UK-USA Mutual Defence Agreement

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The *Agreement between the UK and the USA for Cooperation in the Uses of Atomic Energy for Mutual Defence Purposes 1958*, also known as the Mutual Defence Agreement (MDA), allows the USA and the UK to exchange nuclear materials, technology and information. It was the result of an amendment to post-War US non-proliferation law, which exempted allies that had made substantial progress in developing nuclear weapons from the general ban on exchanges that might lead to nuclear proliferation.

The most important part of the MDA is time limited, and it is due to expire at the end of 2004. The UK and the USA have signed a new treaty to extend this deadline to 2014. This treaty must be ratified by both states.

Critics argue that the MDA as amended contravenes the parties' obligations under the *Treaty on the Non-Proliferation of Nuclear Weapons 1968* (Nuclear Non-Proliferation Treaty, or NPT). Further information on the NPT is in SN/IA/491, *Treaty on the Non-Proliferation of Nuclear Weapons*, 23 March 2004, at:

http://hcl1.hclibrary.parliament.uk/notes/iads/snia-00491.pdf

The procedure in the USA allows Congress an opportunity to veto the ratification. No such opportunity exists in the UK.

This Note describes the MDA, its history, the current amending treaty, the procedures surrounding ratification of that treaty, and the concerns over its relationship with the NPT.

Contents

A. MDA

The *Agreement between the UK and the USA for Cooperation in the Uses of Atomic Energy for Mutual Defence Purposes 1958*[1] (Mutual Defence Agreement, or MDA) was drawn up in order to allow the UK and the USA to share nuclear technology and knowledge.

Under the *United States Atomic Energy Act 1946*, usually known as the McMahon Act, the USA was prohibited from sharing atomic energy information with other states. In 1954 the Act was amended to allow exchanges of information on civil aspects of atomic energy and limited exchanges on defence aspects. In 1958 the Act was amended again to allow greater cooperation in the military field with US allies, and in particular with those which had made "substantial progress" in the development of nuclear weapons. The UK was recognised as the only state fulfilling the substantial progress criterion.

The possibility of cooperation with the UK was prominent in the Eisenhower administration's thinking when it sought to amend the McMahon Act, and the necessary legislation was introduced to Congress shortly after Eisenhower and Macmillan had issued their "declaration of interdependence" in October 1957. The MDA, which had been negotiated in parallel to the US legislation, was signed by the parties on 3 July 1958, three days after the passage of the amendments to the McMahon Act.

In its original form the MDA allowed the sharing of classified information relating to the development of defence plans, to training for the use of and defence against atomic weapons, to the atomic capabilities of potential enemies, to the development of delivery systems and to research in, and development and design of, military reactors. It also allowed the sale to the UK of one complete nuclear submarine propulsion plant, plus the uranium needed to fuel it over a ten year period. There were conditions on the use and protection of classified information, and on patenting of designs developed as a result of the transfer of such information.

Under Article V of the MDA "there will be no transfer by either Party of atomic weapons." At the time there was concern in the House of Commons that this would imply duplication of effort, since the UK would have to manufacture its own weapons, rather than being able to purchase them from the USA. The Government argued that the McMahon Act did not allow the transfer by the USA of complete atomic weapons nor manufactured nuclear components of such weapons.[2]

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1 Cmnd. 537. It entered into force on 4 August 1958.

2 HC Deb 15 July 1958, cc1009-10.

B. Article III *bis*

Article III *bis* (ie a new Article to go after the existing Article III) was introduced in an amendment in 1959.[3] It allowed the transfer of nuclear materials and equipment between the USA and the UK prior to 31 December 1969. It is regarded as the most important substantive part of the treaty.

Article III *bis* has been extended under successive amendments by substituting a new date in place of "1969." The last extension, in 1994, substituted "2004." So, at present the USA and the UK may exchange nuclear materials and equipment prior to 31 December 2004.

The MDA as a whole is not time limited, and it therefore continues in force unless and until the parties agree to terminate it, under its Article XII.[4]

The amendment treaties have also made a number of changes to the substantive parts of the MDA, including Article III *bis* and the other articles, but the 2004 extension treaty does not include such changes.

In response to a parliamentary question on when the last transfer of nuclear material took place under the MDA, Adam Ingram, Minister of State at the Ministry of Defence, said,

> the 1958 Mutual Defence Agreement makes provision for the transfer of special nuclear materials. Such transfers are in connection with nuclear warhead assurance and stockpile stewardship matters. I am withholding precise details of such transfers under Exemption 1 of the Code of Practice on Access to Government Information.[5]

C. Ponsonby rule

The 1994 Amendment was a treaty itself (as will be the 2004 Amendment), so it was subject to normal treaty law and practices. For the UK, these include the Ponsonby Rule, named after Arthur Ponsonby, Under-Secretary of State for Foreign Affairs in the first government of Ramsay Macdonald, who developed the practice.

a. Overview

Briefly, the Government undertakes to lay on the table for 21 sitting days any treaty which it has signed and which needs to be ratified before it comes into force for the UK. There are also undertakings to pass copies of treaties to relevant select committees and, within certain conditions, to respond positively to requests for debate either from committees or through the usual channels.

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3 Cmnd 859.

4 There is a separate provision for termination of Article II, on exchanges of information.

5 HC Deb 28 June 2004, c148W.

b. Detail

In a Written Answer of 1 November 1995 Baroness Chalker outlined the Ponsonby Rule as follows:

> it has been the practice of successive Governments for the past hundred years to lay before Parliament, in the Treaty Series of Command Papers, all treaties entered into by the United Kingdom, but only after their entry into force. Since 1924, it has also been the practice (known as the 'Ponsonby Rule') to lay before Parliament, before entry into force, those treaties which have been signed subject to ratification. The treaty lies on the table in the normal case for a period of 21 sitting days, after which it is ratified and published again in the Treaty Series once it has entered into force. The Ponsonby Rule, which applies as indicated only to treaties which are subject to ratification (or its equivalent), has been understood as allowing for exceptions from its operation in special cases, when other means of consulting or informing Parliament may be employed in its stead.
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> The above practices are not understood as precluding the Government, in appropriate cases, from proceeding to ratification (or its equivalent) without laying for 21 days or from concluding treaties which enter into force on signature.[6]

In October 2000 the Government accepted certain of the recommendations made by the Procedure Committee in its second report of 1999-2000, *Parliamentary Scrutiny of Treaties*.[7] This had the effect of giving departmental select committees a greater role in the scrutiny of treaties. The Government undertook to provide a copy of any treaty laid before Parliament under the Ponsonby Rule, with an Explanatory Memorandum, to what it regarded as the most appropriate departmental select committee, so that the committee could carry out an inquiry if it so wished. The committee could choose to pass it to another committee or committees if it thought this appropriate. The normal time for scrutiny by the committee(s) would still be 21 days, although "the Government would aim to respond positively" to requests for an extension. The Procedure Committee also recommended that the Government undertake to accept a recommendation made by the relevant select committee, and supported by the Liaison Committee, for debate on the floor of the House of a treaty requiring ratification and having major political, military or diplomatic implications.

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6 HL Deb 1 November 1995, c159w. Baroness Chalker also said that the practice was described "more fully" in an affidavit sworn by Lionel Darby, 1st Secretary at the Foreign Office, on 23 July 1993, for the purposes of the proceedings in *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Lord Rees-Mogg*. HL Deb 1 November 1995, c160w. The affidavit is available as Dep 3/2282, 6 November 1995, and the description of the Ponsonby Rule starts at para 10. See also the Memorandum by the FCO on *The Presentation of Treaties to Parliament: the Ponsonby Rule*, which was submitted to the Select Committee on Procedure on 30 November 1998, UP 6 1998/99, 14 January 1999. For a broader discussion of the Rule see R Ware, "Parliament and treaties," in C Carstairs & R Ware (eds) *Parliament and International Relations*, 1991.

7 HC 210 1999-2000, 19 July 2000.

The Government accepted this, saying,

> the Government is happy to undertake normally to provide the opportunity for the debate of any treaty involving major political, military or diplomatic issues, if the relevant select committee and the Liaison Committee so request. It agrees that this would be a useful development of the Ponsonby Rule. The form of the debate will remain a matter for the Government, although it will of course take the views of the Committee concerned and of the Liaison Committee into account. As the Committee notes, there are some circumstances in which treaties are already subject to proceedings in Parliament. The Government sees no need to provide extra opportunities for debate on such treaties, although the Government would welcome any Report from a Committee which could help to inform that debate.[8]

The Ponsonby Rule and associated practice are not derogations from the principle that treaty-making is a Prerogative power, since Parliament is not asked to approve the treaties which are laid. Rather, it is given an opportunity to discuss them, and to interrogate the executive over its exercise of the treaty-making power. Equally, there is no promise of a debate on every treaty subject to ratification. The Government undertakes normally to provide an opportunity for debate at the request of the Committees mentioned above, and it would not normally resist a request for a debate through the usual channels. Ponsonby himself gave a clear undertaking to find time if so requested, but this is not normally stated as part of the Ponsonby Rule.[9]

As mentioned above, the extensions of Article III *bis* of the MDA are effected through treaties subject to ratification, so they are subject to the Ponsonby Rule. The latest was signed on 23 May 1994, and it was presented to Parliament on 21 October 1994 as Cm 2686. Ratification took place on 23 December 1994, at which point the amendment entered into force. It was then republished as Cm 2785. The period between the presentation and ratification of the treaty was 33 sitting days.

D. US Congress

There was some concern in 1994 that Parliament had no formal role in approving the amendment, and in fact the matter was raised in debate only in the course of proceedings on the Consolidated Fund.[10] Some argued that this contrasted unfavourably with the role of the US Congress.

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8 *The Government's Response to the Procedure Committee's Second Report of Session 1999-2000, Parliamentary Scrutiny of Treaties*, (HC 210), published as Second Special Report of Procedure Committee of 1999-2000, HC 990 1999-2000, 15 November 2000.

9 R Ware, "Parliament and treaties," in C Carstairs & R Ware (eds) *Parliament and International Relations*, 1991, p39.

10 Alan Simpson raised it, in the small hours. HC Deb 15 December 1994, cc1222ff.

Under the amended McMahon Act of 1958 any exchange agreement entered into by the USA could be subject to Congressional veto within 60 sitting days of its being laid before Congress.[11] This meant that the Administration could not ratify an agreement, nor an amendment to an existing agreement, until it had lain before Congress for that period. A veto would take the form of a concurrent resolution passed by a simple majority of both Houses. The system resembled the negative procedure in the House of Commons, since Congress was not asked to give positive approval. For the House of Commons, under Ponsonby, the period was 21 sitting days with no veto.

E. The 2004 amendment

On 14 June 2004 the UK and the USA signed another treaty to amend Article III *bis*, extending it until the end of 2014.[12] As noted above, there were no amendments to the substance of the MDA this time.

The 2004 amendment treaty is subject to ratification, and it will not enter into force unless and until both parties ratify. If it is not ratified in time, then Article III *bis* will still have the end date of 31 December 2004. The article as it would stand would not allow transfers of materials and equipment from 31 December 2004 onwards. However, the MDA would still be in force. The parties could adopt a subsequent amendment treaty in order to give Article III *bis* a new date. This would mean that transfers could resume from the time at which the new amendment came into force.

The 2004 amendment treaty was laid on the table on 21 June 2004. At the same time the texts of the previous amendments, and the original MDA, were published on the FCO website.[13] Readers are referred to these, which are not in a format that can be readily reproduced and amalgamated here, for the many detailed changes which have been made to the MDA as a whole over the years.

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[11] *Keesing's Contemporary Archives*, 1958, p16298. For an agreement with the UK during 1958 the period was 30 days.

[12] Cm 6261. See its accompanying Explanatory Memorandum, EM 9.

[13] http://www.fco.gov.uk/Files/kfile/USMilitaryDefenceAgreement1958_537.pdf. They were already available as Command Papers. Cmnd 537, Cmnd 859, Cmnd 4119, Cmnd 4383, Cmnd 6017, Cmnd 7976, Cmnd 9434, Cm 2785.

F. Criticism

A number of British parliamentarians and anti-nuclear campaign groups argue that the renewal of Article III *bis* contravenes the *Treaty on the Non-Proliferation of Nuclear Weapons 1968* (Non-Proliferation Treaty, or NPT). There are two main arguments.

a. Alleged violation of Article I of NPT

First, it is claimed that the renewal of the MDA would violate Article I of the NPT, under which states already in possession of nuclear weapons undertake not to transfer "nuclear weapons or other nuclear explosive devices" to any recipient whatsoever (ie regardless of whether the recipient already has nuclear weapons). The counter-argument is that Article V of the MDA prohibits the transfer of atomic weapons by either party (UK or USA), making the MDA consistent with Article I of the NPT.[14]

b. Alleged violation of Article VI of NPT

Secondly, it is argued that the MDA contravenes Article VI of the NPT, under which states parties undertake to pursue in good faith negotiations towards the cessation of the nuclear arms race, nuclear disarmament and a treaty on general and complete disarmament. In general, this sort of provision tends to be viewed as aspirational, and the UK and the USA might point to existing disarmament agreements and negotiations as evidence of their good faith.

However, three groups, BASIC, the Acronym Institute for Disarmament Diplomacy and Peacerights, commissioned an opinion from Rabinder Singh QC and Professor Christine Chinkin, which gave a contradictory view. They pointed out that the International Court of Justice (ICJ) has said that "there exists an obligation to pursue in good faith *and bring to a conclusion* negotiations leading to nuclear disarmament in all its aspects under strict and effective control" [emphasis added].[15] The lawyers went on to point out that the MDA is directed towards the continuance and enhancement of the UK's nuclear capability. They concluded that "it is strongly arguable that this is not in accordance with the obligations under Article VI."

This argument revolves around an assessment of the strength and particularity of the obligation to pursue disarmament in Article VI. The lawyers drew attention to the fact that non-nuclear weapon states had cited the commitments in Article VI as important reassurances when weighing their own decisions to join the NPT, and that the 2000 Review Conference on the NPT noted this in its Final Document. Further, the Review Conference agreed specific steps towards the accomplishment of nuclear disarmament under Article VI.

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[14] The terms "nuclear weapon" and "other nuclear explosive device" are not defined in the NPT, although "atomic weapon" is defined in the MDA.

[15] Joint Advice, 20 July 2004, citing ICJ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 1996.

The Final Document issued by the Review Conference referred to,

> an unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament to which all States parties are committed under Article VI,

and

> steps by all the nuclear-weapon States leading to nuclear disarmament in a way that promotes international stability, and based on the principle of undiminished security for all.

The latter included

> a diminishing role for nuclear weapons in security policies to minimize the risk that these weapons ever be used and to facilitate the process of their total elimination.[16]

Article III *bis* relates to non-nuclear material which is "for the purpose of *improving* the United Kingdom's state of training and operational readiness" and to nuclear material "necessary to *improve* the United Kingdom's atomic weapon design, development or fabrication capability" (emphases added).

Critics argue that the renewal of Article III *bis* is inconsistent with Article VI as interpreted by the Review Conference and as understood by the majority of non-nuclear states, since it seeks to improve the UK's nuclear training, operational readiness, and design, development and fabrication capability, rather than seeking nuclear disarmament and a diminishing role for nuclear weapons.

An alternative view would be that the improvement of the UK's capacities in these particular areas does not contradict the pursuit of disarmament (weapons can be improved even as their removal is being negotiated), nor the diminution of the role played by nuclear weapons within the UK's security policies.

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[16] *Final Document*, section relating to Article VI, paragraph 15 (6) and (9). http://www.usinfo.state.gov/topical/pol/arms/stories/finaldoc.htm. For further information on the Review Conference, see SN/IA/491, *Treaty on the Non-Proliferation of Nuclear Weapons*, 23 March 2004.

c. British Government's position

For the Government, Lord Bach, Parliamentary Under-Secretary of State at the Ministry of Defence, said:

> The United Kingdom remains fully committed to the nuclear non-proliferation treaty in its entirety. Movements under the MDA do not involve nuclear weapons or nuclear explosive devices; hence they do not contravene the treaty. So far as concerns the United Kingdom's record, we are committed to working towards a safer world in which there is no requirement for nuclear weapons. Indeed, we can claim to lead the world in our commitment to neutral, balanced and verifiable reductions. Since 1992, the UK has given up the Lance nuclear missile in artillery roles, our maritime tactical nuclear capability and all our air-launched nuclear weapons. Trident is now Britain's only nuclear system and we maintain fewer than 200 operationally available nuclear warheads. We are the only nuclear power that has so far been prepared to take such an important step on the route to nuclear disarmament.[17]

[17] HL Deb 22 June 2004, c1119.