports are still subject to the Munitions List. As you would expect, contractors and subcontractors in both countries would be able to receive sensitive items by mutual agreement. And proprietary information would be honored under the terms of whatever private licenses apply.

The Achilles Heel of this treaty, if there is one, is that that it only addresses items on the Munitions List. It does not address “dual use” technologies, which still must be administered through the Bureau of Industry and Security. In a world where advanced civilian technology can be easily adapted to nefarious

purposes, dual use technologies are even more problematical than purely military technology. Speaking for myself, I would think that such technologies are also a potential sore point that should be addressed.

But it is not at all clear that the Bush Administration has taken the Congress into account when it negotiated the treaty. And this is where the politics of this whole mess get interesting – particularly when considered from the UK side. In a Q&A prepared by Andrew Radcliffe, a Defense Equipment Counselor with the British embassy in Washington, several British fears reveal themselves. For instance, under the questions, “Has Congress Been Consulted?” and “Why was Congress not consulted up front?”, Radcliffe in both cases punted: “That is a matter for the US Administration.” He extended his remarks by adding that “we understand that the Administration was simply working up the scope of the agreement before it commenced a dialogue with Congress.” So, the Administration didn’t do a very good job warming up the Congress. And to the question, “Congressional staffers will kill this won’t they?”, Radcliffe replies that “the Administration has plans in place for a full consultation” and “we believe that Congress will find the merits of the Treaty to be very compelling.” We hope.

But what of the EU? Radcliffe asks, “Is the Treaty consistent with the UK’s European and international export control obligations?” His succinct answer? “Yes”. When Radcliffe asks, “Is this aimed at distancing the UK from Europe towards the US on defense?”, he answers in the negative, stating that the agreement only “reduces the burden of bureaucracy.” Indeed. Speaking in a familial way, I’m quite happy to see that members of the embassy staff are concerned about the Special Relationship. You’re not Europeans, after all, you’re British. And for the family’s sake, let’s hope this has a happy ending in Congress.