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U.S. Arms Transfer Restrictions and AUKUS Cooperation

On September 15, 2021, Australia, the United Kingdom (UK), and the United States announced an "enhanced trilateral security partnership," named AUKUS after the participating countries. The partnership consists of two lines of effort, known as pillars: Pillar One is to provide Australia with a nuclear-powered submarine capability. Pillar Two is jointly to develop "advanced military capabilities."

Arms Exports Background

U.S. participation in Pillar Two may require the transfer of items or information via Foreign Military Sales (FMS), a term that refers to the sale of U.S.-origin defense articles, equipment, services, and training (hereinafter referred to as "defense articles") on a government-to-government basis. Such participation may also require U.S. government-issued export licenses for Direct Commercial Sales (DCS), a U.S. program for registered U.S. firms to sell defense articles directly to eligible foreign governments and international organizations. U.S. participation in AUKUS Pillar One is governed by different laws and regulations. (See CRS In Focus IF11999, *AUKUS Nuclear Cooperation*, by Paul K. Kerr and Mary Beth D. Nikitin, and CRS Report RL32418, *Navy Virginia-Class Submarine Program and AUKUS Submarine (Pillar 1) Project: Background and Issues for Congress*, by Ronald O'Rourke.)

The FMS and DCS processes are statutorily governed by the Arms Export Control Act (AECA; P.L. 90-629, as amended; 22 U.S.C. §§2751 et seq.) and the Foreign Assistance Act of 1961 (FAA; P.L. 87-195, as amended; 22 U.S.C. §§2151 et seq.). The Department of State administers the AECA through the International Traffic in Arms Regulations (ITAR; 22 C.F.R. Parts 120-130), which also establishes licensing policy for the export of defense articles and contains the U.S. Munitions List (USML), a list of controlled defense articles. The ITAR do not apply to FMS transactions.

The Department of State's Office of Regional Security and Arms Transfers, in the Bureau of Political-Military Affairs (PM), oversees FMS transactions; DOD's Defense Security Cooperation Agency (DSCA) implements specific FMS cases. The State Department's Directorate of Defense Trade Controls (DDTC), also in the PM Bureau, issues and administers licenses for commercial sales. AECA Section 38(j)(1)(C) limits the scope of items that the United States can include in Defense Trade Cooperation Treaties, such as those described below. State Department officials have identified the role of the Defense Technology Security Administration (DTSA), which manages risks from the international transfer of defense technology and critical information, as particularly important for Pillar 2 activities.

FMS and DCS transfers meeting certain monetary value thresholds are subject to congressional review. Section 36 of the AECA (22 U.S.C. §2776) requires the President to submit a formal notification of such transactions to Congress before issuing a Letter of Offer and Acceptance for an FMS transfer or an export license for a DCS transfer. The executive branch may not proceed with such transfers if Congress adopts a joint resolution of disapproval within an AECA-prescribed time period. In addition, 10 U.S.C. §8677 requires the transfer of any naval vessel that exceeds 3,000 tons or is less than 20 years of age to be "specifically authorized by law." Section 1352 of the National Defense Authorization Act for Fiscal Year 2024 (NDAA; P.L. 118-31) exempts exports of three nuclear-powered submarines from these AECA Section 36 and 10 U.S.C. §8677 requirements.

License Exemptions

The AECA and the ITAR exempt certain exports from some licensing requirements. The AECA and the ITAR also authorize export license exemptions for certain projects undertaken pursuant to governmental agreements. Assistant Secretary of State Jessica Lewis testified on May 24, 2023, that the "vast majority of U.S.-Australia defense trade occurs via FMS."

Defense Trade Cooperation Treaties

Defense Trade Cooperation Treaties, which entered into force in April 2012 and 2013 with Australia and the United Kingdom, respectively, exempt certain DCS transfers to (and retransfers among) approved communities of Australian and British end users from export licensing requirements. 22 C.F.R. Part 126.15 specifies that license applications for exporting defense articles to Australia or the United Kingdom "will be expeditiously processed" by the State Department "in consultation with" DOD. The ITAR also contains provisions governing exports pursuant to the treaties; these provisions include specific requirements regarding such matters as consignees, marking of exported items, and record-keeping. The regulations also detail congressional notification requirements covering exports pursuant to these treaties.

These treaties may not cover all envisioned AUKUS technology cooperation because the treaties exempt certain defense articles from their scope. Moreover, the treaties currently cover fewer defense articles than when the treaties entered into force because, as a result of Obama Administration-initiated changes to U.S. export controls, the Department of Commerce now controls exports of those articles. U.S. regulations may permit only FMS transfers of some sensitive AUKUS-covered technology items. (See CRS In Focus IF12425, *Defense Primer: International Armaments Cooperation*, coordinated by Luke A. Nicastro.)

Canadian Exemption

22 C.F.R. Part 126.5(a) permits "the permanent and temporary export" of certain unclassified defense articles to Canada without an export license. Canadian recipients must be "Canadian Federal or Provincial governmental

authorities acting in an official capacity" or a "Canadian-registered person." Some ITAR requirements, such as license eligibility provisions contained in 22 C.F.R. Part 120.1(c) and Part 120.1(d), still apply to such exports.

The Canadian exemptions include provisions governing non-Canadian entities. For example, retransfers to non-U.S. destinations of items exported pursuant to these exemptions "must in all instances have the prior [DDTC] approval." This requirement also applies to retransfers within Canada. In addition, a U.S. person must obtain an export license for an exempted defense article if the exporter "has knowledge that the defense article … is being exported for use other than by a qualified Canadian-registered person or for export to another foreign destination."

Reacting to State Department-described past "unauthorized" exports and re-exports of U.S.-origin defense articles to Canada, the State Department announced revisions to the Canadian exemption in April 1999. These revisions included "removal of the exemption for several USML items." The two governments subsequently announced in October 1999 that Canada had agreed to improve Ottawa's export controls in exchange for U.S. revision of Washington's controls. Following Canada's implementation of such improvements, the State Department announced in 2001 an ITAR amendment expanding "significantly the scope of the Canadian exemption."

AECA Section 38(j)

AECA Section 38(j)(1)(A) authorizes the President to "exempt a foreign country" from AECA export licensing requirements if the United States "has concluded a binding bilateral agreement with the foreign country." This provision does not apply to existing licensing exemptions for exports to Canada or pursuant to the Defense Trade Cooperation Treaties. AECA Section 38(j)(2) mandates that such an agreement require the foreign government to implement changes necessary for establishing "an export control regime that is at least comparable" to U.S. "law, regulation, and policy" governing transfers and retransfers of both tangible and intangible exports, including defense articles.

AECA Section 38(j)(3) requires the President to, at least 30 days before exempting a country from AECA export licensing requirements, transmit to the House Foreign Affairs Committee and the Senate Foreign Relations Committee a certification that the United States and the foreign government have entered into a bilateral agreement meeting the above-described requirements. Similarly, AECA Section 38(f)(2) stipulates that the President may not exempt a country from AECA export licensing requirements unless the President has transmitted a report to the same committees that describes the exemption's scope and contains an Attorney General determination that a bilateral agreement concluded pursuant to Section 38(j)(1)(A) "requires the compilation and maintenance of sufficient documentation" concerning exports of U.S.-origin defense articles "to facilitate law enforcement efforts to detect, prevent, and prosecute criminal violations."

Special Comprehensive Export Authorizations

Under ITAR 22 C.F.R. Part 126.14, the DDTC issues special comprehensive export authorizations for certain "commercial export endeavor[s]" involving registered U.S. exporters and NATO members, Australia, Japan, or Sweden. Part 126.14 describes, as well as specifies requirements for obtaining, four comprehensive export authorizations: Major Project Authorization; Major Program Authorization; Global Project Authorization; and Technical Data Supporting an Acquisition, Teaming Arrangement, Merger, Joint Venture Authorization.

International Armaments Cooperation

The AECA exempts activities contained in International Armaments Cooperation (IAC) agreements from certain AECA reporting and export license requirements. Such agreements comprise a range of research, development, testing, and evaluation (RDT&E); procurement; and sustainment partnerships between DOD and foreign governments, militaries, or commercial entities. According to DSCA, IAC activities entail "interfacing with international partners during the research, development, test, and evaluation … and production phases of the U.S. systems acquisition process." IAC programs use bilateral or multilateral agreements with participating governments to authorize, scope, and manage particular programs and projects. Pursuant to AECA Section 27(g), FMS and DCS transactions governed by IAC agreements with NATO countries are exempt from some congressional review requirements. 22 C.F.R. Part 126.4 exempts from AECA licensing requirements the "export, reexport, retransfer, or temporary import of a defense article or the performance of a defense service," pursuant to an IAC agreement with any government.

Pillar Two Implementation

Lewis testified in May 2023 that the State Department would implement an initial interim measure, named the AUKUS Trade Authorization Mechanism to establish license exemptions for certain exports to approved entities within AUKUS countries. However, the FY2024 NDAA provisions described below have apparently obviated this effort.

Section 1343 of the NDAA adds a subsection to AECA Section 38 requiring the President, after certifying to Congress that Australia or the UK "has implemented standards for a system of export controls" satisfying all elements of AECA Section 38(j)(2)(A) and certain elements of AECA Section 38(j)(2)(B), to exempt, with some exceptions, DCS transfers "between the United States and that country or among the United States, the United Kingdom, and Australia" from export licensing requirements. The State Department informed Congress in an April 19 letter that neither the Australian nor the British export control systems yet satisfy the AECA requirements.

Section 1344 of the NDAA requires the State Department to "establish an expedited" export license-application review process for transfers to Australia, the United Kingdom, and Canada of defense articles and defense services not covered by an ITAR license exemption. A proposed State Department rule published on May 1 contains potential ITAR amendments that would implement the above-described NDAA provisions.

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