
6. Strategic export controls and the private sector

Evan R. Berlack

I. Introduction

Since 11 September 2001 there has been a fresh surge of interest in international mechanisms for cutting off at the source supplies of weapon-related items and finances to dangerous actors. Strategic export controls, and the groups of states which enforce them, are among the relatively few instruments which in principle could serve a policy of denial aimed at both non-state actors, such as terrorists, and states. What exactly do such controls entail? First, they include controls on the export of all items designed for military use, including not only lethal weapons but also items with potential military use, such as electronics, avionics, metals and telecommunications. Second, the controls may regulate the export of dual-use items which generally have been designed for commercial use but are also viewed as having applicability for military use, such as computer software. Third, controls may regulate the export of any other item if it is known to be for use either in a nuclear, biological or chemical (NBC) weapon programme or in a programme to develop or produce missile delivery systems for such weapons.

II. The US approach

In the United States, separate laws and regulations and government agencies control the export of dual-use items and of military-use items, respectively. The Bureau of Industry and Security (BIS) of the US Department of Commerce administers the Export Administration Regulations (EAR), including the Commerce Control List of Dual-Use Items.¹ The US Department of State's Directorate of Defense Trade Controls (DDTC) administers the International Traffic in Arms Regulation (ITAR), which incorporates the United States Munitions List.²

This US bifurcation of administrative and legal controls over dual-use and military-use items is not typical for other developed countries. The British Government, for example, through the Department of Trade and Industry,

¹ On the EAR and the Commerce Control List of Dual-Use Items, see 'Introduction to Commerce Department export controls', URL <<http://www.bxa.doc.gov/licensing/exportingbasics.htm>>. The EAR database is available at URL <http://w3.access.gpo.gov/bis/ear/ear_data.html>.

² On the DDTC see URL <<http://pmdtc.org>> and on the United States Munitions List URL <http://pmdtc.org/docs/ITAR/22cfr121_Part121.pdf>, Part 121.

maintains similar controls over both dual-use and military items.³ This approach is the one followed by most North Atlantic Treaty Organization (NATO) member governments as well as by Australia, Japan and other states. The bifurcated US system imposes a higher threshold—including higher costs—on the US private sector inasmuch as the policies and detailed procedures, not to mention the nuances, for administration of the controls can have significant differences as between the two systems.

Moreover, the extent of controls over strategic items is in certain respects more extensive under the US system than in other developed countries. US controls on the export of dual-use and military items are extraterritorial: the United States asserts a right to control not only the export but also the re-export of such items anywhere in the world, whether or not US citizens are involved in the transactions. No other developed country's export controls system adopts this posture, which can result in US enforcement actions being taken against non-US citizens and companies: they may be placed on a US denial list which prohibits any further trade with these entities. US controls on technology transfers create additional challenges for multinational companies, although these controls are not necessarily exclusive to the USA.

Other countries are adding such controls to their national control regimes. For example, British national export controls and the European Union (EU) Council Regulation 1334/2000⁴ extend control to 'intangible' transfers of technology and know-how.⁵ Within the EU, the Conventional Arms Exports (COARM) Working Group, which brings together national officials from member states, has endorsed the importance of considering effective legal controls on electronic transfers of the software and technology associated with items on the EU Common List of Military Equipment covered by the 1998 EU Code of Conduct on Arms Exports.⁶ US controls on technology transfers to foreign nationals within the USA, however—so-called deemed exports—are unique and particularly troubling for the allocation of technical expertise within multinational companies, especially when the personnel are of Chinese or, to a lesser extent, Indian nationality.

³ On the Department of Trade and Industry see URL <<http://www.dti.gov.uk/>>.

⁴ For Council Regulation (EC) no. 1334/2000 on setting up a Community regime for the control of exports of dual-use items and technology, of 22 June 2000, see *Official Journal of the European Communities*, L 159/1 (30 June 2000), available at URL <http://europa.eu.int/comm/trade/issues/sectoral/industry/dualuse/docs/dualuse_1334.pdf>.

⁵ For more on 'intangible' transfers see Anthony, I., 'Multilateral weapon and technology export controls', *SIPRI Yearbook 2001: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2001), pp. 631–35.

⁶ For the Code of Conduct on Arms Exports see URL <<http://projects.sipri.se/expcon/eucode.htm>>. For the Common List of Military Equipment see *Official Journal of the European Communities*, C 191/2 (8 July 2000), available at URL <<http://www.nisat.org/EU/EU%20Common%20list%20of%20military%20equipment/Common%20list%20of%20military%20equipment.pdf>>.

III. The evolution of international approaches to export controls after 1945

The cold war directly influenced the thrust of strategic controls for many years. The then NATO member states (except Iceland) as well as Australia and Japan participated in the Coordinating Committee on Multilateral Export Controls (COCOM), an informal but effective multilateral arrangement directed at the Soviet bloc and China in 1950–94.⁷ COCOM maintained three comprehensive lists of strategic dual-use and military items to be controlled, and a list of proscribed recipient countries, although these lists were not made public until after the end of the cold war. Proposed exports of the more sensitive items by any member state required prior notification within COCOM, and proposed exports of the most sensitive items were subject to veto by any member.

Since the end of the cold war, the primary motivation for strategic export controls has been the non-proliferation of weapons of mass destruction (WMD) and conventional weapons. The objective has changed from protection against broad military attack by a known adversary to that of denying WMD to any end-user and denying conventional weapons to irresponsible governments and to terrorists. However, the targets of denial have not necessarily shifted radically, and only a limited number of states (led by the former Warsaw Pact members now entering NATO) have moved from the position of targets to that of participants in the control regimes. In the United States, China remains a concern, particularly within the Department of Defense, as does Russia, in a more muted vein, reflecting the perpetuation of cold war concerns and fixations.

In general, the international focus of the strategic export controls serving a non-proliferation objective rests with a number of self-constituted multinational regimes based on political commitments.⁸

1. The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies was formed in the years following the demise of COCOM and inherited COCOM's lists of dual-use and military items intended for use in conventional weapons. Its membership was meant to be broader than that of COCOM and has included Russia from its establishment, in 1996. However, unlike COCOM, it has not embodied the 'veto' mechanism and is not targeted on any named country or group of countries.

⁷ On COCOM see Adler-Karlsson, G., *Western Economic Warfare 1947–1967: A Case Study in Foreign Economic Policy* (Almqvist & Wiksell: Stockholm, 1968), pp. 50–56; Anthony, I., *SIPRI, Arms Export Regulations* (Oxford University Press: Oxford, 1991), pp. 207–11; and Davis, I., *SIPRI, The Regulation of Arms and Dual-Use Exports: Germany, Sweden and the UK* (Oxford University Press: Oxford, 2002), pp. 32–36.

⁸ For more on these export control regimes and their membership see Anthony, I., 'Supply-side measures', *SIPRI Yearbook 2003: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2003), pp. 727–48; and the SIPRI Internet site at URL <<http://projects.sipri.se/expcon/expcon.htm>>.

While participating states have made a political commitment not to export any item on the control lists without prior assessment, unlike the other multilateral groupings the Wassenaar Arrangement does not have any agreed guidelines to be applied in making those assessments.⁹

2. The Nuclear Suppliers Group (NSG), the Missile Technology Control Regime (MTCR) and the Australia Group, which focuses on chemical and biological weapons, are all regimes which originated in the cold war era because of particular non-cold war-related events. The trigger was India's acquisition of a nuclear capability in 1974 in the case of the NSG, which included the Soviet Union as an original member. Certain missile proliferation events gave the motive to create the MTCR in 1987, and the use of chemical weapons in the 1980–88 Iraq–Iran War gave rise to the Australia Group, formed in 1985. All these groups have developed comprehensive lists of items which should be controlled by member governments. The Wassenaar Arrangement started with the COCOM lists.

IV. Characteristics and limitations of existing regimes

The four multilateral export control regimes suffer from several problems. First, the participation in the regimes is limited and widely overlapping—composed largely of NATO member states and candidate members, plus Argentina, Australia, Brazil, Japan and South Korea. Russia participates in all except the Australia Group, but many key players relevant to the regimes' effectiveness have not joined. China and India do not participate in any of the regimes.¹⁰ Nor are any of the smaller developing countries with rapidly emerging high-technology sectors such as Indonesia, Jordan, Singapore, Taiwan and Thailand; nor active distributing and trans-shipment points, such as the United Arab Emirates. These critical gaps in participation in the multilateral regimes do not serve non-proliferation objectives. Since the private sectors in participating states are placed at a serious disadvantage by the disciplines and restrictions involved, there is almost an incentive for some dual-use industries, especially those in the information-technology and telecommunications sectors, to relocate to attractive non-member economies, such as India.

Second, the multilateral export control regimes are voluntary in nature and have no enforcement mechanisms, relying instead on 'peer pressure'. None of them has adopted COCOM's veto mechanism, which itself was only workable because the COCOM lists were not made public and depended on the shared perception by members of a common threat. Most but not all of the regimes do have a nominal rule against 'undercutting': the avoidance of granting a licence

⁹ However, the participating states have agreed on a list of elements that states may wish to take into account on a voluntary basis when making assessments.

¹⁰ China is an adherent to the MTCR and is expected to join both the MTCR and the NSG in 2004.

by one government where it is known that another government has denied a similar licence. However, this important rule depends for its effect not only on governments abiding by it but also on their being ready to exchange adequate information on licence requests and denials in the first place. In general, the voluntary basis means that the export control regimes of participant countries can vary widely in their scope and effectiveness, particularly in terms of legal enforcement. National judgements are also liable to differ. Should a licence be issued for an item to be used by the Indian Space Research Organisation to help launch commercial satellites? Many MTCR participants say ‘certainly’, but the USA says ‘not yet’: such a transfer might give a boost to the Indian missile programme.

Third, the geographic coverage of the multilateral regimes is subject to different application by participant governments. There is no rule in any of the regimes as to which countries are to be targeted except in the case of the NSG, where it is clear that exports to non-states parties to the 1968 Treaty on the Non-proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT) as well as to non-members of the International Atomic Energy Agency (IAEA) and to nuclear facilities which are not subject to IAEA inspection, should all be controlled by member states.¹¹ The MTCR and the Australia Group publish general guidelines on their Internet sites.¹² When private-sector companies—especially multinational companies—formulate their long-range marketing plans, ideally, they would like to have specificity, certainty and uniformity in order to be compliant with strategic export controls. However, at present, they must deal with national export control authorities in the countries from which they operate.

There is a serious and inevitable time-lag problem in adjusting all the multilateral lists to the emergence and strategic significance of new technologies. To compensate for the time taken in updating agreed control lists, a growing number of states have introduced ‘catch-all’ or end-use controls which apply to any items known to be for use in NBC weapon programmes or for the missile delivery systems for such weapons. These controls are discussed further below. The updating of control lists and the issue of how catch-all controls can be implemented are two respects in which more active private-sector participation could be particularly beneficial. Last but not least, there are serious timing problems resulting from administrative dysfunction in national governments, especially in the USA, which delays the implementation of new versions of the lists. The lists may take months to agree on, and they have no effect on the private sector until they are published.

¹¹ For the Non-Proliferation Treaty see URL <<http://www.un.org/Depts/dda/WMD/treaty/>>, and for the IAEA member states see URL <<http://www.iaea.or.at/About/Policy/MemberStates/>>.

¹² For the MTCR see URL <<http://www.mtrc.info/english/index.html>>, and for the Australia Group see URL <http://www.australiagroup.net/index_en.htm>.

V. The impact of new priorities: non-proliferation and terrorism

With the advent of non-proliferation as the chief objective of export controls, the picture has become much more ambiguous and uncertain for the private sector. The focus is now on individual 'rogue states', which may be found in any of several regions, rather than on long-standing 'blocs' of relatively familiar adversaries. There is no international consensus as to which countries are the 'rogues' or on whether there should be controls on a broad range of items. Indeed, Iraq was a rare example of a country which had attracted such a consensus through successive United Nations resolutions. Moreover, the non-proliferation objective has meant that exports to certain dangerous activities carried out both in countries of concern and by dangerous individuals or groups that are not among the normal subjects of international regulation should be controlled. This has placed a much higher burden of responsibility on the private sector. Export control compliance has become much more complicated and demanding.

This latter development has been highlighted by the adoption by most leading developed countries of the 'catch-all' concept in their export control regulations. The concept was adopted in the USA in 1990 and has been reflected, for example, in the EU dual-use regulation and in a number of national export control regimes.¹³ The catch-all concept imposes an obligation on the private sector to bring to the attention of its export control authorities any situation in which an end-user is thought to be using an item for the design, development or manufacture of a weapon of mass destruction, *whether or not* the item is contained in an applicable control list. In many export control systems, this obligation applies only if the exporter is certain about WMD end-use. In the USA, however, the obligation attaches if the exporter either knows, or *has reason to suspect*, the presence of WMD end-use.

Two ideas lie behind the catch-all concept. The first is that new information may require controls to be introduced more quickly than control lists can be updated. The second is that the private sector may in some instances have better access to information about the activities of end-users than the national intelligence authorities do. In effect, the concept makes the private sector a partner with governmental authorities—a role which is not generally welcomed by private-sector companies.

In the United States, the government has reacted to private-sector concerns by publishing a so-called Entity List: the entities on the current list, which are subject to licence requirements for the export or re-export of specified items, are located in China, India, Israel, Pakistan and Russia.¹⁴ In general, any item

¹³ On the EU dual-use regulation and on the catch-all clause, see Davis (note 8), chapter 3.

¹⁴ See US Department of Commerce, Bureau of Industry and Security, 'The Entity List: entities of proliferation concern listed in supplement no. 4 to part 744 of the Export Administration Regulations', URL <<http://www.bxa.doc.gov/Entities/Default.htm>>.

destined for an Entity List end-user requires a licence, whether or not it is identified on the list. While the Entity List concept helps to reduce the uncertainty of the catch-all concept, the obligation of US exporters and re-exporters to report possible WMD end-users continues, whether or not an end-user is on the Entity List.

The focus of strategic export controls in the post-cold war period has been mainly on denial of sensitive items to other states, but increasing attention has been paid to denial to terrorist groups and individuals. The emphasis on terrorist end-use was dramatically intensified after 11 September 2001. The Australia Group was the first regime to respond by broadening its list with terrorist groups in mind.¹⁵

Precisely because the subject of denial to terrorist end-users is now so important, there is a need for a much greater clarification and rationalization of the role to be played by the private sector in this respect. UN sanctions create a requirement for national controls that can deny any material or technical assistance to any designated terrorist group or individual as well as any group or individual planning to carry out a terrorist act. End-use-based export controls can play a part in implementing this commitment. At present, the counter-terrorism objective is clouded by a proliferation of lists of potential terrorists issued by governments and multilateral bodies—for example, the EU, Interpol, the UN and the USA.¹⁶ The duplications and differences among the lists create uncertainty as to private-sector responsibilities. Added to this is the absence of guidelines from governments as to how to use these lists—for example, how to match names of end-users against the names on the list.

VI. Conclusions

Strategic export controls are meaningless without the full participation of the private sector. Where governments have organized themselves to implement and enforce export controls, there has generally been no lack of will on the part of the private sector to comply and assist. However, the number of governments which have made the effort to reach out to those involved in and affected by enforcement is still relatively small, even among the states participating in the multilateral regimes. The more governments do so, and the more the multilateral regimes are expanded to fill the gaps in participation, the greater the potential will be for the private sector to make a significant contribution, especially as the counter-terrorism effort expands.

¹⁵ As explained in chapters 4 and 5 in this volume, much activity has also centred on stemming the financing of terrorist groups: e.g., through the UN Counter-Terrorism Committee, and the Financial Action Task Force on Money Laundering (FATF) of the Organisation for Economic Co-operation and Development (OECD). On the FATF see URL <<http://www1.oecd.org/fatf>>.

¹⁶ On these lists see chapters 5 and 8 in this volume.

At present, the framework of the multilateral export control regimes provides a valuable forum for the exchange of information and ideas among the governments represented at the periodic meetings of these regimes. International solidarity would be even more complete, the evolution of export control endeavours better informed, and their implementation more fully and uniformly effective if the private sector could also be represented at these meetings.