

Practicalities Loom Larger Than Policy For Aussie Sub Deal

By **Daniel Wilson**

Law360 (January 25, 2023, 10:31 PM EST) -- A pact for the U.S. to supply nuclear submarine technology to Australia raises several export control issues, but experts say practical considerations like improving Australia's shipbuilding capability may be tougher barriers to implementing the deal than any needed trade policy changes.

Under AUKUS, a trilateral defense pact among the U.S., U.K. and Australia signed in September 2021, the three countries have agreed to cooperate on various defense technologies. The most prominent aspect of the deal is that it will allow Australia to access U.S. technologies for nuclear-powered submarines. That will make Australia only the second U.S. ally to do so after the U.K.

AUKUS was brought back into the spotlight when a letter sent to the Biden administration by Senate Armed Services Committee Chairman Jack Reed, D-R.I., and then-ranking member Sen. Jim Inhofe, R-Okla., that raised concerns about the pact was made public Jan. 5.

The senators argued that what had originally been pledged as a "do no harm" opportunity to support key U.S. allies "may be turning into a zero-sum game for scarce, highly advanced U.S. [nuclear-powered submarines]," amid uncertainties over whether U.S.-made vessels will be supplied to Australia under the deal and related constraints in the defense industrial base. A more concrete plan for implementing the pact is expected in March.

That letter has since prompted a steady stream of responses from a broad bipartisan group of lawmakers and Australian Prime Minister Anthony Albanese, among others, defending the submarine deal while also bringing attention to potential barriers and complications for the agreement, including issues with U.S. export controls for sensitive defense technology.

Although providing technology to Australia under AUKUS is subject to complicated U.S. export control rules and laws, there are some policy exceptions already in place and some relatively simple potential changes to export controls that could be exercised to help make the pact proceed smoothly, said Mario Mancuso, leader of Kirkland & Ellis LLP's international trade and national security practice and former undersecretary of industry and security at the U.S. Department of Commerce.

"I think the technical export control regulatory questions are hugely important, but in many respects they are quite straightforward in the sense that there can be pretty easy technical fixes in the regulations that would permit some of the technology that AUKUS ostensibly covered to be shared with and between the Australians and the United States," he said.

The necessary export regulatory and licensing approvals required to put AUKUS into effect will involve coordination among multiple agencies, including the U.S. departments of Commerce, Defense and State.

Typically, the more agencies that are involved in an export deal, the greater chance there is of disagreements, inconsistencies and holdups in the licensing process, said Christopher Stagg, counsel at Miller & Chevalier Chtd., whose practice focuses on export control issues and who previously helped to develop federal export control policy at the State Department's Directorate of Defense Trade Controls.

"It seems that [the end goal of AUKUS] has received warm reception within Congress. There's this broad agreement about the principle of it," Stagg said. "But then, with export controls, there can be [a situation where] we agree with the principle but maybe not some of the specifics."

Still, Australia will have a head start in securing the required approvals as there is already a defense trade cooperation treaty in place between the U.S. and Australia, signed in 2007, which includes an exemption to some of the typical requirements of the International Traffic in Arms Regulations, according to Giovanna Cinelli, head of Morgan Lewis & Bockius LLP's international trade and national security practice and a former Naval intelligence officer who specialized in submarine-related issues.

"The exemption is not being used a lot," she said. "But it already exists in the ITAR, and it is possible that for this deal, there may be some aspect of that exemption that could be used."

There is also an ITAR clause, Part 126.15, specific to Australia and the U.K., which requires expedited processing of any requested export of "defense articles or services" to those countries, Stagg of Miller & Chevalier said. While that clause has an exception for deals where "classified or exceptional circumstances" apply, it may help speed the way for at least some AUKUS-related technology to get to Australia, he said.

And if the Pentagon declares that exports related to AUKUS are in the interest of the U.S. and issues a formal request to that effect, then existing authorities allow the Commerce and State departments to create related export licensing exemptions, said Akin Gump Strauss Hauer & Feld LLP partner Kevin Wolf, a former assistant secretary for export administration at the Commerce Department whose practice focuses heavily on export control issues.

Also, if any regulatory snags ultimately hold up implementation of the pact, Congress has the broad authority to step in with legislation to address those issues.

"They have the power of a pen, there," Stagg said. "If they want to amend the Arms Export Control Act and create an exemption for this program, or even more broadly, they could do that. There's restrictions on what the State Department can do in creating those kinds of exemptions, and that's written into the statute. But for Congress, they can kind of do as they please."

One of the most straightforward, but also most sweeping, legislative methods for removing export control barriers would require adding only a few words to existing law, extending an exemption from export licensing requirements for defense exports that applies to Canada to also cover Australia and the U.K., Akin Gump's Wolf said.

That would not only help free the way for AUKUS to proceed but facilitate broader arms trade with

those countries, as potential defense deals and cooperation are currently stymied by existing international policy, according to Wolf.

"The key to success on the defense trade side is simplicity, because right now there are these two treaties that are so complicated that nobody can really use them," he said. "[That] discourages, from my experience, a lot of joint development and cooperation among the countries, because of fear of the ITAR."

Even if lawmakers continue to have concerns about issues such as ensuring sufficient oversight on technology transfers under AUKUS, which would make a blanket export control exception a political nonstarter, Congress could at least create an expedited and streamlined export approval process related to the pact, experts said.

That means that the more intractable issues with implementing AUKUS may come on the geopolitical and practical sides of the pact. For example, the deal has been driven by concerns about, and has been strongly opposed by, China, creating a tough balancing act for Australia, whose chief military ally is the U.S. but whose main trading partner is China.

Then there is the issue of sourcing highly enriched uranium, required for the naval nuclear reactors currently used by the U.S. and U.K., which is in limited supply. Although Australia is one of the largest global suppliers of unprocessed uranium, it lacks its own enrichment facilities as it only has one small nuclear reactor, which is used for research and making medical isotopes.

And despite the expectation that at least most of the construction of the new submarines will take place in Australia, that nation doesn't currently have all the necessary infrastructure such as dry docks and testing facilities, nor an industrial base that can design, develop, manufacture and sustain a nuclear submarine, according to Cinelli of Morgan Lewis. In addition, workers with expertise in the relevant technologies are rare in the U.S., let alone Australia.

"They have highly qualified companies that have been subcontractors on a host of military platforms, but we're talking about building a ground-up capability," she said. "That requires not just technology, but it requires people, and it requires resources."

In addition to scarce technical expertise, it is also unlikely that Australia has anywhere near the sort of "subculture" of industrial security that exists in the U.S. and serves to protect highly sensitive technologies and classified programs, according to Kirkland's Mancuso.

"There are thousands of people who have been trained in that, who are familiar with it, who have experienced it over many years," he said. "And that kind of subculture, in addition to the physical spaces necessary to conduct this research, this work, this collaboration, I assume is not as well-developed in Australia."

--Editing by Jill Coffey and Emily Kokoll.