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SECRET

Ref. A09598

PRIME MINISTER

SALT II: Non-Circumvention

The provisions in the SALT II agreement on non-circumvention are of special concern to us, not only because of their implications for American collaboration with the Alliance generally, but also because of the possible effect on American willingness or ability to help us with future requirements for our own deterrent force. We have had a number of bilateral exchanges with the United States Administration over the past two years with a view to clarifying the position. These are summarised in the attached note prepared by a group of officials of the Foreign and Commonwealth Office and Ministry of Defence under Cabinet Office chairmanship. It is being circulated for consideration by the Restricted Group of Ministers at the meeting on 24th May.

2. I am sending copies of this minute and the enclosure to the Home Secretary, the Foreign and Commonwealth Secretary and the Secretary of State for Defence.

John

(John Hunt)

21st May, 1979

SALT II: NON-CIRCUMVENTION

Note by Officials

Background

1. From the start of the SALT II negotiations the Russians pressed hard for inclsuion of a "no-transfer" clause, the effect of which would have been to ban the transfer to any third party of any weapon or components covered by the Treaty. The Americans resisted this but, by June 1977, judged it necessary for tactical reasons to respond by offering a "non-circumvention" clause. Though recognising that the Americans must be the final judges of tactics, other members of the Alliance, including the United Kingdom, expressed misgivings. To meet these, the Americans offered to make a unilateral interpretative statement to be published after the Treaty had been signed, explaining how the non-circumvention clause would be applied. On this basis the Government, in line with our other Allies, accepted the American proposal and agreement was subsequently reached on the inclusion in the Treaty of the following:

> "In order to ensure the viability and effectiveness of the Agreement, each Party undertakes not to circumvent the provisions of this Agreement through any other State or States or in any other manner."

On the strength of this, the Americans were able to ride the Russians off their demand for a "no-transfer" clause.

The Interpretative Statement

2. The Americans gave the Germans, the French and ourselves, in March 1978, a draft of the statement and invited our comments. So far as we know the French did not comment. Several amendments proposed by the Germans and ourselves were taken into account in the revised draft (Annex A) which the Americans gave us in February this year. The only point in this draft which causes us concern is the inclusion of the word "necessarily" in the fifth sentence of the third paragraph of the text (underlined in Annex A). The numerically limited systems to which this sentence applies are:

Air Launched Cruise Missiles with a range of over 600 Km
Heavy Bombers (defined by type)
Intercontinental Ballistic Missiles
Air to Surface Ballistic Missiles
Sea Launched Ballistic Missiles.

3. We have three grounds for concern about the inclusion of the word "necessarily":

i. critics of the SALT Treaty, both in the United Kingdom and elsewhere, might focus on the significance of this qualification and argue that European interests could be adversely affected;

ii. the Russians might seek to use this qualification to support protests against any transfers to which they objected;

iii. it could in certain circumstances be held by the Americans to inhibit them from agreeing to transfers which we required for the maintenance of our strategic deterrent.

The Americans have however maintained that the word "necessarily" must be retained in order to:

a. maintain the credibility of their interpretative statement as a whole;

b. avoid the impression that completely unrestricted transfers of numerically limited systems would be permitted, without regard to size, character or overall impact;

c. avoid the need for precise definition of what transfers might or might not be approved (which might be disputed in public by the Russians).

4. We have told the Americans that, in our view, the word "necessarily" is not needed to safeguard this position since this is adequately covered by the succeeding sentence which provides for each transfer requested to be considered on its merits. As an alternative, in order to underline this last point, we have suggested that these two sentences should be run

together, with the word "necessarily" omitted. Our representations have however been rejected at all levels in the United States Administration, including the President. Mr Carter's reply to Mr Callaghan of 27 April is at Annex B. The American intention is to circulate the text of the interpretative statement to the North Atlantic Council about two weeks before the SALT Treaty is signed, ie before the Summit meeting now fixed for 15 June. We have now to decide:

i. whether to make any further representations to the Americans;

ii. what instructions to give the United Kingdom Delegation to NATO.

Bilateral Assurances

5. From our point of view the most important aim is to ensure that neither the non-circumvention clause nor the interpretative statement will inhibit the Americans from providing us with vital assistance for our nuclear forces. In June 1977 we asked the State Department how their proposed non-circumvention formulation would affect:

a. bilateral co-operation under the terms of the United States/ United Kingdom 1958 Defence Agreement (under which we receive materials and equipment for our military nuclear programmes and have the use of the United States underground test facilities);

b. American assistance currently provided under the 1963 Polaris Sales Agreement; and

c. any other forms of assistance in the future.

The State Department's reply is at Annex C. This is satisfactory as regards a. and b. On c, the reply is positive but qualified. But in the absence of any precise indication by the United Kingdom of what assistance we might want this was to be expected. Subsequently, in October 1978, we put three more specific questions to the Americans about the extent which they considered the SALT Treaty might limit their freedom to transfer Air Launched Cruise Missiles to us. These questions and the replies given by the United States Secretary of State in December are at Annex D. We were asked at the time to treat these

replies on a very restricted basis. Although the word "necessarily" is retained in the answer to the first question, the assurances are clear and forthcoming. Finally , we have the general assurance contained in President Carter's message to Mr Callaghan (Annex B). This adds nothing in substance to the previous responses but carries the personal authority of the President. Although not completely watertight, these private assurances go as far as we could reasonably hope in dealing with possible future requirements about which we have not been able to be specific. No reference was made by either side in these exchanges to the question of Polaris replacement.

6. The remaining question for consideration is whether we should seek to remove any possibility that, as a result of the qualification implied by the word "necessarily", the Americans might regard the non-circumvention clause itself or the numerical ceilings the Americans have accepted on their systems as inhibiting them from agreeing to the transfer of whatever system we may select as a replacement for Polaris. Given the assurances we have had, this may be unlikely. But in order to make absolutely certain, an early message to President Carter would be needed. This might be done in the context of an approach to the Americans suggesting preliminary consultation about possible successor systems, which would enable us to ask for assurances relating to concrete cases. The request for assurances at this stage would, of course, relate only to the United States Administration's view of its obligations under SALT II and not to any wider considerations the Americans might wish to apply to a British request.

Public criticism

7. A more immediate problem is how to deal with public criticism. We can point to the various public statements made by the United States Administration (Annex E). But they do not explain away the use of the word "necessarily". On the assumption that this word is retained we have suggested to the Americans, ad referendum to British Ministers, language for a unilateral United Kingdom explanatory statement if Her Majesty's Government comes under strong pressure as the SALT ratification debate develops, to set out the United Kingdom's understanding of the position. The Americans have considered this language

at a high level and, subject to minor drafting changes, have agreed that we could use it on a contingency basis with the assurance that the United States Administration would not contradict it (text at Annex F). This is not a wholly satisfactory arrangement, because it raises the obvious question why it is needed. But the language of the United Kingdom contingency statement should enable us to explain the position satisfactorily in public. The fact that the Americans have agreed to it is a further reassurance that our foreseeable requirements should not be debarred by SALT II.

8. It is possible that other members of the Alliance may question the word "necessarily" when the text of the American interpretative statement is circulated to the Council. If so, they are likely to look to us for a lead. Their direct interests are however covered by the statement in the second paragraph that the non-circumvention provision "will [not] preclude co-operation in [TNF] modernisation"; and in any case, none of our Allies is likely to be interested in the transfer of systems which are numerically limited in SALT II. On the basis that our own position is adequately safeguarded by the bilateral assurances we have received, we should therefore be able to say in the Council that in our view the Alliance's interests will not be prejudiced by the word "necessarily".

Soviet objections

9. The Russians may quote the qualification to reinforce a protest at some future date against United States transfers to members of the Alliance. This is possible, but we do not attach great importance to the extra leverage which the word "necessarily" might give them. They are likely to make a fuss anyway about any transfer they find objectionable, eg cruise missiles, and will no doubt claim that such transfers are contrary to the non-circumvention clause, The Americans have however made clear, by the lead they have taken in the Alliance, that they mean to go ahead with TNF modernisation. They are not likely to be deflected from this by Soviet references to an American unilateral statement. Our own position is covered by the confidential bilateral assurances.

Conclusions

10. In view of the firm position President Carter has taken, we believe that a renewed attempt to get the word "necessarily" removed would be unsuccessful and counter productive to our wider interests. On this basis we conclude that:

i. any public criticism should be dealt with on the lines of paragraph 7;

ii. if the point is raised in the Council our representative should take the line in paragraph 8;

iii. given American support for TNF modernisation, we need not concern ourselves unduly about possible Soviet exploitation of the word "necessarily" (paragraph 9);

iv. Ministers may however wish to consider seeking as soon as possible more concrete assurances from the United States Administration about the effect of SALT II on our possible future requirements (paragraph 5).

May 1979

INTERPRETIVE STATEMENT ON NON-CIRCUMVENTION

The following is a revised text of the US interpretive statement, incorporating three additional changes.

In the view of the United States, the non-circumvention provision in the SALT agreement simply makes explicit the inherent obligation any state assumes when party to an international agreement not to circumvent the provisions of that agreement. It is a basic tenet of international law that agreements once entered into are to be carried out and not circumvented, and the United States would be so obligated with or without a non-circumvention provision. It is the position of the United States that the non-circumvention provision does not impose any additional obligation whatever on it beyond the specific obligations of the provisions of the treaty and, for the period of its effectiveness, the protocol, nor does it broaden the interpretation of those obligations.

The United States has consulted intensively with the Alliance throughout the SALT II negotiations, recognizing the important Alliance interest in the SALT II agreement which deals only with the strategic relationship between the United States and the Soviet Union. In view of the possible implications of the non-circumvention clause for Alliance cooperation, the United States reiterates what it has specifically stated in Alliance consultations during the negotiations, that is, the non-circumvention provision will not affect existing patterns of collaboration and co-operation with its allies, nor will it preclude cooperation in modernization. The United States believes that, in practice, the non-circumvention provision, which it will apply as stated below, will not interfere with continued nuclear and conventional cooperation with its allies.

As to the issue of transfers, the United States has consistently rejected the inclusion of a provision on non-transfer in the SALT agreement. We have made clear in the negotiating record that transfers of weapons or technology to our allies will continue and cannot, ipso facto, constitute circumvention. The United States will deal with future requests for transfers of weapons systems and technology on a case-by-case basis under the SALT II agreement, as it has done in the past. The transfer of weapons systems or technology for systems which were not numerically limited or prohibited by the agreement would be unaffected by the agreement. With respect to systems numerically limited in

the agreement, as under the interim agreement, transfers would not be necessarily precluded by the agreement. Of course, requests for such transfers would have to be dealt with in light of the circumstances of the situation and the particular request. This would also be the case if there were no agreement.

The United States will not be able to transfer to its allies or other states those weapons systems or technology uniquely related to such systems, which are prohibited to the United States itself by the agreement. The United States fully accepts its responsibility not to circumvent the agreement. For the United States to supply to other states systems of a type that is prohibited to the United States itself by a provision of the agreement would be a circumvention of the agreement, even if there were no non-circumvention provision.

In accordance with recognized international practice, no third party can be bound or legally affected by the obligations the United States assumes under the SALT agreement. The United States would reject and would view as inconsistent with the political and strategic purposes of the agreement any attempt by the Soviet Union to raise, on the basis of the non-circumvention provision, questions concerning the activities of states not party to the agreement. In both a legal and practical sense, only the United States is subject to challenge in connection with questions raised by the Soviet Union with respect to the SALT agreement.

ANNEX B

MESSAGE FROM PRESIDENT CARTER TO MR CALLAGHAN OF
27 APRIL 1979

I discussed very carefully with my advisers your recent message regarding SALT and non-circumvention. Let me state, first of all, that I very much appreciate the support that you have given me. Support for SALT by our closest friends is of enormous help to me.

As to the issue of wording that you raised, I am afraid that I cannot accommodate you for reasons that have already been communicated to your associates. At the same time I want to assure you that the agreement will not preclude established forms of co-operation and that requests for transfers of systems numerically limited in the Agreement will be dealt with on a case by case basis in the light of the circumstances of the situation and the particular request.

You can rest assured that the security concerns of our closest friends will be given priority attention. Again, let me thank you for your support and wish you well.

ANNEX C

STATE DEPARTMENT REPLY OF JUNE 1977

In general, the non-circumvention language proposed by the United States would not add any obligation to those of the other provisions in the Treaty. The fact of signing the Treaty indicates that we undertake not to circumvent it. Making this explicit through non-circumvention language adds no obligation, but does attempt to meet a Soviet concern on this point without the specificity and restrictions the Soviets have proposed. The United States position is that the non-circumvention language would apply only to the provisions of the Treaty.

As regards questions a. and b., nothing in either variant of the non-circumvention language proposed by the United States would affect the terms of the 1958 Agreement or the Polaris Sales Agreement of 1963. If the Soviets cited the provision in objection to United States/ United Kingdom co-operation under these agreements, the United States would respond that nothing in this non-circumvention language would prevent the United States from meeting its obligations under these two agreements, which predate the Treaty. The provision of the Treaty on conflicting international obligations applies only to future obligations.

Regarding question c., the non-circumvention language proposed by the United States would permit new forms of assistance which might be agreed by the United States and the United Kingdom in the future. Obviously, neither the United States nor the USSR would be free to pursue through third countries actions which it would be prohibited from pursuing on its own by the provisions of the Treaty. Any additional forms of assistance not prohibited by the Treaty would, of course, be a subject for discussion between the Governments of the United States and the United Kingdom.

ANNEX D

THEATRE NUCLEAR FORCES - AIR LAUNCHED CRUISE MISSILES

A. United Kingdom Questions to the State Department (October 1978)

1. Does the United States view the expected SAL Treaty limitations on air launched cruise missiles (ALCMs) as precluding in principle the transfer of long range nuclear capable ALCMs to the United Kingdom as part of an agreed programme to improve and modernise NATO's Theatre Nuclear Forces?

2. If the answer to 1. is Yes, would the position be changed if the United Kingdom were to establish that it was seeking ALCMs only to replace an obsolescent theatre nuclear system (the Vulcan force) with an up-dated capability?

3. Would any limitations under 1. and 2. above preclude a partial transfer of technology related to ALCMs?

B. Replies handed by Mr Vance to HM Ambassador on 20 December 1978

Question 1.

a. With respect to transfers, the United States has rejected the inclusion of a provision on non-transfer in the SALT Agreement, and has made it clear to the Soviets thattransfers of weapons or technology to United States allies will continue and cannot, ipso facto, constitute circumvention. The United States draft interpretative statement provides that the non-circumvention provision will not affect existing patterns of collaboration and co-operation between the United States and the Alliance, nor will it preclude co-operation on modernisation.

b. The proposed SALT Two agreement would permit the deployment of long-range nuclear-armed cruise missiles on airplanes and provides that air-planes equipped for such ALCMs capable of a range in excess of 600 km would be counted as heavy bombers in both the 2400 and 1320 aggregate limitations. There may also be a limit on the average number of ALCMs which could be deployed in a side's overall number of ALCM carriers.

c. As we have indicated in the draft United States interpretative statement, transfers of weapons numerically limited would not be necessarily precluded by the Agreement. Thus, the answer to question number 1 is No, the United States does not view the transfer of long-range ALCMs to the United Kingdom as precluded in principle.

d. Beyond the relationship to the SALT Two agreement, any actual United Kingdom request for long-range nuclear-armed ALCMs would, of course, pose policy issues, and would have to be dealt with in light of the circumstances of the situation and taking into account all relevant policy considerations.

Question 2.

a. Since the answer to question number 1 is No, the United States does not view the transfer of long-range ALCMs to the United Kingdom as precluded in principle. The answer to question number 2 is No, a fortiori.

b. In this case, as in the case of question number 1, a specific United Kingdom request would have to be dealt with in light of the circumstances at the time, taking into account all relevant policy considerations.

c. The qualification embodied in the United Kingdom's second question (ie the case of a United Kingdom request for ALCMs as replacements for an obsolescent portion of its nuclear capability) would be a factor in the consideration of a specific request, although we cannot say in advance whether it would be a decisive consideration.

Question 3.

a. Transfer of technology for systems numerically limited would not be precluded under the provisions of the proposed SALT Two agreement.

b. The qualification embodied in the United Kingdom's third question (ie technology vice systems) would, again, be one factor taken into account in the consideration of a specific United Kingdom request, although we cannot say in advance whether it would be a decisive consideration. Because major policy issues would be posed by an actual United Kingdom request along the lines of questions 1, 2 or 3, a United States decision on any such request would have to be taken at the highest level of government.

ANNEX E

UNITED STATES PUBLIC STATEMENTS ABOUT NON-CIRCUMVENTION

Department of State pamphlet, November 1978

There will be no ban on the transfer of cruise missile and other sophisticated technology.

Department of Defence Annual Report FY80, 25 January 1979

SALT II will not interfere with continued nuclear or conventional co-operation with our Allies.

Dr Harold Brown to the Senate Armed Services Committee, 25 January 1979

The agreement will protect the security interests of our Allies. We have consulted with the Allies on a regular basis throughout the negotiations. Improved theatre nuclear force options, including cruise missiles, remain open. The agreement will not affect existing patterns of collaboration and co-operation with our Allies, nor will it preclude co-operation in modernisation.

President Carter in a speech at Atlanta on 20 February 1979

The agreement will also permit us and our Allies to pursue all the defence programmes we believe we may eventually need - the MX missile; the Trident submarine and missiles; air, ground and sea launched cruise missiles; cruise missile carrier aircraft; and a new penetrating bomber.

ANNEX F

TEXT OF UNITED KINGDOM EXPLANATORY STATEMENT
(AGREED WITH AMERICANS)

The key part of the United States interpretative statement is the comment that transfers of weapons or technology will continue and cannot ipso facto constitute circumvention. The statement makes clear that transfers of numerically limited systems are not precluded in principle. The Americans have told us that the word "necessarily" was included in the phrase "with respect to systems numerically limited in the agreement, transfers would not be necessarily precluded by the agreement" in order to guard against the suggestion that all transfers of such systems to their Allies would be possible without infringing the integrity of the SALT agreement, irrespective of their magnitude and character. We are satisfied that the United States Administration would not feel debarred from meeting reasonable requests for such transfers on account of their SALT obligations. The United States statement makes clear the view of the United States Government that in practice the SALT non-circumvention provision will not interfere with continued nuclear and conventional co-operation between the United States and its Allies. This is also the understanding of the British Government.