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WASSENAAR ARRANGEMENT

Export Control and its Role
in Strengthening
International Security

Edited by
Dorothea Auer

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PREFACE

Dr. Ursula PLASSNIK

Federal Minister for Foreign Affairs of the Republic of Austria

In a new security environment and its challenges we face an evolution of multilateral non-proliferation and development of new forms and instruments of activities. These new tools build on the existing instruments in order to prevent effectively from proliferation of weapons in general. They do not replace other non-proliferation mechanisms but reinforce them.

The Wassenaar Arrangement (WA) is one of them and its target is to foster the multilateral co-operation to promote transparency and greater responsibility in transfers of conventional arms and sensitive dual-use technology for the purpose of preventing their destabilising accumulations and thus contribute to a safer world and stability.

2005 marks a new era of the Wassenaar Arrangement Outreach activities. For the first time in its history the WA-Plenary Chair (Austria) led a significant delegation and paid a visit to a Non-WA-country, namely to South Africa. Also for the first time, a WA-publication with national perceptions and points of views on various subjects dealt within the Arrangement is now available and shall support the growing request for WA-outreach activities.

The purpose of this Austrian initiative is to make information about the different experiences gathered by the Wassenaar Arrangement available to a wider public. The national presentations offer a diversified insight of their Wassenaar Arrangement based activities and initiatives in various regions of the world done by the Participating States. Current topics and questions such as the linkage between the Wassenaar Arrangement and other International Organisations, legislation and export control functioning, arms brokering control or the UNSCR 1540, to enumerate only some, are covered in this publication.

Austria, host country of the permanent Secretariat of the Wassenaar Arrangement, is holding the Plenary Chair in 2005. Austria follows a long-time active policy in strengthening the existing multilateral Non-Proliferation and disarmament instruments by being an active and reliable partner to the relevant Conventions as well as the export control regimes.

With its broad spectrum of institutions, organisations, initiatives and meetings in this field and other UN-related fora, Vienna is becoming a centre for Non-Proliferation and Disarmament. In addition, our foreign policy is committed to an active participation towards global security wherever and whenever possible.

PREFACE

Günther PLATTER

Federal Minister for Defence of the Republic of Austria

The terror attacks in New York, Casablanca and Istanbul have once again demonstrated the persistent dangers of global terrorism in a drastic way.

International stability and security is also threatened by myriad regional hot spots such as the Near and Middle East.

One of the most important approaches to combating these so-called new threats is non-proliferation. For this purpose efforts by the international community to contain the spread of WMD as well as conventional weapons have become the focus of international cooperation.

The Wassenaar Arrangement for the control of exports of conventional weapons and dual use goods and technology provides an essential element towards the realization of these international efforts.

In accordance with its role in the maintenance of overall national security interests the Federal Ministry of Defence contributes towards achieving those objectives. In view of the unmitigated threat military expertise will continue to be an important and necessary element in the realm of non-proliferation on all levels, -national, regional and global -, in the medium and long term.

PREFACE

Dr. Martin BARTENSTEIN

Federal Minister of Economics and Labour of the Republic of Austria

The Wassenaar Arrangement was designed to promote transparency, exchange of views and information and greater responsibility in transfer of conventional arms and dual-use goods and technologies. In view of increasing threats by international terrorism an efficient international export control system is of great importance. The need for preventing destabilising accumulations of arms, dual-use goods and technologies is a significant concern that has to be addressed in an appropriate manner and by efficient measures like the Wassenaar Arrangement.

With regard to the high requirements, which are provoked by brisk technological developments, the Wassenaar Arrangement plays an active and central role in the field of international security and stability. Participating states secure the effectiveness of the export control regime by developing the agreed lists of technical items which are reviewed periodically in order to take into account technological developments and new experiences gained. Moreover, the Wassenaar Arrangement completes and reinforces the existing regimes for non-proliferation of weapons of mass destruction and their delivery system.

As the first global multilateral Arrangement on export controls for conventional weapons and sensitive dual-use goods and technologies the Wassenaar Arrangement also aims at enhancing cooperation to prevent the acquisition of armaments and sensitive dual-use items for military end-uses, if the situation in a region or the behaviour of a state is, or becomes, a cause for serious concern to Participating States.

Although Wassenaar is constructed in the legal form of a gentlemen's agreement, the importance of the agreement is strengthened by the European legislator due to the legally binding reference in special provisions of the European legislation to the Wassenaar Arrangement.

Moreover the "outreach" activities of the Arrangement, especially the organisation of seminars with representatives of different organisations, representatives from a number of non-Wassenaar countries and representatives of industry, are a worthwhile contribution to raise awareness of responsible transfers of conventional arms and dual-use good and technologies on a widespread platform. It offers participants from leading think tanks and NGO's the possibility to present their perspectives on arms export control issues, and on how the Arrangement and civil society might encourage their cooperation.

Participating states stay in close contact and exchange experience on practical export control problems. They also receive new ideas how to improve their export

control system by studying each others best practices. Therefore these valuable activities should be continued and enhanced.

In practice the current system guarantees a high standard of international security while saving the export interests of the business location. Transparency, one of the major principles of the Arrangement, not only serves the interests of the participating states but also the interests of companies. Based on the fundamental principles and the current improvements it provides clear determined requirements and limits which can be easily identified by entrepreneurs. Small and medium sized companies benefit from the guidelines of the Arrangement as well as big companies. Generally, the Arrangement offers a clear line for the industry under the auspices of the principles of transparency and predictability. Altogether the Arrangement fulfills a responsible role with a minimum of restriction for the international market bearing in mind the complex requirements of a good functioning market.

We all should be proud of the progress the Arrangement has achieved since the establishment in 1995. These improvements focus more on the practical side they also cover the field of harmonisation of national control politics.

In view of the way forward special attention should be given the outreach activities with non-participating states to achieve a more universal platform. The enhancement of greater engagement with industry representatives in all these activities is one of the major challenges we have to tackle in the near future.

BASIC INFORMATION ON THE WASSENAAR ARRANGEMENT

Ambassador Sune DANIELSSON
Wassenaar Arrangement Vienna

1. Establishment of the Wassenaar Arrangement

The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (WA) is named after a suburb of The Hague called Wassenaar. At a meeting there in December 1995, agreement was reached to start a new type of multilateral co-operation to promote transparency and greater responsibility in transfers of conventional arms and sensitive dual-use technology for the purpose of preventing their destabilising accumulations.

The establishment of what became the first global multilateral arrangement on export controls for conventional weapons and related goods and technologies was preceded by two years of negotiations.

After the end of the Cold War, it was felt that the Coordinating Committee for Multilateral Strategic Export Controls (COCOM)¹ was no longer the appropriate basis for export controls and that there was a need for a new arrangement to deal with risks to regional and international security and stability related to the spread of conventional weapons and dual-use goods and technologies. Accordingly, at a High Level Meeting (HLM) in the Hague in November 1993, representatives of the COCOM member states agreed to terminate COCOM and to establish a new multilateral arrangement, temporarily known as the “New Forum”.

This decision was confirmed at a subsequent HLM in Wassenaar, the Netherlands on 29-30 March 1994 and COCOM formally ceased to exist as of 31 March, 1994. At that meeting, the former COCOM cooperating countries, namely Austria, Finland, Ireland, New Zealand, Sweden and Switzerland, were invited to join the “New Forum” process. As of 1995, the Russian Federation, the Czech Republic, Hungary, Poland, and the Slovak Republic formalized their participation in the process of the creation of the “New Forum” and elaboration of its modalities.

At the fourth High Level Meeting held in Wassenaar on 19 December 1995, the participants decided to establish the Wassenaar Arrangement and to set up the WA Secretariat in Vienna. A Preparatory Committee was set up to prepare for the first WA plenary meeting.

¹ Australia, Belgium, Canada, Denmark, France, Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, United Kingdom and the United States.

The inaugural Plenary Meeting of the WA was convened on 2-3 April 1996 in Vienna, at which time Argentina, the Republic of Korea and Romania were welcomed as additional founding members. However, consensus could not be reached on all issues, so the Plenary Meeting was suspended to provide time to resolve the outstanding problems.

On 11-12 July 1996, the Plenary Meeting resumed, with Bulgaria and Ukraine participating, thus making a total of 33 founding members. Final agreement on the *Initial Elements*, the basic document of the WA, was reached and it was decided that the new *Control Lists* and notification requirements would be implemented as of 1 November 1996 (see the WA web site at www.wassenaar.org for these and other documents cited in this article).

2. WA Objectives and Principles

As stated in the *Initial Elements*, the WA complements and reinforces, without duplication, the existing regimes for non-proliferation of weapons of mass destruction and their delivery systems by focusing on the threats to international and regional peace and security which may arise from transfers of conventional arms and sensitive dual-use goods and technologies where the risks are judged greatest.

The Participating States of the WA seek through their national policies to ensure that transfers of arms and dual-use goods and technologies do not contribute to the development or enhancement of military capabilities that undermine international and regional security and stability and are not diverted to support such capabilities. The Arrangement does not impede bona fide civil transactions and is not directed against any state or group of states. Nor does it prohibit transfers of particular items or to particular destinations. Decisions of this kind remain at national discretion. All measures undertaken to put into effect agreements reached in the Arrangement are implemented by the Participating States in accordance with their national legislation and policies and are implemented on the basis of national discretion.

Following the tragic events of 11 September 2001, Participating States underlined the importance of strengthening export controls and decided at the 2001 Plenary to continue to prevent the acquisition of conventional arms and dual-use goods and technologies by terrorist groups and organisations as well as by individual terrorists, and that such efforts were an integral part of the global fight against terrorism. To make this commitment explicit, they decided to add a paragraph (paragraph 5 of Part I, “Purposes”) to the *Initial Elements*.

3. Functioning of the WA

Participating States meet every December in Vienna at the *Plenary* level (with the exception of the 2000 Plenary, which was held in Bratislava) to take stock of the work done by different WA subsidiary bodies during a year and to make decisions as required. All WA decisions are taken by consensus and its deliberations are kept in confidence.

In addition to annual Plenary reviews, Participating States carried out a wide-ranging assessment of the functioning of the WA in 1999 and again in 2003. The next such assessment will be held in 2007. Some specific results of regular and assessment Plenary meetings are addressed below.

The Plenary has established *sub-groups* that meet regularly between Plenary sessions. Among these sub-groups are the General Working Group (GWG), which develops policy recommendations for the Plenary; the Licensing and Enforcement Officers Meeting (LEOM), which is designed to be a working-level exchange on practical export control problems and issues; and the Experts Group which conducts annual technical updates of control lists. Other bodies are established on an *ad hoc* basis as need arises.

The WA *Secretariat* provides support to the meetings of the Plenary and its sub-groups, and assists the Participating States with their information exchange process. It also maintains the Wassenaar Arrangement Information System (WAIS), the secure computer system used by Participating States to share information, and performs other tasks as assigned by the Plenary, *e.g.*, preparation for outreach activities and contacts with other relevant multilateral fora.

4. Role of Export Controls and WA Control Lists

Effective control of the exports of conventional arms and dual-use goods and technology are necessary to discourage irresponsible exports that can destabilise a country or a region.

The WA countries maintain effective export controls for items on agreed lists. Through transparency and exchange of views and information, suppliers of arms and dual-use items can develop common understandings of the risks associated with the transfer of these items and assess the scope for harmonizing national control policies to combat these risks.

The Arrangement's specific information exchange requirements involve semi-annual notifications of arms transfers, currently covering eight categories, most of them derived from the UN Register of Conventional Arms. Participating States are also

required to report transfers and, in certain cases, denials of transfers of dual-use goods and technologies. Denial reporting helps to bring to the attention of Participating States transfers that in the view of some exporting countries may undermine the objectives of the Arrangement. Information exchanged in the Arrangement can also include any other matter relevant to the WA goals that individual Participating States wish to bring to the attention of other Participating States.

Export controls within the WA rely on the control by the Participant States themselves of the transfer of certain items. Within the Wassenaar context, Participating States work together to identify which items should be the subject of national controls. These items are included in two control lists: a Munitions List and a List of Dual-Use Goods and Technology.

The *Munitions List* defines conventional arms which should be subject to national export controls. It is divided into 22 different categories starting with the most basic, such as small arms and light weapons, moving on to ammunition, bombs, naval vessels, up to software and technology. All in all, the Munitions List covers close to 300 different items.

The *Dual-Use List* covers goods and technologies which have civilian applications but could also be used for the production of arms or other military purposes. The Dual-Use List has nine different categories and covers close to 1,000 items.

The List is incorporated by WA Participating States in their national legislation.

A decision whether to place an item on the Dual-Use List is, *i.a.*, based on the following criteria:

- dual-use goods and technologies to be controlled are those which are major or key elements for the indigenous development, production, use¹ or enhancement of military capabilities²;
- foreign availability outside Participating States should be taken into consideration;
- the ability to control effectively the export of goods should be taken into consideration;
- an item which is controlled by another regime should not be dealt with in the Wassenaar Arrangement unless additional coverage proves to be necessary according to the criteria of the Wassenaar Arrangement. When an item is controlled by another regime it should not be automatically excluded from the

² Use means operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing.

³ Controlled by the Munitions List.

Wassenaar Arrangement, in particular when concerns and objectives are not identical;

- the ability to make a clear and objective specification of the item should be taken into consideration.

In 2003, as a result of the overall assessment of the Arrangement's functioning, the Participating States agreed to expand the scope of control in respect of exports of dual-use items to destinations subject to UN arms embargos. This represents a control of dual-use items or technologies which, although not on the list, might cause concern if diverted for military end-use. The Arrangement also elaborated a list of advisory questions for exporting industries to alert them to the need to contact national licensing authorities when a suspicious request is received.

5. Participation Criteria

When deciding on the eligibility of a state for participation, the following factors, *inter alia*, are taken into consideration, as an index of its ability to contribute to the purposes of the new Arrangement:

- whether it is a producer/exporter of arms or industrial equipment respectively;
- whether it has taken the WA Control lists as a reference in its national export controls;
- its non-proliferation policies and appropriate national policies, including: adherence to non-proliferation policies, control lists and, where applicable, guidelines of the Nuclear Suppliers Group, the Zangger Committee, the Missile Technology Control Regime and the Australia Group; and through adherence to the Nuclear Non-Proliferation Treaty, the Biological and Toxicological Weapons Convention, the Chemical Weapons Convention and (where applicable) START I, including the Lisbon Protocol;
- its adherence to fully effective export controls.

Participating States have, during the last two years, actively discussed applications for WA membership. In December 2004, the Plenary welcomed Slovenia as a new Participating State to the WA.

The Arrangement does not have observers.

6. Outreach to Non-Members and Other Institutions

A diverse outreach policy has been adopted in order to provide information to non-member countries, relevant international institutions and regional organizations about the WA's objectives and activities. The purpose of this policy is to encourage non-members to adopt national policies consistent with the objectives of greater transparency and responsibility in transfers of conventional arms and dual-use goods and technologies, to maintain fully effective export controls and to adhere to relevant non-proliferation treaties and regimes. The Arrangement encourages non-members to benefit from the WA's experience in export controls. Considerable efforts have been made by Participating States to identify items that should be the subject of control and to elaborate "best practices", guidelines, and enforcement measures. Even if states are not members of the WA, they can make productive use of the Arrangement's hard work in these areas.

Outreach activities are conducted both by the individual Participating States and Plenary Chair as well as the Secretariat.

A major outreach initiative was undertaken in 2004 in the form of the first WA Outreach Seminar. Participants in this seminar, which took place in Vienna on 19 October 2004, represented more than 50 organizations covering a number of non-participating states, non-governmental entities, academic institutes, the media and industry. The seminar raised awareness of the positive contribution the WA makes to responsible transfers of conventional arms and dual-use goods and technologies. An important lesson that was taken away by Participating States was the need for greater engagement with industry representatives.

The Arrangement has a long history of productive interaction with different multilateral organizations. As early as the 1997 Plenary, Participating States noted with appreciation the efforts being undertaken by other international organisations to contribute to international security and stability through promoting greater responsibility in the transfer of arms and sensitive technologies. In particular, they welcomed the initiatives of the Organisation of American States (OAS) regarding the convention on firearms and regional arms transparency, the EU Programme for Preventing and Combating Illicit Trafficking in Conventional Arms and other similar encouraging international efforts.

At the 1998 Plenary, the WA welcomed the declaration of a Moratorium on the Importation, Exportation and Manufacture of Light Weapons by ECOWAS (Economic Community of West African States). Participating States agreed to undertake an appropriate collaborative role with ECOWAS member states to respect the provisions of the Moratorium and to be open to providing advisory and/or technical assistance in the implementation of the Moratorium.

Participating States took note positively of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in all its Aspects held in July 2001, and the work of the Organization for Security and Cooperation in Europe (OSCE) in this area, including its adoption of a document on small arms and light weapons. As yet another sign of the fruitful collaboration between the WA and the OSCE, the OSCE adopted in May 2004 the OSCE Principles for Export Controls of Man Portable Air Defense Systems, which were largely derived from the WA 2003 document on MANPADS (see below).

The WA also has established contacts with the other export control regimes, namely Australia Group, Missile Technology Control Regime, Nuclear Suppliers Group and the Zangger Committee, at the level of Chairs of the Plenary.

At its 2004 Plenary meeting, Participating States reiterated their intention to broaden the Arrangement's outreach to countries not participating in the Arrangement, other export control regimes and international and regional organizations.

7. Highlights of WA Plenary Meetings and WA Operations, 1996 – 2004

At the annual Plenary meetings, Participating States normally exchange information on arms and sensitive technology flows to regions of concern; discuss issues related to specific projects, programmes and end-users of concern; and consider measures aimed at the prevention of diversions and unauthorised transshipments. They also examine global arms import trends and emerging sensitive technologies and take measures to increase the effectiveness of export controls. In order to keep pace with advances in technology and developments in the international security situations, the Plenary updates annually the WA control lists. As appropriate, controls are either strengthened or relaxed for certain goods and technologies. Successive Plenaries have also worked to make the existing control texts for the Munitions and Dual-Use Lists more easily understood and more 'user friendly' for commercial exporters and licensing authorities.

Because the Arrangement is relatively young, Participating States have often focused on important structural and administrative issues, especially at the earlier Plenary sessions. Successive Plenaries have worked constructively to respond to these issues.

As of 1997, the Arrangement became fully operational. Among other matters considered by the 1997 Plenary, Participating States agreed to establish a voluntary process for notifications that went beyond the categories of arms determined in the *Initial Elements* for reporting purposes, to develop criteria for the selection of sensitive dual-use goods and technologies for the WA control lists and to commence the process of reviewing the Control Lists in 1998.

The adoption of the *Elements for Objective Analysis and Advice Concerning Potentially Destabilising Accumulations of Conventional Weapons* and the accomplishment of the first review of WA control lists were among the main results of the 1998 Plenary.

At the 1999 Assessment Plenary, Participating States recognised the importance of comprehensive controls of listed “software” and “technology”, including controls on intangible transfers, and agreed to continue deepening WA understanding of how and how much to control those transfers. The Plenary also adopted an *Indicative List of End-Use Assurances*.

It was in 1999 that the Arrangement first began formally discussing export controls on Man Portable Air-Defence Systems (MANPADS). That led to the adoption in 2000 of *Elements of Export Controls* on such weapons. The 2000 Plenary also adopted “best practices” for *Disposal of Surplus/Demilitarised Military Equipment*; for *Extreme Vigilance for Very Sensitive List Items*; and for *Effective Enforcement*.

At the 2001 Plenary, Participating States approved a revised *Statement of Understanding on Intangible Transfers of Software and Technology* and work on this important and difficult subject continues.

Building upon the decision of the 2002 Plenary to adopt the *Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW)*, the 2003 Assessment Plenary agreed to expand the scope of mandatory reporting of arms transfers by adding a new category on SALW to Appendix 3 of the *Initial Elements*.

Among other important accomplishments at the 2003 Assessment Plenary was the adoption of *Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS)*, which tightened further the controls on MANPADS. The Plenary also decided to lower the reporting threshold for transfers of artillery systems. Recognizing the importance of controlling arms brokering, Participating States agreed in 2003 to impose strict controls on the activities of those who engage in the brokering of conventional arms by introducing and implementing adequate laws and regulations based on agreed *Elements for Effective Legislation on Arms Brokering*. They stressed their commitment to support, by all appropriate means, the efforts of the UN Security Council to prevent illegal arms transfers to terrorist groups and to all governments and groups under Security Council embargoes.

These and other results of the 2003 Assessment could be considered as significant contributions to the fight against terrorism by means of WA export controls.

In the course of 2004, Participating States worked diligently to implement and expand upon the progress achieved during the 2003 Assessment Year. At the 2004 Plenary, they committed themselves to further develop and undertake, as a matter of high priority, measures to counter terrorism. In this context they also exchanged information on national measures taken in accordance with the

groundbreaking 2003 decision on MANPADS and called again on other countries to apply similar principles in order to prevent proliferation of these dangerous weapons.

The 2004 Plenary also welcomed the adoption of Resolution 1540 by the UN Security Council on 28 April, 2004. Participating States noted that the resolution decided that all states should establish, develop and maintain appropriate and effective export and trans-shipment controls, which was also a primary objective of the WA. The WA noted that it stood ready to respond to any approach from the Chair of the UNSCR 1540 Committee, and Participating States in a position to do so expressed their willingness to provide assistance on the development of effective export controls to those States that request it.

TOWARDS SIMPLE, TRANSPARENT AND HARMONISED EXPORT CONTROLS

Bent Lindhardt ANDERSEN and Dorthe Høst SARUP
Ministry of Economic and Business Affairs, Copenhagen

Abstract

Export controls are facing a range of difficult demands and dilemmas. On the one hand, the political demand for more controls - as well as the focus on export controls as a means in the global fight against proliferation of weapons of mass destruction - has increased dramatically. On the other hand, the globalisation of trade and the fast-growing technological development involves significant challenges to the effectiveness of licensing and enforcement efforts.

Seen from a small state point of view, this article outlines the need for strengthening efficiency and credibility of Wassenaar export controls. The way forward is most probably a development towards a more simple, transparent and harmonised Wassenaar export control system. Consequently, improvement of information exchange, harmonisation of licensing procedures, extraordinary review of Control Lists and closer cooperation with industry is of highest priority in the years to come.

1. Introduction

After September 11th, international security policy has changed dramatically. The political demand for more efficient and strengthened export controls has increased, and this calls for new initiatives and a re-thinking of export controls in general. Export controls play an important role in the global fight against proliferation of weapons of mass destruction, and most recently the UN resolution 1540 was adopted, obliging all states to establish national export control systems. This is not easily realized, since many countries outside the export control regimes have limited experience and knowledge about export controls.

At the same time, the globalization of trade poses significant challenges on the effectiveness of licensing and enforcement efforts. Production and distribution of strategic goods is no longer restricted to only a few states and actors, and the rapid technological development brings about a growing number of highly sensitive items that are easily transferred through intangible means (for example through the internet). For licensing and enforcement officers it is increasingly difficult to control and monitor the trade in strategic goods.

Moreover industry operating across borders encounter great difficulties in complying with a very complex set of different national licensing procedures. Industry claim that the different ways of implementing export controls are leading to distortion of competition, and consequently industry call for harmonisation of licensing procedures, increased transparency, quicker case administration and less administrative burdens.

2. Towards simplicity, transparency and harmonisation

Especially for small states like Denmark, having relatively small export control administrations, it is an ever more demanding task to overcome the growing demands and dilemmas of today's export controls. Having only relatively few people employed with export controls, the number of technical experts and licensing- and enforcement officers are limited. Nevertheless, the number of international meetings and the legal framework and requirements for national authorities to comply with remains the same as for bigger states.

On this background, this article outlines the need for “simplicity”, “effectiveness”, “transparency” and “harmonisation”.

2.1. Improvement of information exchange

High-quality information exchange is crucial for all national authorities working with export controls - not at least for small states. Small states receive relatively few license applications a year, and their intelligence resources and number of technical experts are limited. Accordingly the intelligence information and the denial notifications received from other states through the export control regimes play an important role in the licensing case-administration of a small state. Additionally it is very valuable for small states to receive information on other states' licensing procedures and systems of export controls in general.

However, having the challenges of the globalisation of trade and the growing number of intangible transfers in mind, great merit may be gained from improving both the quality, the speed and the simplicity of today's information exchange. This to better ensure, that the decisions on very similar licensing applications are taken on the same background and thereby avoid distortion of trade. Furthermore improved transparency and information exchange could possibly more effectively prevent undercutting of other states' licensing decisions and more successfully fight “license shopping” performed by potential proliferators of weapons of mass destruction. That is to say critical end-users trying to acquire critical products in several countries, hoping for at least one country to issue a licence due to lack of - or not yet received - intelligence information.

2.1.1 The need to strengthen notification procedures

Improvements of transparency and information exchange may be gained by introducing a few, but significant, changes to today's notification procedures.

For example The Wassenaar Arrangement could develop denial notification procedures on arms. According to existing Wassenaar Arrangement procedures, Participating States are not obligated to notify denials on arms exports. This is in remarkable contrast to the situation for dual-use products, where notifications on denials are obligatory. The quality of information exchange may be increased, if notifications on arms denials were made compulsory as well.

Likewise earlier notifications on export licenses issued regarding the most sensitive items controlled (that is "sensitive list" and "very sensitive list" dual-use products and arms) could be introduced.

According to today's Wassenaar Arrangement procedures, it is only compulsory to notify export licenses for arms and the most sensitive dual-use products twice a year on an aggregate basis. But when it comes to *denial* notifications on the most sensitive dual-use products, the notification deadline is immediately after the issue. If export licenses on arms and the most sensitive dual-use products were also notified immediately after the issue, national authorities would get the "full picture" of the most critical licenses and denials earlier. Furthermore notification procedures for arms and the most sensitive dual-use products would become almost identical and thus more easily understood and administered.

2.1.2 A common database on intelligence information and notifications

Another way forward to improve the quality of information exchange may be the establishment of one common Wassenaar Arrangement database on shared intelligence information and notifications. Perhaps in the future such a database could even evolve into covering all export control regimes?

A common database on intelligence information, denials and export licenses could ensure that all regime members have access to the same information on the spot and without delay. Furthermore cost effectiveness may presumably be increased remarkable by maintaining only one common database instead of upgrading and maintaining national databases in each individual state.

2.2. Harmonisation of licensing procedures

Today the worldwide export control system is characterised by a widespread use of differing national licensing procedures. As a consequence, especially industry operating across-borders often find it very difficult to stay up-to date with various national rules. Moreover there is a risk that the different ways of implementing export controls are leading to differences in licensing decisions and thereby distortion of competition.

Due to the globalisation of trade, there is no reason to believe that this situation will be easier to handle for industry and authorities in the future. The globalisation of trade involves a continuing rise in the number of transnational companies, and furthermore a growing number of countries and actors all over the world are progressively more engaged in the production of strategic goods. For example it is quite common today that one country does the design, another country produces the raw material and a third country manages the overall fabrication of a certain technology.

On this background, the Wassenaar Arrangement can merit immensely from discussing harmonisation of national licensing procedures – procedures which in the long run should be considered harmonised with licensing procedures in other export control regimes.

Harmonised procedures could not only facilitate the licensing process for authorities and industry. Also it could improve transparency and understanding of licensing procedures. Therefore simplicity and “red tape” are very important key words when discussing harmonisation.

A possible way forward to harmonise Wassenaar Arrangement licensing procedures is the establishment of a clear link between the sensitivity of a license application (the sensitivity of the product and the end-user involved) and the licensing procedures applied thereto. This means that relatively strict procedures (e.g. case-by-case approach and individual licenses) could apply for very sensitive license applications, whereas less strict procedures (e.g. use of general/global licenses issued for future years of exports and with no restrictions on export quantity) could apply for relatively less sensitive license applications.

Secondly – and seen only from an administrative perspective - merit could be gained by prioritising the resources spent on harmonisation of licensing procedures. Realizing that harmonisation of licensing procedures inevitably involves changes in most states’ administrative procedures, it is probably best to begin where action is needed the most and where the biggest results can be achieved, namely with regard to the most sensitive license applications (in the Wassenaar Arrangement this would most often involve license applications on arms or on “sensitive” and “very sensitive” dual-use products.)

2.3. Promotion of industry compliance programmes and closer cooperation with industry

As mentioned above, the globalisation of trade poses several challenges to licensing- and enforcement efforts. One particular challenge that serves careful attention is the increase in intangible transfers. Due to the advantages of the “information age”, only within a few seconds - and by using a computer with internet access - a company in Denmark can transfer strategic technology to another country many thousands of

kilometres away. As a consequence border control – in itself – is no longer sufficient, and cooperation with industry is increasingly important to maintain effective export controls.

2.3.1 Promotion of internal compliance programmes

An important tool to improve cooperation with industry is increased promotion of internal compliance programmes; that is internal standardised company procedures (approved and certified by national export control authorities), ensuring company understanding and fulfilment of export control rules.

Increased use of internal compliance programmes is an advantage for both export control authorities and industry.

For export control authorities, the obvious benefits are increased industry attention and understanding of export controls, and thereby also better possibilities for improving future enforcement and licensing efforts. Furthermore increasing the use of compliance programmes would most probably lower administrative burdens for export control authorities, since industry would be able to better prepare and investigate their license applications.

Compliance programmes also provide industry with a range of advantages. By incorporating export controls into their internal procedures, companies are better prepared for appropriate action, when potential proliferators are trying to acquire critical technology for illegal purposes. Moreover, by running the company in adherence with strict export control ethics, allowing for no dubious business deals to take place, the company can protect itself against bad reputation and thereby loss of market share.

But even more could be done to increase industry backing and motivation for using compliance programmes. One way forward could be the development of Wassenaar Arrangement minimum standards, making compliance programmes a precondition for the right to obtain certain advantages – e.g. general or global licenses. This is already the case in some Participating States today.

2.4. Improving transparency and understanding of Control Lists

An always present challenge to the effectiveness of export controls and the credibility of the Control Lists is the fast-growing technological development. These days' most modern and high-tech technology will most certainly be outdated in just a few years or even months. For example the most advanced digital computers, produced only a few years ago, are today mass-produced and even generally available in most family homes.

For national authorities and industry, the consequence is increased complexity and workload with regard to Control Lists. Many new sensitive products should be added to the Control Lists every year, and likewise a lot of outdated technology should be decontrolled. Understanding and revising Control Lists has become a very resource

intensive task. Not at least for national authorities in small states, having only limited access to technical experts.

2.4.1 Extraordinary Control List Review

One possible way forward to improve transparency and understanding of Control lists is making an extraordinary, systematic review of the all the items on the current Wassenaar Arrangement Control List. Outdated technology should be decontrolled once-and-for-all, and ambiguous control text language, if any, should be clarified.

A total review of all categories in the Wassenaar Arrangement Control List is of course a resource intensive task and may take some years. Therefore, to begin with, action could be taken where it is needed the most. Namely by assessing technology that hasn't been subject to Control List review for quite some years or where technological development is escalating the most.

In addition action could be directed towards ensuring, that also *future* sensitive technology added to the Control List is updated on a regular basis. This could be accomplished by making it obligatory always to specify a possible future review date, when adding a new item to the Control List.

3. Perspectives on pending Wassenaar Arrangement initiatives

During the Wassenaar Arrangement Assessment year of 2003, a range of initiatives have already been placed into action in order to solve the growing demands and dilemmas of today's security policy and the globalisation of trade.

For example a Wassenaar Arrangement taskforce on "Criteria" has clarified and updated the selection criteria for adding new dual-use products to the Control List. This to better ensure, that the criteria are interpreted and applied in a consistent manner. Furthermore, in order to increase public knowledge about the selection criteria, the selection criteria have been included on the Wassenaar Arrangement website.

Also a Wassenaar Arrangement taskforce on "Dual-Use List Review" has taken initiatives to increase the transparency and understanding of the Control List. For example the taskforce has made a list of items, which – due to the technological development - needs systematic review. This list will be available for Participating States during the forthcoming regular Wassenaar Arrangement list reviews. Furthermore the taskforce has recommended identifying more clearly in the Wassenaar Arrangement Control List, which dual-use items are considered amongst the most sensitive ones ("sensitive" and "very sensitive" dual-use items).

Finally a Wassenaar Arrangement taskforce is currently working on establishing non-binding "Best practice Guidelines" on licensing procedures, applicable to the Wassenaar controlled dual-use products. It is the aim to increase transparency as regards the different national licensing procedures applied by Participating States.

THE WASSENAAR ARRANGEMENT IN THE INTERNATIONAL FIGHT AGAINST TERRORISM

Dr. Michael WITTER and Matthias HEINZ
Federal Foreign Office, Berlin

New Challenges in International Politics

In today's international politics the scourge of terrorism plays a role of growing importance. There is hardly any United Nations conference, no bilateral summit meeting which is not dealing with new instruments to fight against those partially unknown individuals and organisations who threaten peaceful coexistence in the 21st century. Yet terrorism seems to stir up well-known cleavages, because all states feel themselves in the sight of terrorism.

New threats to world peace demand new measures to cope with the danger. The way of dealing with the fragile world order in the 18th century differed substantially from the answer to Cold War's threat of total destruction by nuclear weapons. The instruments to fight modern world terrorism must be those of a modern world nature. It is up to all actors – national same as international ones – to provide adequate means within their sphere of influence.

The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (WA) reacted swiftly to the events that demonstrated cruelly the existence of a new form of terrorism in 2001. At the Plenary Meeting in December 2001, Participating States committed the Arrangement to fulfil the essential task to prevent terrorist groups and individuals from acquiring conventional arms and dual-use goods and technologies. Thus, the WA accepted the great responsibility to reduce the chances for terrorists to provide themselves with the tools needed for their despicable business: conventional military equipment. A truly Herculean labour.

Do Conventional Military Items matter?

Along with the other international export control regimes focussing on the non-proliferation of weapons of mass destruction (WMD), the WA carries an important responsibility in the fight against terrorism. This is why the WA has recently aligned itself with the goals of the United Nations Security Council resolution 1540 aiming at preventing the spread of nuclear, chemical or biological weapons to non-state actors. Of course, the potential effect of a terrorist act would be maximised by using WMD. For the time being, however, most attacks have been committed with the use of conventional arms or even with unlisted tools of everyday use. These goods are relatively easy to acquire, easy to handle and can have similarly devastating effects.

Their uncontrolled transfer is a true danger to world peace; this is why they are often referred to as “weapons of factual destruction”.

The WA works diligently on specifying weapons that have a major terrorist relevance, in order to exert adequate export control. Facing the fact of the high danger Man-Portable Air Defence Systems (ManPADS) and Small Arms and Light Weapons (SALW) constitute when in the hands of terrorists, Participating States have agreed on strict regulations for their transfer. The 2002 Plenary adopted Best Practice Guidelines for Exports of Small Arms and Light Weapons stating that States should refrain from licensing SALW exports that – among other criteria – might support or encourage terrorism or are in risk of being diverted to terrorists. The 2003 Elements for Export Controls of ManPADS significantly enhanced the 2000 ManPADS document, aiming at eliminating the risk of potential diversion to terrorists. Other areas where WA experts are examining ways of tightening controls are explosives or high-tech electronic equipment. Their export control proves to be particularly difficult due to their everyday nature and mass-market availability.

Besides weapons, the WA’s scope of control also covers dual-use goods and technologies, which can be used for both civil and military purposes. Due to their specific nature, their control has to follow sophisticated structures. There is no use of strangling international trade by imposing insurmountable hurdles on industry, but the potential threat emanating from communication equipment, high-precision turning machines or technology for the production thereof is no lower than the danger of weapons.

WA Assignments

The role the WA plays in the international community is therefore crucial for accomplishing the common goal to drain the procurement ways of international terrorism. It does execute its tasks in three areas of export control: conventional weapons, dual-use goods and technology.

Conventional Weapons

Since its foundation in 1996, the WA has worked on enhancing transparency of transfers and promoting responsible export controls for weapons in accordance with its goal to prevent destabilising weapons' accumulations:

- It has established reporting requirements of certain conventional arms transfers, since 2003 also for SALW.
- All Participating States apply – when considering an export license – the “Elements of Objective Analysis and Advice”, setting common standards on how to decide on applications. Among these, one criterion is the risk of the

weapon being diverted to terrorist groups and organisations (introduced recently by the 2004 Plenary).

- ManPADS being a type of weapon of extreme terrorist relevance have been closely examined. The Elements for Export Controls of ManPADS of 2003 establish very strict regulations for licensing transfers of these weapons. They continue to be handled with particular scrutiny by the WA.
- The steady review of the WA control lists provide for state-of-the-art export controls in all Participating States. Technological development is being reflected in this list review as well as information on terrorist relevance of certain goods.

Despite these jobs being accomplished, the WA further strives for enhancing security. The control lists will be further adapted, Participating States look for further ways to increase transparency in transfers, WA Task Forces work for improving important elements in export controls such as end-use safeguarding or licensing practices.

Conventional Dual-Use Goods

The level of control and transparency requirements for dual-use goods is even higher than the one for weapons. There is a vivid exchange of views, license and denial notifications for items on the dual-use list of the WA. Alike the munitions list, these lists are permanently reviewed and adapted to recent developments in technology. Furthermore, non-listed dual-use items can also be subject to control when intended to be used in military contexts in an embargoed destination country. This ensures responsible treatment of export license applications.

In order to cope adequately with the new terrorist threat, WA Participating States are discussing possible ways of controlling non-listed dual-use items that could be suitable for terrorist end-uses. However, the WA takes into account the principle of free trade that can be limited only when other major principles of the international community are in danger. Comprehensive end-use controls are an important element for dual-use exports and for weapons alike, in order to minimise the risk of diversion.

Technologies

Exports of technology are treated like all other exports in the WA: they require an export license that is issued or denied according to the “Elements for Objective Analysis” and according to national laws. The German Government has organized a seminar in Berlin, which treated the question of Intangible Transfer of Technology (e.g. the transfer of know-how orally or via e-mail) Based on the remarkable results of the seminar, the WA is working on elaborating common standards for this modern-world phenomenon.

Conclusion

The task of the international export control regimes within the joint fight against global terrorism is to prevent terrorist groups and individuals from acquiring goods or technologies necessary for planning and accomplishing terrorist acts. This is, together with the task to specify and capture potential terrorists, one of the most important cornerstones of an adequate reaction to the terrorist threat. National authorities (police, justice, intelligence services) carry the main responsibility in this task. As shown above, the WA plays another vital role, since conventional weapons and dual-use goods are still instruments of choice for terrorists. The WA has soon reacted to the growing threat and has implied important counter-measures. Further steps are being taken and the discussion on future tasks is continuing.

To this end, the WA is keeping up close contacts with other international organisations and non-participating states. Intensive outreach contacts in the last years show the willingness of the WA to co-operate closely with other entities against the common enemy.

While striving for efficiency and effectiveness in export controls, the WA is aware that the entailing burden for the scientific community and global enterprises must stay reasonable and must not suffocate co-operation between reliable partners.

By introducing new measures and adapting its instruments to new challenges, the WA has shown its readiness to deal with new threats to international peace and security in close co-operation with other international entities and national authorities. Though not always in the public spotlight, it has thereby contributed actively in the fight against terrorism. Be it Herculean or not, the WA has managed to accomplish its task.

INCREASING TRANSPARENCY: THE REPORTS ON ARMAMENTS EXPORTS

Per Enrico PADULA

Deputy Head, Armaments Exports Licensing Unit (UAMA), Ministry of Foreign Affairs, Rome

1. Reporting arms material transfer today. A survey

In order to ensure a good level of transparency in the transfer of arms material it is crucial to have a Report to be made available to the public. Many governments are requested by law to present such a Report to the controlling bodies, usually the Parliament or a select parliamentary committee. However, the Report makes usually interesting reading beyond the Members of Parliament, and is often studied by NGOs and experts. It is therefore important to establish which kind of data can be contained in the Report, and how well they reflect what has happened.

Prior to the definition of data, and part of it, is the time frame. Reports are usually published annually, but there are requests to publish data more often, every six months or quarterly. The reason is for a more immediate reaction on part of the public opinion concerning individual licensing decisions. On the other hand, assembling and preparing a comprehensive Report requires its fair amount of time and resources dedicated resources that are often diverted from equally other important tasks. The annual reporting seems therefore preferable, while specific reporting concerning some aspects of export control policy may be published to integrate the former.

Data to be included in the report should concern first of all export licensed material as defined according to the international approved lists, like the WA list. But this definition may leave out some aspects of international arms transfers, like government-to-government transfers, i.e. transfers on the basis of direct agreements between the government that sells and the buyer government. In fact this type of transaction does not require an individual export licence in most countries, and go therefore unreported. Under the same category there are the gifted items.

A more fundamental problem is the debate “*value of licences vs. actual exports*”. To provide the first, means to give clear information on the political priorities a government is following at a given time, but may be misleading as to the actual transfer that is going on, because a licensed item may in reality be exported much later. It may be misleading in another sense, in that big contracts are implemented in the course of more than a year, but the overall value of the contract goes reported just on the year of the issuing of the export licence. On the other hand, to report actual exports is often rather difficult. Some countries are able to collect such data thanks to their customs statistics, but their reliability has been questioned. In fact, the ability of customs

procedures to correctly register data on goods that are for either military or civilian application, or the capturing of intangible technologies transfers, are just two examples of the problems that present themselves.

But the basic point about reporting is: how much should and can be reported? There are here problems of commercial confidentiality that have to be taken in consideration, and therefore no country at present is able to provide full information on all details of the export licences issued. To report only aggregate data, as the total amount of the value of the licences issued in a given period, maybe broken down per countries or geographic areas, is clearly not enough to ensure an acceptable level of transparency.

Most countries report, on a single licence, about the armament classification (the WA List classification of military items provides a commonly accepted reference), with a more or less detailed description of the technical specifications, and the country of final destination. The description and quantity of the items involved in the transaction is of course important to understand the size of the export. Data concerning the consignee or the end user are seldom to be found, as well as details of the exporter. Details concerning the financial transactions involved (price paid and conditions of payment) are as well considered too sensitive from a commercial point of view to be made public.

Request from NGOs, however, go much further than that. The location of ultimate end-use of goods, the intended end-use of goods, the mode of transfer and the transportation route are among the data that could be added, but are at present not to be found in the Reports.

2. The Italian experience

The Italian Report according to Law 185/90 stands out for a very high level of transparency. To this end, Article 5 of the aforementioned Law envisages that, by 31 March of each year, the President of the Council of Ministers shall report in detail to the Parliament – and hence to public opinion – on the authorised operations carried out during the previous year.

This report must, in particular, supply an “analysis by type, quantity and monetary value of the materials involved in the operations (...) subject to the regulations and authorisations foreseen by the present law”.

The report shall also contain the list of countries indicated in the final authorisation.

This is one of the Law’s fundamental articles since it makes it possible for the Parliament to exercise the functions falling within its authority regarding the regulation and guidance of this particularly delicate aspect of the country’s foreign and defence policy.

The first part of the Report is an introduction to the presentation of the global data: total amount of exports, broken down to destination country and exporters. The figures are presented with an analysis that highlights the present trends of this branch of Italian industry. There is a survey dedicated to each geographic area.

In the statistical annex, the Report lists each and every licensed export, import and transit. The data provided are: a brief description of the item, its classification, the number of units involved the name of the exporter and the value of the transaction for each single export licence. The same data are provided for imports and transits.

The same detailed information is provided for each actual export (i.e. for each armament material that has left Italy).

On the premise that transparency requires that the financial side of the arms trade should be made public, in order to avoid shady deals, a further section is devoted to the financial transactions linked to each export licence. The money transfers are listed, with reference made to the relevant export licence, and each rationale for the transfer is specified: is it advance payment, final payment, payment for brokering services.

This part of the Italian reporting system appears still to be unique among the main exporting countries. It is a powerful disincentive to illegal and corrupt dealings, that may be found even the after the issuing of a regular licence.

The 2003 Report highlighted the fact that export authorisations were issued in 2003 for an approximate total of 1 282 million € and exports were carried out for an approximate total of 630 million €, with approximate increases of 40% and 30% respectively as compared with the previous year. In fact, as has been highlighted above, there is no immediate correlation between the number of export authorisations and that of exports carried out during the year, as amounts licensed in a certain year may be exported in the course of the following years.

The Report is 542 pages strong, three-quarters of which are statistical data. Apart from the customary sections on export, import and transit licences, on financial transactions, and on actual exports, imports and transits, there is a comprehensive list of all the international programs Italy (and Italian firms) are part of, and a section devoted to dual use goods and technologies (which are among the items controlled by the Wassenaar Arrangement).

The Italian Report to Parliament has been published for more than a decade, and has been instrumental in increasing transparency in the arms trade sector. At the beginning it was viewed with a certain amount of suspicion by the private industry. However the implementation in the course of time has proven much, if not all, of these suspicion unfounded, while ensuring an almost complete knowledge by the Parliament and the interested public on this important issue.

THE SALW AND THE MANPADS ISSUES IN THE CONTEXT OF THE WASSENAAR ARRANGEMENT

Peter LITAVRIN

*Deputy Director, Department of Security and Disarmament,
Ministry for Foreign Affairs of the Russian Federation, Moscow*

Illegal transfers of SALW and use of these weapons primarily against civilian population and in post-conflict situations raised international concern. Every year nearly half a million people have been killed with SALW. Spread of these weapons promotes culture of violence and terror when human rights are grossly and systematically violated. Since the middle of the 1990s the growing awareness and concern of the international community related to small arms and light weapons resulted in many initiatives undertaken at the international, regional and national levels. Among them are actions in OSCE, in ECOWAS, in Latin America. The major event was the adoption in 2001 of the UN Program of Action to Prevent Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.

Wassenaar was rather slow in addressing the SALW issue. To some extent it was due to the fact that Initial Elements – a basic document of the Arrangement – restricted WA only to destabilizing accumulations of conventional weapons and for years SALW was not viewed, at least by some Participating States, as a serious destabilizing factor *. Although SALW have always been subject to stringent export controls and obligatory licensing in the Wassenaar, reporting procedures on arms transfers did not contain a category of Small Arms and Light Weapons. Some Participating States opposed the idea of transparency and exchange of notifications on export of these weapons.

The situation started to change radically in 2001 after the terrorist attacks on the US. In December 2001 the Initial Elements were updated, and Participating States agreed to continue their efforts to prevent the acquisition of conventional arms and dual use goods and technologies by terrorist groups and organizations as well as by individual terrorists. Such explicit reference to terrorism made it easier to include SALW as one of the top priority items in the agenda of WA. It was recognized that small arms and light weapons might be a weapon of choice for terrorists.

In December 2002 WA Plenary adopted “Best Practice Guidelines for Export of SALW”. This document, *inter alia*, stated that each Participating State should avoid issuing licenses for export of SALW where it deems that there is a clear risk that the small arms in question might support or encourage terrorism.

* Some regional conflicts and terrorists attacks demonstrated that the destructive effect of the large scale use of SALW had been underestimated.

It is of importance that the document not only states that SALW export will be evaluated carefully and certain factors be taken into account, but unequivocally says that unlicensed manufacture of foreign-origin SALW is inconsistent with the Best Practice Guidelines and that Participating States will take into account, as far as possible, the stockpile management and security procedures of a potential recipient. These measures go far beyond the traditional scope of issues related to arms export/import operations covered by WA.

It's also noteworthy that Best Practice Guidelines addressed such problems like manufacture, marking, stockpiles management and destruction of SALW.

The next important step related to SALW in the context of the Wassenaar Arrangement was made in 2003. Partners agreed to increase transparency and information sharing in this area and to establish a new Category 8 for Small Arms and Light Weapons for specific information exchange.

It was a real breakthrough. For a decade four Panels of Experts in the UN Register of Conventional Arms was getting together every two years in attempt to elaborate a formula that would include SALW into the UN Registers Reporting Table but with no visible result. The OSCE was more successful in establishing a reporting table on SALW transfers among the participants of this organization. The Wassenaar standard for transparency proved to be the highest.

One of SALW reporting subcategories are Man Portable Air Defense Systems (MANPADS). MANPADS were intentionally set apart in the Wassenaar due to substantial threat posed by these weapons. A frequently asked question is why MANPADS? Automatic rifles and explosives are far more often used by terrorists. The answer is that synchronized or large scale use of MANPADS against several civilian airplanes can paralyze the world aviation network and kill hundreds of people at once.

The threat to civil aviation from man-portable air defense systems was illustrated in 2002 November's failed attack on an Israeli airliner departing Kenya's Mombasa airport. The Mombasa attack was, of course, not the first time terrorists targeted civil aviation with MANPADS - such weapons have been used to down civilian aircraft as far a field as Africa, South America, the Balkans and Chechnya.

There are an estimated 500,000 MANPADS in the world today, many thousands of which are thought to be on the black market and therefore accessible to terrorists and other non-state actors. MANPADS are attractive to terrorists and insurgents because they are:

- *lethal* - The history of MANPADS usage by guerrillas and terrorists underscores the efficiency of these weapons against both civilian and military targets. Estimates of deaths resulting from MANPADS attacks on civilian aircraft range from 500 to 1000. While most of these deaths were from attacks

on smaller aircraft, several cases were identified in which large civilian turbojet aircraft were targeted. In two of them, the outcome was catastrophic - all people on board were killed.

- *highly portable and concealable*
- *inexpensive* - Early model MANPADS can be acquired on the black market for several thousand dollars. In exceptional circumstances, that price can drop to as low as a few hundred dollars. While later generation MANPADS cost significantly more (>\$30,000), they are still within easy reach of well financed terrorist and criminal groups.

Information as to the exact number of MANPADS in the hands of terrorist groups vary, but at least 27 ‘non-state’ groups have these weapons in Africa, Asia, Europe, the Middle East, and South America. With proper training, MANPADS are relatively simple to operate. All the user has to do is visually acquire the target, and activate the automatic target lock and launch system by pulling a trigger. The missile then uses infrared and/or other seeking capabilities to home in on the target.

Installing effective countermeasures on their planes would be a time-consuming and costly process. Outfitting civilian planes worldwide would take much longer, and countermeasures installed today may not be effective against next generation MANPADS. Thus, civilian aircraft are likely to be vulnerable to MANPADS attacks for the foreseeable future.

Tracking the proliferation of MANPADS is a difficult endeavour. Often, the only verification of use by non-state actors has been post-event in nature – recovery of a used launcher or fragments from expended missiles. The black market is the primary source for these weapons. Unlike state-to-state transfers, usually documented and visible, the illicit black market MANPAD trade defies accurate tracking.

The inability of governments to correctly identify seized weapons also contributes to inaccurate reports. In many cases, soldiers and government officials have identified rocket-propelled grenades (RPGs) and other handheld rocket launchers as MANPADS.

In many cases of surface-to-air attacks on aircraft, misreporting is quite common. Airbursts occurring near low-flying aircraft have frequently been reported as attacks by MANPADS when in fact they are usually RPGs. Attacks on aircraft at very low altitudes, those occurring under 1,000 feet, are almost exclusively RPGs. Guerrilla and terrorist forces have successfully adapted the RPG to the anti-aircraft role.

In 2002, International Security Assistance Force troops in Afghanistan were reportedly offered FIM-92A “Stinger” MANPADS at a cost of US\$250,000 each. The Stinger was widely distributed by the CIA among rebel Mujahideen groups fighting the Soviet troops in Afghanistan during the 1980s, and proved lethal against both fixed- and rotary-wing targets.

The problem of proliferation is exacerbated by weapons such as the SA-7, which is produced under license in several European countries. Such systems are significantly cheaper to purchase on the black market than original SA-7. Sadly, the sheer numbers of MANPADS produced under license has made it very difficult to carry out an accurate assessment of how many weapons may be available.

The fourth Plenary meeting of the Wassenaar Arrangement, held in December 1998, noted the concerns regarding the threat to civil aviation posed by the illicit possession of MANPADS and recognized the need for appropriate measures to prevent such possession. The Participating States agreed to continue the discussion of this issue, to consider their national practices and possibly develop guidelines. The Participating States called on all the non-participating end-user States to strengthen their national controls on MANPADS in order to avoid their unauthorized possession and use.

After more than two years of negotiations, at the December 2000 Plenary, the Participating States the 33 members of the Wassenaar Arrangement agreed to non-binding criteria to guide exports of shoulder-fired surface-to-air missiles. The Wassenaar criteria called for members to export MANPADS only to foreign governments or their authorized agents and to weigh the possibility of whether the missiles will be diverted or misused by the recipient government. Exporters were called upon to assure themselves that importing governments will not re-export the MANPADS without prior consent.

Wassenaar missile exporters were also to assess whether the importing government can safely store and handle the missiles to prevent unauthorized access and use. For example, the criteria called for the missiles and firing mechanisms to be stored and transported separately as a “minimum” safety measure. At least once a month, the recipient countries should had taken a physical inventory of all their MANPADS.

This marked the first time the WA agreed to harmonized export controls on any class of weapons. The December 2003 Plenary, emphasized the continuing threat posed to civil aviation by unauthorized proliferation of MANPADS. Participating States adopted a stronger and more comprehensive agreement with provision for more long-term measures to tighten security over these weapons. These measures are aimed in particular at preventing acquisition by and diversion of these weapons to terrorists. The agreement discourages MANPADS transfers to end-users other than states, and to governments that are unwilling or unable to protect against theft, loss, misuse, or diversion of the MANPADS themselves or related technical information. It also identifies several safeguards that importing governments should implement, including storing the firing mechanism and the missile in separate locations, taking monthly inventories of imported MANPADS, and re-exporting imported systems only after receiving prior consent from the exporting government.

Steps were taken to broaden outreach to relevant international institutions and non-Wassenaar member states to explain the goals of the Arrangement in this regard and to encourage them to apply similar measures.

Prior to that at their June 2003 meeting in Evian, the Group of 8 endorsed the WA's efforts to adopt new Elements for Export Controls on MANPADS and agreed to take several additional steps. Especially noteworthy is the Group's commitment to

- explore the feasibility of preventing unauthorized use of these weapons through the development of launch control features and other design changes;
- help other countries to collect, secure and destroy surplus units;
- exchange information on “uncooperative countries and entities”.
- All these commitments were later incorporated into WA Elements.

Follow up activities:

- *At the October 2003 Asia-Pacific Economic Cooperation Leaders Meeting, APEC's 21 member states agreed to strengthen national controls on MANPADS production, exports, and stockpile security. The Bangkok Declaration on Partnership for the future called on members to ban transfers to sub-national groups, exchange information on national efforts to implement the agreement, and to explore the feasibility of launch control devices.*
- *In 2004 - Organization for Security and Co-operation in Europe (OSCE), Forum for Security Co-operation, adopted in may 2004 OSCE Principles for Export controls of MANPADS, based on the Wassenaar Elements document.*

ARMS BROKERING CONTROL IN THE WASSENAAR ARRANGEMENT

Anne Kari LUNDE

*Department for Security Policy and Bilateral Relations
Ministry of Foreign Affairs, Oslo*

The Wassenaar Arrangement, which consists of 33 major arms producers and suppliers, is an export control regime for transfers of conventional arms. Arms brokering control was identified as a particularly important issue during the first assessment of the functioning of the Arrangement in 1999. There was broad support for the view that the introduction of arms brokering controls would help to fulfil and supplement Participating States' obligations as regards the implementation of comprehensive controls on transfers of conventional arms as stated in the basic document (Initial Elements) agreed in 1996.

As a first step, the WA Participating States agreed to share information on existing national controls. A list of criteria for effective arms brokering legislation and enforcement measures was drawn up, which reflected the control measures that existed in Participating States at the time.

In December 2002 a Statement of Understanding (SoU) on Arms Brokering was adopted by the Plenary Meeting, the purpose of which was to establish a common WA policy in this field. Given that only a few countries had mechanisms for arms brokering control at the time, the SoU represented a substantial political commitment.

WA Participating States were becoming increasingly concerned about the role and activities of arms brokers involved in arms trafficking. Several reports, for example from the UN, revealed that uncontrolled arms brokering activities often played a key role in facilitating arms transfers to embargoed states, conflict zones and rebel groups. This led to a growing willingness among governments and regional and international institutions to deal with the issue, and to a trend towards more international co-operation, co-ordination and exchange of information. The need to control arms brokering activities was no longer questioned by the WA Participating States; they were now discussing how to do it.

At this stage, there were still no agreed definitions or principles for a system of national rules that would prevent gaps that could be exploited by arms brokers. On the basis of the 2002 SoU and the political commitment it represented, WA Participating States agreed to discuss arms brokering control as a matter of priority during the second assessment of the functioning of the WA in 2003. The view was that the activities of legitimate brokers would not be impeded by arms brokering control, but that these brokers would have an interest in ensuring that their business was separated from that of

black market operators. A clear and co-ordinated framework for legitimate brokering activities would serve to differentiate between lawful and unlawful activities.

There was broad support within the Arrangement for the view that a common WA policy on arms brokering control could most effectively be achieved through the establishment of common elements and principles on which the Participating States would base their national legislation.

The following core elements were identified:

- a definition of “brokers” and “brokering activities”
- a description of which arms and military equipment should be covered by the controls
- the establishment of a licence or authorisation requirement
- adequate penal provisions.

At the time, there was no internationally agreed definition of a broker or brokering activities. The initial discussions were based on the very few definitions and existing provisions in WA Participating States. The aim was to build consensus on a set of strict criteria, taking into account that the implementation of the elements would be the responsibility of each Participating States through its national legislation.

Any discussion of definitions of brokers and their activities involves the issue of jurisdiction. The principle of extra-territoriality is complex and difficult to apply for many states. WA Participating States agreed to base their national legislation and practices on the following:

For activities of negotiating or arranging contracts, trading or arranging the transfer of arms and military equipment controlled by Wassenaar Participating States from one third country to another third country, a licence or written approval should be obtained from the competent authorities of the Participating State where these activities take place whether the broker is a citizen, resident or otherwise subject to the jurisdiction of the Participating State.

Similarly, a licence may also be required regardless of where the brokering activities take place.

Since brokers can take advantage of differences in national control systems and relocate their activities to countries with weak controls, the WA agreed elements are important since they also set high international standards to which countries outside the arrangement can adhere to. The aim is that as many states as possible should introduce national controls on arms brokering activities taking place on their own territory in order to develop a “no-go area” for illegal arms brokerage.

The WA consensus document has a broad scope and covers all conventional arms and military equipment controlled by Participating States. As regards transfers of MANPADS, the 2003 Plenary Meeting agreed that control elements should be strengthened (see separate presentation in this publication). These elements prohibit the use of brokers for transferring such equipment.

Further, the WA Elements for National Legislation on Arms Brokering which were adopted by the 2003 Plenary meeting (see below) contain requirements on the keeping of records, penalty provisions and administrative measures, and specify the need for enhancement of co-operation and transparency. Where brokering provisions do not already exist, Participating States will seek without delay to introduce appropriate provisions to control arms brokering activities on the basis of the agreed elements. Participating States will report to the Plenary Meetings, for the first time in 2004, on the progress made in meeting the objectives of the elements.

The adoption of the WA Elements for National Legislation on Arms Brokering and other documents, for example on control of MANPADS, provisions on non-listed items and SALW transparency, is considered as a substantial strengthening of the WA. The Arrangement has developed into an effective export control regime, promoting high international standards and responsibility in conventional arms exports.

Elements for Effective Legislation on Arms Brokering
(Agreed at the 2003 Plenary)

The Participating States of the Wassenaar Arrangement

with reference to the Initial Elements and Participating States' fulfilment of the objectives and intentions of the Wassenaar Arrangement, in particular the objectives of:

- greater responsibility in transfers of conventional arms;
- the prevention of destabilising accumulations of conventional arms;
- the need to prevent the acquisition of conventional arms by terrorist groups and organisations, as well as by individual terrorists;

Bearing in mind the "Statement of Understanding on Arms Brokerage", the "Best Practice Guidelines for Exports of Small Arms and Light Weapons" as adopted by the 2002 Wassenaar Plenary Meeting and the "Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS)" as adopted by the 2003 Wassenaar Plenary Meeting;

Recognising international commitments such as the 2001 “UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in SALW in All its Aspects”, and the relevant provisions of the 2000 OSCE Document and other regional initiatives that Participating States are party to,

and the statement of the President of the UN Security Council of 31 October, 2002 (on behalf of the Council) stressing the importance of further steps to enhance co-operation on the regulation of brokering activities;

Affirming that the purpose of these efforts is to avoid circumvention of the objectives of the Wassenaar Arrangement and UNSC arms embargoes by creating a clear framework for lawful brokering activities, and to enhance co-operation and transparency between Participating States;

Affirming also that they apply strict and comprehensive national controls on the transfer of conventional arms in order to contribute to regional and international security and stability,

agree to

strictly control the activities of those who engage in the brokering of conventional arms by introducing and implementing adequate laws and regulations. Applications for licences or authorisations should be carefully assessed in accordance with the principles and objectives of the Wassenaar Arrangement Initial Elements, the Wassenaar document “Elements for Objective Analysis and Advice concerning Potentially Destabilising Accumulations of Conventional Weapons” and any subsequent amendments thereto and, where applicable, the “Best Practice Guidelines for Exports of Small Arms and Light Weapons” and the “Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS)”. In order to ensure a common WA policy on arms brokering, each Participating State should include, consistent with its national legislation and practices, the following measures in its national legislation on arms brokering:

1. For activities of negotiating or arranging contracts, selling, trading or arranging the transfer of arms and related military equipment controlled by Wassenaar Participating States from one third country to another third country, a licence or written approval should be obtained from the competent authorities of the Participating State where these activities take place whether the broker is a citizen, resident or otherwise subject to the jurisdiction of the Participating State. Similarly, a licence may also be required regardless of where the

brokering activities take place. Participating States may also define brokering activities to include cases where the arms and military equipment are exported from their own territory. Participating States may also seek to limit the number of brokers.

2. Records should be kept of individuals and companies which have obtained a licence in accordance with paragraph 1. Participating States may in addition establish a register of brokers.
3. Adequate penalty provisions and administrative measures, i.e. involving criminal sanctions, should be established in order to ensure that controls of arms brokering are effectively enforced.
4. In addition, Participating States will enhance co-operation and transparency through:
 - (a) exchanging relevant information on arms brokering activities within the framework of the General Information exchange;
 - (b) assisting other Participating States on request in the establishment of effective national mechanisms for controlling arms brokering activities.
5. Where brokering provisions do not currently exist, Participating States will work without delay to introduce appropriate provisions to control arms brokering activities.
6. Participating States will report to the Plenary Meetings (first time in 2004) on the progress made in meeting the objectives of the Elements.

UNITED STATES PAPER ON INTANGIBLE TRANSFERS OF CONTROLLED DUAL-USE TECHNOLOGY AND SOFTWARE IN THE WASSENAAR ARRANGEMENT

Patricia MULDONIAN
US Department of Commerce, Washington

1. Introduction

One of the primary purposes of the Wassenaar Arrangement (WA) is to promote greater responsibility in transfers of conventional arms and dual-use goods and technologies. Through the exchange of information, the WA seeks to prevent destabilizing accumulations of items that can contribute to regional or international instabilities. However, WA's dual-use controls focus primarily on tangible transfers, with very little attention to those transfers that are intangible. In fact, intangible transfers pose the same risk as tangible transfers, and as such, both should be held to the same level of control.

Intangible transfers refer to exports made via some non-physical means, such as facsimile transmissions, oral conversations or electronic transfers. The topic of intangible transfers of controlled technology and software is becoming an increasingly critical issue, given the ever-widening use of electronic communication via the Internet and facsimile machines.

The absence of export controls on intangible transfers could severely undercut multilateral strategic and non-proliferation goals. This issue cuts across several multilateral control regimes and has been discussed in the Missile Technology Control Regime, the Nuclear Suppliers Group, and the Australia Group. In the context of the WA, dual-use software and technologies related to the design, development, production and use of conventional military goods are particularly sensitive and should receive the greatest degree of protection, regardless of the method of export.

2. U.S. Legal and regulatory Basis for Control

The United States has adopted a broad approach to controlling intangible transfers. The export and reexport of technology and software on the WA Dual-Use List is subject to control to all destinations outside of the United States (except for publicly available products). The United States maintains controls on this technology and software irrespective of the means (tangible or intangible) by which a transfer takes place.

The United States maintains legislation and regulations to control the transfer of commodities, technology and software. Statutory authority to control the transfer of commodities, technology and software in the United States is derived from the Export

Administration Act (EAA) and the International Emergency Economic Powers Act (IEEPA), which govern the export and reexport of commodities, technology and software.

The United States Department of Commerce's Bureau of Industry and Security (BIS) has the primary responsibility for controlling U.S. exports of dual-use goods and technology. Under the authority of the EAA, the IEEPA, and the Export Administration Regulations (EAR), BIS regulates exports, reexports and transfers of dual-use items. The following definitions policies, set forth in the EAR, establish the scope of United States export controls:

Definition of Export. "Export" means an actual shipment or transmission of items subject to the EAR out of the United States. "Export" also includes the release of technology or source code subject to the EAR, other than encryption source code, to a foreign national in the United States.

Definition of Reexport. "Reexport" means an actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country. "Reexport" also refers to the release of technology or source code subject to the EAR to a foreign national outside the United States and Canada.

Foreign Technology or Software with United States Content. The export of foreign origin items with United States content may be subject to the EAR depending upon the percentage of controlled United States content in the item. However, encryption technology generally remains subject to United States export controls regardless of the percentage of United States controlled content present in the foreign origin item.

Publicly Available Technology or Software. Except for encryption software, most "publicly available" technology or software is not subject to control. Examples of such technology or software are:

- Publications that are artistic or non-technical in nature, such as books, newspapers, and other miscellaneous publications; or
- Information that is "publicly available", including technology and software.

The United States implementation of the term "publicly available" is much narrower in scope than the WA definition of "in the public domain", primarily in the area of copyright. The United States defines "publicly available" as being generally available to the interested public in any form. Examples of when information becomes publicly available include:

- Information that is available in a library (including a technical library), provided that it is open to the public;
- “Know-how” contained in public records, which is open to the public;
- Fundamental research, basic and scientific applied research, where the resulting information is ordinarily published and shared with the scientific community, including research by universities and corporations, or research conducted by agencies of the United States government, provided that there are no proprietary restrictions;
- Educational information released by instruction in course catalog courses and associated teaching laboratories of academic institutions;
- Information released at an open conference, meeting or at a seminar, provided that the seminar is open to the public and is not restricted; or
- Information contained in a patent application.

Transfers to Foreign Nationals. The United States considers transfers of any technology or source code to a foreign national (either in the United States or abroad) to be an export (or reexport) to the home country or countries of the foreign national. Under this “deemed export rule”, if a license would be required for the export of certain technology or source code to the home country of the foreign national, the release of such technology or source code within the United States to a foreign national would require a license. Transfers to permanent residents, or persons protected under the U.S. Immigration and Naturalization Act are not subject to the restrictions on transfers to foreign nationals.

Electronic Transfers (e.g., via the Internet, e-mail and facsimile). The United States controls electronic transmissions of dual-use controlled technology or software that are or will be received abroad, unless the data has been made publicly available. (See below for broader controls that apply to encryption software and technology.)

3. The Internet and the Export Administration Regulations (EAR)

Under the EAR, transfers of items on the Internet are treated like transfers made through other methods of distribution, and publication on the Internet is treated like other methods of publication. Publication of documents or e-mails of controlled technology and software on the Internet to a foreign destination, when the expectation is that the only the intended party can open the document or e-mail, is an export to that destination. They are treated no differently than an international FAX or e-mail on any other network.

Transfers of Technology and Software (except encryption software) via the Internet. Under the EAR, publication or posting of a document of controlled technology on the Internet that may be retrieved/downloaded by anyone on the Internet with usual search tools makes the document publicly available. Software may be publicly available if it is given to anyone at no more than the cost of reproduction and distribution, which on the Internet is zero or almost zero. The cost of reproduction and distribution is usually determined by the manufacturer who may or may not be the exporter. With the exception of encryption software, the mere posting of information without the intention of dissemination outside the United States is not considered to be an export. An export occurs when a transfer of information has been made.

The United States recognizes that the most common ways to make controlled items available to anyone on the Internet is to simply put the document on a File Transfer Protocol (FTP) site or World Wide Web home page where they can be easily downloaded by anyone, thereby making it not subject to United States export control laws. However, we have seen that United States companies do not share their controlled trade secrets or business proprietary information with their competitors nor do they allow this sensitive information to become publicly available. Moreover, it is a violation of United States law to proceed with a transaction with knowledge that a violation has occurred or is about to occur.

In situations where a former employee knowingly posts controlled business proprietary information on a World Wide Web site or when sensitive information is posted for a limited time period, during the period when the information is available on the Web Site, the information becomes publicly available. Typically, companies remove the sensitive information quickly and unless the sensitive information is available from another source or available in another form, such as a book, the information is no longer publicly available. Also, this type of situation represents an United States export control violation, which may be subject to administrative and/or criminal sanctions.

The United States does not require a United States person to use encryption or other security devices to send an e-mail on the Internet merely because a potential hacker might steal it. Moreover, the technology or software is not rendered publicly available because of the potential that a hacker might steal it. If a United States company has knowledge that controlled information has been leaked or diverted, the United States company must refrain from the transaction and/or advise BIS. Proceeding with this type of transaction is a violation of United States law.

Internet transfers of encryption source and object code software. The United States controls encryption software differently than other dual-use software because of its

direct contribution to strategic applications. Encryption software retains its full functional capacity to encrypt data when it is transferred over the Internet or through other electronic means. Unlike encryption software, encryption technology items (such as blueprints, schematics and expressed Know how) do not themselves possess the functional capacity to encrypt data, and the United States treats transfers of encryption technology no differently than transfers of other technology. Controls are maintained on all source code and object code encryption software, regardless of its public availability, making the United States export policy on the transfer of encryption software more stringent than for other publicly available dual-use software. United States export controls that apply to encryption software conveyed on CD-ROM or other electronic media also apply when downloading, or causing the downloading of, such software to locations (including electronic bulletin boards, Internet file transfer protocol and World Wide Web sites) outside the United States.

For Internet transfers, the mere posting of encryption software is thus considered to be an export. However, for such software that has been authorized for export and reexport from the United States as publicly available or Amass market encryption software, the act of posting to the Internet would not establish knowledge of a prohibited export and would not trigger Red flags. For Internet transfers of other commercial encryption software, United States export laws are not violated if persons making the encryption software available take adequate precautions to prevent unauthorized transfers outside the United States (including to end-users that are not authorized under license or license exception). Adequate precautions can include, but are not limited to, access control systems that check the address (or point of Internet access) of every system/user requesting or receiving a transfer of encryption software and notify that the encryption software is subject to United States export controls.

Standard of Care & the Internet. The standard of care in making transfers on the Internet is the same standard of care required in making a transfer by any other means. The United States prohibits transfers with knowledge or reason to know that a violation is about to occur. Compliance guidance for this prohibition and others are provided in the BIS “Know Your Customer Guidance” and the BIS “Red Flags”. In the Internet context, the following two traditional examples illustrate the application of the above referenced standards.

1. Information received in the normal course of business must be reviewed for red flags, and a country code in an Internet address is such a red flag if it is a code for a country of concern.
2. Real world addresses collected for business reasons must be reviewed for red

flags, at least electronically for red flags, and a country of concern (for the technology or software) at such an address is a red flag.

4. Enforcement Mechanisms

To maintain effective export controls on intangible technology, United States export enforcement officers apply standard law enforcement techniques in a carefully focused manner. Evidence necessary for successful enforcement cases can be obtained by traditional means, such as surveillance, interviews, informants, review of documents, inspection of cargo or baggage, and technical analysis of the goods or technology in question to determine whether export licenses were required. These types of evidence may be supplemented by evidence developed from reviews of electronic data, such as computer disk drives or server files. United States enforcement officials view intangible transfers not in the abstract, but in the context of actual export investigations.

The Internet has been reported to offer criminals an ideal world of anonymous, instantaneous communication worldwide. Yet the Internet has also given law enforcement officers new tools, in part, due to the idiosyncratic features associated with the majority of Internet activity. Every time someone visits a web site, they leave a footprint with the Internet address of their computer, the type of browser software they are using and sometimes the last web page visited. E-mail traveling across the Internet collects the Internet addresses of the various servers it traverses along its way.

If investigators can seize a computer in the course of an investigation, a wealth of information can usually be uncovered. Internet e-mail is rapidly becoming the primary means of conducting international business. Most businesses will store their e-mail, business records, financial data, sales contact lists, and schedules of meetings on computers. A computer forensic investigator can often recover this information, including recently deleted files and e-mail.

In addition to the records stored on a company's own computers, investigators can obtain records from Internet Service Providers (ISPs) used by the company. The ISP maintains copies of electronic mail messages and Internet activity logs. Depending upon the type of records maintained, the ISP may be capable of providing investigators with exact times people logged onto the Internet and the activities performed by people while they are on the Internet.

Given the close link between intangible transfers and technological advances, specialized training for investigators is necessary to maintain an effective export control system. Because most United States companies, of all sizes, use computers and the Internet, United States law enforcement community has for the past several years strongly emphasized the need to train our investigators at the Federal, State and local levels, in order to detect, seize, and recover computer evidence. For example, the

Department of Commerce's Office of Export Enforcement has approximately 100 investigators, all of whom receive several basic training courses on investigating computer crimes. In addition, eight of these investigators have received advanced training in seizing and recovering computer evidence. They have been qualified to serve as expert witnesses in criminal cases, where they can testify about the records they have retrieved from computers. All major investigations today require these specialized investigators to seize corporate computers, analyze the disk drives, and retrieve information that can be admitted as evidence in court.

As explained above, the EAR require persons who distribute encryption software (except that which has been authorized as "publicly available" or "mass market") over the Internet to take adequate precautions to prevent the illegal export of the software. Accordingly, companies in the United States who sell or transfer encryption software via the Internet must screen transaction requests coming from outside the United States and Canada. This is accomplished by automated computer analyses of the Internet address (or point of Internet access) of the person requesting the software. Failure to implement these controls constitutes a violation of the EAR. In this case, the violation occurs before anyone outside the United States and Canada downloads the software.

To ensure companies are following screening requirements, the Office of Export Enforcement verifies that companies have protective download measures in place. Each law enforcement agent has desktop Internet access. Agents review trade press and Internet discussions related to encryption software. Agents visit company Internet sites and examine site download controls. If a company is discovered to be distributing encryption software without the required controls in place, agents will visit the company and educate it about the requirements of the regulations as well as the penalties for violating the regulations. Thus far, such companies have promptly implemented the appropriate export controls or removed the software from their Internet site. If they refused to take the appropriate steps, they would be subject to administrative or criminal prosecution.

In undertaking enforcement measures for software exports, the same fundamental techniques are used for exports of both tangible and intangible items. United States export enforcement agents learn how the business community works, educate companies about the export controls, develop informants, and obtain evidence about transactions.

Experience has shown that one of the most difficult aspects of enforcing controls on intangible transfers is when a foreign national travels to the United States to obtain controlled training and know-how. Recognizing the difficulty of proving what a person has learned and what a person intends to do with newly acquired knowledge, the Office of Export Enforcement employs preventive enforcement measures to enforce controls on transfers to foreign nationals. The United States issues various types of visas to

foreign nationals. The Office of Export Enforcement works closely with the Department of State's Bureau of Consular Affairs to review the applications for business visas which appear to be relevant to controlled technology transfer. If enforcement officials identify concerns about a particular visa application, an enforcement official may visit the United States company to ensure that the company has actually extended an employment offer to the foreign national. Subsequently, more information is gathered about the purpose of the foreign national's activities with the company, and an enforcement official will ensure that the company understands that an export license may be required for certain transfers of controlled technology or software to the foreign national.

These visits to companies enable the Office of Export Enforcement to detect instances of visa fraud (for example, if a company has no knowledge of the foreign national), and prompt the United States company to review the proposed technology or software transfer to determine if a license is required. On some occasions, the Office of Export Enforcement will recommend that a business visa request be denied by the Department of State, based on an unacceptable risk of an illegal transfer.

The United States also uses information obtained by reviews of business visa applications as part of ongoing investigations. For example, the Office of Export Enforcement may conduct an investigation concerning possible illegal exports of technology or source code by a United States company. Enforcement officials can obtain additional information about these transactions by examining past business visa applications of United States companies.

5. Outreach/Training Efforts

The United States maintains training programs to help industry understand, correctly interpret, and implement export control regulations. On the subject of export licensing, the Department of Commerce holds regional, national and international seminars open to the general public. These seminars cover a wide range of export topics including technical data, exports to foreign nationals and changes to United States regulations. United States government personnel routinely visit industry and host industry programs dedicated to implementing United States laws and regulations. Specialized training programs unique to individual industries are provided to train company personnel on how to understand and comply with the United States export regulations, and to train companies to implement effective export management systems.

6. Conclusions and future Actions

As the world becomes more electronically connected, the frequency of intangible transfers of technology which may be controlled appears to be increasing rapidly. In the context of the WA, software and technologies related to the design, development, production and use of conventional military goods are particularly sensitive and should receive the highest degree of protection. This technology and software should be controlled regardless of the means of transfer because the same regional instability and diversion risks exist with both tangible and intangible transfers. Export legislation and regulations must allow the control of intangible transfers of technology and software. These legal authorities, combined with increased enforcement and education, are effective means for controlling intangible transfers globally.

SECURITY COUNCIL RESOLUTION 1540 AND EXPORT CONTROLS

Per S. FISCHER

Ministry of Foreign Affairs, Copenhagen¹

Abstract

UN Security Council resolution 1540 was passed unanimously on 28 April 2004. It marks a turning point for export controls because it imposes a legal obligation on all States to control the export of weapons of mass destruction, their delivery systems and related items. It may be argued that the Non-Proliferation Treaty and the biological and chemical weapons conventions imply an obligation to ensure that exports do not contribute to proliferation of prohibited weapons, but it has also been argued that export controls are inconsistent with the obligation to foster cooperation and development, which is embedded in the conventions. An explicit, worldwide legal obligation to exercise export controls therefore represents a fundamental, even dramatic change.

This article explores the resolution's export control obligations and suggests that full and effective implementation will require a substantial effort over a long period of time. In the process, the concept of export controls will change, making it more appropriate to speak of transfer controls. Finally it will be argued that the export control regimes, not excluding the Wassenaar Arrangement (the subject of other articles in this issue), have a substantial contribution to make to this process. One possible outcome would be agreement in the context of 1540 implementation on best practice guidelines for transfer controls.

1. UNSCR 1540 makes export controls mandatory under international law

UN Security Council resolution 1540 (hereinafter referred to as UNSCR 1540 or simply 1540) “*affirms that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security.*” Acting under the UN Charter’s Chapter VII the Council’s decision that all States must exercise export controls is binding under international law.

¹ The viewpoints expressed are those of the author. They do not necessarily represent the policy of the Government of Denmark.

The origin of the resolution will not be tracked here except to note - once more - the impact of the September 11 terrorist attacks in New York and Washington. For its part, the European Union first adopted a set of anti-terrorism measures related to export controls and later an elaborate strategy against the proliferation of weapons of mass destruction (WMD) with a strong emphasis on export controls. Similarly, the export control regimes changed their guidelines to recognize explicitly the need to prevent controlled items from falling into the hands of terrorist groups and individuals.

The emphasis in UNSCR 1540 on non-state actors follows the same line. It is important to keep in mind, however, that 1540 is not limited to preventing terrorists from getting hold of WMD or related materials. The threat to international peace and security as identified by the Security Council in 1540 covers proliferation of WMD and their means of delivery to both states and non-state actors. The opening paragraph is quite general - proliferation of WMD and their means of delivery constitutes a threat to international peace and security - and the first reference to non-state actors does not appear until the 8th preambular paragraph. Export controls must address the risk of proliferation to states as well as non-state actors.

Even more important, from an export control point of view, is the legal status of the resolution and its decisions. Export controls have often been criticized for being unfair, hindering trade and technology transfers and basically being opposed to the obligations of the Non-Proliferation Treaty (NPT), the Chemical Weapons convention (CWC) and the Biological Weapons convention (BTWC) to promote peaceful cooperation and development. States exercising export controls have argued that these controls are necessary for them to fulfil their legal obligation to ensure that exports are indeed for peaceful purposes and do not violate their non-proliferation obligations. They have also pointed out that denials of transfers are negligible compared to the volume of trade in controlled items. Although remnants of this debate surfaced as late as the Conference of States Parties to the CWC in December of 2004, UNSCR 1540 should really have settled the issue. Export controls are not contrary to other international obligations. It is not something to be criticized, tolerated or reluctantly recognized as legitimate. It is an international, legal obligation for all states.

What, then, are these obligations?

2. States must deny terrorists any form of support and maintain domestic in-state and export controls

The first two operative paragraphs of UNSCR 1540 focus on non-state actors and impose an obligation on all States to *“refrain from providing any form of support to*

non-state actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery”, and to enforce this by adopting appropriate effective laws.

The main focus of this article will be operative paragraph three, which is not specifically concerned with non-state actors but “*decides also that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery, including by establishing appropriate controls over related materials*”. In export control jargon, related material refers to dual-use goods and technologies. Where practical I shall use the term “items” to cover all three: WMD, their means of delivery and related materials.

These items must be controlled in two ways, i.e. within states and when exporting the items to another state. In accordance with the resolution’s paragraph 3 (a) to 3 (c) in-state controls must include “*measures to account for and secure such items in production, use, storage or transport*”, “*physical protection measures*” and “*appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items*”. Physical control, protection and enforcement are key ingredients of in-state controls, but note that border controls, illicit trafficking and brokering also relates to the movement of items across borders. With that we shall turn to the resolution’s export and trans-shipment control requirements as spelled out in paragraph 3 (d). Such exports and trans-shipment may of course be outright illegal, as in the case of WMD, but they may also be perfectly legal, peaceful and commonplace as in the case of most dual-use transfers. The main obligation is therefore to control exports and trans-shipment. What does this mean?

3. UNSCR 1540 widens the scope of controls

Actually, the controls imposed on all States in UNSCR 1540 go well beyond export controls in the traditional sense. In so doing 1540 reflects a trend towards controlling more and more types of activities related to the transfer of items across borders. According to 1540, States must “*establish, develop, review and maintain appropriate effective export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls*”. Although the resolution does not offer any explanation of these words, even a modest interpretation makes it pretty far-reaching - probably

beyond the scope of controls in many UN Member States, including states that have exercised export control for many years.

Figure 1 illustrates the widening scope of controls. Export controls proper is at the heart of these efforts, but it is increasingly supplemented by controls over several other types of activities related to the transfer of items across international borders. It is already appropriate to speak of transfer controls rather than export controls. This trend will be strengthened by UNSCR 1540 because its wording sparks a debate not only about export controls, but also about brokering, trans-shipment, transit, re-export, funding, servicing, financing, transporting and end-user controls.

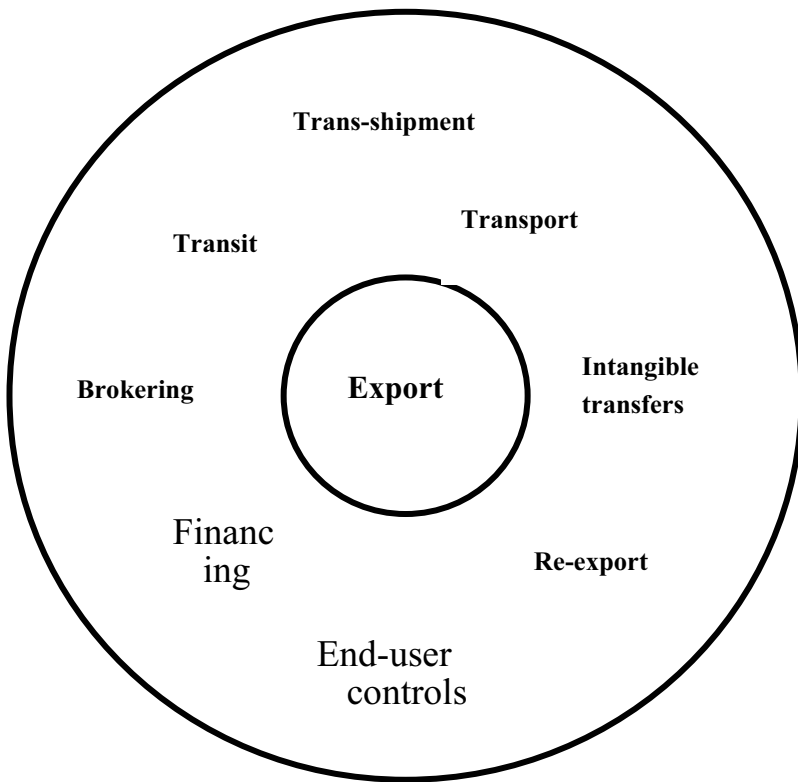


Figure 1: The widening scope of export controls

This expansion of controls from exports to transfer-related activities was evident even before UNSCR 1540 was passed. Two examples may illustrate this. The first is the

expansion of controls to include brokering. The 2001 UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons (SALW) called for control of brokering of arms transfers, as did the (legally binding) EU Common Position on Brokering adopted in June 2003 and the Wassenaar Arrangement and OSCE guidelines on brokering controls adopted in 2003 and 2004 respectively. The second example is the issue of transport. In 2004 Denmark outlawed the transport of arms to embargoed destinations irrespective of whether or not such arms are exported from Denmark and also outlawed any arms transport on Danish carriers, for which the required export and import licenses have not been issued. Such examples of expanding controls are significant developments. The future export control agenda will be heavily loaded with questions relating to transfer activities such as those mentioned in UNSCR 1540.

4. A long-term agenda

A closer look at the efforts to control brokering reveals the magnitude of the task. The UN SALW action programme called for brokering control in 2001. Although not legally binding, the request was agreed by consensus by all UN Member States. Export control regimes have typically handled calls for new controls by collecting a matrix showing to what extent Participating States already exercise such controls - if at all. In the Wassenaar Arrangement such a matrix was drawn up on Participating States' brokering controls and used as a basis for negotiating the guidelines adopted in 2003. A similar debate within the European Union led to the adoption in June 2003 of a Common Position, which in turn influenced the final agreement in Wassenaar and in the OSCE towards the end of 2004. Simultaneously, many countries enacted legislation on brokering along these lines. In terms of widening controls, brokering may be the issue that has received most attention, strongly supported also by NGOs. Yet, at the beginning of 2005 a very large majority of states still have no brokering controls. The point is not that states are opposed to brokering controls, but that things take time, in particular when new legislation is needed to expand controls.

There is another, sometimes overlooked, aspect of expanding controls. Brokering can again be used as an example. If arms are exported from a member State of the European Union, that state must apply the criteria of the EU Code of Conduct on arms exports when deciding to license or deny the export. If the deal is brokered by someone acting in another EU Member State, that Member State must also license the brokering activity, using the same Code of Conduct criteria. To avoid such duplication the EU Common Position contains a provision that Member States may exempt from their brokering controls transfers to or from another EU Member State.

In general, when controls are expanded to cover more than just exporting the items, a transfer may involve activities that are controlled by a number of states. Brokering, exporting, transporting, transiting and importing may require a license from, in this example, five different states, more or less acting according to the same guidelines. Although control is better than confidence, duplication may divert resources that are badly needed elsewhere. Over time, the expansion of controls to other activities than exports will therefore make it increasingly necessary to look at export controls not as a set of separate national controls, but as a truly international system where the interplay of different national control measures creates both loopholes and duplication. The challenge will then be to channel resources from duplication to the closing of loopholes. The export control regimes are eminently suited to take on this technically complicated task.

By ordering the expansion of controls beyond traditional export controls UNSCR 1540 adds momentum to these trends. Interpreting and implementing the 1540 requirements will require a sustained effort over a long period of time. The next section discusses the more immediate follow-up of 1540 within the framework of the 1540 committee.

5. The 1540 Committee and the prospect for best practices

UNSCR 1540 set up a committee consisting of all members of the Council, which will report to the Council on the implementation of the resolution. The Committee has had a slow start, partly due to reluctance on the part of some UN Member States, but mostly because of the inherent timeline of its work. First, Member States were called upon to submit a first report on their implementation of 1540 no later than October 28 2004. By 25 January 2005 100 states - a little more than half the UN membership - had submitted their reports. The reports will be translated into the official languages of the UN and published. Second, the UN appointed experts to assist the Committee in its examination of the reports will begin their work in February 2005. It seems quite likely that the announced Committee lifetime of two years will not be sufficient for it to complete its work and ensure implementation of the resolution. A number of choices relating to the work of the committee still have to be made. What is the purpose of examining national reports, and what are the standards against which implementation is assessed?

The Committee's mandate is to "report to the Security Council for its examination on the implementation of this resolution", i.e. resolution 1540. According to its agreed guidelines the Committee "will submit regular reports, including recommendations as necessary, to the Security Council on the implementation of resolution 1540". The resolution's broad scope combined with the lack of detail and clarity of its prescriptions

leave many questions open to interpretation. Beyond the simple question of whether or not a given state controls exports and trans-shipment of items covered by the resolution, assessing implementation will be difficult. A minimum of common understanding of what precisely states must do in the field of export controls to implement 1540 is necessary.

The Committee could start by asking what UN Member States themselves believe they are supposed to do. Faced with the broad export and trans-shipment control requirements of 1540 they have had to apply their own interpretations before submitting their reports. The Committee therefore disposes of at least a hundred answers to this question and may try to extract a general trend from this material.

The Committee guidelines also provide for the opportunity to cooperate with relevant international, regional and sub-regional bodies. This is particularly interesting in the field of export controls, as the export control regimes have developed general and specialised guidelines for export controls and dispose of a large body of experience and know-how. UNSCR 1540 itself welcomes efforts by multilateral arrangements, which contribute to non-proliferation. For their part, the export control regimes have all welcomed the adoption of UNSCR 1540 and expressed willingness to assist the 1540 Committee in its task, if asked. It is to be hoped that the Committee will find ways to make use of this.

One area where the export control regimes may be of assistance in implementing 1540 is the control lists developed and constantly updated by the regimes. The resolution recognizes the utility of effective national control lists, most of which are anyhow based on or identical to the lists maintained by the regimes. The resolution stops short, however, of imposing an obligation to follow any particular list.

One possible outcome of the 1540 Committee's deliberations could be to develop a set of guidelines or best practices for transfer controls. This could be based on the reports from Member States and the experiences of the International Atomic Energy Agency and the Organisation for the Prohibition of Chemical Weapons and, of course, the Committee's own deliberations. Such guidelines or practices should spell out in more detail than was possible in the 1540 resolution itself, but still in a general form, what states are supposed to do to implement the resolution. This is an area where the experience of the export control regimes might be particularly useful.

The Committee's examination of the reports from Member States, itself a valuable source of inspiration for best practices, could then develop into a true dialogue with Member States, identifying issues, suggesting solutions and channelling assistance where needed, as foreseen in the resolution.

6. UNSCR 1540 and the Wassenaar Arrangement

The Wassenaar Arrangement is the focus of other articles in this issue. The Arrangement's was "*established in order to contribute to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilizing accumulations*" (Initial Elements). What is the relevance of this to 1540 implementation? The answer is two-fold.

The Wassenaar control lists include items relevant to non-proliferation of WMD. The Munitions List includes chemicals relevant to the Chemical Weapons convention. As for dual-use goods it has been estimated that about one third of the dual-use items on the Wassenaar list are relevant to WMD or delivery system manufacture. What Wassenaar does is, therefore, also relevant to non-proliferation.

In a more general sense, the Wassenaar Arrangement could also contribute to the development of best practices for transfer controls, if the 1540 Committee were to attempt this. In terms of working methods and the stuff that best practices are made of, the export control regimes have many similarities. The Wassenaar Arrangement has developed both general and issue- as well as product-specific guidelines. This experience is highly relevant to 1540 implementation and should not be left untapped.

OUTREACH ACTIVITIES TO ASIA

Japan's efforts to promote cooperation in Asia for nonproliferation

Futoshi MATSUMOTO

Director for Nonproliferation, Ministry of Foreign Affairs of Japan, Tokyo

1. Japan's policy and Asia

Japan and Wassenaar Arrangement

Japan is fully committed to the aims of all the export control regimes including the Wassenaar Arrangement, and has been actively engaged in discussions of the export control regimes with a view to contributing to global peace and stability. In particular, Japan has been implementing strict export controls on both weapons and dual-use goods and their related technologies, which fall within the scope of the Wassenaar Arrangement and the UN Register of Conventional Arms.

Japan is determined to continue to actively pursue the prevention of conflicts through the sincere implementation of decisions agreed to by all the export control regimes. Based on such policies, Japan is also promoting the same policies vis-à-vis our Asian partners.

Nonproliferation in Asia

The proliferation of weapons of mass destruction (WMD) and their means of delivery poses a serious threat to the international peace and stability and requires an urgent resolution. Particularly in Asia, WMD and missile proliferation needs to be tackled without delay in light of a number of recent revelations of the so-called black markets for WMD transactions. The DPRK's proliferation activities, in particular, continue to cause serious concerns in Asia, and other regions of the world.

In addition, it is evident that the military balance in the region continues to be of concern to the national security of Japan. In this regard, Japan believes that increased transparency in arms transfers in the region is essential and will continue to raise its voice about the importance of transparency in arms transfers in the discussions of the Wassenaar Arrangement.

Japan is of the view that every country in the region needs to strengthen its preparedness and its enforcement abilities to combat proliferation by taking effective measures particularly in export and import control, and border control, and that they should also universally adhere to international nonproliferation treaties and norms.

Precisely because Asia is in the process of further economic integration, the increased flow of goods among Asian countries necessitates increased attention and stricter control. This is especially true of goods of concern that are transferred under

suspicious circumstances. Under such circumstances, loopholes can no longer be tolerated since any country that has weaker controls or no controls over their exports may be easily exploited as a place of diversion. This is the major reason why Japan is trying to promote nonproliferation in the whole region.

Multi-layered approach

In approaching such issues of nonproliferation, Japan thinks that all countries should continue to seek the strengthening of nonproliferation in three different dimensions: the universalization and full implementation of nonproliferation-related treaties and norms; the strengthening of export controls; and the promotion of the Proliferation Security Initiative (PSI), which complements export control regimes. Such a multi-layered approach is effective, also in the case of Asia.

From such a viewpoint, Japan continues to promote the importance of the universalization and full implementation of nonproliferation-related treaties and norms. As a member of all the international export control regimes, Japan has been promoting stricter export controls in the region. Recognizing the acute need to interdict shipments of concern, Japan is the only original member of the PSI in the region, and has been eager to maintain its advanced law enforcement capabilities so as to help secure peace and security of the region.

2. Outreach to Asia

In the effort to stem proliferation in a more comprehensive manner, Japan has been taking various measures. The following are some prime examples of our regional actions.

Asian Export Control Seminar

Since 1993, Japan has annually hosted the Asian Export Control Seminar, inviting officials in charge of export control policy to cooperate with the Asian countries in strengthening export controls.

Most recently, on 19-21 October 2004, the 12th Asian Export Control Seminar was held, with the attendance of officials and scholars from 16 countries and 4 regions, namely Australia, Brunei, Cambodia, China, Germany, Hong Kong, Indonesia, Laos, Macao, Malaysia, Mongolia, Pakistan, the Philippines, Republic of Korea, Singapore, Chinese Taipei, Thailand, UAE (Dubai), the United States and Vietnam. Participants exchanged information and opinions about recent trends in WMD proliferation, their export control practices, cooperation in export control between governments and private sectors, and international cooperation.

Various training courses and seminars on export control

Since 1999, Japan has annually organized the “Training Course for Administration of Export Controls” to which licensing and enforcement officials from Asian countries and regions have been invited. This course has helped Asian countries and regions to learn legal structures and technical knowledge for upgrading enforcement ability.

For the countries and regions which have already introduced basic export controls systems, Japan provides technical assistance. In this regard, the Japanese government sent officials as lecturers to the “Commodity Identification Training (CIT) Workshop” held in Hong Kong April 2004, organized by the U.S. Department of Energy. Japan also co-organized with the U.S. and Australia the CIT Workshop in Singapore in January 2005. These workshops were designed for inspectors to learn how to identify controlled items.

The joint industry outreach seminar held in Seoul in February 2005 with the governments of the Republic of Korea and Japan was a good opportunity to nurture better awareness among Korean industries representatives.

In addition, to follow up the discussion at the “Japan-ASEAN Non-proliferation Cooperation Mission” (as referred to hereinafter), Japan held the “Export Control Seminars” in Indonesia, the Philippines, Thailand, Vietnam and Cambodia in 2004 and in Laos in 2005 and is presently preparing to arrange similar seminars in the remaining ASEAN countries. These seminars are intended to help governments and industries to better understand export controls.

Asian Export Control Policy Dialogue

Since procurement activities by end-users of concern have been taking place in more subtle ways, including the circumvention of transaction routes or the use of dummy front companies, regional cooperation is essential to implement export control effectively. Japan, therefore, recognizes that strengthened cooperation with Asian countries should be the next step in the field of export control.

In this regard, Japan, in cooperation with Australia, China, Hong Kong, the Republic of Korea, Singapore, Thailand and the U.S., established the Asian Export Control Policy Dialogue in October 2003 to discuss practical ways to take cooperative action in the field of export control at the Director-General level.

The 2nd Asian Export Control Policy Dialogue was held in Tokyo on 18 October 2004 and the following points were recognized as basic elements of export control among participants: (1) implementation of stringent control with reference to international nonproliferation treaties and export control regimes, (2) effective prevention of circumvention through taking cooperative actions including information-

sharing, and (3) intense outreach activities on export controls to other Asian countries and regions, for instance, holding seminars and dispatching experts in export control.

ASTOP and beyond

To further cooperation among Asian countries with a view to intensifying policy dialogues, Japan initiated the „Asian Senior-level Talks on Non-Proliferation (ASTOP).” The first ASTOP took place in Tokyo in November 2003 and policy dialogues on various nonproliferation issues were held with the participation of all the ASEAN countries, Australia, the Republic of Korea, and the United States. This ASTOP meeting deserves credit for being the first senior official level meeting in the region specifically dedicated to talks on nonproliferation. The participants shared the view that the prevention of proliferation of WMD, their delivery means, and related materials, equipment, and technologies is vitally important to international peace and security.

Following the first ASTOP meeting, the Japanese government, headed by the Ministry of Foreign Affairs, formed an inter-agency “Japan-ASEAN Non-Proliferation Cooperation Mission”. The Mission visited all ASEAN 10 countries in February 2004. The Mission has enabled Japan and ASEAN countries to nurture a common understanding on the importance of nonproliferation and to identify concrete areas of cooperation. Based on the results of the Mission, Japan held “Asia Non-Proliferation Seminar Focusing on Maritime Cooperation” in May 2004 for ASEAN countries, that are in need of cooperation, namely, Cambodia, Indonesia, Malaysia, the Philippines and Thailand, notably in the field of maritime law enforcement.

Most recently, the second ASTOP was held in Tokyo on 9 February 2005 with the participation of ASEAN countries, Australia, China, the Republic of Korea, and the United States. This meeting provided an opportunity to discuss ways to further strengthen nonproliferation efforts in Asia. Participants discussed a number of issues, including the universalization of nonproliferation treaties and norms, progress made since the first ASTOP in the fields of export controls, and the Proliferation Security Initiative and further cooperation for resolving obstacles to the national implementation of the treaties and norms. Through active discussions, participants recognized the progress made during the past year and confirmed their willingness to continue efforts in nonproliferation. The second ASTOP successfully pointed regional partners towards deepened cooperation and further positive steps towards nonproliferation are expected as a result.

3. Recent outcomes and future perspectives in the region

Reflecting the outcomes of the first ASTOP, the “Japan-ASEAN Tokyo Declaration” and the “Japan-ASEAN Plan of Action” were issued at the “Japan-ASEAN Commemorative Summit” in December 2003, in which the leaders agreed to “enhance cooperation in the areas of disarmament and nonproliferation of weapons of mass destruction and their means of delivery, and related materials”. The consensus reached at the summit is a great step toward further strengthening of nonproliferation mechanisms in Asia.

Japan believes that its nonproliferation outreach activities are gradually bearing fruit thanks to the active cooperation of Asian countries. For example, Cambodia recently subscribed to the Hague Code of Conduct against ballistic missile proliferation, the first international norm to tackle the proliferation of ballistic missiles. Singapore introduced the Strategic Goods Control Act in 2003, which provides comprehensive controls over its exports of dual-use materials. Singapore, which has demonstrated positive and action-oriented attitude toward nonproliferation, also became a so-called 'core member' of the PSI in March 2004.

It should also be noted that the Philippines now assumes the chair of the HCOC and is promoting the importance of the HCOC among Asian partners. The role being played by the Republic of Korea as the chair of the MTCR is also held in high esteem particularly in terms of its active outreach to the region.

In the past couple years, it has become increasingly evident that the Asian regional partners that had not yet fully institutionalized an export control system have gradually begun to positively demonstrate their serious intent to strengthen their export control systems.

Under the framework of APEC, building on “Bangkok Declaration on Partnership for the Future” in 2003, in which “adopting and enforcing effective export controls” are committed by APEC leaders, in 2004, Japan and the United States proposed the “APEC Key Elements for Effective Export Control Systems”, a model to upgrade export control systems, in which export control practices are listed comprehensively by four categories: legal framework, licensing, enforcement and industry outreach. At the APEC Ministerial Meeting on 18 November 2004 in Santiago, the key elements for effective export control systems were identified by APEC members. Such regional promotion of nonproliferation certainly merits further attention.

Japan has been greatly encouraged by these developments, and hopes that these outreach efforts to our Asian partners will continue to provide the countries in the region with opportunities to think and act in concert for the common interests of the region. Japan strongly believes that a regional approach will best serve the interests of the region to effectively tackle the nonproliferation agenda in the region.

GOVERNMENT OUTREACH TO INDUSTRY – A PLATFORM FOR EXPORT CONTROLS COMPLIANCE

Nineta BARBULESCU

Head of Romanian National Agency for Export Controls

Export controls as a permanent non-proliferation tool must be built, political, legal and practical, as a network of cooperation. The building blocks of export controls system might have different dynamics but *enforcement* and *dialogue with Industry* should remain the heart and the sang of domestic export controls.

Since the foundation of Romanian export controls system in 1992 many historical and spectacular processes happened both domestic and abroad. Turbulent times forced export controls officials to adapt to a very modern and unique field of international cooperation. In addition, the framework of Romania pro-European and Euro Atlantic foreign policy was and still is the unique background of major accumulation and mature developments in export controls.

In a certain way, the origin of Romania export controls first regulation was “prisoner” of a quickly customisation of regimes guidelines and control lists during 1992 when Romania participated only to NSG activities. Two generations of responsible made possible the evolution of export controls from the Primary phase (1992-1994) via the Accumulation (1994-2001) to the Development phase where we are standing now. Conservative beginning and reluctance to transparency was replaced by speedy adaptation to most advanced European practice and lessons learned. It was increasingly important to import European *acquis communautaire* and to become constituent part of decision making process within Wassenaar Arrangement, Australia Group, Nuclear Suppliers Group and Zangger Committee. Later on these challenging process proved to be the most consistent added value to the continued process of Romanian export controls up the strong European profile as it stands now.

The following comments are inherent related with my view as representative of the second generation of Romanian export controls officials. This generation marked the developments during the process of Romania integration into NATO and adherence to European Union. The Euro-Atlantisation process covers not only the new politics in the broad sense built on a new legislative network with the support from key-institutions.

The beginning of the current phase of export controls development in Romania, originated in January 2001, is essential connected to the genuine building of a distinct building block in export controls network: government outreach to industry.

In April 2001 during the first Romanian conference of export controls community, I launched an overhaul strategy for conducting relationship with industry named *Program of Transparency, Cooperation and Communication with Companies*. In my

capacity of head of Romanian national authority for export controls (National Agency for Export Controls, notorious abbreviation ANCESIAC, later on ANCEX). Learning and building something 100% new in the same time is always a challenge. Government Outreach to Industry has both international and domestic demands for its end-users and it is a strong need for permanent assessment and of the strategy impact, of the human and financial support and of the results. On the other hand I was very much helped by the simple fact that Romania national authority for export controls assumed the leading role in promotion and implementation of this strategy.

Designing and adjusting the strategy point by point and therefore maximizing the impact event by event and project by project was one of my professional agenda. For the implementation of this strategy I was helped by Ancex team of experts and key - people from competent institutions. In addition, some open minded managers those commentaries and added value were valuable bring their specific contributions not only to Government Outreach to Industry but also to develop the necessary modern practices inspired by European and north American experience. To what extend I succeed, it is only the assessment of the results perceived as fruits of Government Outreach to Industry that might help.

At the original stage Romanian government to Industry was drawn for an entire administration: 2001-2004. Later on it was obvious that it is crucial to continue the process because of obvious reasons: it is a permanent need for dissemination of rules and regulation: the process of adaptation, modernization and customisation never ends; plus the fact that always you face new companies or new people responsible with export controls. International developments and multilateral regimes codification of best practices and new standards is also a consistent incentive for conducting on a permanent basis the dialogue with industry field and exporters.

Here I inserted the most representative developments happened within this framework and the premises of the future developments.

Starting from the necessity of maximization the export controls channels of communication and taken into consideration those advanced European practices that might be effectively applied in Romania, I built *Outreach to Industry* targeted on two levels: managerial and executive responsible (POCs). In the same time, I focused export controls *laboratory of decision making strategy* on very specific projects, some of them I listed below. The core goals of the Program *-to know - to understand – to respect – to observe*, as follows:

- to survey the Export Controls compliance and to disseminate Export Control rules and regulation
- to educate and train the Export Controls teams within Romanian strategic companies

- to improve *de lege lata* procedures and practices
- to create and maintain an honest image of Romania and Romanian companies.

The main projects were coordinate on two main areas: transparency and cooperation plus communication. Here are some practical examples of what we have accomplished during 2001-2004 administration.

1. In the area of transparency

- Learning from European *acquis communautaire* and adjusting with American practices in the field of transparency, I began the endless process of transparency by building 2 internet web sites: www.ancex.ro and www.export-control.ro during 2001/2002. Later on I added an independent server administration.

- are currently used for dissemination of export controls rules and regulations and national lists of controls, for acknowledge and understanding national practices and for export controls documentation

- it contains data and information about export controls events organized by Ancex, the Reports on arms export controls covering 2000-2001 and 2002 (with English version) and most representative statements and presentations delivered by the Head of Ancex

- it also contains excerpts from *European Commission Regular Report on Romania Progress towards Accession* and some other proofs of the high level of probity and

- An extensive English version is currently under way.

- Free and friendly dissemination of new laws and regulations for arms and dual use export controls plus CWC implementation pillar, including implementation procedures. For the record *de lege lata* laws in Romania are:

- Dual use Pillar

Law 387/2003 on the regime of export controls of dual use items and technologies

Law 92/2003 on Romania participation to Australia Group

Law 448/2003 on completion of CWC implementation.

- Arms Pillar

Law 595/2004 on arms export controls regime

Law 9/2004 on the adherence to UN Firearms protocol

Law 448/2003 on completion of CWC implementation

- Dissemination of IT products – *pecially designed* for authorities and Romanian companies, containing rules, regulations, control lists, implementation procedures a.s.o.

- The very first 2 Reports on Romanian Arms Export Controls during 2000 – 2001 and 2002

- National Focal Point for Consultancy: ancex@consultanta.ro

- National warning campaigns focused to specific items (i.e. for machine tools, baring, scheduled chemicals) or special activities (CWC declarations, OPCW inspections)
- Several Guidelines for Companies Managers and POCs
- Warning Notice on embargoes available on www.ancex.ro
- Overview of 45 Export Controls policies and practices
- Interviews and public awareness campaigns

2. In the area of cooperation and communication

Like in any other field of cooperation among different domestic institutions and *end-users* of specific rules and regulation, our efforts were concentrated on one important sub-goal: dissemination of information. A professional and friendly dissemination of data and information towards other state institutions responsible and Romanian companies merges with an additional “warranty” process of conducting the unitary interpretation of the laws as the most important precondition of their uniform implementation. For the record I would like to mention the main conferences and seminars conducted by Ancex team during 2001 -. 2004. It is perhaps redundant to express the idea of a teamwork process for organizing and conducting such events as the main *erga omnes* channels of communication with Romanian companies. During last two years I also invited critical important institutions (such as Customs Authority and Ministry of Interior) to be part of the process of dissemination of the rules and regulations. It is needed to say that their valuable contributions helped managers and POCs to better understand and furthermore to observe the new rules and regulations.

- April 26-27, 2001, First Annual Conference **Export Controls Regime in Romania**
- Oct.25–26, 2001, Pitesti, Arpechim Plant **The CWC Implementation in Romania**
- November 2001 EXPOMIL & ICOMIL **Romanian Practices in Export Controls**
- March 29, 2002 **Recent Development in Dual Use Export Controls**
- April 29, 2002, **OPCW – Five Years of International Cooperation**
- Sept. 25-28, 2002, Second Annual Conference **Ten Years of Export Control System in Romania**
- February 17-18, 2003 – **Implementation of Internal Controls Program**
- May 15-16, 2003 - **Recent Developments in Export Controls**
- Sept.25-26, 2003, **The third Annual Conference Export Controls Recent Developments and Perspectives**
- November 4, 2003 **Splitting Export Controls: The new Dual use Control Regime**

- November 2003 *EXPOMIL and ICOMIL 2003 – Globalization of Export Controls - A Romanian Perspective*
- March 31, 2004 **A Stronger Inter– Agency Cooperation**
- April 28, 2004 **New Regulations in the field of Dual-Use Goods and Technologies**
- July 9, 2004 **Progresses in the Field of Dual-Use Items**
- September 28-29, 2004, **The Fourth Annual Conference Export Controls**
- December 29, 2004, **New Law on Arms Export Controls**

Enhancing the dialogue with companies as a platform for the export controls compliance was the main goal of this strategy, taking advantage in a progressive manner by the experience acquired both by officials and companies.

Summarizing the concrete results of what we have done we may speak about a workable network of cooperation between Ancex, other state institutions and companies. On the other hand, these events are venues for knowing each other and for expert to expert communication between export controls officials on one hand and people POC s responsible with export controls on the other hand.

The second result of organizing these conferences is the establishment and encouraging of a strong motivation of safe transfers within companies decision making process. Involving Romanian managers and POC s in the worldwide struggle against terrorism is another dimension of the relationship with companies. From manufacturers and suppliers to exporters and transporters, all export controls economic community have to be involved in the actions of discouraging and jeopardizing any action of instigation and contribution to any local or regional armed conflicts. In this light, it is vital even for small and medium size companies to understand the importance of prevention of uncontrolled proliferation of weapons of mass destruction. The bridges of trust among export controls officials and domestic companies should be incentives for addressing the new challenges related with antiterrorism.

The third concrete result of this dialogue is consists of a package of lessons learned from specific international cooperation, customized for Romania. For instance we have an extreme vigilance monitoring licensing procedure, recently codified as an in house register with licenses approved and monitored on two levels of cooperation:

- Between Ancex, as licensing authority, and the holder of the license – there are specific details related with sensitive transfers, basically definitive export, forward as requested in advance to Ancex.
- Between Ancex and key-institutions such as National Customs Authority, Ministry of Administration and Interior plus specific intelligence organizations, depending on the competencies.

Another sample of proliferation of best effective practices is related with a concrete procedure of consultation, in particular for classification needs of companies, which is critical for the rest of export controls process. An expert from Ancex had the idea of customizing an American practice with a special form for classification of products as strategic, either for military or for dual use pillar. In conjunction with this task of helping companies to classify the products, which sometimes is an administrative burden assumed by the agency experts, I provided a special concept named Focal Point for Consultancy and I allocated resources (human, logistics and financial) for this project.

In the end I would like to add a comment regarding the end results of Ancex Program. I believe that any advanced National Export Control System (i.e. effective and efficient) has to be conducted by people capable of the highest standards of probity and integrity, characterized by *bona fidae*, ethical behavior and accountability. From the administration perspective, a modern export controls system has to have responsiveness to the Government and it should be encouraged and much effective if it is developed within a culture of compliance.

After 4 years of implementation of this dedicated programme we understand that this process is an endless soft burden for the officials and un adequate channel of information and training for the companies. At this stage, another simple but efficient goal stands in front of the national agency for export controls in Romania: to motivate companies to create and institutionalize a dedicated export controls management system inside the corporate culture *of any company*.

How to address the interpretation of the laws, regulations and advanced practices and to induce a strong motivation for observing the laws in the export controls field seems to be overall process involving institutions, people and finance from distinct areas. How to keep alive both state institutions and civil society with the main challenges coming from nonproliferation and export controls is one of the main duties assumed by the national authority in Romania.

To what extent I succeeded in assuming and doing these, I believe some of the readers, more familiar perhaps with precedent stages of export controls developments in Romania and wider, in Eastern Europe, may assess. One thing is for certain: after 4 years of implementing Government Outreach to Industry Romania became an European country with a sustained image of trust, with responsiveness to the Government, an homogenous team of export controls experts proving day by day probity and integrity and the overall result of all these developments as an advanced and adaptable export control system, effective and efficient.

In the end I would like to underline, once again, one particular feature of the current phase of export controls administration in Romania; to create a specific export controls management within Romanian companies in order to use an internal

mechanism of warning for managers and preventing them from involuntary involvement in unclear or misconduct of unsafe transfers. In very few years, this management will contribute to raise the awareness of counter proliferation standards, including export controls, and will help the tremendous process of understanding international and multilateral standards even prior to the moment of their import to Romania. In addition, this dimension of the corporate culture will facilitate the progresses of export controls as a whole. However, the challenging process of modernization and adaptation will go on, closer observing the European dynamics.

Nota bene: For further details please visit our websites: www.ancex.ro and www.export-control.ro. Questions regarding specific aspects of this article may be forward to nb@ancex.ro.

MODEL OF CERTIFIED INTERNAL COMPLIANCE SYSTEMS

Jacek ŚLIWOWSKI

Director, Export Control Department, Ministry of Economy and Labour, Warsaw

1. Foreword

For years, the international public has been observing the attempts by certain countries, in various regions of the globe, to gain possession of weapons of mass destruction and/or to amass conventional weapons arsenals, including weapons based on advanced military technologies, which can be used in regional armed conflicts or by terrorists, with growing concern.

Since the tragic events of September 11, 2001, non-proliferation and export control issues set to play a key role in the international debate. They are addressed and discussed on various international fora, such as NATO, EU, UN, OSCE, and have become a subject of multilateral political initiatives.

The stockpiling of conventional arms by certain countries, out-of-control transfers of dual-use goods and technologies detrimental to regional and global peace and security, as well as terrorism, have led to an intensification of international efforts aimed at establishing or tightening the existing non-proliferation regimes of international trade control in conventional arms and in selected categories of so-called dual-use goods, equipment, and technologies. The words “dual-use” mean that they have, besides civilian, also military applications, that may lead to their possessors gaining a manufacturing capability of modern weapons systems, especially weapons of mass destruction (including nuclear, chemical, and biological arms systems) and of rocket propelled means of delivery.

An effective and control of foreign trade in “sensitive” goods and technologies of either domestic or imported provenience conforming with international standards allows access to the most advanced products, technologies, and know-how which are subject to international controls in the global marketplace.

Hence, the establishment of an effective control system is one of the components, which attract foreign capital investors who are, in every respect, prominent growth drivers in every country. A national export control system is also part and parcel of the integration policy which leads to international standards also being adopted in the fields of export, import and transit control of goods and technologies, which are on the control lists of international non-proliferation agreements.

In most countries, economic strengthening and developing plans are centered on foreign trade policies.

Many programs are developed to promote entrepreneurship and the growth of small and medium-sized enterprises, boost economies in the regions, and encourage foreign investors to enter into sustainable collaboration with local industry, including the defense sector. By and large, it is the small and medium-sized companies that are the driving force of every economy, as they become the main source of jobs, ideas, and initiatives in the area of modern manufacturing and trade exchange.

Yet, as international trade exchange intensifies, there is a growing risk that strategically significant dual-use goods and technologies, weapons, and results of R&D projects, which seemingly have nothing in common with armaments, may fall into unreliable hands.

The terrorist attacks in the USA and in other countries clearly demonstrate such a possibility.

The extent of foreign trade in strategically significant goods will depend to a large degree on the stance that the entrepreneurs take towards the challenges of the international common foreign and security policies of NATO and the European Union.

2. Common foreign policy, common security policy

Over 30 most highly developed countries of the world participate in the international of the weapons, armaments, and dual-use goods and technologies export control system, and in the control regimens thereof, which have been developed by international non-proliferation organizations and treaties.

Cooperation with the parties to such treaties and regimes is essential as it provides an input to regional and international security and stability by increasing transparency and responsibility regarding transfers of conventional weapons and dual-use goods and technologies, in order to prevent the stockpiling of weapons, which has a destabilizing effect on international peace and security.

International efforts aimed at:

- taking joint action against identified or likely terrorist organizations,
- stopping trade exchange with countries which are involved in war operations and/or which support international terrorism,
- counteracting military buildup in countries that pose a threat to international security,
- preventing the proliferation of weapons of mass destruction, of conventional weapons and of their development technologies,
- reducing business with certain authorities and organizations in countries subject to

a total or partial UN and/or EU embargo, ought to involve every country which deems itself a responsible, aware political partner, participant in international trade exchange. International treaties and agreements, which result in obligations to control the export of “sensitive” categories of goods and technologies and other non-proliferation obligations, are an important factor of foreign policy and international peacekeeping efforts.

The membership of non-proliferation organizations and groups is of paramount importance including the Wassenaar Arrangement, the Australia Group, the Nuclear Suppliers Group (NSG), the Zangger's Committee, the Missile Technology Control Regime (MTSR), the Organization for Prevention of Chemical Weapons (OPCW), and the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO).

Export control has ceased therefore to be the internal business of individual countries and has developed into a lynchpin of the foreign and security policies of NATO and the European Union, and a core cooperation area of the Member States.

These policies must not remain mere declarations; the criteria and principles of the European Union Code of Conduct on Arms Exports must be applied.

In order to harmonize efforts, it is necessary to involve industry in the national export control systems.

3. Systemic regulations

Foreign trade in arms, military equipment, and dual-use goods and services must be prohibited by law, unless the enterprise complies with the conditions and limitations provided for by national law and international agreements and obligations. Such a provision, enshrined in the fundamental law governing export control, means, essentially, that the licenses issued for export, import, transit and provision of services are a privilege that the enterprise is granted if it can meet all conditions provided for in the legislation and in international agreements and obligations. As a privilege, the license may be withdrawn, changed or simply denied.

In order to make the export control system comprehensive, it is necessary to:

- implement internal control systems within enterprises, and have them certified on the basis of uniform, common standards. The national control system must provide for a legal and institutional framework for such certification.
- allow enterprises to participate in the of strategic goods export control process,
- establish a foundation for partnership of enterprises and governmental administration,

- establish export controls of intangible technology transfers that are usually effected via computers, faxes, telephones and training seminars,
- extend control over the goods not mentioned on the control lists if their end use gives rise to suspicion,
- make sure that transfer of strategic goods passes exclusively through appointed customs offices.

The Polish export control system, and Polish regulations regarding the foreign trade in strategic goods, technologies and services relevant to the state security and maintenance of international peace and security, can serve as a good example.

In future, trade exchange between enterprises that have implemented certified internal control systems might take place on the basis of simplified procedures, or even without the present licenses. Only export to companies that have not implemented such control systems would be subjected to licensing.

4. Export control

The enterprise must make sure that the dual-use goods and technologies and/or arms and military equipment it exports are not going to fall into unauthorized hands. That means that the enterprise must keep an eye on both the goods and their end use.

Before filing an application for an export license, the enterprise must make sure that:

- the end user will not use the imported goods to violate or suppress human rights and fundamental freedoms,
- the delivery of arms and/or dual-use goods and technologies will not pose a threat to international peace and security or otherwise affect stability in the local region,
- the destination country does not support, facilitate or encourage terrorism and/or international crime,
- the arms to be delivered cannot be used in an aim other than the satisfaction of justified defense and security needs of the recipient country.

Additionally, it should be possible to demand from the enterprise that a statement by the foreign end-user, endorsed by the competent authorities of that country is provided. The end user statement is issued by the foreign end user and is formulated in the manner required by the exporting country's control authorities require.

The end user statement should be endorsed by the foreign importer and by the competent authorities of the destination country.

The end user statement is a document, which is widely used in all export transactions. It attempts to transfer the responsibility to the foreign business partners and authorities as well as to prevent the transfer of goods to an unauthorized consignee.

In addition to information such as:

- end use country,
- foreign end user name and address,
- specification of the strategic goods, description, quantities, and values,
- description of the end use of the strategic goods,
- specification of the intermediary organizations,
- an obligation not to transfer strategic goods to any other consignee without the previous consent of the export control authorities,

the end user statement should also include the commitment that the end user and importer will not:

- re-export,
- sell,
- lend, and/or
- otherwise dispose of the goods/technologies listed in the statement.

The commitment applies also to spare parts, special equipment, documentation, and manuals for servicing.

The commitments, which are provided in the end user statement, foreign importer statement, and in the endorsement by the administration of the end user country, allow that the responsibility is transferred onto the foreign authorities and minimize the risk of the goods being transferred to an unauthorized consignee.

5. Import control

The national trade control authority may issue an import certificate and/or endorse the end user statement only if so required by the authorities of the foreign exporting country.

The international import certificate and end user statement are the documents required to be presented to the competent foreign export control authorities. They confirm the importer's credentials and also the fact that the import transaction involving strategic goods has been subject to control exercised by the competent authorities.

The import certificate or endorsement of the end user statement may be denied when it is impossible to confirm that import is subjected to controls and/or there are no premises for lawful trade in the strategic goods.

The export control requires the active involvement of customs services and shipping agents in control operations.

6. Control of export of goods not mentioned on the control lists

The national enterprise must to file an application for the license for the export, of or performance of, intermediary services in connection with goods not listed on the international control lists, if it knows or has been informed that:

- the goods about to be exported may be used among others for the purpose of implementation, production, operation, control, maintenance, storage, detection, identification and/or proliferation of chemical, biological, nuclear weapons and/or the delivery systems for such weapons,
- the buying country or the end use country is subjected to an arms embargo by the European Union or UN Security Council when the exported goods are likely to be used by local armed forces,
- the goods about to be exported may be fully or partially used to violate or suppress human rights and fundamental freedoms,
- the delivery of such goods will constitute a threat to peace and/or otherwise be detrimental to stability in the region,
- the end use country supports, facilitates, and/or encourages terrorism and/or international crime.

7. Transit control

For transit of dual-use goods, which is to end outside the customs territory of the transit country, a license by the transit country's customs authorities is required. Such a license is issued upon the carrier's request.

The licenses for such transits of arms and dual-use goods and technologies which also includes trans-shipment, are issued by the governmental administration (trade control authority) of the transit country.

8. Brokering and other services

Those enterprises which perform services in connection with foreign trade in arms, military equipment, and dual-use goods and technologies, i.e. forwarders, shipping agents, carriers, trans-shippers, business consultants who participate in dealings involving export, import, and transit of arms, military equipment, and dual-use goods and technologies, leasing, lending and/or contributions in kind to companies, ought to be subjected to the export control system supervised by the competent authority of their country.

9. Issuing and scope of licenses

The licenses issued by the national control authority for foreign trade in strategic goods are part and parcel of the control system. Such licenses are required for:

- export, import, and transit of dual-use goods and technologies, arms, and military equipment,
- export of goods not mentioned on the control lists (the ‘catch-all’ clause),
- donations, loans, leasing thereof,
- provision of shipping, transportation, and loading services,
- provision of intermediary services, business consultations, assistance in entering into business agreements in connection with trade in strategic goods.

For export, import and transit of dual-use goods and technologies as well as for export, import, transit of arms and military equipment and/or performance of services in connection therewith, the following licenses are issued :

- individual licenses: over specific goods, their quantities and value and/or service connected with such goods and the country with which trade is allowed,
- global licenses: cover the type or category of dual-use goods and destination country,
- general licenses: cover the type or category of dual-use goods, the trade in which may be carried out with one or several countries.

In addition to the licenses mentioned above, the competent national authority also issues international import certificates and endorses end user statements.

10. Governmental authorities involved in the process of licensing and foreign trade control

The competent authority of the exporting country issues individual and global licenses upon consulting advisory bodies, and, having made sure that the conditions provided for by the law are met.

The national advisory authorities are the ones with the following competencies:

- Ministry of Foreign Affairs
- Intelligence Agency
- Home Security Agency
- Ministry of Defense
- Ministry of the Interior
- Customs Administration
- Nuclear Research Agency.

Licenses must not be issued without having consulted these authorities.

11. Denial, withdrawal, alteration of the licenses granted

By virtue of an administrative decision it is possible to deny a license for export, import, transit and/or service performance connected with the trade, if:

- engaging in such trade violates obligations imposed on the country by virtue of international agreements,
- important interests of the country's foreign policy so require,
- in case of national defense and/or national security considerations,
- important economic interests of the country so require,
- the enterprise in question does not warrant legitimacy of trade activities.

Licenses for such trade in strategic goods should be denied if the goods are likely to be used, fully or partially, for implementation, production, operation, maintenance, storage, detection, identification, or proliferation of weapons of mass destruction, especially chemical, biological or nuclear weapons, as well as for implementation, production, maintenance of means of delivery of such weapons, which is illegal or detrimental to the country's national interest.

Furthermore, the trade license should be denied, if:

- there is a risk of alteration of the end use or destination of strategic goods,
- the enterprise has previously violated the regulations concerning trade in strategic goods.

The licensing authority may, upon consultation with the advisory bodies, withdraw and/or alter at any time a license granted thus far, if any of the limitations referred to above has occurred, or if the enterprise has been otherwise acting in violation of the conditions of the license.

12. Control lists

Dual-use goods that are subject to export controls are listed in Appendix to the Council Regulation (EC) No 1334/2000, setting up a Community regime for the control of exports of dual-use items and technologies of the 22 June 2000.

The arms and military equipment that are subject to export controls are listed on the joint military equipment list to which the European Union Code of Conduct on Arms Exports applies.

Both lists must be translated into the official local language.

13. Internal compliance systems

In a fast growing economy it is neither possible, nor desirable for governmental administration to interfere with business operations and to monitor each and every transaction. Such an approach would inevitably lead to the emergence of procedures and mechanisms that would paralyze the export of dual-use goods, arms, military equipment, which would eventually retard or restrain the business operations of the industry.

Trade control primarily ought to function within the industry, i.e. in trading companies, research and implementation facilities, with service providers such as forwarders, shipping agents, carriers, trans-shippers, business consultants etc., where proprietary internal compliance systems shall be established.

The basic control mechanisms ought to be established by manufacturers, exporters, users, research and development facilities etc., who produce, use, and export dual-use goods and technologies, military equipment and arms subjected to the international control regimes, as well as agents.

The key tool in preventing the transfers to unauthorized consignees of arms, military equipment, dual-use goods and technologies is the Internal Control System, which ought to function in each and every company.

The enterprise should be made responsible by virtue of law for establishing and applying an internal control and management system for trade in strategic goods, which essentially helps carry out each transaction individually, pursuant to the existing regulations.

The system ought to be an link in a broader chain that interconnects industry, governmental administration, and international organizations that set out the rules and principles of trade in arms, military equipment and dual-use goods and technologies. This, and similar links, should complement one another in order to strengthen international security and maintain peace.

The internal compliance system (ICP) at the enterprise level:

- is a component of the national export control system,
- regulates the principles of foreign trade in strategic goods,
- determines how export, import, and transit records should be kept, helps control even the smallest organization entity within the enterprise,
- streamlines the decision making process in the enterprise,
- eliminates human mistakes,
- builds up corporate probity,

The ICP (ICS) is based on three rules of thumb:

- know your foreign partner,
- know the technical specifications of the goods you trade in,
- be aware of what your product can be used for.

The internal compliance system allows:

- the build up of cooperation between the enterprise and the competent governmental agency (export control authority),
- the scrutiny and intelligence gathering on partners and goods, the production of records and their submission it for inspection.

It is the gathering and processing of intelligence on trade, and forwarding it to the export control authority, which constitutes the core of the ICP. Such intelligence is passed on in a completed in export license application form. Another information transmission channel is the procedure of the notification of the export control authorities about emergency situations.

The notification process is the sort of consultation that helps build up a mutual trust relationship between the enterprise and the governmental administration, and allows the company to take informed decisions in difficult cases.

From the managerial point of view, the internal control system operates as a safeguard protecting the company against actions that might violate national trade control requirements and international obligations in export control.

With the internal control system in place, the enterprises can assert security and protect both their business interests and image in the eyes of their foreign partners.

14. Certification of the Internal Compliance Systems

The national export control legislation should expressly stipulate that only those enterprises are eligible for the export, import, transit and/or service provision license, which have implemented the internal control system and can now produce a certificate of compliance of such a system with the international ISO 9000 series requirements, and with additional requirements, which the competent governmental agency might impose. The obligation to have the internal control systems certified must be also enshrined in national export control legislation.

The governmental administration ought to devise special software, which should be made compliant with the ISO 9000 series standards and meet all requirements of the international non-proliferation regimens. Available on CD-ROMs, the software ought to be made available to the enterprises which engage in foreign trade in strategic goods. It should provide the full range of information necessary to implement the internal control system.

The internal control software must have the following recording features:

- corporate mission statement,
- HR selection,
- data archiving,
- training,
- order execution procedures,
- reporting,
- analysis of denials list,
- product classification,
- end-use alteration risk analysis,
- internal controlling,
- technology transfer,
- system certification.

In the future, enactment of a specific ISO international standard might be considered for the purpose of certification of internal compliance systems (ICP). Until then it suffices to follow the Polish example and to draw up additional requirements applicable to the existing ISO series standards (e.g. ISO 9001:2001). Such an “overlay” on the existing standard allows that the existing, management system is used, and makes possible that internal control systems can be implemented immediately and developed further under the ISO 9000 standard procedures.

15. Monitoring and inspecting of enterprises engaged in foreign trade in strategic goods

A facilitator in the monitoring of enterprises is the System, i.e. the combination of the computer hardware and software that is used to automate the licensing process of foreign trade in goods, technologies and services of strategic relevance for state security, and for maintenance of international peace and security.

The above mentioned System, referred to as the TRACKER, allows:

- the speeding up of the application validation process,
- the storage and processing large of amounts of data,
- automated archiving of consultation results at all levels and opinions given,
- thorough analysis both the decision making process and information on goods, technologies, services, applicants, and other parties to the contract,
- the preparation of export, import, transit, and service licenses,
- significantly imported control exercised over export, import and transit.

With TRACKER, a database can be set up of the enterprises that operate in violation of the law and/or of those whose knowledge of law is insufficient. Such information would be valuable when inspecting the enterprises that engage in foreign trade in strategic goods.

16. Inspections in the enterprises

The inspections are to be carried out by the competent authority with assistance rendered by experts from appointed governmental authorities and agencies.

In cases where irregularities in foreign trade in strategic goods are found, the trade control authority summons the enterprise to restore the lawful state of affairs within one

month of the date of receipt of the writ. If the prescribed period of time expires, the control authority withdraws the license granted by virtue of administrative decision.

The enterprise is entitled to obtain further licenses not sooner than 3 years after the date when the decision revoking the license entered into effect.

The inspection in the enterprise might cover in particular:

- compliance of trading activities with the license granted, including post factum verification of transactions,
- functioning of the internal control system,
- accuracy of records of trade in strategic goods.

17. Cooperation of the industry with governmental administration

Due to a high number of businesses operating in the country, and the diversity of their legal forms (joint-stock companies, limited liability partnerships, partnerships of local companies with foreign businesses, state-owned enterprises etc.) and to the scale of international decisions on non-proliferation, it is not possible to build up the national foreign trade control system solely on the basis of directives and bans issued by a central administration.

To the contrary; a broad dialogue between the administration and the industry has become a necessity. A stronger awareness within the industry of the national policy in the field of non-proliferation and export control of goods, technologies, and services of strategic relevance is a crucial prerequisite for national security and maintenance of international peace and security.

The idea behind the internal control system lies in the requirement for the industry and administration to go hand in hand in their efforts to counteract the stockpiling of arms and dual-use goods and technologies which can be detrimental to the international peace and security.

Thus, the implementation of the internal control system throughout industry is as important to the enterprise in question as it is to the whole country.

In a modern state, industry ought to be partners with the administration. As such, the industry must have at least a rudimentary awareness of international non-proliferation agreements.

18. Training

In order to fully appreciate the principles of the internal control systems in the

enterprise, staff training must be provided. The additional benefit of training seminars is also that the industry becomes involved in the control system thus, becoming a useful instrument in attaining the goals of the legislation.

These goals include:

- appreciation of the idea and principles of export control by the industry,
- compliance with the export control principles,
- implementation of effective and uniform export control instruments.

Training should also be provided to universities, scientific research facilities and other know-how centers, since these possess the so-called intangible technologies. Transfer of intellectual property concerning strategic technologies takes place very often at various seminars, scientific conferences, training seminars etc. thereby making it necessary to implement certain self-control mechanisms to the transfer of knowledge.

The aim of cooperation of industry with the administration is to implement such control mechanisms and procedures, which, when setting up a control system which lives up to international standards, will not restrain freedom of business more than it is absolutely necessary.

Export control administration's web-site

An important instrument facilitating collaboration between the administration and the industry is export control administration's web-site.

Independence and self-control of the industry

The enterprises ought to be granted the freedom to do business as long as they implement self-control mechanisms.

With their own internal control systems in place, the enterprises can protect their commercial interests as well as their image in the eyes of foreign partners.

The internal control system in an enterprise means, most of all, that the business interest of the industry is in accordance with the interest of state policy and with common security policy, which is drawn up together with other countries.

Cooperation with governmental administration in export control is in the interest of the industry, as it:

- helps protect the enterprise against inadvertent violation of the existing legislation, which might lead to economic and criminal sanctions,
- may be the crucial factor in favor of the enterprise (and its management) in case of

violation of trade control provisions,

- when absent, may affect relations with international companies which are committed to follow the principles of the export control.

Furthermore, administration profits from the process of involving the industry in export control, as it is the enterprises who are in possession of up-to-date and quite information concerning exports: they know the goods, partners, and transfer routes. Comprehensive, certified internal control systems allow information to be gathered in the enterprises in a uniform form, acceptable to the administration.

Self control is an added positive effect of the independence of the industry operating within certified control systems.

19. Penal and monetary sanctions

The national legal act on control of foreign trade in goods, technologies, and services of strategic relevance for national security and international peace and security shall set out, inter alia, the following:

- criminal and pecuniary sanctions for legal and natural persons who, without license, effect export, import, transit and/or who provide services in connection with the trade, albeit inadvertently,
- possibility for courts to rule on forfeiture of goods and other objects used to commit an act of violation, including means of payment and securities,
- penal fees for interfering with inspections in the enterprise,
- criminal and pecuniary sanctions for legal and natural persons who engage in trade in violation of the conditions set forth in the license.

20. Long term objectives

An export control system consisting of certified internal control systems in place in every company makes it possible to attain the following objectives:

- to involve the industry in joint actions against identified or possible terrorist organizations,
- to involve the industry in joint actions against organizations which instigate local or regional armed conflicts,
- to harmonize actions taken by the industry and administration with those by other countries in order to prevent the stockpiling of conventional arms of a destabilizing

effect, and of uncontrolled transfers of dual-use goods and technologies which threaten regional and global peace and security,

- to create conditions for development of a dialogue and exchange of information, between the industry and administration in the field of export control,
- to strengthen the awareness within the industry that export control is necessary and useful,
- to expand the circle of persons aware of the reasons why the control system is a necessary component of the foreign and economic policy,
- to implement a quality management system, compliant with the international ISO 9000 standards in the national export control authorities,
- to integrate internal control systems (ICP) with the automated TRACKER licensing system.

21. Summary

The effectiveness of the export control system will largely depend on whether all parties that participate in the trade can be involved in it, and on whether they understand that compliance with the control procedures and mechanisms which form such a control system in line with international standards do not constitute restriction of business freedom but rather become a certain privilege.

By implementing control mechanisms of transfers of arms, military equipment, dual-use goods and technologies that can be used to produce weapons of mass destruction by terrorist organizations within the industry, every country joins the international effort of the creation of a common foreign and security policy.

Certified control system for export of arms, military equipment, and goods, services and technologies connected thereto, can help meet the expectations of NATO and EU partners relating to the capability of providing security to individual countries and maintaining international peace and security.

The maintenance of peace and security and effective implementation of the European Union Code of Conduct on Arms Exports will be possible only when national governments strive to implement internal control systems in their industry and to have them certified in accordance with the international ISO 9000 series standards.

AUSTRIAN REFLECTIONS ON EXPORT CONTROL: ECONOMIC, INDUSTRIAL AND MILITARY PERSPECTIVES

Function of the Austrian Federal Ministry of Economics and Labour within export control and reflections by an industrial sector concerned

Gerhard ERDPRESSER

Federal Ministry for Economics and Labour, Vienna

Erwin ZMESKAL

Export Control and Customs Manager for Siemens Austria/Global Procurement and Logistics, Vienna

The Federal Ministry of Economics and Labour (BMWA) takes the lead among ministries regarding the enforcement of controls on exports of dual-use items in Austria. Direct control is performed in close cooperation with customs authorities.

Alongside cooperation at international and EC levels for the advancement of appropriate export control regulations and the enforcement of relevant legal standards and international commitments, BMWA's main tasks consist in ensuring efficient communication between ministry and industry and, for the purpose of appropriate opinion-forming processes, among the ministries involved.

This kind of cooperation enables all the relevant parties to obtain a wider perspective and provides welcome input for new ideas and suggestions. It is also very expedient in regulatory contexts that require an approach with other non-proliferation regimes.

According to Austria's Foreign Trade Act (*AußHG*), an advisory board has been established at BMWA composed of two representatives of BMWA, one representative of each of the other ministries concerned, one representative of each of the statutory interest groups and one representative of Austria's federal provinces (*Laender*).¹ This advisory board addresses fundamental issues of export control but will primarily ensure appropriate decision-making in matters of enforcement.

Business and industry in Austria are subject to export controls, specifically so under the Wassenaar Arrangement and the EC Regulation on Dual-Use Items and Technology.² The scope of legal application and its practical effects cover the most diverse companies ranging from international groups to SMEs, retailers, forwarders or other carriers, agents and other market participants involved in such exports.

¹ cf. §§ 14-16 AußHG

² Council Regulation (EC) No. 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology

An essential task of BMWA is to ensure rapid and smooth information, communication and advice for businesses coming under the export control regime.³ The latter service function relates to legal and technical counselling and assistance in individual cases, plus participation in and organisation of seminars.

Despite the administrative restrictions imposed on international trade by this export control regime BMWA undertakes great efforts to process export applications as rapidly as possible, while maintaining high international security standards. A special data collection system helps to achieve this target. This system is used by BMWA to administer and update data in-house with due regard to their confidential nature. Such sensitive data require particularly high safety and security standards, under which data access is rigidly restricted to only a specific number of users.

In addition, we refer to a particular feature of the Austrian regime: the exporting company has to appoint a person responsible in charge for export control matters (*Ausführverantwortlicher*) who is liable in case of infringements of export regulations. This feature helps to ensure effective compliance with regulations in daily practice.

Using the example of a specific company, we wish to highlight the interaction between an undertaking's business objectives and the statutory restrictions to be observed when exporting goods.

To gain some insight into day-to-day business and good-practice implementation within a company we present the case of a renowned Austrian company to provide a concise overview of the situation.⁴

A major player in Austrian business and industry, *Siemens AG Österreich* adds substantial value to local industry in an economic area with more than 712,000 km², roughly 65 million inhabitants and a GDP of over € 412 billion and is responsible for operations in seven Central and Eastern European countries, i.e. Slovenia, Slovakia, Croatia, Bosnia / Herzegovina, Serbia / Montenegro, Romania and Bulgaria. The company and its associated and affiliated undertakings cover a great variety of goods and services. They range from information and communication technology, industrial items, software manufacturing and development to services and medical solutions, transportation systems and power engineering.

Almost half of the sales of *Siemens AG Österreich* in the past business year were made abroad. It goes without saying that painstaking export controls play an important role in this context. In fact, business inside the internal market is also subject to certain customs and export law requirements. Well-functioning export controls are of special importance for items from the Munitions List and/or items listed in Annex I of the

³ A practical guide for applications for the issue of export authorisations is available from the BMWA Homepage under <http://www.bmwa.gv.at/BMWA/Themen/Aussenwirtschaft/DualUse/dualuse.htm>.

⁴ The following contribution is written by Erwin Zmeskal (Export Control and Customs Manager for Siemens Austria/ Global Procurement and Logistics).

Regulation on Dual-Use Items and Technology and/or items for sensitive end-use. Compliance with all of these provisions will support national security and prevent the proliferation of weapons of mass destruction and missile technology. No reputable company wants to see its products in the wrong hands.

Siemens maps all laws and regulations that are of relevance to export control in its company-wide Export Control Program (ECP), which also defines essential policies and binding compliance with them. In addition, ECP serves as an information database on the issue of customs and export control and is accessible to all *Siemens* employees. Basically, it defines the organisational and supervisory duties of its associated undertakings and any process-related policies. The latter are implemented with IT-assistance and subdivided into contract-specific and item-specific control. In contract-specific control, the system will question end-use and end-destination and will check involved partners in “black lists” (e.g. EU regulations, lists of terrorists). Item-specific control will check whether the items to be delivered are subject to export authorisation requirements.

One of the conditions for compliance with ECP requirements is the appointment of a customs and export control manager inside the company. At *Siemens Austria* this function is performed centrally by a whole department, which coordinates and controls ECP implementation with due regard to national regulations. Another major focus is on training, support and guidance for the 115 employees who are responsible for export control in operational units and who ensure policy implementation within their managerial terms of reference. Roughly 1,500 operative employees have already received relevant training, and another 120 employees will be introduced to the multi-tiered categorisation system of the items lists.

However, any targeted export control also needs a well-defined procedural structure. Currently, there are different implementation variants for the required export control regime inside the Wassenaar member states’ area. Authorisation procedures and the documents needed for them are defined by national law. Some countries have general licences or license exceptions already included in national laws. Other member states have opted for a system of applications for single export authorisation or company-related authorisation. This results in competitive distortion also for a “global player” and in different procedures depending on the item (product and/or service) to be delivered.

Siemens Austria queries the data relevant for customs and export control in all its purchases. These export control provisions, however, are mainly targeted on exporters. This leads to a situation wherein many local market participants (component suppliers / wholesale / retail businesses) cannot always know whether items are subject to export

control or not, although they, too, are important partners (suppliers) of global undertakings.

In Austria, we enjoy an excellent climate of cooperation and communication with the Federal Ministry of Economics and Labour. The ministry has always been at our disposal – within the existing legal framework – and ready to listen to our concerns.

For enhancing the effectiveness and efficiency of export control we need to tap the above potential for improvement. This calls for the cooperation of all the parties concerned (authorities, international regimes, business and industry). Involving business and industry in the Wassenaar Arrangement Outreach Seminar on 19 October 2004 in Vienna was a first step in this direction.

MILITARY ASPECTS OF NON-PROLIFERATION

Günter GREIMEL

Federal Ministry for Defence, Vienna

More than ever the need to prevent the spread of conventional weapons has become the focus of efforts of the international community. Due to the increasing vulnerability caused by global terrorism multilateral non-proliferation agreements have become the centrepiece for the international community's responses to the new challenges.

In accordance with its role in maintaining the overall national security interests appropriate contributions are also made by the Federal Ministry of Defence. An important and necessary element of that strategy is arms control with the domains of disarmament, non-proliferation and confidence building.

Due to topical overlap as well as increased mutual dependency among non-proliferation regimes and with other international fora the need for networking within regimes and liaison with international organizations has become imperative for the international community's efforts at non-proliferation.

This process should be viewed as open-ended and dynamic. It is being shaped by a wide range of differing factors including foreign, economic, security and military policy.

In view of deliberations on the extent of the military component it should be noted that as a result of a continuous involvement in activities of the "Wassenaar Arrangement" trends and developments can be identified at an early stage. These trends and developments can contribute as part of the international security structure to military-political assessments, which in turn represent an essential element of a comprehensive national as well as European security policy.