

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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STATE DIPLOMATIC AND CONSULAR RELATIONS

The United States, Australia, and the United Kingdom Announce “AUKUS” Alliance Focused on Indo-Pacific Security

doi:10.1017/ajil.2021.69

On September 15, the United States took concrete steps to shift its security and defense focus to the Indo-Pacific region by announcing a new “enhanced trilateral security partnership” with the United Kingdom and Australia.¹ The initial focus of the so-called AUKUS alliance is an agreement to share nuclear-powered submarine technology with Australia.² The announcement sparked an immediate reaction in Europe and the Indo-Pacific region. Most notably, securing nuclear-powered submarines prompted Australia to cancel an agreement with France for diesel-powered submarines,³ and France reacted furiously, recalling its ambassadors from both the United States and Australia.⁴ Although the announcement of the alliance made no direct mention of China, the inference that it addresses Chinese power in the region is unavoidable, and China warned that the alliance, and particularly the submarine agreement, could accelerate an arms race.⁵

The AUKUS announcement builds on nearly a decade of efforts to increase U.S. focus on Asia and the Pacific. In 2011, the Obama administration announced “America’s pivot toward the Asia Pacific,” citing “winding down” of operations in Iraq and “a transition in Afghanistan.”⁶ Competing concerns, including, for example, countering the Islamic State in Iraq and Syria and Russia’s invasion of Ukraine, ensured that the “pivot” remained incomplete.⁷ The Trump administration also focused on the Indo-Pacific region and particularly on China, including imposing wide-ranging tariffs in response to allegations of unfair trade practices by China.⁸

¹ White House Press Release, Joint Leaders Statement on AUKUS (Sept. 15, 2021), at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/15/joint-leaders-statement-on-aukus> [<https://perma.cc/P9MG-Y2BF>].

² *Id.*

³ Steven Erlanger, *The Sharp U.S. Pivot to Asia is Throwing Europe off Balance*, N.Y. TIMES (Sept. 28, 2021), at <https://www.nytimes.com/2021/09/17/world/europe/biden-china-europe-submarine-deal.html>.

⁴ Roger Cohen & Michael D. Shear, *Furious Over Sub Deal, France Recalls Ambassadors to U.S. and Australia*, N.Y. TIMES (Sept. 17, 2021), at <https://www.nytimes.com/2021/09/17/world/europe/france-ambassador-recall-us-australia.html>; Michael D. Shear & Roger Cohen, *The United States Says It Gave France Only a Few Hours’ Notice of Defense Deal that Paris Called a “Knife in the Back,”* N.Y. TIMES (Sept. 16, 2021), at <https://www.nytimes.com/2021/09/16/us/politics/france-us-biden-australia-submarine.html>.

⁵ Embassy of China in the United States Press Release, Wang Yi: U.S.-Britain-Australia Nuclear Submarine Cooperation Poses Three Hidden Dangers (Sept. 28, 2021), at <http://www.china-embassy.org/eng/zgyw/t1911163.htm>.

⁶ Hillary Clinton, U.S. Sec’y of State, Remarks at East-West Center, Honolulu, HI, America’s Pacific Century (Nov. 10, 2011), at <https://2009-2017.state.gov/secretary/20092013clinton/rm/2011/11/176999.htm> [<https://perma.cc/H8HS-AGYJ>]; see also Barack Obama, Remarks by President Obama to the Australian Parliament 2011 DAILY COMP. PRES. DOC. 00873 (Nov. 17, 2011), at <https://obamawhitehouse.archives.gov/the-press-office/2011/11/17/remarks-president-obama-australian-parliament> [<https://perma.cc/9M9Y-LYFH>].

⁷ See, e.g., Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 109 AJIL 175 (2015); Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 109 AJIL 429 (2015).

⁸ See Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 505 (2018).

Since taking office, the Biden administration has worked systematically to shore up strategic alliances in both Europe and the Indo-Pacific. In remarks in March 2021, Secretary of State Antony Blinken emphasized “the need to engage China from a position of strength,” an approach that “requires working with allies and partners, not denigrating them, because our combined weight is much harder for China to ignore.”⁹ To that end, the United States and United Kingdom announced the “New Atlantic Charter” in June to “defend the principles, values, and institutions of democracy” among other things,¹⁰ and the Biden administration has resolved several trade disputes with Europe, removing irritants in the Atlantic alliances.¹¹ The Biden administration has also strengthened relationships in the Indo-Pacific region by working closely with the “Quad,” which includes the United States, Australia, Japan, and India, to respond to the COVID-19 crisis, as well as climate change and other shared challenges.¹² In a joint statement following their first in-person meeting in September, the Quad leaders emphasized their commitment “to promoting the free, open, rules-based order, rooted in international law and undaunted by coercion, to bolster security and prosperity in the Indo-Pacific and beyond,” and noted that they “stand for the rule of law, freedom of navigation and overflight, peaceful resolution of disputes, democratic values, and territorial integrity of states.”¹³

The AUKUS announcement appears to mark a serious shift in U.S. focus. In announcing the partnership, the AUKUS leaders resolved “to deepen diplomatic, security, and defense cooperation in the Indo-Pacific region” and emphasized “interoperability.”¹⁴

The first stage of the AUKUS agreement focuses on delivering nuclear-powered submarine capabilities to Australia.¹⁵ In light of the planned acquisition of nuclear-powered submarines, Australia withdrew from a \$66 billion agreement with France for the purchase of diesel-powered submarines.¹⁶ Reports suggest that the Australian government feared that the diesel submarines would be obsolete by the completion of the deal, possibly as late as 2036.¹⁷ The nuclear-powered submarines that the United States and United Kingdom will provide can remain underwater longer without surfacing, giving them an improved ability to monitor

⁹ Antony J. Blinken, Sec’y of State, A Foreign Policy for the American People (Mar. 3, 2021), at <https://www.state.gov/a-foreign-policy-for-the-american-people> [<https://perma.cc/GN59-J2VN>]; see also Kristen E. Eichensehr, Contemporary Practice of the United States, 115 AJIL 536, 541 (2021).

¹⁰ White House Press Release, New Atlantic Charter (June 10, 2021), at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/10/the-new-atlantic-charter> [<https://perma.cc/B8CB-NPVH>].

¹¹ See Kristen E. Eichensehr, Contemporary Practice of the United States, 115 AJIL 715, 720 (2021) (discussing the resolution of the Airbus-Boeing trade dispute); Ana Swanson & Katie Rogers, *U.S. Agrees to Roll Back European Steel and Aluminum Tariffs*, N.Y. TIMES (Oct. 30, 2021), at <https://www.nytimes.com/2021/10/30/business/economy/biden-steel-tariffs-europe.html>.

¹² Eichensehr, *supra* note 9, at 544.

¹³ White House Press Release, Joint Statement from Quad Leaders (Sept. 24, 2021), at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/24/joint-statement-from-quad-leaders> [<https://perma.cc/6XYH-T9VQ>].

¹⁴ White House Press Release, *supra* note 1.

¹⁵ *Id.*

¹⁶ Erlanger, *supra* note 3.

¹⁷ David E. Sanger, *Secret Talks and a Hidden Agenda: Behind the U.S. Defense Deal that France Called a “Betrayal”*, N.Y. TIMES (Sept. 17, 2021), at <https://www.nytimes.com/2021/09/17/us/politics/us-france-australia-betrayal.html>.

activity by China.¹⁸ The AUKUS deal will be the first time that the United States has agreed to transfer its nuclear propulsion technology since sharing it with the United Kingdom in 1958, and Australia will be the first non-nuclear weapons country to obtain such submarines.¹⁹

Although the pledged submarines are nuclear powered, Australia, the United Kingdom, and the United States reiterated their commitment to the non-proliferation of nuclear weapons. The AUKUS leaders' statement noted that "Australia remains committed to fulfilling all of its obligations as a non-nuclear weapons state" and the three countries "are deeply committed to upholding our leadership on global non-proliferation."²⁰ In a press statement, Australian Prime Minister Scott Morrison firmly stated that "Australia has no plans to acquire nuclear weapons and this proposal will remain consistent with Australia's longstanding commitment to nuclear non-proliferation."²¹

The AUKUS announcement envisions an eighteen-month period to "seek an optimal pathway to deliver" nuclear-powered capabilities to Australia.²² President Biden emphasized that the governments will use the eighteen-month period "to determine every element of this program—from workforce, to training requirements, to production timelines, to safeguards and nonproliferation measures, and to nuclear stewardship and safety—to ensure full compliance with each of our nation's commitments under the Nuclear Non-Proliferation Treaty."²³

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) imposes obligations on both nuclear weapons states and non-nuclear weapons states.²⁴ The treaty requires non-nuclear weapons states like Australia to "accept safeguards" negotiated and agreed to with the International Atomic Energy Agency (IAEA) to verify its "fulfilment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices."²⁵ The treaty obligates all parties, including nuclear-weapons states, "not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to" IAEA safeguards.²⁶ Both the United States and the United Kingdom use weapons-grade highly

¹⁸ Sylvia Pfeifer, et al., *The Nuclear Technology Behind Australia's Aukus Submarine Deal*, FIN. TIMES (Sept. 19, 2021), at <https://www.ft.com/content/aa5c9fd5-891b-4680-b3c7-5a55d03f673c>.

¹⁹ Shayan Karbassi, *Legal Mechanisms of AUKUS Explained*, LAWFARE (Sept. 24, 2021), at <https://www.lawfareblog.com/legal-mechanisms-aukus-explained>.

²⁰ White House Press Release, *supra* note 1.

²¹ Prime Minister of Australia Press Release, Australia to Pursue Nuclear-Powered Submarines Through New Trilateral Enhances Security Partnership (Sept. 16, 2021), at <https://www.pm.gov.au/media/australia-pursue-nuclear-powered-submarines-through-new-trilateral-enhanced-security>.

²² White House Press Release, *supra* note 1.

²³ White House Press Release, Remarks by President Biden, Prime Minister Morrison of Australia, and Prime Minister Johnson of the United Kingdom Announcing the Creation of AUKUS (Sept. 15, 2021), at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/15/remarks-by-president-biden-prime-minister-morrison-of-australia-and-prime-minister-johnson-of-the-united-kingdom-announcing-the-creation-of-aukus> [<https://perma.cc/P25U-6SY8>]; see also Chris Buckley, *Nuclear-Powered Submarines for Australia? Maybe Not so Fast*, N.Y. TIMES (Oct. 29, 2021), at <https://www.nytimes.com/2021/10/29/world/australia/nuclear-powered-submarines.html>.

²⁴ Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 UST 483, 729 UNTS 161, at <https://www.un.org/disarmament/wmd/nuclear/npt/text>.

²⁵ *Id.* Art. 3(1).

²⁶ *Id.* Art. 3(2).

enriched uranium to power their nuclear submarines,²⁷ and the AUKUS countries have already begun to work with the IAEA to ensure that the submarine deal meets their NPT obligations.²⁸ IAEA Director General Rafael Mariano Grossi noted that the countries had informed the IAEA of their plans and pledged that “[t]he IAEA will engage with them on this matter in line with its statutory mandate, and in accordance with their respective safeguards agreements with the Agency.”²⁹

Domestically, the Atomic Energy Act of 1954 authorizes international cooperation, including agreements for sharing of nuclear material for civilian and military applications, pursuant to certain conditions. In particular, the Act allows sharing with non-nuclear-weapon states subject to IAEA safeguards,³⁰ and it allows the president to authorize the transfer to other countries of nuclear material for military applications when he determines that such cooperation “will promote . . . the common defense and security.”³¹ The Act also includes a report-and-wait provision whereby the executive must submit a proposed cooperation agreement to relevant congressional committees and Congress has sixty days to pass a joint resolution disapproving the agreement.³² Pursuant to this provision, Biden transmitted to Congress on December 1 an agreement with the United Kingdom and Australia for “the Exchange of Naval Nuclear Propulsion Information.”³³

To date, AUKUS has received bipartisan support, rendering congressional disapproval of the agreement unlikely. House Foreign Affairs Committee (HFAC) Chairman Rep. Gregory Meeks (D-NY) tweeted that he “welcome[s] this step to bolster cooperation with our allies Australia and the UK in the pivotal Indo-Pacific region” and “will be engaging closely with the @White House and our allies & partners to preserve safety and security for all.”³⁴ HFAC Ranking Member Rep. Michael McCaul (R-TX) called the alliance a “welcome step” that “will help deter [China’s] belligerent ambitions.”³⁵ After a meeting with House Speaker Nancy Pelosi (D-CA) and Senate Minority Leader Mitch McConnell (R-KY), Australian

²⁷ Karbassi, *supra* note 19.

²⁸ Francois Murphy, *AUKUS to Engage with IAEA on Nuclear Subs*, *CANBERRA TIMES* (Sept. 16, 2021), at <https://www.canberratimes.com.au/story/7434119/aukus-to-engage-with-iaea-on-nuclear-subs>.

²⁹ Int’l Atomic Energy Assoc. Press Release, IAEA on Trilateral Effort of Australia, United Kingdom, and United States on Nuclear Naval Propulsion (Sept. 16, 2021), at <https://www.iaea.org/newscenter/pressreleases/iaea-on-trilateral-effort-of-australia-united-kingdom-and-united-states-on-nuclear-naval-propulsion>.

³⁰ 42 U.S.C. § 2153(a)(2).

³¹ 42 U.S.C. § 2121(c)(4).

³² 42 U.S.C. § 2153(d).

³³ Message to the Congress Transmitting an Agreement Between the Government of the United States of America, the Government of Australia, and the Government of the United Kingdom of Great Britain and Northern Ireland for the Exchange of Naval Nuclear Propulsion Information, 2021 DAILY COMP. PRES. DOC. 01014 (Dec. 1). For the full text of the agreement, see Agreement Between the Government of the United States of America, the Government of Australia, and the Government of the United Kingdom of Great Britain and Northern Ireland for the Exchange of Naval Nuclear Propulsion Information, U.K. Gov’t Misc. Series No. 8 (2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1036009/MS_8.2021_Agreement_UK_USA_Australia_Naval_Nuclear_Propulsion.pdf.

³⁴ House Foreign Affairs Comm. (@HouseForeign), TWITTER (Sept. 16, 2021, 12:25pm), at <https://twitter.com/HouseForeign/status/1438539610649464833> [<https://perma.cc/N8UP-GDFA>].

³⁵ House Foreign Affairs Committee Republicans Press Release, McCaul on Defense and Nuclear Partnership with U.K., Australia (Sept. 15, 2021), at <https://gop-foreignaffairs.house.gov/press-release/mccaul-on-defense-and-nuclear-partnership-with-uk-australia> [<https://perma.cc/W3D3-UN79>].

Prime Minister Scott Morrison stated that “we received overwhelming support” for the submarine deal.³⁶

Internationally, reactions to the announcement of the alliance were mixed. France reacted angrily to the announcement of the deal and to Australia’s cancellation of its contract for French submarines. French Foreign Minister Jean-Yves Le Drian called the actions a “stab in the back” and claimed that “this unilateral, sudden and unforeseeable decision very much recalls what Mr. Trump would do.”³⁷ French President Emmanuel Macron recalled France’s ambassadors from Australia and the United States and cancelled a Washington, D.C. gala meant to celebrate the long-standing U.S.-French alliance.³⁸ While UK Prime Minister Boris Johnson suggested that France “*donnez-moi un break*” and “*prenez un grip*,”³⁹ the European Union has expressed support for France. European Commission President Ursula von der Leyen “called the treatment of France ‘unacceptable,’”⁴⁰ and EU High Representative Josep Borrell criticized the lack of European inclusion in the alliance and called for “[m]ore cooperation, more coordination, less fragmentation” in the Indo-Pacific region.⁴¹ According to a senior official, the United States had expected Australia to handle the cancellation of the French deal,⁴² and the United States has since taken steps to repair its relationship with France. In a joint statement released on September 22, Biden and Macron agreed that “the situation would have benefited from open consultations among allies,” and Macron agreed to return the French ambassador to the United States.⁴³ When Biden and Macron met in person in October, Biden acknowledged that “what we did was clumsy.”⁴⁴

U.S. allies in the region reacted more positively. In a call between the Japanese and Australian foreign ministers, Japan’s Foreign Minister Motegi Toshimitsu “welcomed the

³⁶ Matthew Cranston, *U.S. Congress Gives “Overwhelming Support” to AUKUS*, FIN. REV. (Sept. 23, 2021), at <https://www.afr.com/policy/foreign-affairs/us-congress-gives-overwhelming-support-to-aukus-20210923-p58u31>.

³⁷ Karen DeYoung, Michael E. Miller & Lily Kuo, *Biden’s Submarine Accord with Australia Angers Both France and China*, WASH. POST (Sept. 17, 2021), at https://www.washingtonpost.com/world/asia_pacific/australia-us-subs-relations/2021/09/16/3db2e820-1699-11ec-a019-cb193b28aa73_story.html.

³⁸ Cohen & Shear, *supra* note 4; Shear & Cohen, *supra* note 4.

³⁹ *Boris Johnson Tells Macron: Donnez-Moi un Break Over New Pact*, BBC (Sept. 22, 2021), at <https://www.bbc.com/news/uk-58654624>.

⁴⁰ David M. Herszenhorn, *EU Leaders Accuse Biden of Disloyalty to Allies*, POLITICO (Sept. 21, 2021), at <https://www.politico.eu/article/eu-charles-michel-biden-disloyalty-allies-aukus> (quoting von der Leyen interview with CNN).

⁴¹ European External Action Serv. Remarks, Informal EU Ministers Meeting: Remarks by the High Representative Josep Borrell at the Press Conference (Sept 20, 2021), at https://eeas.europa.eu/headquarters/headquarters-homepage/104404/informal-eu-foreign-ministers-meeting-remarks-high-representative-josep-borrell-press_en.

⁴² Sanger, *supra* note 17.

⁴³ White House Press Release, Joint Statement on the Phone Call Between President Biden and President Macron, (Sept. 22, 2021), at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/22/joint-statement-on-the-phone-call-between-president-biden-and-president-macron> [<https://perma.cc/T72K-4CFX>].

⁴⁴ Katie Rogers, et al., “*It Was Not Done with a Lot of Grace*,” *Biden Says of the Submarine Deal with Australia that Angered France*, N.Y. TIMES (Oct. 29, 2021), at <https://www.nytimes.com/2021/10/29/world/europe/biden-macron-submarine-deal.html>.

security cooperation between Australia and the United States” and both the Australian and Japanese foreign ministers reaffirmed their commitment to “the realization of a Free and Open Indo-Pacific.”⁴⁵ Although New Zealand prohibits nuclear-powered submarines in its ports and was not asked to join the alliance, New Zealand Prime Minister Jacinda Ardern nonetheless “welcome[d] the increased engagement of the UK and US in the region and reiterate[d] our collective objective needs to be the delivery of peace and stability and the preservation of the international rules-based system.”⁴⁶

China criticized the alliance and the submarine deal specifically. Foreign Ministry Spokesperson Zhao Lijian said that the deal “undermined regional peace and stability, aggravated the arms race and hurt international nonproliferation efforts.”⁴⁷ Chinese Foreign Minister Wang Yi cited three hidden dangers to AUKUS and the nuclear deal: resurgence of the Cold War, an arms race, and nuclear proliferation and accused AUKUS of “fueling conflict and confrontation, [and] endangering peace and stability.”⁴⁸ North Korea’s reaction was similar to China’s. Through a state news agency, a North Korean Foreign Ministry official said, “These are extremely undesirable and dangerous acts which will upset the strategic balance in the Asia-Pacific region and trigger off a chain of nuclear arms race.”⁴⁹

The long-term shape of the alliance and its ramifications remain to be seen. In addition to the submarine deal, the leaders’ statement announcing AUKUS said that the countries will “embark on further trilateral collaboration under AUKUS to enhance our joint capabilities and interoperability,” including with respect to “cyber capabilities, artificial intelligence, quantum technologies, and additional undersea capabilities.”⁵⁰ The exclusion of European countries, other than the United Kingdom, from the alliance may push the European Union to pursue “strategic autonomy” to navigate between the United States and China—an approach advocated by Macron in particular.⁵¹ Although the United States has said that it will not extend nuclear submarine technology to other allies such as South Korea,⁵² the AUKUS deal is fueling speculation about increased military spending by states across the Indo-Pacific region.⁵³

⁴⁵ Japanese Ministry of Foreign Affairs Press Release, Japan–Australia Foreign Ministers’ Tel. Talk (Sept. 17, 2021), at https://www.mofa.go.jp/press/release/press3e_000248.html.

⁴⁶ Audrey Young, *New AUKUS Security Pact: Jacinda Ardern Says No Change to Relationships*, N.Z. HERALD (Sept. 15, 2021), at <https://www.nzherald.co.nz/nz/new-aukus-security-pact-jacinda-ardern-says-no-change-to-relationships/4MBOHQV5MXANHTVD5XBLDW3CPE>.

⁴⁷ DeYoung, *supra* note 37.

⁴⁸ Embassy of China in the U.S. Press Release, *supra* note 5.

⁴⁹ Rachel Pannett, *North Korea Says Australia’s Submarine Deal Could Trigger “Nuclear Arms Race,”* WASH. POST (Sept. 20, 2021), at <https://www.washingtonpost.com/world/2021/09/20/north-korea-submarine-nuclear-aukus/>.

⁵⁰ White House Press Release, *supra* note 1.

⁵¹ Henry Foy & Sam Fleming, *European Defence: The Quest For “Strategic Autonomy,”* FIN. TIMES (Sept. 27, 2021), at <https://www.ft.com/content/f14c3e59-30bb-4686-8ba3-18ff860647e7>; see also Erlanger, *supra* note 3.

⁵² Nam Hyun-woo, *AUKUS Comes as Pressure on Seoul to Join Anti-China Campaign,* KOREA TIMES (Sept. 23, 2021), at https://www.koreatimes.co.kr/www/nation/2021/09/120_315914.html [<https://perma.cc/H9PY-XP2S>].

⁵³ Chris Buckley, *Australia’s Submarines Make Waves in Asia Long Before They Go to Sea,* N.Y. TIMES (Sept. 21, 2021), at <https://www.nytimes.com/2021/09/21/world/asia/australia-submarines-china.html>.