

THE GEORGE WASHINGTON UNIVERSITY
GOVERNMENT PROCUREMENT LAW PROGRAM

TRADE CONTROLS AND THE AUKUS EXCEPTION: NEXT STEPS

Friday, November 1, 2024
12 pm ET / 9 am PT



Welcome

Christopher Yukins

Lynn David Research Professor in Government Procurement Law
GW Law School – Government Procurement Law Program

- Recording available (later today):
 - publicprocurementinternational.com/webinar-trade-controls-aukus/ (with program materials)
 - *GW Law Government Procurement Law Program* YouTube page
- Audience Questions & Answers
- Speakers' statements are in their personal capacities



Allen Green



Special thanks to ABA Public Contract Law Section
– International Procurement Committee

Webinar: Over 200 Registrants from 32 Countries

Panelists

William (Bill) Greenwalt

- William Greenwalt is a **Visiting Fellow, American Enterprise Institute**, where he focuses on the expansion of **America's defense industrial base** and defense management issues, including on issues of **technology-transfer reform, defense acquisition and procurement reform, technology policy and innovation**.
- Dr. Greenwalt is also a founder of the **Silicon Valley Defense Group** and a member of the **Procurement Round Table**.
- When he served as **deputy under secretary of defense for industrial policy**, he advised the under secretary of defense for acquisition, technology, and logistics on all matters relating to the defense industrial base.
- In Congress, he served as a **senior staff member for the Senate Armed Service Committee, the Senate Governmental Affairs Committee, and the House Appropriations Committee**.
- In the private sector, Dr. Greenwalt has worked **for Lockheed Martin** and the **Aerospace Industries Association**.



Nicholas Townsend

- Nicholas Townsend is counsel at an international law firm, **Arnold & Porter**, resident in the firm's Washington offices.
- Nick has **extensive experience in export controls, trade sanctions, cybersecurity, privacy, and the aerospace industry.**
- His practice includes **conducting internal investigations and audits** regarding the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR), advising foreign and domestic companies **on compliance with financial sanctions** on Iran, Russia, Ukraine, Cuba, Venezuela, and other countries, representing companies before **the Committee on Foreign Investment in the United States (CFIUS)**, obtaining **Office of Foreign Assets Control (OFAC) licenses and export authorizations under the ITAR and EAR**, and preparing **Foreign Corrupt Practices Act (FCPA) and export control compliance plans**



Lorraine Romero

- Lorraine (Lori) Romero is the lead **Trade Compliance Counsel with the Global Trade Group of L3Harris Technologies.**
- Lori provides **enterprise legal advice and guidance on issues involving international trade controls** codified in the Arms Export Control Act, International Traffic in Arms Regulations, Export Administration Regulations, sanctions, boycott and anti-boycott laws and regulations. Lori assumed the position of Director, Lead Trade Compliance Counsel in 2021 and **supports the Vice President of L3Harris' Global Trade Group.** Lori reports directly to the L3Harris General Counsel.
- Before joining L3Harris in 2021, Lori served as **Director, Senior Counsel at CGI Federal Inc.** Her duties at CGI Federal included international corporate secretarial, trade compliance, privacy, and intellectual property.
- Before joining CGI Federal, Lori served in increasingly senior roles in the law department of **Raytheon Company including trade compliance, supply chain counsel, and providing legal support to various business units within Raytheon.** She served as the **General Counsel to Raytheon's transatlantic joint venture, Thales Raytheon Systems, Inc.**



Marques Peterson

- Marques Peterson is the **managing partner of Pillsbury's Washington, DC office.**
- His practice focuses on **counseling and representing aerospace/defense and civil contractors in both federal procurement and international defense sales.** He regularly helps clients navigate the intersection of government contracting and international defense sales processes.
- He advises clients on **foreign military sales, direct commercial sales and contracts, and the complex regulatory compliance requirements** associated with such international defense sales.
- Prior to entering private practice, Marques served on **active duty in the Air Force Office of General Counsel** at the Pentagon, where he counseled senior leaders on numerous acquisition-related matters including services contracting and space acquisitions.



AUKUS Overview



America Can't Produce the Weapons It Needs for the Future. This Could Help.

The United States, Australia and Britain are making it easier to share defense technology, hoping to spur the innovations needed to keep up with China.

▶ Listen to this article · 2:01 min [Learn more](#)

📖 Share full article 🔗 📌



The leaders of Australia, the United States and Britain gathered in San Diego last year to discuss a submarine alliance. Hailun Jiang/The New York Times

NYT, August 15, 2024

Australia – United Kingdom – United States (AUKUS)

In September 2021, the three countries announced the **AUKUS partnership**. AUKUS is an **enhanced trilateral security partnership** intended to strengthen the three nations' ability to support security and defense interests. The AUKUS partnership seeks to **promote information and technology sharing**, and to foster deeper integration of security and defense-related science, technology, industrial bases and supply chains.

Photo: Pres. Joe Biden greets UK Prime Minister Rishi Sunak and Australian Prime Minister Anthony Albanese at AUKUS meeting, San Diego (March 2023) (photo: U.S. DoD)



AUKUS – Two Pillars

The AUKUS partnership launched with two initiatives. The first pillar was a **commitment to support Australia in acquiring nuclear-powered submarines** for the Royal Australian Navy. **Pillar 2** seeks to **enhance joint capabilities and interoperability**, with a focus on cybersecurity, artificial intelligence, quantum technologies and additional undersea capabilities.



AUKUS: Trade Controls

As part of that initiative to enhance technology exchanges, in **August 2024 the State Department certified to Congress that, in accordance with the AUKUS arrangement, the UK and Australian export control systems are comparable to those of the United States and both nations have implemented reciprocal export exemptions for U.S. entities.** On the U.S. side, the two lead U.S. agencies on trade controls, the Commerce Department and the State Department, have announced **rule changes** (respectively, interim and interim final) to **reduce compliance burdens and streamline AUKUS-related trade between the United States, Australia, and the United Kingdom**, and more broadly to increase trade between the three countries.

Photo: U. S. Secretary of Defense Lloyd Austin with Richard Marles MP, Deputy Prime Minister and Minister of Defense, Australia, and Grant Shapps, UK Secretary of State for Defense (Dec. 2023) (photo: U.S. DoD)



Agenda

01

Nick
Townsend:
Introduction to
Trade Controls

02

Bill Greenwalt:
Understanding
AUKUS

03

Lori Romero:
Persistent
Issues Under
AUKUS

04

Marques
Peterson:
Market Impact
of AUKUS

Presentations



Arnold & Porter

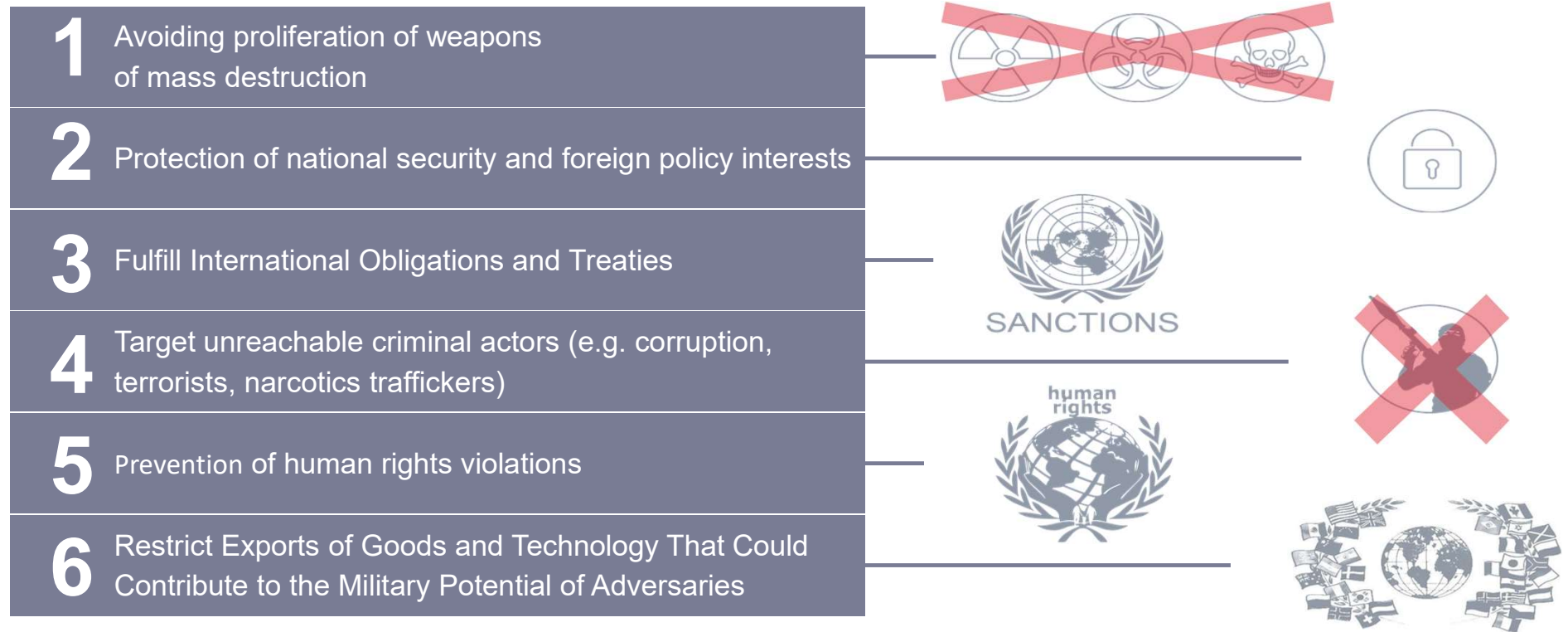
Innovative. Integrated. Industry-Focused.

U.S. Export Controls: Introduction Nicholas Townsend

Privileged & Confidential

©2024 Arnold & Porter Kaye Scholer LLP. All Rights Reserved.

Purpose - U.S. Export Controls and Trade Sanctions

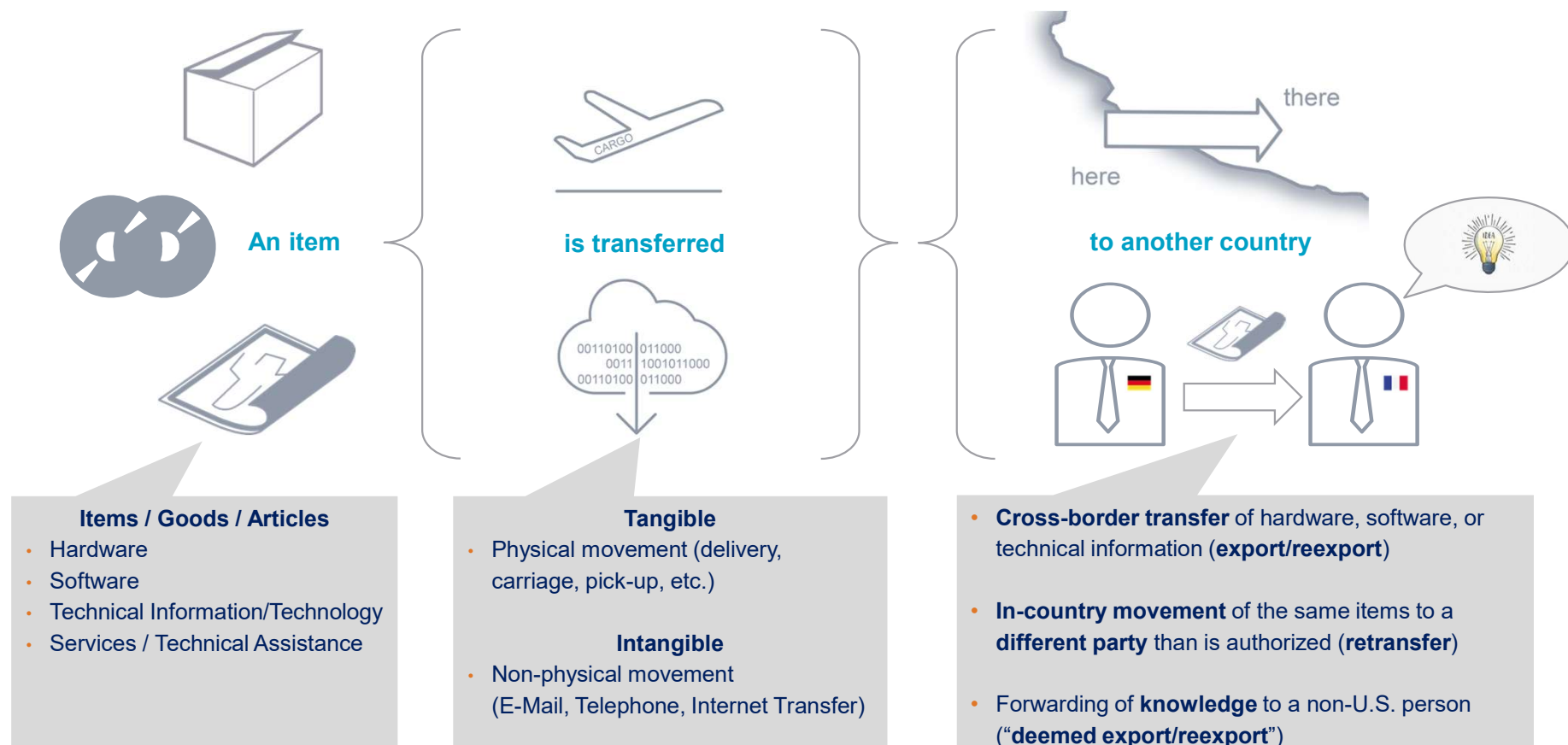


Exports

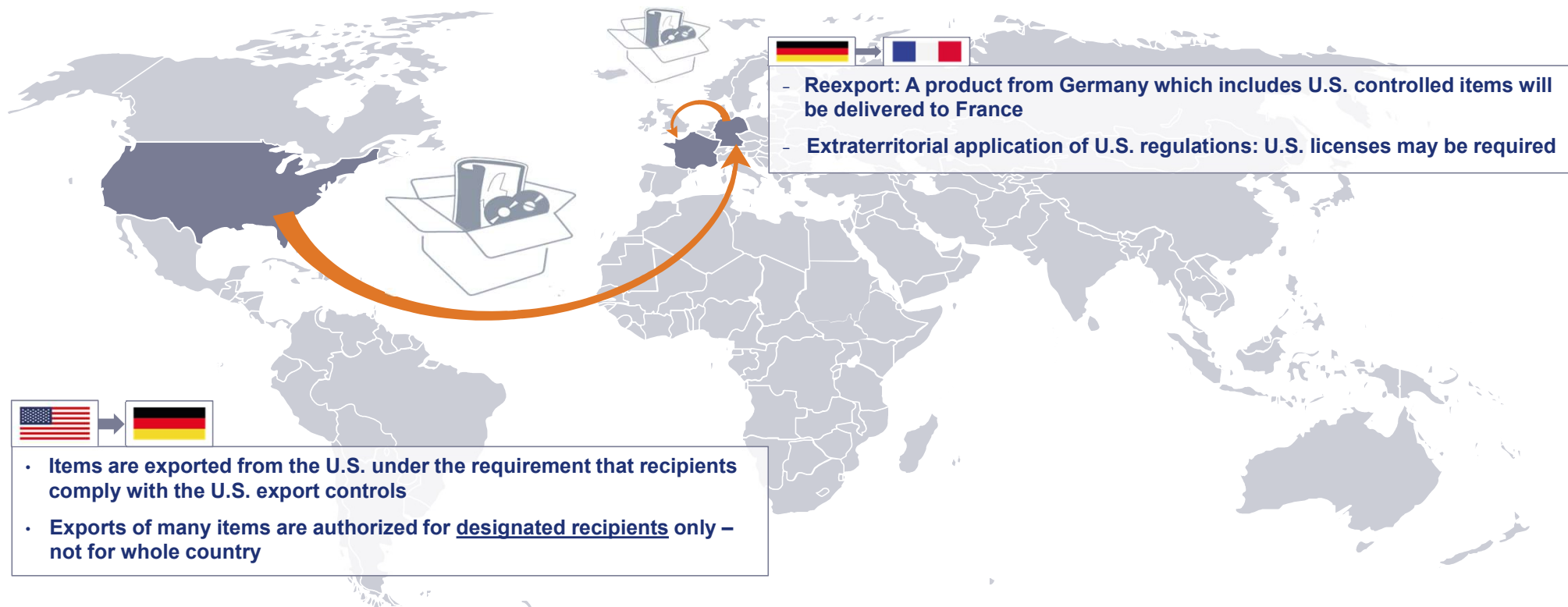


- What's an “export”?
 - The actual shipment or transmission out of the U.S.
 - Jurisdiction extends to any item physically in the U.S., regardless of the country of origin
 - The “release” in the U.S. (or anywhere) of controlled information to a non-U.S. person
 - Oral discussions
 - Visual inspection

Exports, Reexports, and Retransfers



Exports and Reexports



Primary U.S. Export Control Agencies



Law	Arms Export Control Act ("AECA")	Export Control Reform Act of 2018 ("ECRA")
Agency Responsible	State Department's Directorate of Defense Trade Controls ("DDTC")	Commerce Department's Bureau of Industry and Security ("BIS")
Regulation	International Traffic in Arms Regulations ("ITAR")	Export Administration Regulations ("EAR")
Control List	U.S. Munitions List ("USML")	Commerce Control List ("CCL")



The Spectrum of US Export Controls EAR to ITAR

More Controls and More Compliance Requirements // More Likely to Need U.S. Government Approval

Item	Quantity	Value	Value	Value	Value
Financial statements about flamethrower sales	10,000	10,000	10,000	10,000	10,000
Financial statements about flamethrower sales	10,000	10,000	10,000	10,000	10,000
Financial statements about flamethrower sales	10,000	10,000	10,000	10,000	10,000
Financial statements about flamethrower sales	10,000	10,000	10,000	10,000	10,000
Financial statements about flamethrower sales	10,000	10,000	10,000	10,000	10,000
Financial statements about flamethrower sales	10,000	10,000	10,000	10,000	10,000
Financial statements about flamethrower sales	10,000	10,000	10,000	10,000	10,000
Financial statements about flamethrower sales	10,000	10,000	10,000	10,000	10,000
Financial statements about flamethrower sales	10,000	10,000	10,000	10,000	10,000
Financial statements about flamethrower sales	10,000	10,000	10,000	10,000	10,000

Financial statements about flamethrower sales

Not Controlled



A lighter

EAR99



An industrial furnace

Other EAR



A specially designed component of a weaponized flamethrower tank

EAR "600" Series



A weaponized flamethrower tank

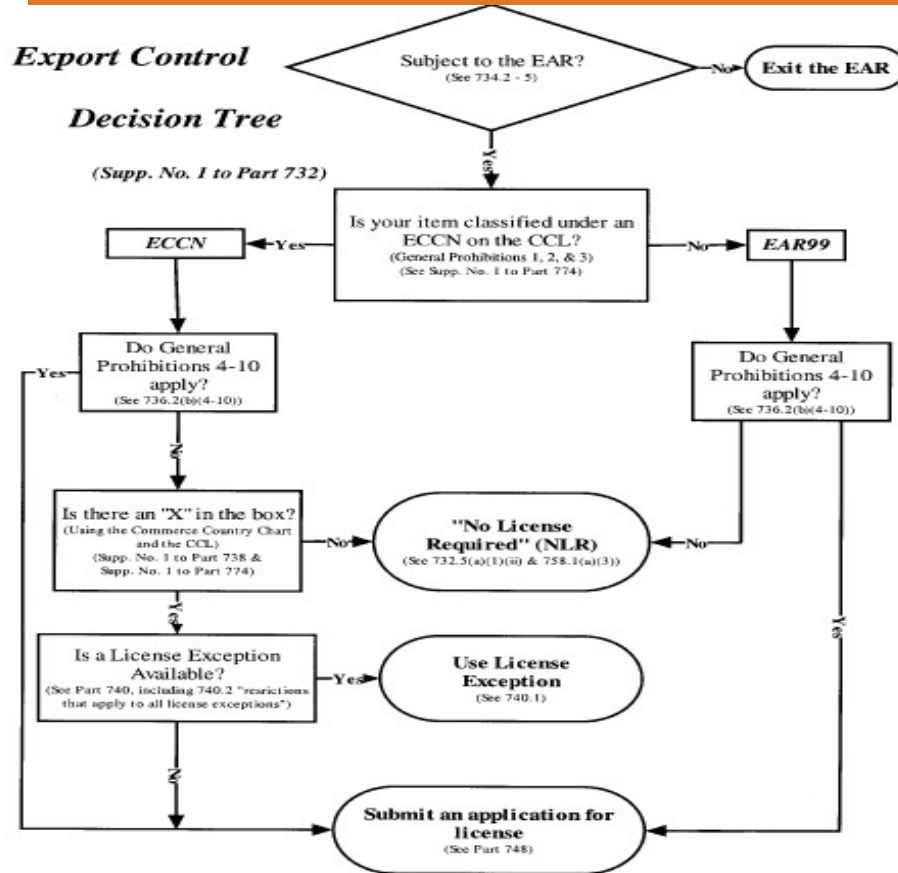
ITAR



Licensing under EAR vs. ITAR (oversimplified)

EAR is Complex, But Flexible

ITAR is Simple, but Strict



**PERMISSION
REQUIRED**

William Greenwalt

Understanding AUKUS





AUKUS: Introduction

- September 15, 2024 marks the third anniversary of AUKUS.
- Pillar I of AUKUS will hopefully transfer Virginia class nuclear submarines to Australia by the early 2030s and develop a joint UK-Australian submarine in the 2040s.
- Pillar II meanwhile focuses on jointly developing emerging technology solutions and has the most potential to deliver anything tangible in the near term to enhance deterrence with China.
- AUKUS requires a degree of integration between the industrial bases of the United States, the United Kingdom, and Australia, that has so far remained elusive primarily due to US export controls processes.
- Despite an intense amount of bureaucratic engagement and well-intended legislative efforts to address the so-called US International Traffic in Arms Regulations (ITAR) problem, the three countries have been only able to agree to a marginal self-defeating path forward.

AUKUS Trade Control Reform: An Assessment

- The framework that will guide AUKUS technology cooperation has now become clearer and is incredibly disappointing.
 - Tom Corbin and I recently documented the path to this outcome in a US Studies Centre report, *AUKUS enablers? Assessing defence export control reforms in Australia and the United States*.
- Unfortunately, decisions made on export control process reform ensure that the benefits from AUKUS either remain far off into the future or are unlikely to ever be achieved.
- The dream of a collective industrial base working hand-in-glove on new cutting-edge innovation cannot happen under rule changes that the US State Department has reluctantly acquiesced to, and are now being emulated by a perhaps naïve Australian government.
- Only the UK Ministry of Defense has displayed any semblance of common sense and understanding in its rule changes of how the wrong type of incentives and processes destroy innovation. As such, the UK may be the best positioned of the three powers to potentially take advantage of emerging technology trends, if it has enough confidence in itself to seize that outcome.



AUKUS: Opportunity Missed

- As a result of primarily US policy decisions and ham-fisted negotiations with its partners, AUKUS is now at best a backwards-looking enterprise, and even here progress cannot be guaranteed.
 - These changes primarily address the process with older, non-AUKUS systems and technical data originating from the US. Many of the technologies necessary for Pillars I and II will not even be covered under this “AUKUS” ITAR exemption.
- In the last three years, AUKUS has thus evolved from a futuristic vision of leveraging and jointly developing new technology solutions and capabilities, to ultimately the granting of an obsolete “Canadian-like” ITAR exception to the UK and Australia that was first recommended by the Clinton Administration.
- While limited US export control reform proposals addressing legacy systems, even if three decades too late, are welcome in theory, proposed changes seem more designed to show progress rather than elicit any change to the balance of power. China will not be fooled by the innovation theater being conducted under the rules of an outdated arms control ideology dating from the 1970s.
- The US thus appears to be stuck in an America-centric Cold War-era mindset when it created control processes aligned around a time when it completely dominated defense technology, and rapid commercial technology advances relevant to defense had yet to occur.

AUKUS: Outlook

- As AUKUS enters its fourth year with impending American elections, the partner countries need to choose whether to overturn this trajectory and pursue bolder export control reforms than what have been agreed to so far.
 - This will likely have to wait for a new US Administration and Congress that are committed to stopping the bureaucratic sabotage emanating around ITAR that is doing immense damage to US national security, all in the name of protecting it.
- Meanwhile, in the last three years, as AUKUS country bureaucracies and Congress have danced over the definition of what it means to have comparable export control processes, the Communist Party of China and its military have only grown stronger while autocratic nations have grown closer.
- The bureaucratic resistance to reforming export control processes with our closest allies has kept the US from focusing on new emerging technology trends and recognizing the potential importance of allied and commercial contributions to US national security.
- Meanwhile, the technology balance between the US and China is rapidly degrading while little has been tangibly added through the AUKUS mechanism. Without a course correction, AUKUS and the US' Pacific strategy will continue on a track for failure.

Lorraine Romero – L3Harris

Persistent Legal Issues Under AUKUS



AUKUS Issue #1

Defense Services

- Service must take place within the territory of the exemption
- Exemption does not cover services performed by a USPAB
- Must assure coverage for USML services not covered by the exemption
- Services definition not tied to Defense Articles and continuing to grow with expansion to intelligence

AUKUS Issue #2

ITAR Contamination

Avenues for Contamination

- “See Through Rule” for parts and components - 120.11(c)
- Services involving the design, development, manufacture, production, assembly, etc. of a foreign defense article (transfers, retransfers, and reexports)
- Use of US Technical Data in the design, development, manufacture, production, assembly, etc. of a foreign defense article (transfers, retransfers, and reexports)

Results of Contamination

- Foreign person must obtain authorization from DDTC for any transfer or retransfer of otherwise foreign defense articles if:
 - Outside the original end use
 - Outside of the approved community

Impact of AUKUS on the Defense Market

Marques Peterson

Partner, Government Contracts & Disputes

Pillsbury Winthrop Shaw Pittman



pillsbury

Overview: AUKUS Partnership Pillars

Pillar 1: Submarines

- Support Australia's acquisition of conventionally armed, nuclear-powered submarine (SSN) capability.
- Key elements:
 - Rotational deployments of U.S. and UK SSNs from Australia
 - Sale of three to five Virginia-class SSNs to Australia
 - Replacement SSNs to be built for the U.S. Navy
 - UK and Australia construction of SSN AUKUS boats incorporating U.S. technology
 - Australian investments in U.S. and UK submarine industrial bases.

Pillar 2: Advanced Capabilities

- Enhance joint advanced capabilities and interoperability in several focus areas:
 - Uncrewed maritime systems
 - Artificial Intelligence & Autonomy
 - Electronic Warfare
 - Quantum Technologies
 - Cyber
 - Hypersonic & Counter-Hypersonics
 - Innovation
 - Information Sharing

Impact of AUKUS on the Defense Market

- Expanded array and range of capabilities
 - Integration of partner capabilities enhances overall interchangeability (e.g., tools, forces)
 - Resiliency of munitions stockpiles across AUKUS nations
 - Faster data and intelligence sharing across the alliance, sourced from a wide array of assets
- Co-development, joint operations lead to faster deployment of technologies
 - Each country benefits from the capabilities of the other partners
 - Scale better than future capabilities faster
 - Maritime Big Play trilateral test series
 - Integrated experiments and exercises enhancing capability development, improving interoperability, and increasing sophistication and scale of autonomous systems in the maritime domain.
 - Autonomous Warrior, October 2024 - Trilateral collaboration to improve maritime awareness through networked autonomy, decision advantage, enhanced strike.
 - Reduce acquisition, maintenance, training costs by creating economies at scale
 - Opportunity to showcase new technologies, systems

Impact of AUKUS on the Defense Market

- Defense trade and industrial base collaboration
 - Reduced export control restrictions to facilitate trade, enhance technological innovation among AUKUS-partners
 - Expedited processing of certain export license applications
 - Expanded authority to retransfer classified defense articles to certain cleared Australian, UK citizens
 - Reduced transactional costs with fewer license requirements
 - “Going Global” – Australian government program to assist companies seeking to team with U.S. defense prime contractors
- Entry into the U.S. defense market
 - Establishing a U.S. footprint expands opportunities for Australian defense companies in the U.S. market
 - Facilitate direct relationships with the U.S. government, and closer collaboration with U.S. industry
 - Insights into supply chain constraints, government requirements, and matching products to a government demand
 - Increased collaboration resulting from the ability to participate in classified programs

Panel & Audience Discussion

- The AUKUS arrangement seems a breakthrough – is that true?
- Why has the AUKUS arrangement been difficult to implement?
- What are next steps in the AUKUS arrangement?
- Does AUKUS provide a template for future agreements with other allies?

Conclusion

Video recording of today's session will be available on
GW Law – Government Procurement Law **YouTube Page**
& **www.publicprocurementinternational.com**