

**BEST PRACTICE GUIDE ON
UN SECURITY COUNCIL RESOLUTION (UNSCR) 1540
EXPORT CONTROLS AND TRANSSHIPMENT**

I. Introduction

A national export control system to prevent the proliferation of nuclear, chemical and biological weapons, as well as their means of delivery is an essential instrument in meeting national obligations under UNSCR 1540. It is for each State to decide on its own national export control system in accordance with UNSCR 1540. There is no single model for an export control system due to the great diversity in the legal and administrative systems in different countries. However, there are certain key elements which any export control system should have to be effective, including: a clear legal basis establishing jurisdiction over relevant parties and activities; a transparent inter-agency co-ordination and decision-making mechanism for licensing or otherwise authorizing regulated behavior; enforcement authorities; and a capacity to actively reach out to industry to inform corporate actors of their obligations under national law.

In addition to exports, each State should also maintain appropriate national procedures or introduce and implement authority for the control over nuclear, chemical or biological weapons, and their means of delivery, including related materials and technologies within its jurisdiction, and including items in transit or being trans-shipped through its territory to a final destination outside its territory.

This guide provides information for developing or enhancing a national export control system over nuclear, chemical or biological weapons, and their means of delivery, including related materials and technologies. Note that while UNSCR 1540's primary objective is to prevent the proliferation of Weapons of Mass Destruction (WMD) many countries choose to implement an export control system

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that covers both WMD proliferation and proliferation of conventional armaments. This guide lists key elements of a national export control legal framework, reviews decision-making procedures for implementing export control mechanisms for specific license applications, considers effective enforcement of export controls, and outlines best practices for providing industry with information concerning corporate compliance with export control laws. Overall, it is a guide and therefore not intended to alter or define the practices unique to each country or region. Effective export controls made at states of origin are of utmost significance.

II. International Commitments

The most comprehensive international obligations for the control over exports were set out on April 28, 2004 when the United Nations Security Council adopted Resolution 1540 (UNSCR 1540) under Chapter VII of the UN Charter. UNSCR 1540 established the need for Member States to adopt and enforce controls over exports insofar as materials and technologies related to nuclear, chemical, and biological weapons and their means of delivery are concerned.

Operational Paragraph 3(d) requires Member States to control exports and transshipments of nuclear, chemical, or biological weapons, their means of delivery, and related materials and technologies, and states that Member States shall:

Establish, develop, review and maintain appropriate effective national 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 transshipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations.

In Operational Paragraph 6, Member States are encouraged to develop “effective national control lists” and in Operational Paragraph 8(d) called upon to “develop appropriate ways to work with and inform industry and the public regarding their obligations under such laws.”

Thus, under Operational Paragraphs 3, 6 and 8, the UN Security Council identified the key elements to safely and effectively control the trade in materials and technologies that could legally have legitimate commercial purposes, but also could be diverted by non-state actors to WMD-related purposes. Legitimate trade should not be unduly impeded.

III. National Legislation

As is the case with any law, its primary purpose should be easily ascertained. In the case of an export control legal framework, the relevant legislation should make the main objective transparent to government officials, citizens, and corporations, namely to protect national security, to further national foreign policy interests, and to fulfill international commitments to prevent unauthorized transfers and end-use of WMD-related items and technologies. This statement of purpose demonstrates the commitment of the society to these objectives. It also indicates that the government will use the law for these purposes rather than other objectives, such as revenue enhancement or protection or commercial advantage.

This guide posits five key elements of an effective export control system in order to prevent the proliferation of weapons of mass destruction and their means of delivery to non-state actors that attempt to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempt to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them.

The key elements described herein do not constitute a menu from which a government might choose some and disregard others, but a set of ingredients found to be beneficial in the development of an effective legal framework in this area. At the same time, effective legislation must reflect the unique legal, security, and foreign policy requirements of each nation. Each nation should translate these elements into its own legal forms that will make them most effective as national law.

The key elements are:

- (i) Establishment of jurisdiction over territory, people and transactions;
- (ii) Authority to implement export control processes;
- (iii) Penalties, Investigation and Prosecution;
- (iv) Responsibilities of the government;
- (v) Responsibilities of the parties.

Each of these elements reflects a significant individual principle that helps create and maintain an effective system of export controls. Countries with effective export control systems integrate these elements into their overall system of laws in a variety of ways.

Some have a separate law specifically designed for export controls. Others incorporate these elements into a larger law on foreign trade or customs authorities or in conjunction with controls on trade in military items. No matter in which legal foundation a country sets these elements, effective legal authorities for export controls should seek to encompass each of these key elements.

Element I - Jurisdiction over Territory, People, and Transactions

A key element of a legislative framework for export controls would be to give the government sufficient authority to control, where appropriate, the export, re-export, transit or transshipment of WMD-related materials and technologies by

individuals, firms, or other organizations in its territory. An export control legal framework should also give the government sufficient authority to control specific activities related to trade in WMD-related materials and technologies by its subjects where possible and appropriate, including training of others in the use, design or manufacture of such items.

With the increasing globalization of production, distribution, and financing of goods and services, those seeking weapons of mass destruction can undermine strong national export controls by disguising an illicit export as a complex series of otherwise legitimate transactions. Consequently, broad authority to control items into, through, or out of the physical territory of a country, including intangible transfers of technology, is beneficial in the establishment of an effective legal framework for export controls. This should include authority to control items entering into special economic, free trade, or similar government-designated zones.

Trade in many legitimate commercial items, unfortunately, can contribute to the proliferation of weapons of mass destruction or their means of delivery. Historically, nations have relied on “control lists” that include such "dual-use" items, as well lists of more purely military items, in order to narrowly tailor their control systems and not unduly burden lawful commercial endeavors. An export control legal framework should authorize the government to list WMD-related materials and technologies made subject to export controls consistent with the requirements of UNSCR 1540, and also empower the government to prohibit or restrict trade in any item if the item is intended or may be intended for end-uses related to the proliferation of weapons of mass destruction.

Currently, many countries integrate the control lists of dual-use and military items and technologies coordinated by the major producing countries into their national control list(s). More recently, countries have expanded their controls on items that are not listed in these multilateral regimes or in national law but could still

be diverted or used by non-state actors for WMD-related purposes. Through these "catch-all" controls, the government can control the trade in listed and unlisted items when there is an unacceptable risk that these items could be diverted. Finally, the national legal framework should facilitate implementation of the requirements of United Nations Security Council resolutions, such as UNSCR 1540, 1673, 1810.

Element II - Authority to Implement Export Control Processes

An export control legal framework should designate competent authorities, to implement controls through a licensing process to approve, deny, or condition transactions.

At their core, modern national control systems invariably have a licensing process for controlled items, generally defined by regulations. Although the specific processes differ considerably from country to country, most governments designate a single agency, with input from other agencies, or an interagency body to approve (potentially with conditions) or deny licenses. Examples of useful features associated with the licensing process would include identification of the types of licenses that may be granted, the information required for submitting license applications, the submission procedures, the time-line for review and decision on a license application, and the license validity period. The identification of circumstances where licenses for exports can be granted via simplified procedures or without any specific prior export application (e.g. when an export would fulfill the terms and conditions of an appropriate general license or license exception) may also be useful.

Element III - Penalties, investigation and prosecution

An effective export control legal framework should empower the government to designate a law enforcement agency or agencies with authority to assess the

admissibility of an export, to monitor foreign trade and to carry out investigations of possible violations of relevant laws or regulations, and an agency responsible for prosecuting suspected violations. Applicable civil or criminal penalties for violations should be identified and, where appropriate, public disclosure of imposed penalties should be contemplated for its deterrent value.

Effective export control systems require enforcement actions, including prosecution and punishment, where appropriate. The law should permit the law enforcement agency to exercise its authority within the physical territory of the country, including free trade zones or any other specially designated areas controlled by the government.

Element IV – Responsibilities of the Government

Records Retention

An effective export control legal framework should address the responsibilities of the government to the regulated industry. For example, the government must maintain accurate records to process licenses, resolve licensing issues, conduct effective training, audits, and outreach efforts, and take appropriate and effective remedial or enforcement actions. While most governments require the maintenance of government records for several years for many regulatory areas, the complexity of the transactions and the possibility that such transactions may contribute to weapons of mass destruction proliferation indicate that governments should pay special attention to this element. Each national judicial system is different; and each government should regulate the retention of documents related to licenses for controlled items based on the probable length of time needed for the government to bring a case to completion in the courts.

Transparency

Transparency is also a key responsibility of the government in the context of an effective export control legal framework. The government should identify clearly how it will maintain and publish up to date export control regulations and guidance. This material should make the regulatory and licensing procedures and processes transparent to the regulated industry. License application forms should also be made readily available and opportunities for consultation and comment on the regulatory and licensing procedures in force should be offered to those with an interest in the process. The national licensing authority should also make decisions on export license applications in a prompt and transparent manner, informing the applicant of decisions made (either approval or denial) expeditiously.

Opaque regulatory and licensing procedures increase uncertainty for legitimate commercial activity. Insufficient transparency in the system will increase the number of unintentional violations of the law. It hampers the ability of officials to implement the law consistently. It also will undermine public support export controls, as a lack of transparency may give or perceive to give, at worst, the government opportunities for unlawful bias and corruption or, at best, an unfair advantage to those companies with exceptional access to official information.

Confidentiality

Another important responsibility of the government, which might also implicate data protection laws in certain countries, is a description of how the government will keep business proprietary information confidential, unless and until it determines that disclosing such data meets the national security or foreign policy interests of the country or unless an investigation into violations of export control laws make it necessary. In addition, provisions allowing or directing the government to provide information obtained in implementing the law to international institutions

or other governments pursuant to obligations under international treaties or agreements are beneficial.

To obtain a license for export of controlled items or participate in an investigation, companies must supply the government with information about their product, their customers, and other data that, if disclosed to the general public, to other companies, or to other governments, could be used by business competitors to gain a market advantage. If companies do not have assurances that the government will treat such information with confidentiality, they will be less inclined to comply fully and otherwise cooperate with the government on export controls. At the same time, the government agencies responsible for implementing and enforcing export controls may need, when appropriate, to share critical data with other agencies, with other governments, and with international bodies to meet control obligations and prevent weapons of mass destruction proliferation.

Element V - Responsibilities of the Parties

As with the principle of transparency, a provision clearly identifying the responsibilities under the law and regulations of all parties to a transaction creates greater certainty for industry and government. Parties may include exporters, re-exporters and other individuals and entities involved in a transaction. The responsibilities for parties should cover documentary requirements, license requirements, compliance with inspection requests and related matters. The law may also identify restrictions on the activities of persons engaged in intermediary activities such as brokers, trade facilitators, carriers and forwarders.

Summary

These key elements constitute the fundamental concepts that the legal authorities for an effective system of export controls should address. Without

incorporating these elements, national legal authorities may create weaknesses that non-state actors seeking weapons of mass destruction can exploit. At the same time, integrating these elements into national legal authorities will not prove sufficient to create an effective legal framework if that framework remains static.

Several of the concepts behind these elements, such as "catch-all" controls or controls on intermediate trade services under the relevant State's jurisdiction, evolved in response to changes in the commercial environment and the tactics of those seeking weapons of mass destruction over the past decade. We can expect that new or additional standards will emerge in the future. As the global strategic, commercial, and technological environment changes, a legal framework must adjust to remain effective.

Consequently, the more detailed and specific the overarching legal authorities or primary legislation, the more likely that it will require change regularly. Typically, governments can more easily undertake changes to regulations or secondary legislation than changes to primary legislation. This argues that an overarching export control law should create broad fundamental authorities as described in these key elements and permit the regulatory process to generate the detail. Each nation should seek to address the elements listed here in a manner that is compatible with its own legal system.

IV. Procedure

The controls over the export and trans-shipment of chemical, biological, nuclear, and delivery system related materials and technologies are commonly regulated via control lists that contain materials, technologies and dual-use items that require a license application for export, including intangible transfers of technology. In many countries, the individual or corporation requesting permission to export an item that is on the control list is required to classify it according to where it falls

under the control list (although the licensing authority is ultimately responsible for making or endorsing that decision). An exporter must also provide information about relevant parties involved in the transaction, information on the transaction itself such as the quantity to be exported, the technical specification of those items, final destination, a description of the end-use, identification of the intermediary parties and end-user and the estimated or actual value of the transaction.

License applications should be handled impartially, fairly and within a reasonable period of time. Many countries provide regulatory guidance that indicates how long the licensing authority has to decide on a license application, and several countries actually make public the average amount of time taken in this process. The applicant should be given a written decision on the application and the possibility to appeal. Decisions on license applications should be made consistently, and in accordance with export licensing criteria reflected in national legislation or regulation. Relevant background information concerning the exporter and proposed end-user should be examined carefully by appropriate governmental authorities before granting an export license. In particular, it should be established that there is no reason to question the exporter's intention to follow the law.

In deciding whether or not to grant an export authorization, the competent authorities may wish to take into account the following relevant considerations:

- (i) their obligations in relation to agreements on non-proliferation or other arms control and disarmament agreements as well as resolutions adopted by the Security Council of the United Nations;
- (ii) considerations of national foreign and security policy as well as international peace and security;
- (iii) considerations about intended end-use or end-user; and

(iv) considerations about the risk of diversion, such a whether the item may be re-sold or otherwise diverted within the recipient country or re-exported for purposes contrary to conditions on the license granted.

In most countries, license applications are generally reviewed as part of an interagency process which includes appropriate internal processes for dispute resolution. It is commonly accepted that the ministry responsible for foreign policy as part of the interagency process examines the foreign policy aspects of the license applications; likewise, ministries with subject area competency (e.g. over nuclear affairs) could provide technical review of license applications in their area of expertise.

Authorities should examine critically the information in the license application, and assess the plausibility and conclusiveness of the application, for example whether it is reasonable for the end-user to acquire the type and quantity of goods listed, whether the stated end-use is valid for the technology in question, and whether the valuations stated in the application are realistic for the products to be exported.

Once granted, a license would ordinarily contain the following information:

- (i) the place and the date of issuance;
- (ii) the date of expiration of the license;
- (iii) the country of export and the country of final destination (location of the end user);
- (iv) the final recipient/end user;
- (v) a description, including where possible the reference of the national control list or relevant international classification number where relevant (for example, CAS number for chemical items);
- (vi) the quantity of the items or technology to be exported; and
- (vii) the value of the goods.

The period of validity of the authorization should be sufficiently long to enable the export to be conducted before the license expires. For some items on the control list, end-use certificates or statements from importing companies or governments should be requested on a case-by-case basis. While end-use certificates are an essential element of end-use controls they are not a substitute for a full assessment of risk by the licensing authority and the exporter. The end-use of the goods should be verified, when possible. For example, this may be done by requiring the final consignee to provide the exporter with a delivery verification certificate once the export has reached the final destination.

The importing State may wish to consider, in appropriate circumstances, whether to cooperate with the exporting state on the conduct of post-shipment controls on a mutually agreed basis that is both consistent with national laws and relevant international agreements. Adequate legal authority authorizing the suspension or revocation of licenses is also necessary to ensure that information may be acted on as necessary to prevent the evasion of controls or otherwise.

V. Enforcement of Export Controls

Enforcement measures include preventing and detecting violations of national laws and regulations, preventing exports that lack authorization, investigating and prosecuting suspected violations and helping partners in international law enforcement cooperation. The organizational distribution of legal powers to perform these tasks and their precise documentation can vary from country to country. Appropriate mechanisms should exist for information exchange and co-operation between licensing and enforcement authorities in the license application review process, as described earlier, and also at various other points in the export process. Customs authorities play an essential role in the enforcement of export and transit control. Customs officials should determine that:

- (i) the exporter has a valid license and all other required documentation;
- (ii) the goods and the quantity are in accordance with the license; and
- (iii) the export documentation is consistent with the license.

In order to perform this function, Customs and/or other law enforcement agencies should have the legal and institutional means available to pursue cases of illicit trafficking in WMD-related materials and technologies, target transactions that are of higher risk, as well as to detain, search and seize cargoes when violations have been found. If a violation is discovered, Customs, border control, and police authorities should also exchange information and co-operate with appropriate investigators and prosecutors of export control violations, consistent with national and international laws.

Cooperation with other governments' enforcement authorities, and international organizations should also be considered where appropriate to achieve enforcement objectives.

Effective sanctions sufficient to punish and deter violations of export controls should be established. The penalties may range from civil fines to criminal sanctions (monetary and incarceration), denial of export privileges, and revocation of licenses. For instance, the following type of offences and any other violation of the export control legislation, where appropriate, can be punished through fines or imprisonment:

- (i) export or attempted export of controlled technologies or services in violation of export control legislation;
- (ii) violation or attempted violation of specific conditions included in the license;
- (iii) submission of false or incomplete information in connection with a license application;
- (iv) lack of record keeping if punishable under relevant regulations;

Enforcement authorities should be provided with sufficient resources and regular training on export controls so that they are up to date on the relevant policies, regulations, trends in export controls and other efforts to stop the proliferation of weapons of mass destruction.

VI. Government Outreach to Industry

All exporters of WMD-related materials and technologies, as well as the business community in general, should be aware of their national export system including its legislative and regulatory base, the government's general nonproliferation policy and the licensing process.

It is advisable to provide information and/or training for exporters and representatives of industry in order to improve their understanding of the objectives and scope of export control. The authorities may, for instance, arrange seminars or workshops on export controls of chemicals specifically for those involved in such trade. Likewise, governments may organize annual update seminars for exporters/traders in order to provide information on recent changes to export control laws and procedures.

Relevant information may include national and international legislation, embargoes in force, control lists, licensing authorities, application forms, customs information, and instructions. A regularly updated handbook or website containing such information on national export controls is one way to provide information.