

The trojan submarine: AUKUS, Pillar II, and the U.S. ITAR

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Abstract

Since the announcement of the AUKUS trilateral security partnership in September 2021, critics have attacked the U.S. International Traffic in Arms Regulations (ITAR) as a key obstacle to its success. Echoing long-standing frustrations over the regulatory burden of the ITAR, these critics manufactured an “AUKUS-ITAR dilemma” which seemed to require a general ITAR exemption for military trade between the three partner countries. This dilemma minimized critical disparities between the Australian, U.K., and U.S. military export control regimes and exaggerated the impact of ITAR reform on the success of AUKUS, especially on the emerging technology collaboration envisioned in the second pillar of the partnership. Yet recent U.S. legislation and regulatory reform indicate that rather than eliminating U.S. military export controls, the AUKUS-ITAR dilemma has resulted in a more robust, ITAR-based plurilateral export control regime dominated by U.S. interests and primed for further expansion.

Keywords

AUKUS, Australia, Canada, critical and emerging technologies, ITAR, military export controls, United Kingdom, United States.

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Introduction

In September 2021, the United States, Australia, and the United Kingdom jointly announced a trilateral security partnership to address evolving threats in the Indo-Pacific region—AUKUS. Described as “the most significant security arrangement among the three countries in a generation,” this partnership was initially perceived as a vehicle for the transfer of nuclear propulsion technology to Australia for use in conventionally-armed, nuclear-powered submarines.¹ External analysis, especially in the U.S., focused on the controversial export of nuclear technology and reactions from the impetus for the new partnership: China.² While the second-last paragraph of the official joint statement also promised new collaboration in “cyber capabilities, artificial intelligence, quantum technologies, and additional undersea capabilities,” this second pillar of AUKUS seemed like an ambiguous afterthought.³ Submarines, not science fiction, were the core deliverable of the partnership.

Yet as the timeline for the submarine sales (Pillar I) lengthened, Pillar II emerged as not only central but also essential to the AUKUS partnership. In the words of one former U.S. official and industry analyst in March 2023, “If Pillar Two fails, AUKUS will be a failure. Plain and simple.”⁴ Industry representatives and several former U.S. ambassadors to Australia positioned U.S. military export controls, specifically the U.S. International Traffic in Arms Regulations (ITAR) as obsolete Cold War-era relics and impediments to collaboration among the three AUKUS partners, creating an “AUKUS-ITAR dilemma.” The ITAR was called a “unique threat” to U.S. national security, and the “most significant obstacle” to winning a strategic competition with China.⁵ These arguments echoed long-

¹ Derek E. Mix and Bruce Vaughn, “AUKUS and Indo-Pacific Security,” Congressional Research Service, IF12113, May 19, 2022, p. 1, <<https://crsreports.congress.gov/product/pdf/IF/IF12113>>.

² Tyler Pager and Anne Gearan, “U.S. Will Share Nuclear Submarine Technology with Australia as Part of New Alliance, A Direct Challenge to China,” *The Washington Post*, September 16, 2021, <<https://www.washingtonpost.com/politics/2021/09/15/us-will-share-nuclear-submarine-technology-with-australia-part-new-alliance-direct-challenge-china>>.

³ “Joint Leadership Statement on AUKUS,” The White House, September 15, 2021, <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/15/joint-leaders-statement-on-aucus>>.

⁴ William Greenwalt, quoted in Joe Gould and Bryant Harris, “Big AUKUS News Coming, but Hill and Allies see Tech Sharing Snags,” *Defense News*, March 7, 2023, <https://www.defensenews.com/pentagon/2023/03/07/big-aucus-news-coming-but-hill-and-allies-see-tech-sharing-snags>.

⁵ James Carouso et al., “ITAR Should End for Australia,” Center for Strategic and International Studies, December 7, 2022, <<https://www.csis.org/analysis/itar-should>>.

standing frustrations over the regulatory burden of the ITAR in all three countries, and inspired a series of radical proposals from hawkish members of Congress to implement a blanket ITAR exemption for AUKUS partners.

However, the passage of the 2024 National Defense Authorization Act (NDAA) in December 2023 revealed that these arguments had not been as persuasive as advocates had originally hoped. Instead, the U.S. Congress pursued a more moderate version of ITAR reform predicated on ensuring comparability between that the U.S., Australian and U.K. export control regimes, with implementation entrusted to conservative elements within the U.S. Department of State. In May 2024, the State Department released a proposed rule outlining a limited ITAR exemption that was finalized in August and implemented on September 1.⁶ Instead of receiving the crown jewels without caveat, Australia and the U.K. were forced to adopt ITAR-like regimes of their own.

Does this result mean Congress missed a “generational opportunity” to implement AUKUS and ensure a new era of allied collaboration and innovation?⁷ Not quite. This article argues that Congress has evaded an attempt to use the AUKUS/ITAR dilemma as a “trojan horse” for long-standing commercial frustrations with the ITAR. This attempt built on previous initiatives to exempt Australian and British entities from ITAR licensing requirements and minimized critical disparities between the Australian, U.K., and U.S. military export control regimes. It also misaligned the goals of Pillar II and the probable outcomes of blanket ITAR exemptions, exaggerating the impact of the ITAR on military trade between the three countries – especially exports of critical and emerging technologies. As shown by the existing Canadian ITAR exemption,

end-australia>; William Greenwalt and Tom Corben, *Breaking the Barriers: Reforming US Export Controls to Realise the Potential of AUKUS*, (Sydney: United States Studies Centre, May 2023), p. 10, <<https://www.ussc.edu.au/breaking-the-barriers-reforming-us-export-controls-to-realise-the-potential-of-aukus>>.

⁶ U.S. Department of State, “International Traffic in Arms Regulations: Exemption for Defense Trade and Cooperation Among Australia, the United Kingdom, and the United States,” *Federal Register* 89 n. 85 (May 1, 2024), pp. 35028-35032, <<https://www.federalregister.gov/d/2024-08829>>; “International Traffic in Arms Regulations: Exemption for Defense Trade and Cooperation Among Australia, the United Kingdom, and the United States,” *Federal Register* 89 n. 161 (August 20, 2024), pp. 67270-67292, <<https://www.federalregister.gov/documents/2024/08/20/2024-18043/international-traffic-in-arms-regulations-exemption-for-defense-trade-and-cooperation-among>>.

⁷ Jeffrey P. Bialos, “Is the FY24 NDAA a Missed Opportunity for AUKUS Technology Sharing?” *Defense News*, December 20, 2023, <<https://www.defensenews.com/opinion/2023/12/20/is-the-fy24-ndaa-a-missed-opportunity-for-aukus-technology-sharing>>.

licensing relief has limited potential to realize the sort of seamless military integration and research collaboration envisioned under Pillar II. Ultimately, rather than eliminating U.S. military export controls, the AUKUS/ITAR dilemma has created a more robust ITAR-based regime dominated by U.S. interests and primed for further expansion.

This article begins by describing the re-emergence of export controls amidst increasing competition between the U.S. and China. After introducing the ITAR and contrasting it with the Australian and U.K. military export control regimes, it summarizes a series of recent attempts to reducing export licensing requirements among the three AUKUS partners and highlights the key obstacles to greater collaboration. Finally, it contextualizes three major arguments used to criticize the ITAR prior to the passage of the 2024 NDAA and explores the possibility that AUKUS constitutes not only a security partnership but also lays the groundwork for a new plurilateral military export control regime.

The dilemma of economic statecraft

The debate over whether ITAR is a critical obstacle to AUKUS mirrors the general re-emergence of strategic trade controls (STC) as the tool of choice for U.S. geopolitical competition.⁸ For the last several years, U.S. National Security Advisor Jake Sullivan has publicly conflated the concepts of national security and economic security in American foreign policy—promising a mixture of investment in emerging technologies, the onshoring or friend-shoring of relevant supply chains, and the rigorous protection of the resulting innovation through export and investment controls.⁹ This hybrid is evident in new U.S. export restrictions on

⁸ For example, see Hyuk Kim and Robert Shaw, “Strategic Trade Controls as a Foreign Policy Tool in Strategic Competition: Implications of a Shift Beyond Global Nonproliferation Goals,” *Strategic Trade Review* 10, no. 11 (2024); Richard Nephew, *The Art of Sanctions: A View from the Field* (New York: Columbia University Press, 2018); Joop Voetelink, “The Extraterritorial Reach of US Export Control Law. The Foreign Direct Product Rules,” *Journal of Strategic Trade Control* 1 no. 1 (April 2023).

⁹ Jake Sullivan, “Remarks by National Security Advisor Jake Sullivan at the Special Competitive Studies Project Global Emerging Technologies Summit,” The White House, September 16, 2022, <<https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/16/remarks-by-national-security-advisor-jake-sullivan-at-the-special-competitive-studies-project-global-emerging-technologies-summit>>; Jake Sullivan, “The Sources of American Power: A Foreign Policy for a Changed World,” *Foreign Affairs*, October 24, 2023, <<https://www.foreignaffairs.com/united-states/sources-american-power-biden-jake-sullivan>>.

advanced chips and semiconductors,¹⁰ the U.S.-led sanctions regime imposed on Russia following the 2022 invasion of Ukraine, and increasing interest in a new multilateral regime to supplement (if not replace) the Wassenaar Arrangement.¹¹ Part of a larger return to coercive “economic statecraft,” the use of STCs results from an emerging Washington consensus that the U.S. is engaged in a “tech Cold War” with China over a spectrum of emerging technologies.¹² Using an assortment of carrots and sticks, Washington is therefore pushing its partners and allies to accept a robust decoupling from the Russian and Chinese economies across a spectrum of technologies, natural resources, and dual-use goods.

Critics of the economic security turn in American foreign policy argue that the indiscriminate use of export controls and financial sanctions alienates U.S. partners and allies, incentivizing them to reduce their dependence on the U.S. dollar, exclude U.S. companies from supply chains, and prioritize indigenous production of key technologies.¹³ As shown by Russia’s continued sanctions evasion, enforcement is notoriously difficult and requires substantial investment in multilateral cooperation and multi-jurisdictional enforcement. Additionally, experts worry that controls imposed on key emerging technologies such as quantum computing, artificial intelligence, and biotechnology could easily become ineffective, counterproductive, or stifle innovation.¹⁴ Within this debate, export

¹⁰ Hannah Dohmen and Jacob Feldgoise, “A Bigger Yard, A Higher Fence: Understanding BIS’s Expanded Controls on Advanced Computing Exports,” CSET, December 4, 2023, <<https://cset.georgetown.edu/article/bis-2023-update-explainer>>.

¹¹ Emily Benson and Catharine Mouradian, *Establishing a New Multilateral Export Control Regime* (Washington: CSIS, November 2023), <https://csis-website-prod.s3.amazonaws.com/s3fs-public/2023-11/231102_Benson_Export_Control.pdf?VersionId=yDYttVvOeh06DnBtOivC0rsYrypmIO rU>; Kevin Wolf and Emily S. Weinstein, “COCOM’s Daughter?” *WorldECR*, May 2022, pp. 24-28, <<https://cset.georgetown.edu/wp-content/uploads/WorldECR-109-pp24-28-Article1-Wolf-Weinstein.pdf>>.

¹² Caitlin Lee, “Winning the Tech Cold War,” RAND, August 17, 2023, <<https://www.rand.org/pubs/commentary/2023/08/winning-the-tech-cold-war.html>>.

¹³ Agathe Demarais, *Backfire: How Sanctions Reshape the World Against U.S. Interests* (Columbia University Press, 2022).

¹⁴ William A. Reinsch, Emily Benson, Thibault Denamiel, Margot Putnam, *Optimizing Export Controls for Critical and Emerging Technologies* (New York: CSIS, May 2023), <https://csis-website-prod.s3.amazonaws.com/s3fs-public/2023-05/230531_Reinsch_Export_Controls.pdf>; Kevin Klyman, “The U.S. Wants to Make Sure China Can’t Catch Up on Quantum Computing,” *Foreign Policy*, March 31, 2023, <<https://foreignpolicy.com/2023/03/31/us-china-competition-quantum-computing>>; Lindsay Rand, Tucker Boyce, and Andrea Viski, *Emerging Technologies and Trade Controls: A Sectoral Composition Approach* (Strategic Trade Research Institute & Center for International and Security Studies at Maryland, October 2020), <<https://strategictraderesearch.org/wp-content/uploads/2020/10/Emerging-Technologies-and-Trade-Controls-1.pdf>>.

controls are situated on a spectrum ranging from indispensable tools of national security to indefensible obstacles in the race to harness revolutionary technologies.

Correctly balancing these two competing priorities has become more challenging as the geopolitical situation has deteriorated and China has emerged as a key threat. On one hand, competition with a near-peer adversary has sharpened the historical criticism that U.S. military controls were “designed for an era of U.S. technological dominance that no longer exists,” meant to preserve the fruits of state-sponsored military R&D from both Cold War enemies and unreliable allies alike.¹⁵ According to this line of thinking, the regime erodes U.S. market share in key industries, obstructs collaboration with allies, and incentivizes foreign companies to create “ITAR-free” supply chains.¹⁶

On the other hand, AUKUS partners, along with many other countries, are struggling to prevent the exfiltration of data and technology by increasingly aggressive foreign actors.¹⁷ US Federal Bureau of Investigation (FBI) Director Christopher Wray has argued that the Chinese government is “running the biggest hacking program in the world,” and recently disclosed that the agency has 2000 open investigations potentially involving Chinese state actors.¹⁸ In February 2023, the Director-General of Security for Australia’s Security Intelligence Organization (ASIO), Mike Burgess, warned that “more Australians are being targeted for espionage and foreign interference than at any time in Australia’s

¹⁵ William Greenwalt, *Leveraging the National Technology Industrial Base to Address Great-Power Competition: The Imperative to Integrate Industrial Capabilities of Close Allies* (Atlantic Council, April 2019), p. 9, <https://atlanticcouncil.org/wp-content/uploads/2019/04/Leveraging_the_National_Technology_Industrial_Base_to_Address_Great-Power_Competition.pdf>.

¹⁶ Martijn Rasser, *Rethinking Export Controls: Unintended Consequences and the New Technological Landscape* (Center for a New American Security, December 2020), <<https://www.cnas.org/publications/reports/rethinking-export-controls-unintended-consequences-and-the-new-technological-landscape>>.

¹⁷ For example: Cate Cadell and Ellen Nakashima, “American Technology Boosts China’s Hypersonic Missile Program,” *The Washington Post*, October 17, 2022, <<https://www.washingtonpost.com/national-security/2022/10/17/china-hypersonic-missiles-american-technology/>>; “Assistant Attorney General Matthew G. Olsen Delivers Remarks on U.S. Navy Servicemembers Arrested for Transmitting Military Information to the People’s Republic of China,” U.S. Department of Justice, August 3, 2023, <<https://www.justice.gov/opa/speech/assistant-attorney-general-matthew-g-olsen-delivers-remarks-us-navy-servicemembers>>.

¹⁸ Aruna Viswanatha, “FBI’s Christopher Wray Wants Business to Help Fight China, Cyber Threats,” *WSJ*, February 9, 2023, <<https://www.wsj.com/articles/christopher-wray-tries-to-thaw-fbis-frosty-relationship-with-business-11675911906>>.

history.”¹⁹ A British General revealed in September that the U.K. Ministry of Defence (MOD) had been targeted by six million cyber-attacks over the last year.²⁰ All three countries have also experienced recent breaches of critical infrastructure despite enhanced precautions.²¹

The breaches have not all been in the digital sphere. In Australia, Burgess also noted that some veterans have put “cash before country” by providing combat training for authoritarian regimes, yet that “legal ambiguities” had prevented Australian law enforcement from being able to intervene.²² The Director-General’s comments were probably in references to allied efforts to prevent former servicemembers from training Chinese pilots – at the time, former U.S. Marine Daniel Duggan was struggling to avoid extradition in a Sydney court after working on behalf of the Test Flying Academy of South Africa in China.²³ Over the ensuing months, journalists discovered that Australian, British, Canadian, and New Zealander veterans had also been providing similar services, but only Duggan had been charged.²⁴ While both Australia and the U.K. have subsequently solved the

¹⁹ Mike Burgess, “Director-General’s Annual Threat Assessment,” ASIO, February 21, 2023, <<https://www.transparency.gov.au/publications/home-affairs/australian-security-intelligence-organisation/asio-annual-report-2022-23/director-general’s-review>>.

²⁰ General Sir Jim Hockenhull, “Strategic Command DSEI 2023 Keynote,” U.K. Government, September 13, 2023, <<https://www.gov.uk/government/speeches/gen-jim-hockenhull-dsei-2023-keynote-sharpening-defences-edge>>.

²¹ See Australian Signals Directorate, *ASD Cyber Threat Report: 2022-2023* (Commonwealth of Australia, 2023), p. 8, <<https://www.cyber.gov.au/sites/default/files/2023-11/asd-cyber-threat-report-2023.pdf>>; U.K., Joint Committee on the National Security Strategy, *A Hostage to Fortune: Ransomware and UK National Security* (House of Commons & House of Lords, December 13, 2023), pp. 20-21, <<https://committees.parliament.uk/publications/42493/documents/211438/default>>; “A Survey of Reported Chinese Espionage, 2000 to the Present,” CSIS, March 2023, <https://csis-website-prod.s3.amazonaws.com/s3fs-public/2023-03/230329_CN_Espionage_List.pdf>; Office of the Director of National Intelligence, *Annual Threat Assessment of the U.S. Intelligence Community* (US Government, February 6, 2023), p. 8, <<https://www.odni.gov/files/ODNI/documents/assessments/ATA-2023-Unclassified-Report.pdf>>.

²² Burgess, “Director-General’s Annual Threat Assessment.”

²³ Hilary Whiteman, Angus Watson, and Paul Devitt, “Ex-U.S. Marine Accused of Training Chinese Military Pilots Fights Extradition to the U.S.,” *CNN*, July 25, 2023, <<https://www.cnn.com/2023/07/24/australia/australia-us-fighter-pilot-extradition-hearing-intl-hnk/index.html>>.

²⁴ Robert Fife and Steven Chase, “Former Canadian Fighter Pilots Face RCMP Probe Over Training Work in China,” *The Globe & Mail*, September 6, 2023, <<https://www.theglobeandmail.com/politics/article-canadian-pilots-china-training-rcmp>>; Hilary Whiteman, Angus Watson, and Paul Devitt, “Ex-U.S. Marine Accused of Training Chinese Military Pilots Fights Extradition to the U.S.,” *CNN*, July 25, 2023,

“legal ambiguities” preventing prosecution, the delay raised questions in Washington about the comparability of export controls amongst the three partners.

The U.S., Australian, and U.K. regimes

Even before the AUKUS-related changes required to meet U.S. comparability requirements, the U.S., Australia, and the U.K. had similar export control regimes. Each country controls the export of strategic (military and dual-use) items via a licensing system implemented by a government department, with some consideration given to the end-use and end-user in addition to the exported item. Each nation also licenses individuals and companies dealing in military articles and services, and conducts various monitoring and enforcement activities to ensure compliance. At the international level, all three nations are part of the four major multilateral export control regimes: the Australia Group, Missile Technology Control Regime (MTCR), the Nuclear Suppliers Group, and the Wassenaar Arrangement.

The U.S. regime

The modern U.S. military export control regime was created by the 1976 Arms Export Control Act (AECA), which authorized the president to control the movement of military articles, services, and data.²⁵ This authority was subsequently delegated to the Bureau of Political-Military Affairs within the Department of State and implemented through the ITAR. Items considered military in nature or providing a critical military or intelligence advantage (and therefore controlled under the ITAR) are listed on the United States Munitions List (USML).²⁶ The controls are both “sticky” and extraterritorial: each subsequent transfer of an ITAR-controlled good or service requires another license, even if it has been incorporated into a larger product.²⁷ Unlike in the case of reexports of U.S.-origin dual-use goods controlled by the Export Administration Regulations (EAR), there is

<<https://www.cnn.com/2023/07/24/australia/australia-us-fighter-pilot-extradition-hearing-intl-hnk/index.html>>.

²⁵ Eric L. Hirschhorn, Brian J. Egan, and Edward J. Krauland, *US Export Controls & Economic Sanctions*, 4th edition (Oxford: Oxford University Press, 2022), pp. 125-126.

²⁶ The separate Export Administration Regulations (EAR), implemented by the U.S. Department of Commerce, controls dual-use items.

²⁷ This concept is often referred to as the “see-through” rule. “A Decade After the ITAR Challenge: New Parallels, New Barriers?” *WorldECR*, October 20, 2021, <<https://www.worldecr.com/archive/a-decade-after-the-itar-challenge-new-parallels-new-barriers>>.

no “de minimis” threshold for U.S.-origin content at which the ITAR license requirement no longer applies. Any defense article or service exported from the U.S. or produced under a manufacturing license agreement (MLA) or technical assistance agreement (TAA) remains under perpetual U.S. jurisdiction.²⁸ This rigorous implementation of extraterritorial controls is sometimes referred to as the “ITAR-taint,” since a single ITAR-controlled component makes any system, no matter where it is produced, subject to U.S. control.

The regulations also require that companies and individuals engaged in military production, export, import, or brokering must register with the Bureau’s Directorate of Defense Trade Controls (DDTC), obtain licenses for all commercial activity, and maintain careful records of each transaction. Additionally, ITAR violations can occur without crossing national borders via “deemed exports” - domestic transfer of controlled technology or technical data to a non-U.S. person via physical or digital means, or even word of mouth.²⁹

In general, U.S. military exports are separated into Foreign Military Sales (FMS) and Direct Commercial Sales (DCS).³⁰ FMS are generally government-to-government transactions which do not require export licenses. DCS do not require the government to participate as a broker or intermediary but are ITAR-controlled and require a license.³¹ Applications for licenses are reviewed by DDTC for foreign policy, human rights, and national security concerns, and may be sent to the Defense Technology Security Administration (DTSA) in the Department of Defense (DoD) to assess national security risks. The 1976 Arms Export Control Act (AECA) requires reporting to Congress on DCS sales above a certain value threshold. For NATO members or close allies like Australia, reporting is required 15 days before the license is issued if the sale exceeds \$25

²⁸ Hirschhorn, Egan, and Krauland, *US Export Controls & Economic Sanctions*, 126; 22 C.F.R. 124.8(a)(5).

²⁹ The term “deemed export” is technically from the EAR, yet the concept is also found in the ITAR. Bureau of Political-Military Affairs, “Myths and Facts about U.S. Defense Export Controls,” U.S. Department of State, July 10, 2023, <<https://www.state.gov/myths-and-facts-about-u-s-defense-export-controls>>; §120.56 of the ITAR.

³⁰ “Foreign Military Sales FAQ,” Defense Security Cooperation Agency, available at <<https://www.dsca.mil/foreign-military-sales-faq>>.

³¹ Christina L. Arabia, Nathan J. Lucas, and Michael J. Vassalotti, “Transfer of Defense Articles: U.S. Sale and Export of U.S.-Made Arms to Foreign Entities,” Congressional Research Service, R46337, March 23, 2023, 15, <<https://crsreports.congress.gov/product/pdf/R/R46337>>.

million in major military equipment or \$100 million in military articles or services.³²

The Australian regime

The Australian government regulates *tangible* strategic exports under the Australian Customs Act, with licensing authority delegated to the Defence Export Control Branch (DEC) within the Department of Defence.³³ The goods, software, and technology considered strategic are included in the Defence and Strategic Goods List (DSGL).³⁴ The Defence Trade Controls Act (DTC) of 2012, which implements the requirements of the Australia-U.S. Defence Cooperation Treaty (discussed below), created controls on the supply, publication, and brokering of tangible *and intangible* strategic goods.³⁵ However, the government has had difficulty implementing and enforcing these controls, in part due to push-back from the research and university sectors and a lack of political will.³⁶ Prior to new legislation passed in 2024, Australian controls differed from the ITAR in failing to control the transfer of strategic items within or outside Australia, and ignoring the nationality of the recipient for the purposes of export control law (what the U.S. terms “deemed exports”).³⁷ Historically, Australian controls have been both “country-agnostic” and use-restricted only in

³² Christina L. Arabia, Nathan J. Lucas, and Michael J. Vassalotti, “Transfer of Defense Articles: U.S. Sale and Export of U.S.-Made Arms to Foreign Entities,” p. 16; 22 U.S.C. § 2776(c).

³³ AI Group Defence Council, *Australian Guide to Export Controls and Best Practices* (AI Group, April 2020), pp. 23-24, <<https://www.aigroup.com.au/globalassets/australian-export-best-practice-guide-2020.pdf>>.

³⁴ Department of Defence, “The Defence and Strategic Goods List,” Commonwealth of Australia, <<https://www.defence.gov.au/business-industry/export/controls/export-controls/defence-strategic-goods-list>>.

³⁵ Department of Defence, “Legislation, Regimes and Agreements,” Commonwealth of Australia, <<https://www.defence.gov.au/business-industry/export/controls/export-controls/legislation-regimes-agreements>>.

³⁶ Vivienne Thom, *Independent Review of the Defence Trade Controls Act 2012* (Commonwealth of Australia, 2018), pp. 12-13, p. 26, p. 35, p. 46, <<https://www.defence.gov.au/about/reviews-inquiries/defence-trade-controls-act-review-2018>>; Kevin Andrews, “Defence Trade Controls Amendment Bill 2015: Explanatory Memorandum,” The Parliament of the Commonwealth of Australia, May 13, 2015, <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5407_ems_91cdb1c3-98c1-46a0-9f1b-01ff9395fda4/upload_pdf/500980.pdf>.

³⁷ Department of Defence, “Supply FAQs,” Commonwealth of Australia, <<https://www.defence.gov.au/business-industry/export/controls/training-faqs/supply-faqs#FAQOral>>.

regards to WMD applications, which limited the government's ability to prohibit strategic exports to specific destinations.³⁸

The U.K. regime

The U.K. government implements strategic export controls created in the Export Control Act 2002 via the Export Control Order 2008, and consolidates items subject to controls on the U.K. Strategic Export Control List.³⁹ The export licensing process is overseen by the Export Control Joint Unit (ECJU) within the Department of Business and Trade (DBT).⁴⁰ The release of classified items or information to foreign entities requires the approval of a Form 680 application by the Ministry of Defence.⁴¹ Like Australia, the U.K. has not historically controlled the transfer of strategic items wholly within or outside the U.K. (except when intended for "WMD purposes").⁴² Additionally, neither the U.K. nor Australia operate any end-use verification system akin to the U.S. Blue Lantern or Golden Sentry programs.⁴³ Even within the U.K., monitoring and enforcement of military export controls by the chronically under-staffed ECJU has faced sustained criticism.⁴⁴

³⁸ Lauren Sanders, "Australia's Defense Export Control Regime and Critical Technologies," *Journal of Strategic Trade Control* 2 (February 2024), p.18 and 22, <<https://popups.uliege.be/2952-7597/index.php?id=93&file=1>>.

³⁹ U.K. Government, Parliament, *Export Control Order 2008*, No. 3231, 59-60, <<https://www.legislation.gov.uk/uksi/2008/3231/note/made>>; Department of Business and Trade, *UK Strategic Export Control List* (April 2024), <<https://assets.publishing.service.gov.uk/media/64ef1c7e13ae15000d6e305f/uk-strategic-export-control-lists.pdf>>.

⁴⁰ U.K. Government, House of Commons, United Kingdom Strategic Export Controls Annual Report 2022 (July 19, 2023), HC 16815, <https://assets.publishing.service.gov.uk/media/64b7dc8eef537100147aee89/uk_strategic_export_controls__annual_report_2022.pdf>.

⁴¹ Ministry of Defence, "Form 680 Policy and Guidance for UK Companies and UK Government Departments," U.K. Government, Version 1, August 2024, <<https://www.gov.uk/government/publications/ministry-of-defence-form-680-procedure-guidance>>.

⁴² Although the National Security Act 2023 has created certain new offences related to the disclosure of trade secrets. U.K. Government, Parliament, *Export Control Order 2008*, No. 3231, pp. 8-9; U.K. Government, "Policy Paper – New Espionage Offences: Factsheet," May 3, 2024, <<https://www.gov.uk/government/publications/national-security-bill-factsheets/espionage-etc-national-security-bill-factsheet>>.

⁴³ U.K. Government, House of Commons, Committee on Arms Export Controls, *Developments in U.K. Strategic Export Controls: First Joint Report of Session 2022-23* (October 2022), pp. 26-28, <<https://committees.parliament.uk/publications/31422/documents/176184/default>>.

⁴⁴ U.K. Government, *Developments in U.K. Strategic Export Controls: First Joint Report of Session 2022-23*, pp.13, 21, 23.

A history of Australian-U.K.-U.S. military industrial cooperation

While the three AUKUS countries have a long history of political and military cooperation, the U.S. is the dominant partner in terms of both military spending, military industrial production, and military exports.⁴⁵ According to one estimate, U.S. military exports accounted for 40 percent of global arms exports between 2018 and 2022, while Australia and the U.K. accounted for 0.6 percent and 3.2 percent respectively.⁴⁶ Yet both Australia and the U.K. are intensely committed to expanding military exports as a means of subsidizing their own military industrial bases.⁴⁷ In fact, major sectors of both bases are export-oriented and even export-dependent, conditions which have historically undermined the consistent application of military export controls and created strong commercial incentives for arms sales.⁴⁸ As all three AUKUS partners have continued to pitch AUKUS to their domestic constituencies as a significant source of jobs and foreign investment, the economic and security goals of the partnership have become increasingly intertwined.⁴⁹ It is hard, therefore,

⁴⁵Various databases. Stockholm International Peace Research Institute (SIPRI), <<https://www.sipri.org/databases>>.

⁴⁶Pieter D. Wezeman, Justine Gadon and Siemon T. Wezeman, *Trends in International Arms Transfers, 2022* (SIPRI, March 2023), <https://www.sipri.org/sites/default/files/2023-03/2303_at_fact_sheet_2022_v2.pdf>.

⁴⁷U.K. Government, Parliament, *Defence Command Paper 2023: Defence's Response to a More Contested and Volatile World* (Ministry of Defence, July 18, 2023), CP 901, p. 75, <https://assets.publishing.service.gov.uk/media/64b55dd30ea2cb000d15e3fe/Defence_Command_Paper_2023_Defence_s_response_to_a_more_contested_and_volatile_world.pdf>; Commonwealth of Australia, Department of Defence, *Defence Export Strategy* (Commonwealth of Australia, 2018), <<https://www.defence.gov.au/business-industry/export/strategy>>.

⁴⁸Anna Stavrianakis, "Debunking the Myth of the 'Robust Control Regime': UK Arms Export Controls During War and Armed Conflict," *Global Policy* 14:1 (February 20, 2023), pp. 121-130; Sam Perlo-Freeman, "Special Treatment: UK Government Support for the Arms Industry and Trade," SIPRI and CAAT, November 2016, p. 9, <<https://www.sipri.org/publications/2016/partner-publications/special-treatment-uk-government-support-arms-industry-and-trade>>; Commonwealth of Australia, Department of Defence, *Defence Export Strategy*, 75; Christopher Knaus, "Australia's Rise in Military Export Approvals to Saudi Arabia Labelled 'Disturbing,'" *The Guardian*, September 4, 2023, <<https://www.theguardian.com/world/2023/sep/05/australias-rise-in-military-export-approvals-to-saudi-arabia-labelled-disturbing>>.

⁴⁹Rob Harris, "AUKUS as Much About Jobs as it is National Security, Albanese says," *Sydney Morning Herald*, May 4, 2023, <<https://www.smh.com.au/politics/federal/aukus-as-much-about-as-jobs-as-it-is-national-security-albanese-says-20230504-p5d5gi.html>>; Sylvia Pfeifer and Demetri Sevastopulo, "AUKUS Defence Pact's Political Pay-Off Will be a Jobs Bonanza," *Financial Times*, March 14, 2023, <<https://www.ft.com/content/58a7fd30-51ae-46b0-9894-741a328e861d>>; "Undersecretary of State Bonnie Jenkins on AUKUS Security Agreement," video, *C-Span*, November 27, 2023,

to distinguish ITAR criticism motivated by security concerns from that motivated by commercial interests—a historical source of friction amongst the three partners.⁵⁰

The disproportionate sizes of the Australian, U.K., and U.S. military industrial bases mean that the smaller two have historically operated as satellites of their U.S. counterpart. This is most true for Australia, which, between 2018-2022 was the fourth largest importer of major arms in the world behind India, Saudi Arabia, and Qatar, with 76 percent of those imports procured from the U.S.⁵¹ According to the Australian government, around a third of the 3000 export applications for DSSL items assessed annually are for exports to the U.S. or U.K., while the U.S. issues around 3,800 licenses per year for exports to Australia.⁵² The U.K. MIB is comparatively larger, but the government maintains domestic production capabilities selectively while still relying heavily on American imports.⁵³

Consequently, navigating the ITAR has become an essential skill for Australian and U.K. military producers, especially those with aspirations of exporting military systems to other markets. Australian or British companies seeking to participate in U.S. military industry must overcome the processing delays and general uncertainty of license approvals, the financial or time costs of complying with ITAR registration and record-keeping requirements, and the potential loss of Intellectual Property (IP) control to DoD via TAAs.⁵⁴ Even governments aren't immune—the U.K.

<<https://www.c-span.org/video/?532028-1/undersecretary-state-bonnie-jenkins-aucus-security-agreement>>.

⁵⁰ “There is no denying that all three partners have differing commercial equities at play and the desire to maintain and build their areas of comparative advantage and market share. The reality is that Australian companies will ultimately be competing against US and UK firms.” Jennifer Jackett, *Laying the Foundations for AUKUS: Strengthening Australia's High-Tech Ecosystem in Support of Advanced Capabilities* (United States Studies Centre, July 2022), p. 20, <<https://www.ussc.edu.au/strengthening-australias-high-tech-ecosystem-in-support-of-advanced-capabilities>>.

⁵¹ Wezeman, Gadon and Wezeman, *Trends in International Arms Transfers, 2022*, p. 6.

⁵² Australian Government, Department of Defence, *Impact Analysis: Strengthening Australia's Export Control Framework* (Commonwealth of Australia, 2023), p. 2, <<https://oia.pmc.gov.au/sites/default/files/posts/2023/12/Impact%20Analysis.pdf>>.

⁵³ U.K. Government, Parliament, *Defence and Security Industrial Strategy* (Ministry of Defence, March 2021), CP 410, p. 14,

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/971983/Defence_and_Security_Industrial_Strategy_-_FINAL.pdf>; Wezeman, Gadon and Wezeman, *Trends in International Arms Transfers, 2022*, p. 6.

⁵⁴ Greenwalt and Corben, *Breaking the Barriers: Reforming US Export Controls to Realise the Potential of AUKUS*, p. 10.

Ministry of Defence once claimed to spend half a billion pounds a year on ITAR-compliance.⁵⁵

These arguments have bolstered multiple historical attempts to pursue ITAR licensing relief for U.S. allies. Technically, the Pillar II debate since 2021 was the “third bite at the apple” for Australian and U.K. military producers.⁵⁶ Both countries have been seeking a “Canada-style” ITAR exemption for several decades, hoping to simplify the existing patchwork of targeted license exemptions and special programs into a less onerous regulatory burden. However, Australian and British officials have also been less willing than Canada to adopt export regime alignment—a key U.S. prerequisite for licensing relief, but also a critical impediment to export-dependent military industrial bases.

The first “bite” began during the late 1990s as a proposal attached to the Defense Trade Security Initiative that would have exempted NATO and certain other states from the ITAR.⁵⁷ Yet negotiations with the U.K. and Australia stalled after Congress imposed strict requirements on any exemptions via bilateral agreement requirements in the 2000 Security Assistance Act. A few years later, the White House again attempted to create blanket ITAR licensing exemptions for both countries, but continuing Congressional resistance forced the administration to pursue more limited exemptions under separate bilateral treaties instead.

The resulting Defense Trade Cooperation Treaties (DTCTs) entered into force in 2012 (U.K.) and 2013 (Australia).⁵⁸ In practice, they created licensing exemptions on export and transfer for “approved communities” of individuals and companies vetted by both participating governments—a process that involves registration, personnel screening, compliance protocols, and routine monitoring. The treaty was also limited to articles intended for end-use by the U.S. or U.K. governments, which made them “insufficiently attractive” for companies with international supply chains and diverse commercial aspirations.⁵⁹ Current usage of the treaty

⁵⁵ Greenwalt, *Leveraging the National Technology Industrial Base to Address Great-Power Competition: The Imperative to Integrate Industrial Capabilities of Close Allies*, p. 12.

⁵⁶ Greenwalt and Corben, *Breaking the Barriers: Reforming US Export Controls to Realise the Potential of AUKUS*, p. 3.

⁵⁷ Authors Redacted, “Defense Trade Security Initiative: Background and Status,” Congressional Research Service, RS20757, August 29, 2001, p. 3, <<https://www.everycrsreport.com/reports/RS20757.html>>.

⁵⁸ International Cooperation Office, “Defense Trade Cooperation Treaties,” Department of Defense, <<https://www.acq.osd.mil/ic/dtct.html>>.

⁵⁹ Both treaty texts are available on the DDTC website: “United Kingdom & Australia Defense Trade Cooperation Treaties,” U.S. Department of State,

exemptions is difficult to determine given the lack of reporting requirements in all three countries, but they are allegedly rarely used by industry.⁶⁰

The second “bite” occurred in 2017, when the U.K. and Australia were added to the National Technology and Industrial Base (NTIB).⁶¹ The NTIB, created by Congress in 1993, formalized traditional military-industrial relationships between Canada and the U.S by providing certain statutory preferences to Canadian military producers.⁶² Although the NTIB ostensibly pursues the “seamless integration” and transfer of knowledge, goods, and services among members, its primary benefit has been to reduce barriers for non-US producers of ammunition and military components.⁶³ It therefore eased the regulatory burden on certain industries, but did not fundamentally transform military industrial cooperation among the three allies.

Another initiative, known as the Open General License (OGL) program was introduced in 2022 to facilitate retransfers and reexports of unclassified defense articles and services in and between Australia, Canada, and the U.K.⁶⁴ The OGL program has been lauded as a significant improvement in U.S.-U.K. military industrial cooperation.⁶⁵ Yet because it excludes most technical data and all articles and services classified as missile

<https://www.pmdtcc.state.gov/ddtc_public/ddtc_public?id=ddtc_kb_article_page&sy_s_id=2d21e8b3dbb8d300d0a370131f96190b>. Also, Greenwalt, *Leveraging the National Technology Industrial Base to Address Great-Power Competition: The Imperative to Integrate Industrial Capabilities of Close Allies*, p. 27.

⁶⁰ Conversation with DDTC official; Jerry McGinn and Michael T. Roche, *A ‘Build Allied’ Approach to Increase Industrial Base Capacity Center for Government Contracting* (George Mason University, June 22, 2023), p. 13, <<https://business.gmu.edu/news/2023-06/build-allied-approach-increase-industrial-base-capacity>>.

⁶¹ Luke A. Nicastro, “Defense Primer: The National Technology and Industrial Base,” Congressional Research Service, IF11311, March 30, 2023, <<https://crsreports.congress.gov/product/pdf/IF/IF11311/12>>.

⁶² Luke A. Nicastro, “Defense Primer: The National Technology and Industrial Base.”

⁶³ Congress.gov, 114-328, “National Defense Authorization Act for Fiscal Year 2017,” December 23, 2016, §2315, <<https://www.congress.gov/114/plaws/publ328/PLAW-114publ328.pdf>>; Luke A. Nicastro, “Defense Primer: The National Technology and Industrial Base.”

⁶⁴ “Summary of the Open General License Pilot Program,” Fact Sheet, Directorate of Defense Trade Controls, May 25, 2023.

⁶⁵ U.K. Government, House of Commons, *Defence Committee: Oral Evidence: The U.S., U.K. and NATO, HC 184*, (November 2, 2022), question 243, <<https://committees.parliament.uk/oralevidence/11495/pdf>>.

technology on the USML, the program doesn't facilitate the ambitious integration and collaboration promised by Pillar II.⁶⁶

The reasons for the "failures" of the DTCTs and the NTIB are contested. Industry analysts tend to blame Congress or the State Department for defending the status quo.⁶⁷ In response, U.S. government officials point to ITAR violations, unlicensed technology transfers, and even espionage as reasons to retain strict regulatory control over industry. However, a key reason the DTCTs and NTIB didn't result in tangible ITAR reform is because the Australian and British governments refused to fully align their export control regimes with the ITAR.⁶⁸ Explicitly importing the ITAR into domestic regulation is a radical step that only Canada, of all the U.S. allies and partners, has every taken.

The Canadian case

Sacrificing autonomy for access is a simple economic calculation in Canada, since the U.S. is Canada's largest trading partner, most significant source of foreign investment, and biggest customer for Canadian military exports.⁶⁹ Canada has maintained special access to the U.S. military industrial base since the Second World War, although the level of access has varied.⁷⁰ This access was formally acknowledged by an official country exemption in the ITAR in 1954 which was modified in conjunction with the enactment of AECA in 1976.⁷¹ Yet the exemption excludes all

⁶⁶ Greenwalt and Corben, *Breaking the Barriers: Reforming US Export Controls to Realise the Potential of AUKUS*, pp. 23-24.

⁶⁷ Bialos, "Is the FY24 NDAA a Missed opportunity for AUKUS Technology Sharing?"; William Greenwalt, "Two Years on, is the AUKUS Agreement at the Brink of Failure?" *Breaking Defense*, September 14, 2023, <<https://breakingdefense.com/2023/09/two-years-on-is-the-aukus-agreement-at-the-brink-of-failure>>.

⁶⁸ Private interview. Also mentioned in Bryant Harris, "AUKUS Standoff: Australia, UK Wait on Congress to Approve Pact," *Defense News*, September 5, 2023, <<https://www.defensenews.com/congress/2023/09/05/aukus-standoff-australia-uk-wait-on-congress-to-approve-pact>>.

⁶⁹ "Canada and the United States: The Numbers on a Unique Relationship," Statistics Canada, March 21, 2023, <<https://www.statcan.gc.ca/o1/en/plus/3250-canada-and-united-states-numbers-unique-relationship>>; Kelsey Gallagher, "Canada's Arms Exports in 2022," Project Ploughshares, September 18, 2023, <<https://www.ploughshares.ca/publications/canadas-arms-exports-in-2022>>.

⁷⁰ Andrew P. Hunter et al., *U.S.-Canadian Defense Industrial Cooperation* (CSIS, June 2017), p. 69, <https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/170628_Obecny_USCanadianDefenseCoop_Web.pdf>.

⁷¹ §126.5 of the ITAR; "Key Events That Shaped the Controlled Goods Programs," Government of Canada, <<https://www.tpsgc-pwgsc.gc.ca/pmc-cgp/etapes-events-eng.html>>.

classified articles and services, as well as those relating to aircraft, spacecraft and satellites, and submersibles.⁷² Detailed analysis of Canada-U.S. military industrial cooperation reveals that Canada functions primarily as a producer of components and sub-systems for U.S.-manufactured platforms, with 86 percent of transactions involving product-related contracts rather than services or R&D.⁷³ Technical data transfers still require TAAs, disincentivizing cross-border partnerships. In other words, the Canadian exemption has not catalyzed the type of collaborative innovation envisioned by Pillar II and is probably not an appropriate model for Australia and the U.K.

Part of the issue is the use (on both sides of the border) of military procurement as an economic tool to produce employment and foreign investment. Like many nations, Canada has imposed formal offset requirements on military procurement since the 1970s.⁷⁴ Currently, the Canadian Industrial and Technological Benefits (ITB) Policy requires companies awarded military procurement contracts worth more than \$100 million to undertake “business activities” in Canada worth 100 percent of the value of the contract.⁷⁵ The U.S. Congress has long viewed offsets as a trade irritant and, since 1984, has required an annual report on their impact on the U.S. military industrial base.⁷⁶ However, U.S. protectionism, even outside the ITAR, also provides a formidable barrier to allied cooperation in military production.⁷⁷ While most key allies are exempted from general “Buy America” restrictions by Reciprocal Defense Procurement (RDP) agreements with DoD, other barriers remain.⁷⁸ Legislation like the Berry Amendment, the Byrnes-Tollefson Amendment, and the Small Business Act, excludes Canadian (and British and

⁷² Rhys McCormick et al., *National Technology and Industrial Base Integration* (CSIS, March 2018), p. 12, <https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/180307_McCormick_NationalTechnologyAndIndustrialBaseIntegration_Web.pdf>.

⁷³ Hunter et al., *U.S.-Canadian Defense Industrial Cooperation*, vi-vii.

⁷⁴ Aaron Plamondon, *The Politics of Procurement: Military Acquisition in Canada and the Sea King Helicopter* (Vancouver: UBC Press, 2010), pp. 84-85.

⁷⁵ Government of Canada, *Industrial and Technological Benefits Policy: Value Proposition Guide*, May 2022, <https://ised-isde.canada.ca/site/industrial-technological-benefits/sites/default/files/attachments/2022/ISED_VPGuide_eng.pdf>.

⁷⁶ For example, see Bureau of Industry and Security, *Offsets in Defense Trade, 27th Study* (U.S. Department of Commerce, 2023), <<https://www.bis.doc.gov/index.php/documents/sies/3269-public-version-27-annual-offsets-report/file>>.

⁷⁷ Colin Grabow, *The Self-Imposed Blockade: Evaluating the Impact of Buy American Laws on U.S. National Security* (CATO, August 16, 2022), <https://www.cato.org/sites/cato.org/files/2023-08/policy-analysis-933_updated.pdf>.

⁷⁸ McGinn and Roche, *A ‘Build Allied’ Approach to Increase Industrial Base Capacity Center for Government Contracting*, p. 8.

Australian) companies from many military contracts.⁷⁹ For example, in 2015, all DoD contracts between \$3500 and \$150,000 were set aside for U.S. small businesses.⁸⁰ This carveout has now been extended to all contracts between \$10,000 and \$250,000.⁸¹ Put bluntly, there is a strong incentive for both Canada and the U.S. to leverage military production for domestic economic benefit, even at the expense of greater allied cooperation.

The history of Canadian access also shows the security risks of blanket ITAR exemptions. In 1999, the State Department revoked the Canadian exemption after identifying 19 criminal cases in which U.S.-origin goods or services were improperly exported to Canada or re-exported abroad.⁸² The ruling also required the Canadian government to screen dual nationals and third-country nationals from certain countries (for example, North Korea, Venezuela, or Iran), which violated the Canadian Charter of Rights and Freedoms.⁸³ In order to regain access to a modified ITAR exemption, the Canadian government agreed to significantly strengthen its military export regime through a new Controlled Goods Program – effectively indigenizing U.S. laws by enforcing Canadian companies’ compliance with the ITAR.⁸⁴ This episode is indicative of a Canadian strategy that extends back to the Second World War: trading military export policy autonomy for access to and participation in the U.S. military industrial base.⁸⁵

In short, while the Canadian ITAR exemption has facilitated the export of military articles between Canada and the U.S., it has not catalyzed Pillar II-style R&D collaboration among the two allies. The leveraging of military spending for economic ends, either in the form of “offset” agreements or domestic purchasing requirements, has created ongoing friction and

⁷⁹ Hunter et al., *U.S.-Canadian Defense Industrial Cooperation*, p. 49.

⁸⁰ Hunter et al., *U.S.-Canadian Defense Industrial Cooperation*, p. 49.

⁸¹ “Set-Aside Procurement,” U.S. Small Business Administration, <<https://www.sba.gov/partners/contracting-officials/small-business-procurement/set-aside-procurement>>.

⁸² U.S. Government, Senate, *Defense Trade: Lessons to be Learned from the Country Export Exemption* (Government Accountability Office, March 2002), pp. 21-23, <<https://www.gao.gov/assets/gao-02-63.pdf>>.

⁸³ Issues about the legality of this discrimination were resolved in 2011. “Key Events That Shaped the Controlled Goods Programs,” Government of Canada, <<https://www.tpsgc-pwgsc.gc.ca/pmc-cgp/etapes-events-eng.html>>.

⁸⁴ John Black, “U.S. Announces New Canadian Exemptions for Military Exports,” Export Compliance Training Institute, February 26, 2001, <<https://www.learnexportcompliance.com/us-announces-new-canadian-exemptions-for-military-exports>>.

⁸⁵ Paul Esau, “A Departmental Dilemma: The Genesis of Canadian Military Export Policy, 1945-1960” (Dissertation: Wilfrid Laurier University, 2023), pp. 29-34.

discouraged integration. Finally, the 1999 incident shows the importance of export control alignment in preventing the proliferation of ITAR-controlled goods. While there are some differences in the lists of articles and services excluded from the Canadian and AUKUS exemptions, these exclusions seriously limit the ability of each exemption to facilitate collaboration on advanced technologies like hypersonics.⁸⁶ In short, a Canada-style exemption is an inadequate solution for ensuring the success of AUKUS Pillar II.

A trojan horse

Arguments that the ITAR is archaic or overly burdensome have validity. It is true, for example, that the U.S. percentage of global R&D funding has fallen drastically in recent decades, and that DoD is now primarily an adopter, rather than a developer, of strategic technologies.⁸⁷ However, claims that radical ITAR reform is a necessary precondition to the success of AUKUS merit significant scrutiny. As mentioned above, the Australian and U.K. pursuit of ITAR exemptions for commercial reasons long predates AUKUS and undermines the credibility of the current linkage. Three other key arguments have also proven to be exaggerated, if not misleading, including (a) the argument that allied military trade, especially U.S.-Australian trade is dependent on the ITAR, (b) that the ITAR is constraining the development of cutting-edge Pillar II technologies, and (c) that Australia, the U.K., and the U.S. already had comparable military export control regimes prior to 2023.

⁸⁶ “International Traffic in Arms Regulations: Exemption for Defense Trade and Cooperation Among Australia, the United Kingdom, and the United States,” *Federal Register* 89 n. 161 (August 20, 2024), pp. 67270-67292, <<https://www.federalregister.gov/documents/2024/08/20/2024-18043/international-traffic-in-arms-regulations-exemption-for-defense-trade-and-cooperation-among>>; Supplement No.1 to Part 126, Title 22; William Greenwalt and Tom Corben, *AUKUS Enablers? Assessing Defence Trade Control Reforms in Australia, and the United States* (Sydney: United States Studies Centre, August 2024), pp. 28-29, <<https://www.ussc.edu.au/aukus-assessing-defence-trade-control-reforms-in-australia-and-the-united-states>>.

⁸⁷ John F. Sargent Jr., “Global Research and Development Expenditures: Fact Sheet,” Congressional Research Service, R44283, September 2022, <<https://crsreports.congress.gov/product/pdf/R/R44283/15>>; “A Fast Follower Strategy for the Department of Defense (DoD),” Defense Innovation Unit, 2022, <https://assets.ctfassets.net/3nanhbfkr0pc/1Gkew4PQ4ZnRiChEIRb6BM/01f6ad3a22268141abe7dfb2f0818cd3/2022_Fast_Follower_Strategy.pdf>.

A. The ITAR impact

While the U.S. is a major supplier of military articles and services to both Australia and the U.K., these transactions are split into two categories. As mentioned above, the U.S. government provides government-to-government sales through the FMS program, which, while overseen by the State Department, is administered via DoD's Defense Security Cooperation Agency (DSCA) and is not subject to the ITAR. Direct Commercial Sales (DCS) are subject to the ITAR and allow U.S. allies and partners to purchase directly from U.S. companies. According to the DoD, more than 90 percent of U.S. articles and services exported to Australia occur under the FMS program.⁸⁸ While the U.K. likely imports more U.S. military items via DCS than FMS, the Australian case suggests the limitations of the ITAR's impact on military trade.

Complaints about the duration of license processing, especially within the State Department, are similarly deceptive. Multiple recent reforms have reduced both the size of the USML and the processing time for individual licenses. In 2008, the Obama White House began an Export Control Reform (ECR) initiative which shortened the USML and halved the number of license applications received by DDTC per year (down to 37,000 in 2018).⁸⁹ Specifically, the reforms reduced U.K. licensing requests by two-thirds, and Australian licensing requests by half.⁹⁰ In recent years, the number of licenses received annually have stabilized around 23,000 with averaging license processing times at just under 40 days; however, applications from Australia and the United Kingdom, which are prioritized because of their status as key allies, generally beat this average.⁹¹ In summary, DDTC has substantially reduced the bureaucratic burden of the ITAR through initiatives like targeted licenses (the OGL program), defense treaties, USML revision, and export control reform, among others.

⁸⁸ "Assistant Secretary of Defense for Strategy, Plans, and Capabilities Dr. Mara Karlin Testimony to the House Foreign Affairs Committee Hearing on Modernizing U.S. Army Exports and a Stronger AUKUS," U.S. Department of Defense, May 24, 2023, <<https://www.defense.gov/News/Transcripts/Transcript/Article/3408956/assistant-secretary-of-defense-for-strategy-plans-and-capabilities-dr-mara-karlin>>.

⁸⁹ Paul K. Kerr and Christopher A. Casey, "The U.S. Export Control System and the Export Control Reform Act of 2018," Congressional Research Service, R46814, June 7, 2021, pp. 6, 9, <<https://crsreports.congress.gov/product/pdf/R/R46814>>.

⁹⁰ McCormick et al., *National Technology and Industrial Base Integration* (CSIS, March 2018), p. 11, <https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/180307_McCormick_NationalTechnologyAndIndustrialBaseIntegration_Web.pdf>.

⁹¹ Reducing the total number of license applications eliminated routine and low-risk applications, therefore increasing processing times for the remaining, more complex cases. Sarah Heidema and Cat Hamilton, Presentation at BIS 2023 Update Conference, March 2024.

ITAR critics will respond that the initial export of military items via FMS is simply the first chapter in a saga of ITAR-related requirements and delays. The ubiquity of external contractors within most modern militaries, for example, has required a proliferation of license applications for the transfer of equipment and technical knowledge.⁹² Increasingly international supply chains also create licensing headaches as equipment crosses multiple borders (or a single border multiple times) at different stages during the manufacturing process.⁹³ The “ITAR taint” has imposed barriers to commercial exports of military goods produced in Australia or the U.K.⁹⁴ Finally, while the delays required to obtain licenses from the State Department impact all military producers, the bureaucratic burden imposed on small and medium business is allegedly especially onerous. These points represent a legitimate grievance for export-dependent military industrial bases reliant on private companies leveraging international supply chains, but they are not specifically tied to AUKUS (or frankly, national security). In fact, the most important catalyst for Pillar II success is probably political will and bureaucratic reform, not ITAR revision. True collaboration in key emerging technologies transcends the ITAR and will require changes to U.S. classification practices (especially the use of the “NOFORN” classification label),⁹⁵ Technology Security and Foreign Disclosure (TSFD) evaluations,⁹⁶ and procurement procedures.⁹⁷ Attempts to improve and accelerate the FMS case processing pipeline,

⁹² Greenwalt, *Leveraging the National Technology Industrial Base to Address Great-Power Competition: The Imperative to Integrate Industrial Capabilities of Close Allies*, pp. 13-14

⁹³ The U.S. Aerospace Industries Association (AIA), for example, has argued that “export relief” must cover the entire AUKUS supply chain, including links in non-AUKUS countries. “Statement of Industry Consensus on AUKUS, Selected Defense Trade Provisions, and Other Policy Matters,” AIA, September 1, 2023, pp. 7-8.

⁹⁴ Colin Clark, “Upstart Anduril Australia Hopes to Make 100s of Large Drone Subs, ‘ITAR free,’ CEO says,” *Breaking Defense*, August 19, 2022, <<https://breakingdefense.com/2022/08/upstart-anduril-australia-hopes-to-make-100s-of-large-drone-subs-itar-free-ceo-says>>; Austin Wyatt et al., *Towards AUKUS Collaboration on Responsible Military Artificial Intelligence*, (RAND Australia, 2024), p. 22, <https://www.rand.org/pubs/research_reports/RRA3079-1.html>.

⁹⁵ Sean Corbett and James Danoy, “Beyond NOFORN: Solutions for Increased Intelligence Sharing Among Allies,” Atlantic Council, October 31, 2022, <<https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/beyond-nofor-n-solutions-for-increased-intelligence-sharing-among-allies>>.

⁹⁶ McGinn and Roche, *A ‘Build Allied’ Approach to Increase Industrial Base Capacity Center for Government Contracting*, p. 13.

⁹⁷ Bob Moyses, “Will AUKUS Policy Penetrate Defence Bureaucracies,” *The Strategist*, June 14, 2023, <<https://www.aspistrategist.org.au/will-aucus-policy-penetrate-defence-bureaucracies>>.

like DoD's establishment of an FMS "Tiger Team" in 2022, are entirely independent of the ITAR.⁹⁸

Fortunately, the 2024 NDAA includes a host of other mechanisms which will collectively have a greater impact on the success of Pillar II than the ITAR exemption. These include the addition of entities in Australia and the U.K. as "domestic sources" under the 1950 Defense Production Act, designated AUKUS advisors at both DoS and DoD, an expedited technology transfer policy for AUKUS partners (and Canada), exemption of certain military exports to AUKUS partners from Congressional notification requirements, and the development of a list of systems and technologies pre-cleared for sale to AUKUS partners (and Canada).⁹⁹

B. Critical technologies

The United States government has historically had great difficulty identifying and defining critical technologies as a meaningful category for export restrictions. The term itself ("critical technologies") was first introduced in the 1979 Export Administration Act (EAA), which required the creation of both a Militarily Critical Technologies List (MCTL) and a Developing Science and Technologies List (DSTL) to inform U.S. export controls on dual-use items.¹⁰⁰ However strong the theoretical appeal of such an approach, the lists proved extremely difficult to implement and were gradually abandoned as a meaningful tool. Yet the concept was resurrected in 2018 when the U.S. Department of Commerce's Bureau of Industry and Security (BIS) proposed various controls on a list of fourteen broad categories labelled "emerging technologies."¹⁰¹ Similarly, foreign investment controls introduced in the 2018 NDAA were scoped to include transactions involving "critical technologies," which were defined in the 2018 Export Control Reform Act (ECRA) as "emerging and foundational

⁹⁸ "Department of Defense Unveils Comprehensive Recommendations to Strengthen Foreign Military Sales," Department of Defense, June 13, 2023, <<https://www.defense.gov/News/Releases/Release/Article/3425963/department-of-defense-unveils-comprehensive-recommendations-to-strengthen-forei>>.

⁹⁹ Congress.gov, 118-31, "National Defense Authorization Act for Fiscal Year 2024," December 22, 2023, §1080, pp. 1321-1345, <<https://www.congress.gov/118/plaws/publ31/PLAW-118publ31.pdf>>.

¹⁰⁰ Scott Jones, "Disrupting Export Controls: 'Emerging and Foundational Technologies' and Next Generation Controls," *Strategic Trade Review* 6 no. 9 (Winter/Spring 2020), p. 38.

¹⁰¹ Rand, Boyce, and Viski, *Emerging Technologies and Trade Controls: A Sectoral Composition Approach*, pp. 16-17.

technologies.”¹⁰² A few years later, the Office of Science and Technology Policy (OSTP) created its own list of critical and emerging technologies, which was further updated in 2022 and 2024.¹⁰³ Yet what these technologies are, and how they should be controlled, remain deeply controversial questions.¹⁰⁴

The original AUKUS announcement in September 2021 specified four focus areas for collaboration amongst AUKUS partners: cyber capabilities, artificial intelligence, quantum technologies, and undersea capabilities.¹⁰⁵ By the following April, four more areas had been added to this list (hypersonic and counter-hypersonic capabilities, electronic warfare, innovation, and information sharing), and trilateral working groups had been created to coordinate progress.¹⁰⁶ Referred to alternately as “advanced capabilities,” “emerging technologies,” or “critical technologies,” many of these areas overlap with the categories identified by BIS and OSTP as key to national security. They represent core concerns in the Pentagon about eroding U.S. advantages in key emerging technologies, and China’s emergence as a “full-spectrum peer competitor.”¹⁰⁷ Repeated claims that China actually leads global research in most technologies prioritized by AUKUS would seem to justify an

¹⁰² Rand, Boyce, and Viski, *Emerging Technologies and Trade Controls: A Sectoral Composition Approach*, p. 17.

¹⁰³ Fast Track Action Subcommittee on Critical and Emerging Technologies, *Critical and Emerging Technologies List Update* (OSTP, February 2022), <<https://www.whitehouse.gov/wp-content/uploads/2022/02/02-2022-Critical-and-Emerging-Technologies-List-Update.pdf>>; Fast Track Action Subcommittee on Critical and Emerging Technologies, *Critical and Emerging Technologies List Update* (OSTP, February 2024), <<https://www.whitehouse.gov/wp-content/uploads/2024/02/Critical-and-Emerging-Technologies-List-2024-Update.pdf>>.

¹⁰⁴ Scott Jones, “Disrupting Export Controls: ‘Emerging and Foundational Technologies’ and Next Generation Controls, p. 48.

¹⁰⁵ Joint Leadership Statement on AUKUS,” The White House, September 2021, <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/15/joint-leaders-statement-on-aucus>>.

¹⁰⁶ “FACT SHEET: Implementation of the Australia – United Kingdom – United States Partnership (AUKUS),” The White House, April 5, 2022, <<https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/05/fact-sheet-implementation-of-the-australia-united-kingdom-united-states-partnership-aucus>>.

¹⁰⁷ Graham Allison et al., *The Great Tech Rivalry: China vs the U.S.* (Belfer Center for Science and International Affairs, December 2021), <https://www.belfercenter.org/sites/default/files/GreatTechRivalry_ChinavsUS_211207.pdf>; Kelley M. Sayler, “Emerging Military Technologies: Background and Issues for Congress,” Congressional Research Service, R46458, November 1, 2022, <<https://crsreports.congress.gov/product/pdf/R/R46458/12>>.

immediate need for trilateral Pillar II-style collaboration.¹⁰⁸ However, because the link between critical technologies and the ITAR is tenuous, it remains unclear how a relaxation of export controls could ensure AUKUS dominance in Pillar II focus areas.

While it is true that certain Pillar II capabilities (like hypersonic and electronic warfare) are primarily military technologies with correspondingly high ITAR-reliance, other capabilities involve general-purpose goods and technologies that are being developed primarily in the commercial sphere.¹⁰⁹ Controlling military development of general-purpose goods is even more difficult than traditional dual-use goods, since “straightforward distinctions and thresholds between military and civilian applications of emerging technologies in many cases do not exist.”¹¹⁰ Since many of the technologies involved are not explicitly military in nature, U.S. controls are often being implemented via the Department of Commerce’s Export Administration Regulations (EAR) rather than the more restrictive ITAR.¹¹¹

Additionally, private investment in technologies such as A.I. and quantum far exceeds public investment, and significant innovation in these fields generally occurs outside of government labs or military contractors.¹¹²

¹⁰⁸ Kirsty Needham, “China Leads Tech Race, Highlighting Need for AUKUS Sharing, Says Think-Tank,” *Reuters*, June 5, 2023, <<https://www.reuters.com/world/china-leads-tech-race-highlighting-need-aukus-sharing-says-think-tank-2023-06-05>>.

¹⁰⁹ According to the director of the U.S. Defense Innovation Unit (DIU), progress in 11 of the 14 critical technology areas identified by the Pentagon is being led by commercial entities. Douglas Beck, *DIU 3.0 – Scaling Defense Innovation for Strategic Impact* (CNAS and DIU, February 2024), p. 3, <<https://s3.us-east-1.amazonaws.com/files.cnas.org/documents/CNAS-Report-DIU-Finalc-020624.pdf>>.

¹¹⁰ Lindsay Gorman, “Lindsay Gorman Testifies Before the Senate Committee on Housing, Banking, and Urban Affairs,” German Marshall Fund, January 18, 2024, <<https://securingdemocracy.gmfus.org/lindsay-gorman-testifies-before-the-senate-committee-on-housing-banking-and-urban-affairs>>.

¹¹¹ Sam Howell, “To Restrict, or Not to Restrict, That is the Quantum Question,” *Lawfare*, May 1, 2023, <<https://www.lawfaremedia.org/article/to-restrict-or-not-to-restrict-that-is-the-quantum-question>>; Paul Triolo, “The Industry View of U.S. Export Controls: Moving the Goalposts,” *The Wire: China*, January 14, 2024, <<https://www.thewirechina.com/2024/01/14/the-industry-view-of-u-s-export-controls-moving-the-goalposts-chips>>; International Security Advisory Board, *Report on the Impact of Artificial Intelligence and Associated Technologies on Arms Control Nonproliferation, and Verification* (Department of State, October 2023), pp. 6-7, 30, <https://www.state.gov/wp-content/uploads/2023/11/ISAB-Report-on-AI-and-Associated-Technologies_11172023-Accessible.pdf>.

¹¹² Human-Centered Artificial Intelligence, *Artificial Intelligence Index Report 2024* (Stanford University, April 15, 2024), pp. 248, 403-405, <<https://aiindex.stanford.edu/report>>; “Steady Progress in Approaching the Quantum Advantage,” McKinsey Digital, April 24, 2024,

Even the U.S. DoD acknowledges that, especially regarding A.I., the department is seeking to adopt commercial innovation rather than create parallel systems.¹¹³ All three partners have created “innovation hubs” to help leverage commercial and academic breakthroughs, including the U.S. Defense Innovation Unit (DIU), the U.K.’s jHub program, and Australia’s Advanced Strategic Capabilities Accelerator (ASCA).¹¹⁴ While the adapted, military-specific systems incubated by these hubs may eventually be ITAR-controlled, they will remain far from the bleeding edge of the field.¹¹⁵

Of course, operationalizing emerging and critical technologies within AUKUS partner militaries will require close cooperation and information-sharing, which will be eased by ITAR and NOFORN reform.¹¹⁶ Yet the standardizing of software, A.I. models, and networks creates novel security concerns beyond those associated with traditional weapons platforms. Successful integration of electronic warfare systems, for example, will require standardized open system architecture (OSA) across all three AUKUS partner militaries.¹¹⁷ Similarly, the co-development of A.I. will most likely require the sharing of sensitive data sets to train models to meet the operational requirements of all three partners.¹¹⁸ Standardized weapons, software, and algorithms operating on linked networks dramatically escalate the risks of foreign espionage and the importance of robust control mechanisms like the ITAR.

<<https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/steady-progress-in-approaching-the-quantum-advantage>>.

¹¹³ “Remarks by Deputy Secretary of Defense Kathleen H. Hicks on ‘The State of AI in the Department of Defense’ (As Delivered),” Department of Defense, November 2, 2023, <<https://www.defense.gov/News/Speeches/Speech/Article/3578046/remarks-by-deputy-secretary-of-defense-kathleen-h-hicks-on-the-state-of-ai-in-t>>.

¹¹⁴ Wyatt et al., *Towards AUKUS Collaboration on Responsible Military Artificial Intelligence*, (RAND Australia, 2024), p. 30.

¹¹⁵ Expert assessments of AI models indicate that commercial models dominate the field. “Helm Leaderboard,” Center for Research on Foundation Models,” accessed on March 1, 2024, <<https://crfm.stanford.edu/helm/lite/latest/#/leaderboard>>.

¹¹⁶ According to an AUKUS defense ministers statement released in December 2023, the three nations are already running trilateral exercises experimenting with autonomous systems, quantum technologies, and artificial intelligence, among other Pillar II priorities. “AUKUS Defense Ministers Meeting Joint Statement,” U.S. Department of Defense, December 1, 2023, <<https://www.defense.gov/News/Releases/Release/Article/3604511/aucus-defense-ministers-meeting-joint-statement>>.

¹¹⁷ John Christianson, Sean Monaghan, and Di Cooke, *AUKUS Pillar Two* (CSIS, July 2023), p. 4, <https://csis-website-prod.s3.amazonaws.com/s3fs-public/2023-07/230710_Christianson_AUKUS_PillarTwo.pdf>.

¹¹⁸ Wyatt et al, *Towards AUKUS Collaboration on Responsible Military Artificial Intelligence*, (RAND Australia, 2024), pp. 1, 23-26.

In summary, many of the Pillar II critical and emerging technologies have been difficult to categorize and controversial to control. While the ITAR may provide obstacles to AUKUS partner collaborations on military systems implementing critical technologies, these systems have so far remained tangential to the larger race to maintain dominance in these technologies.

C. Comparable regimes

One of the key battlegrounds in debates over AUKUS Pillar II has been section 38(j) of the Arms Export Control Act (AECA), which ties blanket ITAR exemptions for foreign nations to their establishment of an export control regime “at least comparable” to its U.S. equivalent.¹¹⁹ Section 38(j) requires foreign nations to control the handling, end-use, retransfer, and reexport of U.S.-origin military items, to systematically share export and import information with U.S. law enforcement agencies, to control tangible and intangible technology exports, as well as unclassified information relating to military items, and to pass legislation criminalizing and penalizing export control violations.¹²⁰ Overall, there are nine requirements included in the section, seven of which are required of the U.K. and Australia by the 2024 NDAA.

The requirement for comparable export control regimes has been a sticking point in previous negotiations – indeed, some observers claim it is a “poison pill” inserted by the U.S. State Department into negotiations over the 2012-13 DTCTs to prevent reform.¹²¹ Others have argued that U.K. and Australian military export controls are already comparable to their U.S. equivalents, or that ITAR’s bureaucratic barriers are absurd given the current sharing of classified intelligence via the Five Eyes partnership.¹²² These arguments culminated in July with the introduction of two bill in the U.S. House Foreign Affairs Committee (HFAC) which provided blanket ITAR exemptions for the U.K. and Australia that far exceeded the

¹¹⁹ Paul K. Kerr and Ilana Krill, “U.S. Arms Transfer Restrictions and AUKUS Cooperation,” Congressional Research Service, IF12483, January 4, 2024, <<https://crsreports.congress.gov/product/pdf/IF/IF12483>>.

¹²⁰ § 38(j)(2)(A) and (B) of the AECA.

¹²¹ Jeffrey P. Bialos, “Will Regulatory Poison Pills Render AUKUS Dead on Arrival?” *The Diplomat*, September 1, 2023, <<https://thediplomat.com/2023/09/will-regulatory-poison-pills-render-aukus-dead-on-arrival>>.

¹²² “Ranking Member Risch Opening Statement at Hearing on AUKUS,” U.S. Foreign Relations Committee, September 6, 2023, <<https://www.foreign.senate.gov/press/rep/release/ranking-member-risch-opening-statement-at-hearing-on-aukus>>; James Carouso et al., “ITAR Should End For Australia,” CSIS, December 7, 2022.

Canadian exemption and lacked reciprocal requirements for regime alignment.¹²³

In reality, both the Australian and U.K. military export control regimes lacked key restrictions and enforcement mechanisms when AUKUS began, especially regarding “deemed exports,” and the exports of defense services. These weaknesses remained a primary concern for the State Department, which consistently tied potential ITAR licensing relief to their mitigation.¹²⁴ While both Canberra and London appear to have hoped that industry lobbying would stampede Congress into ignoring State’s concerns, the resistance of the U.S. Senate Foreign Relations Committee (SFRC) eventually killed this hope.¹²⁵ The final AUKUS-implementing legislation, passed as part of the 2023 NDAA in December 2023, excluded a substantial list of USML items and included the comparability requirement championed by the State Department and derided as a “poison pill” by industry analysts.

Of the two impacted AUKUS partners, Australia has been the most transparent about reforming its military export controls.¹²⁶ Canberra launched a review of its control regime in August 2023 before introducing new legislation in September to prevent cases like that of Daniel Duggan mentioned above.¹²⁷ Elements of this new legislation were modelled on

¹²³ "Text - H.R.4716 - 118th Congress (2023-2024): KOALA Act," Congress.gov, July 26, 2023, <<https://www.congress.gov/bill/118th-congress/house-bill/4716/text>>; Congress.gov, "Text - H.R.4715 - 118th Congress (2023-2024): BRITS Act," July 26, 2023, <<https://www.congress.gov/bill/118th-congress/house-bill/4715/text>>.

¹²⁴ Richard Abott, “House Committee Advances AUKUS Sub Transfer, ITAR Exemptions While Wicker Holds Up Senate Side For Sub Funds,” *Defense Daily*, July 27, 2023, <<https://www.defensedaily.com/house-committee-advances-aukus-sub-transfers-itar-exemptions-while-wicker-holds-up-senate-side-for-sub-funds/navy-usmc>>; Bryant Harris, “House Advances AUKUS Authorizations Amid Sub, Export Control Debate,” *Defense News*, July 26, 2023, <<https://www.defensenews.com/congress/2023/07/26/house-advances-aukus-authorizations-amid-sub-export-control-debate>>.

¹²⁵ “Chairman Menendez Delivers Opening Remarks at Full Committee Hearing on AUKUS Partnership,” U.S. Foreign Relations Committee, September 6, 2023, <<https://www.foreign.senate.gov/press/dem/release/chairman-menendez-delivers-opening-remarks-at-full-committee-hearing-on-aukus-partnership>>.

¹²⁶ Australian Government, Department of Defence, *Impact Analysis: Strengthening Australia’s Export Control Framework*, p. 2.

¹²⁷ Department of Defence, “Review of Defence Trade Controls Act 2012,” Commonwealth of Australia, August 29, 2023, <<https://www.minister.defence.gov.au/media-releases/2023-08-29/review-defence-trade-controls-act-2012>>; Department of Defence, “New Legislation to Safeguard Australia’s Military Secrets,” Commonwealth of Australia, <<https://www.minister.defence.gov.au/media-releases/2023-09-14/new-legislation-safeguard-australias-military-secrets>>.

similar provisions in U.S. law, and, according to Australian Defence Minister Richard Marles, were motivated to the requirements of AUKUS.¹²⁸ Two months later, the government introduced an amendment to the 2012 DTC to restrict deemed exports of certain DSGL technologies and services both within and outside Australia.¹²⁹ The amendment has been attacked because of its similarity to the ITAR and for its potential impact upon Australian scientists and academics engaged in international research; however, the government has argued that freeing military trade with the U.S. and U.K. from licensing requirements is worth the sacrifice.¹³⁰

U.K. military export control reform has remained comparatively opaque. The only apparent concession to regime alignment was the inclusion of new tools in the 2023 National Security Act allowing the prosecution of U.K. veterans engaged in training foreign militaries.¹³¹ The Act also criminalizes obtaining or disclosing “trade secrets” in abroad set of circumstances, but only when the conduct is unauthorized.¹³² Just prior to U.S. regime certification in August 2024, two other importance changes emerged. First, the U.K. Ministry of Defence updated Form 680, requiring government approval prior to the release of ITAR-controlled material to a foreign entity (including via “deemed exports” within the U.K.).¹³³ Second,

¹²⁸ Comments from Richard Marles, Hansard, Australian House of Representatives, September 14, 2023, <https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/27169/&sid=0004>.

¹²⁹ Department of Defence, “Defence Trade Controls Amendment Bill 2023,” Commonwealth of Australia, <<https://www.defence.gov.au/about/reviews-inquiries/defence-trade-controls-amendment-bill-2023>>.

¹³⁰ Andrew Greene, “Warning AUKUS Legislation Cedes Australian Sovereignty Over Military Technology,” *ABC News*, November 29, 2023, <<https://www.abc.net.au/news/2023-11-30/warning-aucus-legislation-cedes-australian-sovereignty/103168408>>; Justin Hendry, “Australia Races Ahead With Defence Export Control Reforms,” *InnovationAus*, November 30, 2023, <<https://www.innovationaus.com/australia-races-ahead-with-defence-export-control-reforms>>.

¹³¹ “Former Armed Forces Personnel Training Foreign Militaries Could be Prosecuted Under National Security Act,” UK Government, September 17, 2023, <<https://www.gov.uk/government/news/former-armed-forces-personnel-training-foreign-militaries-could-be-prosecuted-under-national-security-act>>.

¹³² “New Espionage Offences: Factsheet,” UK Government, February 12, 2024, <<https://www.gov.uk/government/publications/national-security-bill-factsheets/espionage-etc-national-security-bill-factsheet#annex---further-information-on-new-offences>>.

¹³³ Ministry of Defence, “Form 680 Policy and Guidance for UK Companies and UK Government Departments,” U.K. Government, Version 1, August 2024, <<https://www.gov.uk/government/publications/ministry-of-defence-form-680-procedure-guidance>>.

a bilateral agreement made ITAR-controlled technical data “protected information” under the 2023 National Security Act, simplifying the prosecution of ITAR-related export violations.¹³⁴ Other tangential U.K. regime modifications include the creation of the new Office of Trade Sanctions Implementation (OTSI) to aid the ECJU in civil enforcement, and the addition of certain quantum, semiconductor, and additive manufacturing technologies to the Strategic Export Control List.¹³⁵ It is British resistance to reform which likely led to the State Department delaying implementation of its AUKUS-related ITAR exemption into the summer of 2024.¹³⁶

In short, the expansion of an ITAR exemption to Australia and the U.K. when the partnership was announced in 2021 would have created substantial loopholes in U.S. military export controls, potentially allowing foreign adversaries to siphon U.S.-origin technology through American allies because of disparities in the export control regimes. Efforts to minimize this fact emphasized the onerous nature of the ITAR, the basic compatibility of the AUKUS partners’ controls, and the insulting and sovereignty-threatening implications of AECA section 38(j). However, to steal an analogy from U.S. National Security Advisor Jake Sullivan, export controls on critical technologies require a “small yard, high fence” approach to be successful.¹³⁷ While the “yard” generally refers to a spectrum of technologies rather than a geographic area, the same principles apply in either interpretation. Expanding the “yard” in the context of AUKUS to both Australia and the U.K. has, and will continue to, require a great deal of fence construction, modification, and surveillance.

¹³⁴ Private conversation with U.S. State Department official.

¹³⁵ “New Unit to Crack Down on Firms Dodging Russian Sanctions,” Press Release, U.K. Government, December 11, 2023, <<https://www.gov.uk/government/news/new-unit-to-crack-down-on-firms-dodging-russian-sanctions>>; “NTE 2024/04: The Export Control (Amendment) Regulations 2024,” Notice, U.K. Government, <<https://www.gov.uk/government/publications/notice-to-exporters-202404-the-export-control-amendment-regulations-2024/nte-202404-the-export-control-amendment-regulations-2024>>.

¹³⁶ U.S. Department of State, “International Traffic in Arms Regulations: Exemption for Defense Trade and Cooperation Among Australia, the United Kingdom, and the United States”, 35028; Luke A. Nicastro, “AUKUS Pillar 2 (Advanced Capabilities): Background and Issues for Congress,” R47599, Congressional Research Services, May 21, 2024, p. 11, <<https://crsreports.congress.gov/product/pdf/R/R47599>>.

¹³⁷ “Remarks by National Security Advisor Jake Sullivan on the Biden-Harris Administration’s National Security Strategy,” The White House, October 12, 2022, <<https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/10/13/remarks-by-national-security-advisor-jake-sullivan-on-the-biden-harris-administrations-national-security-strategy>>.

Conclusion: a new plurilateral export control regime?

The U.S. government has turned to tools of economic statecraft, including STCs, in recent years in response both to Chinese competition and Russian aggression. In both cases, Washington has found existing multilateral regimes like the Wassenaar Arrangement lacking, and instead has constructed new informal structures such as the Global Export Control Coalition (GECC) by leveraging U.S. soft power. While AUKUS is primarily a security partnership rather than an export control regime, its creation of a limited “ITAR-free” zone consisting of the U.S., Australia, and the U.K. bridges the definitional gap. The endurance of the ITAR despite the AUKUS challenge, and the ongoing alignment of each partner’s military export control regimes, has created an interesting possibility: the embryonic core of a new plurilateral export control regime to rival Wassenaar, albeit one (like the original COCOM) largely dominated by U.S. geopolitical interests.

This possibility is distant, but not unreasonable. First, the emergence of Pillar II has made AUKUS more attractive to other close U.S. allies like New Zealand and Canada.¹³⁸ Factions in the U.S. Senate and U.K. Parliament have already recommended that South Korea and Japan be allowed to join, reflecting both their geographical proximity to China and their domestic expertise in certain Pillar II technologies.¹³⁹ Potential additions might balk before accepting the comparability requirement imposed by the 2024 NDAA, but each AUKUS addition would expand both the economic benefits of inclusion and the opportunity costs of remaining outside the partnership.

Second, despite protestations to the contrary, AUKUS encourages partners to decouple from the Chinese economy, especially in the

¹³⁸ Renju Jose and Lucy Craymer, “New Zealand to Explore AUKUS Benefits, Boost Security Ties with Australia,” *Reuters*, December 19, 2023, <<https://www.reuters.com/world/asia-pacific/new-zealands-luxon-talk-defence-economy-australia-2023-12-19>>; Robert Fife and Steven Chase, “Canada Seeks to Join Non-Nuclear Pillar of AUKUS Alliance,” *The Globe & Mail*, May 9, 2023, <<https://www.theglobeandmail.com/politics/article-canada-eyes-entry-into-aukus-alliance-to-help-keep-china-in-check>>; Stephanie Carvin and Thomas Juneau, “Why AUKUS and not CAUKUS? It’s a Potluck, not a Party,” *International Journal*, 78 no. 3 (September 4, 2023), pp. 359-374, <<https://journals.sagepub.com/doi/10.1177/00207020231195109>>.

¹³⁹ Foreign Affairs Committee, *Tilting Horizons: The Integrated Review and the Indo-Pacific* (UK House of Commons, July 18, 2023), p. 31, <<https://committees.parliament.uk/publications/41144/documents/204045/default>>; “U.S. Bill Would Require U.S. to Coordinate Japan AUKUS Role with U.K. and Australia,” *Reuters*, May 8, 2024, <<https://www.reuters.com/world/us-bill-would-require-us-coordinate-japan-aukus-role-with-uk-australia-2024-05-08>>.

academic and technical spheres. This trend will be accelerated by the imposition of “deemed export” controls in both Australia and the U.K., increased scrutiny of international academic collaborations, and the ongoing friendshoring of complex Pillar II-related supply chains. Australian academics have argued that the new DTC amendment will require “an unprecedented level of monitoring” of university employees, affiliates, students, and visitors with exposure to DSGI-related research.¹⁴⁰ In the U.S. and U.K., governments are pressuring universities to end academic partnerships with Chinese institutions,¹⁴¹ surveilling international graduate students,¹⁴² eliminating student visas,¹⁴³ and scrutinizing sources of university income.¹⁴⁴ The breadth of anticipated AUKUS Pillar II collaboration will require a fundamental realignment of human, economic, and technical capital away from China and towards alliance partners.

Third, as the Canadian government has discovered again and again since the Second World War, access to the U.S. military industrial base requires continuous realignment with U.S. policy. The NDAA 2024 includes a provision for suspending any ITAR exemption granted to Australia or the U.K. if either country ceases to implement a comparable regime, or if

¹⁴⁰ Emma Johnston, “Submission on the DTC Amendment Bill Exposure Draft,” The University of Sydney, November 17, 2023, pp. 3-4.

¹⁴¹ Christine Mui, “Is There a Future for U.S.-China Research Collaboration?” *Politico*, May 13, 2024, <<https://www.politico.com/newsletters/digital-future-daily/2024/05/13/is-there-a-future-for-u-s-china-research-collaboration-00157725>>; Fiona Quimbre, “Educating Academics Will Ease Universities’ Foreign Influence Crisis,” RAND, October 19, 2023, <<https://www.rand.org/pubs/commentary/2023/10/educating-academics-will-ease-uk-universities-foreign.html>>.

¹⁴² Elizabeth Redden, “A Retreat From China Collaborations in the Face of U.S. Scrutiny,” *Inside Higher Ed*, October 28, 2021, <<https://www.insidehighered.com/news/2021/10/29/survey-finds-chilling-effect-china-initiative>>.

¹⁴³ Donald Trump, “Proclamation on the Suspension of Entry as Nonimmigrants of Certain Students and Researchers from the People’s Republic of China”, The White House, May 29, 2020, <<https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-suspension-entry-nonimmigrants-certain-students-researchers-peoples-republic-china>>.

¹⁴⁴ Matthew A. Goldstein, “Congress Focuses on China Risk at U.S. College and Universities,” *Reuters*, January 8, 2024, <<https://www.reuters.com/legal/legalindustry/congress-focuses-china-risk-us-colleges-universities-2024-01-08>>; U.K. Government, Parliament, *Government Response to the Intelligence and Security Committee of Parliament Report ‘China,’* CP 929 (September 2023), pp. 24-29, <https://assets.publishing.service.gov.uk/media/6502c367702634001389b818/HM_Government_Response_to_the_ISC_Report__China_.pdf>.

doing so serves a vital U.S. security interest.¹⁴⁵ Similarly, the exemption is only available to a list of Australian and British “authorized users” dependent on American approval through the DDTC, giving Washington “ultimate gatekeeping authorities” over eligibility.¹⁴⁶ If the dynamism of recent U.S. export controls, sanctions, and investment screening continues, Canberra and London, like Ottawa before them, will discover that a U.S. ally may have an ITAR exemption or export control policy autonomy, but not both.

The possibility that AUKUS might develop into a new plurilateral export control regime would have seemed unreasonable in September 2021, when Pillar II remained a dinghy tenuously tethered to the hull of a nuclear submarine deal. Yet as that dinghy has been expanded and retrofitted for various political purposes—mobilizing military industry, catalyzing quantum and A.I. innovation, integrating the three partner militaries, and confronting China—it has become difficult to tell which vessel is the true flagship of AUKUS.

Similarly, attempts to use Pillar II to attack U.S. military controls and remove a longstanding trade irritant (the ITAR), have instead further entangled Australia and the U.K in a U.S.-centered, ITAR-based control regime targeting China. While both countries have achieved a desired outcome (an ITAR exemption) in 2024, this aim remains tangential to the success of AUKUS Pillar II and will continue to be limited in scope and bolted to an onerous regime comparability requirement. Key exclusions to the exemption, as well as competition generated by each partner’s export-dependent military industrial base, will complicate implementation. As always, the three partners will need to balance the strategic imperatives for military industrial collaboration and security with the economic benefits of deregulation and export competition—or risk the “generational opportunity” of AUKUS becoming another generational failure.

¹⁴⁵ Congress.gov, 118-31, “National Defense Authorization Act for Fiscal Year 2024,” December 22, 2023, §1343, <<https://www.congress.gov/118/plaws/publ31/PLAW-118publ31.pdf>>.

¹⁴⁶ William Greenwalt and Tom Corben, *AUKUS Enablers?*, p. 27.