

NUCLEAR SUPPLIERS GROUP

Brokering and Transit/Transshipment in the context of the NSG

At the 31st Consultative Group Meeting in June 2013, Participating Governments mandated Germany to draft a document presenting good practices on the implementation of brokering and transit/transshipment controls as they apply to nuclear transfers.

Therefore, the present paper contains the document entitled “Good Practices for the Implementation of Brokering and Transit/Transshipment Controls”, which was adopted by the 2014 NSG Plenary.

Good Practices for the Implementation of Brokering and Transit/Transshipment Controls

A. Introduction and background

The following practices are authored by the Government of Germany with the help and support of the Governments of Australia, Austria, Canada, Czech Republic, Denmark, Estonia, France, Hungary, Japan, Republic of Korea, Mexico, Netherlands, Norway, Portugal, Romania, Spain, Sweden, United Kingdom, United States.

The document outlines good national practices to provide an information resource for interested Participating Governments. These practices are not legally binding – they are intended to assist interested Participating Governments in considering introduction or further development of national controls on brokering and transit/transshipment.

United Nations Security Council Resolution 1540 was adopted in 2004. It decides, among other things, *“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 and to this end shall: ...*

(c)Develop and maintain 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 in accordance with their national legal authorities and legislation and consistent with international law;

(d)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 trans-shipment 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 2009, the United Nations General Assembly adopted Resolution A/RES/63/67 – tabled by the Republic of Korea and Australia – recognising that brokering activities covered “not only conventional arms but also materials, equipment and technology that could contribute to the proliferation of weapons of mass destruction and their means of delivery” and calling upon Member States to “establish appropriate national laws or measures to prevent and combat illicit brokering activities”.

The purpose of the NSG Guidelines is to avert the proliferation of nuclear weapons and to limit the risk of proliferation of such weapons by controlling transfers that could

make a contribution to nuclear weapons or other nuclear explosive devices. This includes controlling exports of nuclear as well as nuclear dual-use items. Potential loopholes could be taken advantage of to shift transfer arrangements and routes and thereby circumvent a strong comprehensive export control system as laid down in the NSG Guidelines for all NSG Participating Governments. The end result would be that transfers could take place which are not in line with the purpose of the NSG Guidelines and which the NSG Participating Governments would not have authorised as exports.

During discussions on the topic of brokering and transit/transshipment between the Participating Governments, some Participating Governments considered these activities as relevant in the context of the NSG and important to be monitored.

B. Implementation

Export controls start with the setting up of rules and licensing requirements for exports. “Export” is traditionally understood as the transfer of items from one country to another. “Brokering” and “transit/transshipment” also describe actions that are connected to the passage of items across borders.

There is no need to control each and every lawful brokering and transit/transshipment activity. Only illicit brokering and transit/transshipment activities are to be combated. The term “illicit” refers to activities which are not in line with the basic principles as outlined in Part 2 No. 2 of the NSG Guidelines.

I. Definitions

“**Brokering**” generally refers to activities involved in arranging the transfer of items from one country to another. The term “**transit/transshipment**” in general describes a scenario where an item passes through a given country on its way from the country of consignment to the country of destination. Persons involved in brokering and transit/transshipment activities and the control authorities need to know what constitutes a brokering activity or a transit/transshipment, so national legal definition is essential.

Basic elements

The subjects of control (brokering and transit/transshipment issues) need to be defined on the basis of the respective national requirements. It is important to

Optional elements

note that national rules do not necessarily have to use the terms “brokering” and “transit/transshipment”.

The following could serve as an **example**:

“Brokering Services shall mean

- *the negotiation or arrangement of transactions for the purchase, sale or supply of items from a third country to any other third country, or*
- *the selling or buying of items that are located in third countries for their transfer to another third country.”*

For the purposes of this regulation the sole provision of ancillary services is excluded from this (basic) definition. Ancillary services are transportation, financial services, insurance or re-insurance, and general advertising or promotion.

Transit/Transshipment can be defined as

“transport of an item entering and passing through the customs territory of the State with a destination outside the State.”

Depending on national law and practices, a broader definition could be:

“Brokering Services shall mean

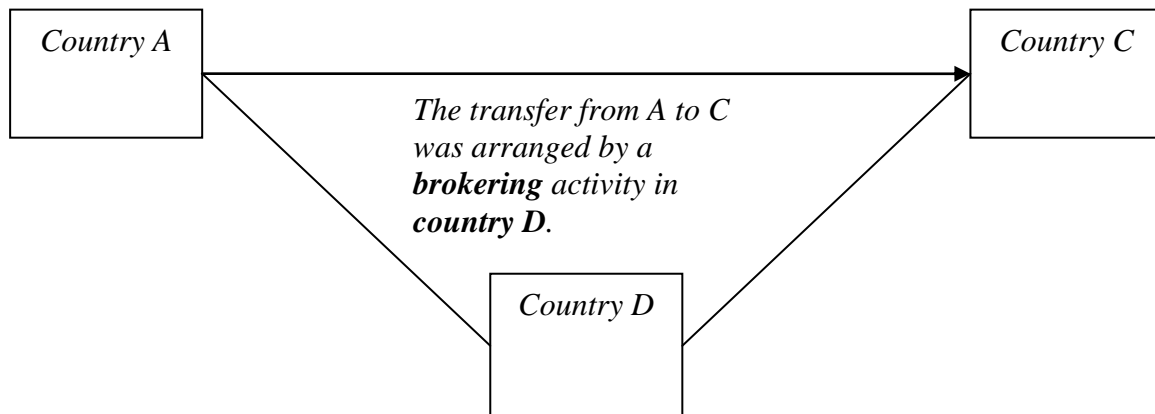
- *the negotiation or arrangement of transactions for the purchase, sale or supply of items from one country to any other country, or*
- *the selling or buying of items that are located in one country for their transfer to another country.*

Additionally, brokering can by definition include ancillary services (transportation, financial services, insurance or re-insurance, and general advertising or promotion) and any other action that facilitates the manufacture, export or import of an item.

Examples

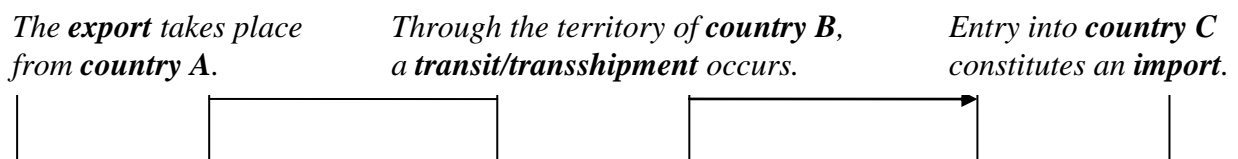
The following figure illustrates an example **brokering** situation (based on the basic definition of brokering):

The contact and subsequent contract between the seller in country A and the buyer in country C was arranged by a person in country D.



The following figure illustrates an example **transit/transshipment** situation:

An item is exported from country A to country C by passing through country B. As illustrated, transit/transshipment takes place in country B and should be subject to possibly existing relevant controls in this country.



II. Controls

When drafting legislation, several options can be considered. It is important to note that the legal basis neither has to address brokering and transit/transshipment specifically nor has to be named “brokering and transit/transshipment law”. What matters in the end is that some kind of legal instrument authorises government authorities to deter, intervene in and act upon illicit brokering and transit/transshipment activities. To avoid unnecessary administrative burdens, it is

important that brokering and transit/transshipment controls do not overlap with export controls, but rather play a complementary role.

Examples of what goes to make up the legal environment may be export control laws, custom laws, national security laws, penal laws, transportation laws, aviation/seafaring laws, laws addressed to freight forwarders/shipping companies or other rules below the level of laws.

Some important questions are as follows: Which items should be subject to controls? What should trigger the controls? And, on the subject of brokering – should the controls only refer to brokers operating inside the country or also to residents who act as brokers outside the country?

1. Legal mechanisms that trigger brokering and transit/transshipment controls

Basic elements	Optional elements
<p>Brokering and transit/transshipment: Brokering and transit/transshipment activities/issues should be subject to governmental supervision.</p> <p>A kind of catch-all mechanism or a mechanism to stop particular named activities should be in place.</p> <p><i>For example, whether the items are subject to controls depends on how sensitive (in terms of proliferation concern) the intended end-use or end-user is in the particular case.</i></p>	<p>Control lists <i>Certain listed items are always or in combination with a catch-all mechanism subject to controls.</i></p>
<p>Brokering: Controls should refer to persons acting as brokers inside the country.</p>	<p>Controls can in addition refer to residents acting as brokers outside the country.</p>

There are several options to choose from. The goal should be for the authorities to have the right to intervene in certain suspicious transactions, not to establish a universal licensing system for brokering and transit/transshipment.

2. Legal consequences regarding **brokering activities**

Basic elements	Optional elements
Licensing requirement – Certain brokering activities should be subject to governmental authorisation.	A license could be required for brokering regarding listed items .
Effective penal provisions should be inserted in order to deter and sanction violations. Therefore explicit definition of offences is important.	A license could also be required for brokering regarding unlisted items that are intended for a sensitive end-use/end user . Not only core intermediary activities can be licensed; such a requirement can also be established for ancillary services. Certain brokering activities could be generally prohibited . A legal obligation to report certain transactions (<i>enumerating and describing approved activities</i>) to authorities could be established. Even subsequent duties (e.g. proof of destination and end-use after the transaction) can be set.

3. Legal consequences regarding **transit/transshipment**

Basic elements	Optional elements
Licensing requirement – Certain transits/transshipments should be subject to governmental authorisation.	A license could be required for the transit/transshipment of listed items .
Effective penal provisions should be inserted in order to deter and sanction violations. Therefore explicit definition of offences is important.	A license could be required for the transit/transshipment of unlisted items that are intended for a sensitive end-use/end-user.

Certain transits/transshipments **could be prohibited**.

An **obligation to notify** the authorities about an intended transit/transshipment can be set.

In addition, customs and enforcement officers should be provided with adequate resources as well as training and technology, so that they can, in a case of transit/transshipment, identify items of concern. Even encouraging the industry to set up internal compliance programmes is an important measure.

III. What do we gain?

By implementing brokering and transit/transshipment controls, we can close the identified loopholes with new accompanying rules that go beyond the requirements for exports to cover other activities.

Illegal exports remain illegal exports, but controlling brokering and transit/transshipment creates an opportunity to catch additional activities, regardless of whether or not there is an illegal export as such involved.

With both elements – brokering and transit/transshipment controls – we can supplement a reasonable and functioning export control system.