



SOUTH KOREA'S EXPORT CONTROL SYSTEM

JAEWON LEE*

I. Introduction

A wide range of trading activities—including export, brokering, transit and trans-shipment—can now be exploited as procurement methods by those attempting the proliferation of weapons of mass destruction (WMD). In contemporary debate about international efforts to prevent proliferation by controlling exports of dual-use items—that is, goods and technologies that can be used for both civil and military purposes—much focus is put on this wide range, and on the increasing number of countries that are exposed to potential abuse of the new methods of procurement and are required to establish and enhance export control policies. Asserting control over the expanded scope of activities was also emphasized in United Nations Security Council Resolution 1540 of 2004, which imposed binding obligations on UN member states to establish national export control regulations.¹

Yet the emergence of new suppliers of dual-use items and the subsequent establishment of export control systems is not a new phenomenon. In the 1980s, although no international obligation existed to introduce domestic measures, the Republic of Korea (ROK or South Korea) established export control policies. South Korea has an export-oriented economy, and its government implements export controls to assist the international trade of South Korean companies, while preventing illegal export of strategic items to avoid companies breaching the guidelines of the multilateral export control regimes.

South Korea is a major producer of strategic items and serves as a global trans-shipment point. The value of its exports of all types of goods increased from \$162.4 billion in 2002 to \$547.8 billion in 2012, and it rose from 12th to seventh largest exporter of merchandise.² The South Korean Government is also investing in its arms industry in a global market: the value of South Korean arms exports grew from \$241 million in 2003 to \$2.35 billion in 2012

¹ UN Security Council Resolution 1540, 28 Apr. 2004. Prior to the adoption of Resolution 1540, UN arms embargoes also imposed indirect obligations on UN member states, requiring controls of arms exports. On arms export regulations in the early 1990s see Anthony, I. (ed.), *SIPRI, Arms Export Regulations* (Oxford University Press: Oxford, 1991).

² World Trade Organization, Statistics database, 'Time series on international trade', <<http://stat.wto.org/>>.

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SUMMARY

● Although South Korea began to establish its export control system in the 1980s, conflicting domestic and international pressures meant that it was not fully implemented. Today, South Korea—now a major player in the global market and a major producer of dual-use items—has successfully implemented and is further improving its export control system. The rationale for South Korea's commitment to export control derives from a view that compliance with multilateral export control norms and regulations is essential to protect trading companies so that they can avoid risks of illegal exports, and thus promote exports.

There are three licensing authorities, each issuing export licences for different categories of strategic item. A public notice listing the items subject to export control is updated annually to reflect changes in the control lists of the multilateral export control regimes.

South Korea's implementation of export controls has accelerated since 2007. The establishment of the Korea Strategic Trade Institute (KOSTI) is an example of how a government can facilitate implementation of export controls by raising awareness among exporting companies and by assisting the companies to increase their capacities.



while the number of South Korean companies exporting arms increased from 10 in 2008 to 36 in 2011.³ The South Korea port of Busan ranks among the top 20 ‘mega ports’.⁴ In short, South Korea is a significant exporter, and so must be a significant actor in non-proliferation export controls.

This paper describes the establishment and recent development of the South Korean export control system, focusing on controls on WMD-related dual-use items.⁵ It continues in section II with a description of the initial establishment and subsequent development of export control regulations in the context of national security policy and economic interests. Section III describes the legal structure and lists of controlled items. The types of licence and the functions of licensing agencies are introduced in section IV. Section V deals with enforcement issues, including the functions of customs authorities and prosecutors. The paper concludes in section VI.

South Korea is a major producer of strategic items and serves as a global trans-shipment point

II. The development of export controls in South Korea

From the cold war to the 1990s

Beginning in the early 1950s, industrialized Western countries formulated restrictive measures to control exports of military and dual-use items to the Communist bloc, with the United States taking a leading role. The efforts were realized with the establishment of the Coordinating Committee for Multilateral Export Control (COCOM).⁶

Japan was the only Asian country to participate. COCOM had little concern with exports from other Asian countries such as South Korea, Singapore and Taiwan because they were not capable of producing commodities that were controlled under the regime. In the case of South Korea, where little industrial capacity remained after the devastating 1950–53 Korean War, companies were not capable of producing dual-use items and the country’s exports mostly consisted of agricultural, fishery and mineral products.⁷ Moreover, South Korea had no political will to trade with the Communist

³ Defense Acquisition Program Administration (DAPA), [Current status of exported defence industry materials], <http://www.dapa.go.kr/internet/information/statistics/list_statistics.jsp?mode=readForm&boardCode=BDDAPA92&curPage=1&searchField=TITLE&searchWord=&articleSeq=11670> (in Korean); and Korea Institute for Industrial Economics and Trade (KIET), [2012 KIET white paper on defence industry statistics and its competitiveness] (KIET: Seoul, 21 June 2013) (in Korean), p. 24. On arms-producing companies in South Korea see also Jackson, S. T., ‘Arms production’, *SIPRI Yearbook 2011: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2011), pp. 240–44.

⁴ Jones, S., *Current and Future Challenges for Asian Nonproliferation Export Controls: A Regional Response* (US Army War College, Strategic Studies Institute: Carlisle, PA, 2004), p. 2.

⁵ Dual-use items can be categorized into conventional and WMD uses. All nuclear items from the NSG trigger lists—including items with a solely nuclear use—are dual-use items from the perspective of export control, since they have both military and civilian uses. On these concepts and their overlap see Bauer, S., ‘Arms trade control capacity building: lessons from dual-use trade controls’, SIPRI Insights on Peace and Security no. 2013/2, Mar. 2013, <http://books.sipri.org/product_info?c_product_id=454>.

⁶ On the implications of COCOM for the current multilateral export control regime see Anthony, I. and Bauer, S., ‘Transfer controls’, *SIPRI Yearbook 2006: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2006).

⁷ Frank, C. R., Kim, K. and Westphal, L. E., ‘Economic growth in South Korea since World War II’, eds C. R. Frank, K. Kim and L. E. Westphal, *Foreign Trade Regimes and Economic Development: South Korea* (National Bureau of Economic Research: Cambridge, MA, 1975).



bloc; enmity with the Democratic People's Republic of Korea (DPRK or North Korea) left little opportunity for any form of exchange.

In the late 1980s a mixture of international and domestic political dynamics produced ambiguity in South Korea's export control policy. On the one hand, a new South Korean policy emerged that emphasized political and economic relations with Communist countries, and South Korean companies increasingly demanded economic engagement with them. South Korea achieved rapid economic growth driven by export-oriented industrialization and sought new markets in China, Eastern Europe and the Soviet Union.⁸ On the other hand, this ambitious approach was seen as a challenge to the US-led effort to exert more pressure to contain the declining economies of the Communist bloc. Moreover, by this time South Korean companies had reached a level of technological development that allowed them to produce goods (e.g. computers with 16-bit processors) that were controlled under COCOM. The USA thus approached South Korea on a bilateral basis to ask it to comply with the COCOM guidelines in order to avoid a weakening of the effect of the existing multilateral containment policy.

A mixture of international and domestic political dynamics produced ambiguity in South Korea's export control policy

In 1987 South Korea and the USA signed an agreement 'to preclude the unauthorized transfer of such commodities and technical data to proscribed communist destinations'.⁹ In return for the establishment of a comprehensive export control system, South Korea was granted preferential licensing benefits by the US Government.¹⁰ The agreement thus served as a cornerstone for South Korea's establishment of export control regulations.

The South Korean Government made slow progress in implementing the agreement. As a partial implementation, South Korea established a system to issue COCOM-style 'import certificate/delivery verification' (IC/DV) documents by issuing a presidential decree in 1987 under the Foreign Trade Act.¹¹ However, the South Korean Government only started to operate the IC/DV system in 1990.¹² In 1992 South Korea amended the Foreign Trade Act to include an additional sub-chapter authorizing the Minister of Commerce

⁸ On the new policy toward the Communist countries see Kim, H., 'The Republic of Korea's northern policy: origin, development, and prospects', *Japan Review of International Affairs*, vol. 5, special issue (1991). On implications of the policy for export controls see Park, H. S., 'South Korea's export control policy', eds G. K. Bertsch, R. T. Cupitt and S. Elliott-Gower, *International Cooperation on Nonproliferation Export Controls: Prospects for the 1990s and Beyond* (University of Michigan Press: Ann Arbor, MI, 1994).

⁹ Memorandum of Understanding between the Government of the Republic of Korea and the Government of the United States of America on the Protection of Strategic Commodities and Technical Data, signed 11 Sep. 1987, entered into force 11 May 1989, <<http://www.law.go.kr/trtyInfoPWah.do?trtySeq=1520&chrClsCd=010203>>.

¹⁰ US Government, 'Korean export control development: continued relevance of export controls', Cable on US-South Korean Export Control/Nonproliferation Talks, Honolulu, 7-9 June 1993, Declassified Documents Reference System, <<http://gdc.gale.com/products/declassified-documents-reference-system/>>. According to the declassified cable, South Korea was granted 2 licensing benefits, but the details are not provided. On US licensing benefits to 3rd countries see Sheen, S., 'Trade, technology and security: U.S. bilateral export-control negotiations with South Korea, Taiwan, Singapore, and Australia', PhD dissertation, Tufts University, Fletcher School of Law and Diplomacy, 2001, p. 135.

¹¹ Presidential Decree no. 12 191 on the Foreign Trade Act, 30 June 1987, <<http://www.law.go.kr/lsInfoP.do?lsiSeq=18881>> (in Korean), Article 27.

¹² [Import management for strategic items], *Hankyoreh*, 13 June 1990 (in Korean).



to require permits for export of strategic items.¹³ It was only in 1993 that the South Korean Government announced a concrete plan to set up a legal and organizational framework for licensing authorities.¹⁴

In the 1990s the USA came to consider export controls, which were no longer needed as part of a containment policy against Communist countries, as necessary for non-proliferation purposes. The USA was concerned that the new post-cold war order would weaken the impetus for South Korea to continue to implement export controls.¹⁵ However, the South Korean Government had a keen interest in continuing export controls as part of its containment policy against North Korea. South Korea also had concerns about those former Communist countries that maintained relations with North Korea. When it came to relations with North Korea, there was no possibility for military security to compromise with economic interests.¹⁶

South Korea's national security interests were projected at the international level as a political commitment to the non-proliferation of strategic items, which led to South Korea becoming one of the original participants in the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-use Goods and Technologies in 1996.¹⁷ Participation was possible because of South Korea's normative approach to non-proliferation, its achievement of a certain level of production capabilities and enactment of the export control regulations required by the Wassenaar Arrangement.¹⁸ South Korea also joined the other multilateral export control regimes: the Nuclear Suppliers Group (NSG) in 1995, the Australia Group in 1996 and the Missile Technology Control Regime (MTCR) in 2001. UN Security Council Resolution 1540 of 2004, which obliges all UN member states to establish measures to control the risk of proliferation of WMD and their means of delivery, further stimulated the development of South Korea's export controls.

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Recent developments

South Korea has facilitated the implementation of export controls, with agencies such as the South Korean Ministry of Trade, Industry and Energy (MOTIE) assisting companies in order to enhance the country's competitiveness on the global market. For example, MOTIE has helped prepare exporting companies for the increasing demands of enhanced export controls.¹⁹

As a result, the Foreign Trade Act was amended in September 2003 to create an online system, subsequently named Yestrade, for the management

¹³ Foreign Trade Act, Law no. 4527 as amended up to 8 Dec. 1992, <<http://www.law.go.kr/lsInfoP.do?lsiSeq=5134&ancYd=19921208&ancNo=04527&efYd=19930701&nwJoYnInfo=N&efGubun=Y&chrClsCd=010202>> (in Korean), Article 24.3.

¹⁴ Sheen (note 10), pp. 147–61.

¹⁵ See US Government (note 10).

¹⁶ On South Korea's perception of North Korea and its understanding of the necessity of export controls see Park (note 8).

¹⁷ On the Wassenaar Arrangement as a successor of COCOM see Anthony and Bauer (note 6).

¹⁸ Wassenaar Arrangement, 'Guidelines & procedures, including the Initial Elements', Dec. 2011, <<http://www.wassenaar.org/guidelines/>>, Appendix 4.

¹⁹ Shim, S., [A study on the efficient implementation system of Korean export control], PhD dissertation, Sungkyunkwan University, 2010, <<http://www.riss.kr/link?id=T12150031>> (in Korean), pp. 160–62.



of strategic items (see section IV below).²⁰ In 2007 the Foreign Trade Act was fully amended and export controls on strategic items were strengthened more generally.²¹ For example, the Korea Strategic Trade Institute (KOSTI) was established to support the implementation of export controls, including activities such as identification services (see box 1 below).

The South Korean Government has continuously amended its provisions on export control in order to reflect changes in the multilateral export control regimes and has developed ever more sophisticated legal instruments, always bearing in mind the need for a balance between export promotion and non-proliferation.²² Between 2004 and February 2013 the Public Notice on Trade of Strategic Goods and Technologies—which lists the items subject to export control—was amended 15 times. Until 2009 the list was updated irregularly; since then, the authorities have updated it at the end of each year to reflect changes in the control lists of the multilateral export control regimes.²³ While most of the amendments to the Public Notice have dealt with the annual updates to the lists of the four regimes, provisions for transit and trans-shipment and brokering licences have also been added. In addition, exceptions have been added to the ‘catch-all’ clause, which requires exporters to obtain export permits for items not mentioned in control lists but which may be intended for use in a WMD programme (known as unlisted items).

In addition, the Denial List—which lists end-users for whom the exporters are requested to contact the licensing authorities to obtain catch-all licences—has been reduced from around 7000 to around 600 individuals and companies.²⁴ The larger Denial List was based on lists from the UN Security Council’s lists of denied parties and the four export control regimes’ licence denials. The shorter amended list now follows the UN Security Council’s designation (see section IV below). The South Korean Government has not required the import of dual-use items to be reported since November 2009.

A further amendment to the Foreign Trade Act was passed in 2013 and is expected to come into force on 31 January 2014.²⁵ The amendment makes several changes to support legal trade flows. For example, it implements a plan of the South Korean Government to provide identification services regarding catch-all clauses, so that a company can reduce the risk of an illegal export caused by its subjective judgement on identification of items to be exported (see box 1 below). MOTIE and KOSTI have not yet provided specific information on how the service will operate.

The South Korean Government has continuously amended its provisions on export control

²⁰ Korea Strategic Trade Institute (KOSTI), [Annual report 2008] (KOSTI: Seoul, 2008) (in Korean), p. 5.

²¹ Korea Strategic Trade Institute (note 20).

²² Korea Strategic Trade Institute (KOSTI), [Annual report 2012] (KOSTI: Seoul, 2012) (in Korean).

²³ Yestrade, [System overview], <<http://www.yestrade.go.kr/portl/html/sl/sposl100.jsp>> (in Korean).

²⁴ Yestrade, [Denial list], <<http://www.yestrade.go.kr/portl/jsp/si/sposi050lf.jsp>> (in Korean).

²⁵ Korea Strategic Trade Institute (note 22), p. 90.



III. Legal structure and control lists

Four pieces of primary legislation form the basis of the current export control system in South Korea: the Foreign Trade Act, the Defense Acquisition Program Act, the Nuclear Safety Act, and the Act on the Control of the Manufacture, Export and Import of Specific Chemicals and Chemical Agents for the Prohibition of Chemical and Biological Weapons (Prohibition of Chemical and Biological Weapons Act).²⁶ While each of these laws regulates a different type of item, the Foreign Trade Act serves as the main

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pillar of South Korean export controls. It regulates who issues export permits and how the licensing procedure should be conducted. For example, Article 11 of the Prohibition of Chemical and Biological Weapons Act requires exporters to obtain export licences in accordance with articles 19 and 26 of the Foreign Trade Act, while Article 57(2) of the Defense Acquisition Program Act requires anyone who plans to export military items to obtain licences from either the Minister of Trade, Industry and Energy (in line with the Foreign Trade Act) or the commissioner of the Defense Acquisition Program Administration (DAPA).

A single implementation system applies to all four laws, based on Article 19 of the Foreign Trade Act and its Public Notice on Trade of Strategic Goods and Technologies.²⁷ Article 19(2) of the Foreign Trade Act states that anyone who exports 'strategic items' must obtain an export licence from either the Minister of Trade, Industry and Energy or the head of the relevant administrative agency.²⁸ 'Strategic items' which require export permits are designated by the Minister of Trade, Industry and Energy in consultation with the heads of the relevant administrative agencies, and published in the Public Notice.²⁹ The Public Notice also specifies the process for preparing and submitting a licensing application and contains two control lists of items.³⁰

Control lists of strategic items

Strategic items are listed in annexes 2 and 3 of the Public Notice. Export of the items in these two lists is subject to control under the four export con-

²⁶ Foreign Trade Act, Law no. 11 873 as amended up to 7 June 2013, <<http://www.law.go.kr/lsInfoP.do?lsiSeq=141071&efYd=20130701>> (in Korean); Defense Acquisition Program Act, Law no. 11 713 as amended up to 23 Mar. 2013, <<http://www.law.go.kr/lsInfoP.do?lsiSeq=137319&efYd=20130323>> (in Korean); Nuclear Safety Act, Law no. 11 715 as amended up to 23 Mar. 2013, <<http://www.law.go.kr/lsInfoP.do?lsiSeq=137336&efYd=20130323>> (in Korean); and Act on the Control of the Manufacture, Export and Import of Specific Chemicals and Chemical Agents for the Prohibition of Chemical and Biological Weapons (Prohibition of Chemical and Biological Weapons Act), Law no. 11 690 as amended up to 23 Mar. 2013, <<http://www.law.go.kr/lsInfoP.do?lsiSeq=137009&efYd=20130323>> (in Korean).

In addition, transactions with North Korea are regulated by the Ministry of Unification, under the Inter-Korean Exchange and Cooperation Act. Transactions with North Korea are not recognized as import or export; instead, the terms 'taking in' and 'taking out' are used.

²⁷ Public Notice on Trade of Strategic Goods and Technologies, Ministry of Trade, Industry and Energy Notice no. 2013-39, 31 Mar. 2013, <<http://law.go.kr/admRulInfoP.do?admRulSeq=2000000023976&chrClsCd=010201>> (in Korean), Article 1.2.

²⁸ For details of the relevant administrative agencies see section IV below.

²⁹ Foreign Trade Act (note 26), Article 26

³⁰ Korea Strategic Trade Institute (note 20), p. 5



trol laws.³¹ In Annex 4 of the Public Notice, the South Korean Government provides a table that categorizes such items under the four export control regimes and two international treaties—the Wassenaar Arrangement, the MTCR, the NSG and the Australia Group and the 1972 Biological and Toxin Weapons Convention (BTWC) and the 1993 Chemical Weapons Convention (CWC).³²

Annex 2 lists dual-use items, including items from the NSG trigger list with a solely nuclear use. Annex 3 lists conventional munitions (identical to the Wassenaar Arrangement munitions list). These new control lists came into effect in 2008; previously, South Korea had maintained separate control lists for each export control regime.³³ Items in the list are assigned a five-character alphanumeric code; the fourth (alphabetic) character and the fifth (numeric) character represent the category of the items; and the third (numeric) character indicates the relevant export control regime.³⁴ South Korea's current coding method is thus similar to that used in the European Union (EU) list of dual-use items (which is based on the Wassenaar Arrangement control list system) and to the Export Control Classification Number (ECCN) used in the US Commerce Control List, a list of items controlled under US export regulations.³⁵

The annexes are frequently updated to reflect changes in the lists of the four multilateral regimes; amendments are issued through a notification from the Minister of Trade, Industry and Energy, in consultation with the head of relevant administrative agencies.³⁶ The South Korean lists include two items in addition to the items listed by the regimes: severe acute respiratory syndrome (SARS) coronavirus and bovine spongiform encephalopathy (BSE) agent.

Defence industry materials

In addition to the conventional arms listed in Annex 3, the South Korean Government maintains another list for munitions, defined as 'defence industry materials' by the Defense Acquisition Program Act. Although the concept of the Annex 3 munitions list and defence industry materials differ, since the

³¹ Public Notice on Trade of Strategic Goods and Technologies (note 27), Article 1.2

³² Public Notice on Trade of Strategic Goods and Technologies (note 27), Annex 4 (controlled items categorized by the multilateral export control regimes and treaties); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological and Toxin Weapons Convention, BTWC), opened for signature 10 Apr. 1972, entered into force 26 Mar. 1975, *United Nations Treaty Series*, vol. 1015 (1976); and Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention, CWC), opened for signature 13 Jan. 1993, entered into force 29 Apr. 1997, <<http://treaties.un.org/Pages/CTCTreaties.aspx?id=26>>.

³³ Shim (note 19), p. 87

³⁴ Korea Strategic Trade Institute (KOSTI) and Korea Institute of Nuclear Nonproliferation and Control (KINAC), [Atomic export control guide] (KOSTI/KINAC: Seoul, Nov. 2011), <<https://www.kosti.or.kr/kosti/downloadAction.do?fileName=1849>> (in Korean), p. 13.

³⁵ Council Regulation (EC) no 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering, and transit of dual-use items, *Official Journal of the European Union*, L134, 29 May 2009; and US Department of Commerce, Bureau of Industry and Security, 'Export Control Classification Number (ECCN)', <<http://www.bis.doc.gov/index.php/licensing/commerce-control-list-classification/export-control-classification-number-eccn>>.

³⁶ Foreign Trade Act (note 26), Article 19(1).



Table 1. South Korea’s export control system

Controlled items	Dual-use items	General defence industry materials	Major defence industry materials	Exclusively nuclear items (Trigger List)
Combined list from the Public Notice on Trade of Strategic Goods and Technologies	Annex 2, categories 1–9	Annex 3 (Munitions List)	Annex 3 (Munitions List)	Annex 2, Category 10
Identification service provider	KOSTI	– ^a	– ^a	KINAC
Licensing authority	MOTIE	MOTIE	DAPA	NSSC
Online system	Yestrade, www.yestrade.go.kr	Yestrade, www.yestrade.go.kr	Defense Trade Service, www.d4b.go.kr	Nuclear Export Promotion Service, www.neps.go.kr

DAPA = Defense Acquisition Program Administration; KINAC = Korea Institute of Nuclear Nonproliferation and Control; KOSTI = Korea Strategic Trade Institute; MOTIE = Ministry of Trade, Industry and Energy; NSSC = Nuclear Safety and Security Commission.

^a Companies producing military materials need a designation as a contractor by the Minister of Trade, Industry and Energy, who is obliged by the Defense Acquisition Program Act to consult with DAPA. Identification in the export control process is thus not necessary.

two laws control the weapons according to different criteria, most defence industry materials are included in the list of ‘strategic items’ in Annex 3.

Defence industry materials are defined to be ‘weapons systems’ that are designated by the commissioner of DAPA in consultation with the Minister of Trade, Industry and Energy as being ‘necessary for the securing of stable source of procurement, strict quality assurance, etc.’—that is, items whose export needs to controlled in order to secure a stable supply of high-quality arms for the South Korean Government.³⁷ Defence industry materials are divided into two groups: major items and general items. The Defense Acquisition Program Act designates 12 types of major defence industry item.³⁸ All other defence industry materials are general defence industry materials.³⁹ The commissioner of DAPA, in consultation with the Minister of Trade, Industry and Energy, is responsible for designation of contractors and classification of the products into categories.⁴⁰

In summary, the South Korean Government largely regulates three types of controlled item: dual-use, munitions and exclusively nuclear items (see table 1). Among these, munitions include two subcategories: general defence industry materials and major defence industry materials. However, there could be conflicting definitions of the munitions list (Annex 3) and ‘defence industry materials’, which would affect the identification and licensing

³⁷ Defense Acquisition Program Act (note 26), Article 34.

³⁸ These 12 categories are: (a) firearms and other fire power weapons; (b) guided weapons; (c) aircraft; (d) vessels; (e) ammunition; (f) tanks, armoured vehicles and other mobile combat equipment; (g) radars, friend or foe identification devices, and other communication and electronic equipment; (h) night observation devices and other optical or thermal imaging devices; (i) combat engineering equipment; (j) chemical, biological and radiological warfare equipment; (k) command and control systems; (l) other materials that the head of the Defense Acquisition Program Administration designates as recognized to be important for military strategy or tactical operations. Defense Acquisition Program Act (note 26), Article 35(2).

³⁹ Presidential Decree no. 24 442 on the Defense Acquisition Program Act, 23 Mar. 2013, <<http://www.law.go.kr/lsInfoP.do?lsiSeq=136012>> (in Korean), Article 39(2).

⁴⁰ Defense Acquisition Program Act (note 26), Article 34.1.



process. Nonetheless, the three licensing authorities have a clear division of roles for issuing export permits for controlled items (see below).

IV. Licensing

Major agencies

There are three licensing authorities in South Korea's export control system, each issuing export licences for different categories of strategic item: the Minister of Trade, Industry and Energy, the commissioner of DAPA and the head of the Nuclear Safety and Security Commission (NSSC).⁴¹

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The export of dual-use items listed in categories 1–9 of Annex 2 and general defence industry materials found in Annex 3 (the munitions list) requires a licence from the Minister of Trade, Industry and Energy. Licence application documents can be submitted via Yestrade, the online national export controls system developed by MOTIE and KOSTI.⁴²

Export of major defence industry materials found in Annex 3 and any dual-use item in Annex 2 where the importer intends to use it for a military purpose requires a licence from the commissioner of DAPA.⁴³ Exports of dual-use items with a solely nuclear use in category 10 of Annex 2 require licences from the head of the NSSC.⁴⁴

Inter-agency coordination is provided by the Council for Control of Exportation and Importation of Strategic Items. Meetings of the council can be organized by the Minister of Trade, Industry and Energy and the heads of relevant administrative agencies—that is, the NSSC, the Ministry of Unification, the Ministry of Foreign Affairs and the Ministry of National Defense—for consultation among the organizations.⁴⁵ The Council may request the intelligence, investigation or prosecution agencies—the National Intelligence Service, the Prosecution Service, the Korean National Police Agency, and the Defense Security Command—to conduct an investigation or render assistance, if necessary, for any items on its agenda.

Identification services—that is, identification of which items are subject to export control—are provided by three agencies. KOSTI provides identification services for dual-use items (see box 1). Identification services for the trigger list items (Annex 2, Category 10) are provided by the Korea Institute of Nuclear Nonproliferation and Control (KINAC) on behalf of the NSSC. DAPA provides identification services within its department. All three agencies provide the services via the webpages mentioned above.

⁴¹ Public Notice on Trade of Strategic Goods and Technologies (note 27), Article 4

⁴² Yestrade, <<http://www.yestrade.go.kr/>>.

⁴³ Applications can be submitted online via the Defense Trade Service website, <<http://www.d4b.go.kr/>>.

⁴⁴ Applications can be submitted online via the Nuclear Export Promotion Service website, <<http://www.neps.go.kr/>>.

⁴⁵ Foreign Trade Act (note 26), Article 30; and Presidential Decree no. 24 442 on the Foreign Trade Act, 23 Mar. 2013, <<http://www.law.go.kr/lsInfoP.do?lsiSeq=136012&efYd=20130323>> (in Korean), Article 47.

Box 1. KOSTI and identification services

In general, before a company applies for an export licence, it must identify whether the item for export is classified as a dual-use item. However, many companies do not have in-house capacity to conduct this identification process, are reluctant to hire technical and legal experts on export control, are unaware of export controls or do not have financial resources to operate an internal compliance programme. To address these issues, a government can establish an institution to assist companies in complying with export control regulations, and in particular to provide ‘identification services’. The establishment process of the Korea Strategic Trade Institute (KOSTI) is a good example of the role that a government can play in increasing awareness of export controls and providing identification services.^a

Beginning in 2003 the Ministry of Trade, Industry and Energy (MOTIE) reviewed the implementation of South Korea’s export controls, including the awareness of strategic items among the South Korean business community, and as a result introduced an Establishment Plan for the Trade Control System of Strategic Items.^b According to Shim Soung-kun, the first head of KOSTI, who previously worked at MOTIE, the South Korean Government recognized that the country’s economic growth could be hampered if export controls were not implemented effectively. It was also emphasized that South Korean companies that did not comply with export controls would be mentioned in denial notifications within the multilateral export control regimes and so denied international transactions.

The government considered the idea that each private company could conduct its own identification service, but this soon turned out to be an unrealistic option. The capacity of the business sector to implement export controls was limited because there were few experts in South Korea. In addition, companies were reluctant to allocate financial resources to invest in an internal compliance programme. According to Shim, in a survey conducted by MOTIE of 80 executives of leading South Korean trading companies, only 3 or 4 answered that they knew about the concept of strategic items. Moreover, the executives collectively rejected the idea of hiring personnel for internal export control compliance.^c

To achieve efficient implementation of national export controls by reaching out to the business community and the public, MOTIE established KOSTI in 2007. KOSTI plays a leading role in facilitating national export controls. In addition to identification services, it also provides educational service (including outreach activities) for the business sector and the public in order to facilitate implementation of national export controls. Exporters can check whether the items are on the list using the Yestrade online system, either through the use of parameter sheets or by applying for an institutional evaluation. KOSTI also provides educational courses for companies, the government and the academic community. For companies, KOSTI provides regular courses on export control regulations and the use of Yestrade. It offers courses on the identification of strategic items for police and customs officers. In 2012 KOSTI started a programme for college and graduate students who are studying in relevant fields, such as engineering.

^a Although KOSTI’s official English name includes the term ‘strategic trade’, a direct translation of its name would be Korea Strategic Items Management Institute. The term ‘strategic trade’ is not commonly used in Korean.

^b Shim, S., [A study on the efficient implementation system of Korean export control], PhD dissertation, Sungkyunkwan University, 2010, <<http://www.riss.kr/link?id=T12150031>> (in Korean), pp. 162–63.

^c Shim (note b).

Groupings of destinations

The licensing authorities divide importing countries into two groups.⁴⁶ Group A consists of those countries that have joined the four multilateral export control regimes and are parties to the CWC and the BTWC.⁴⁷ Group B consists of all other countries.

Exporters trading with end-users in Group A are exempted from submitting certain documents such as an export letter of credit, an end-user certificate and exporter’s written oath.⁴⁸ In addition, for export of unlisted

⁴⁶ Public Notice on Trade of Strategic Goods and Technologies (note 27), Annex 6.

⁴⁷ Presidential Decree of the Foreign Trade Act (note 45), Article 32.

⁴⁸ Public Notice on Trade of Strategic Goods and Technologies (note 27), articles 20, 21.



items to countries in Group B more criteria apply for a situational licence (defined below).⁴⁹

Types of licence

The Foreign Trade Act categorizes licences as ‘export licences’, ‘situational licences’ (also known as ‘catch-all licences’), ‘transit and trans-shipment licences’ or ‘brokering licences’.⁵⁰ Each licence is issued by the organization responsible for the designated items except for situational licences, which MOTIE issues.

An export licence is a general form of licence for strategic items exported from South Korea. It can be an individual export licence or a comprehensive export licence. Comprehensive licences are issued after MOTIE certifies that a company has incorporated an internal compliance programme into its business operations that allows it to abide by export control regulations. A comprehensive export licence permits exports of certain items without an individual licence for a given period of time when deemed not to undermine international peace and security.⁵¹ According to the Annex 8 of the Public Notice, special comprehensive licences are not applicable for solely nuclear items in Annex 2, munitions in Annex 3, items in the ‘Very sensitive list’ in Annex 2 and items in MTCR category I.⁵² There are general comprehensive licences and special comprehensive licences. The former applies to the countries in group A, and the latter applies to the countries in group B.

An exporter is required to obtain a situational licence if it becomes aware—from the government or directly—that the importer intends to use an exported item, which is not listed as a ‘strategic item’, in the manufacturing, developing, using or storing of WMD or their delivery system (i.e. if it falls under the catch-all clauses).⁵³ Catch-all clauses in the South Korean legislation focus on potential misuse in WMD programmes; this contrasts with, for example, EU regulations, which cover a broader range of military end-use.⁵⁴ The catch-all clauses include suspect elements. For example, before applying for a situational licence, exporters should consider 12 cautionary situations listed in the Foreign Trade Act, the list of designated entities and individuals based on UN Security Council sanctions (the Denial List), and other items designated in Annex 2(2) of the Public Notice.⁵⁵ The 12 situations are similar to ‘red flag’ conditions.⁵⁶

Catch-all clauses in the South Korean legislation focus on potential misuse in WMD programmes

⁴⁹ Articles of the Public Notice that deal with groupings of destination are those clauses on exceptions of documentations and on situational, brokering and special comprehensive licences. Public Notice on Trade of Strategic Goods and Technologies (note 27), articles 21, 29, 30, 31, 39, 42.

⁵⁰ Foreign Trade Act (note 26), articles 19(2), 19(3), 23(3), 24.

⁵¹ Yestrade, ‘Licensing’, <http://www.yestrade.go.kr/portl/html/eng/sub03/s03_3.jsp>.

⁵² Public Notice on Trade of Strategic Goods and Technologies (note 27), Annex 8.

⁵³ MOTIE uses the term ‘items subject to the situational licence’ to describe unlisted items with potential licence requirements.

⁵⁴ Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering, transit of dual-use items, *Official Journal of the European Union*, L134, 29 May 2009.

⁵⁵ Foreign Trade Act (note 26), Article 19(3); Yestrade (note 24); and Public Notice on Trade of Strategic Goods and Technologies (note 27), Annex 2(2).

⁵⁶ ‘Export control, Seoul-style’, WorldECR, Dec. 2012, <<http://www.worldecr.com/archives/export-control-seoul-style/>>

**Box 2. Situations listed in the Public Notice on Trade of Strategic Goods and Technologies**

1. The importer is reluctant to provide information on the end-use of the item.
2. The item to be exported does not fit the end-user's line of business.
3. There is a significant gap between the item's capacity and the importing country's level of technology.
4. The end-user has no business experience in which the item could be used.
5. The end-user does not have the required technical knowledge about the export of the item.
6. The end-user declines installation, maintenance or educational training services for the item.
7. The ultimate consignee of the item is a forwarding agent.
8. The price and payment conditions for the item are outside the normal range.
9. The delivery dates for the item are outside the normal period.
10. The shipping route of the item is abnormal.
11. It is unclear whether the item will be used in the importing country or re-exported.
12. The information about the item or a destination is requested with abnormal security standards.

Source: Public Notice on Trade of Strategic Goods and Technologies, Ministry of Trade, Industry and Energy Notice no. 2013 39, 31 Mar. 2013, <<http://law.go.kr/admRulInfoP.do?admRulSeq=2000000023976&chrClsCd=010201>> (in Korean), article 39(1)1–12.

Since many conditions, with different perspectives, apply to export controls on unlisted items, MOTIE provides an implementation process for catch-all clauses on Yestrade. When an item of concern is identified as not listed in the Public Notice, exporters are asked to answer the following four questions to see if the item, end-use and certain circumstances require a situational licence.

1. Is the importer or the end-user on the Denial List (searched via Yestrade)?
2. Does the item and its destination appear in Annex 2(2)?⁵⁷
3. Is a diversion of end-use perceived?
4. Is the destination of the item a Group B country and does a situation listed in articles 39(1)1–12 of the Public Notice apply (see box 2)?

If the answer to any of these questions is yes, the exporter is required to apply for a situational licence.

A transit and trans-shipment licence is required by anyone who is to transit or trans-ship strategic items or items subject to a situational licence through South Korean harbours or airports. 'Trans-shipment' is defined as moving and loading goods from an arriving means of transport to another departing means of transport within the same customs jurisdiction.⁵⁸

For brokering licences, only strategic items (or listed items) are subject to control; in other words, the South Korean Government does not apply a catch-all clause to brokering licences. The Public Notice defines 'brokering' as any action conducted by any South Korean who is residing in South Korea (including legal persons established according to domestic laws) to transfer strategic items from one foreign country to another, when the transactions

⁵⁷ Twenty-one situations are described in Annex 2(2) (items with specific details and destination country). E.g. export to Syria of a fume hood more than 2.5 meters wide requires a situational licence.

⁵⁸ Special Notice on Trans-shipment Freight Management Process, Customs Notice no. 2013-48, 10 June 2013, <<http://www.law.go.kr/admRulLsInfoP.do?admRulSeq=2000000093765>> (in Korean), Article 2(1).



involve contracts for trade or other forms of transaction (including free transfer) with payment of commission or other compensation.⁵⁹

The Public Notice also regulates re-export of strategic items.⁶⁰ Re-export is defined as the export of an imported strategic item in its original form or of manufactured or processed goods that incorporate imported strategic items (regardless of whether the new goods are strategic).⁶¹ If it is a new product that is not identified as a strategic item and the value of the imported strategic items is less than 25 per cent of the new product or if the imported strategic item cannot be separated from the final product without losing its original functions, a re-export licence is not required.⁶²

V. Enforcement

Customs authorities

Although the primary function of the Korea Customs Service (KCS) is to impose import duties and internal taxes on imported goods and to control smuggling, it also conducts surveillance of breaches of the Foreign Trade Act in support of national export controls. According to the KCS's Public Notice on Export and Import Customs Clearance of Strategic Items (the Customs Public Notice), an exporter is to report to the head of the customs office after obtaining an export licence from the relevant agency.⁶³ The exporter must also include the licence number in the document required to be submitted during the clearance process, which allows collection of information when the exporter reports to the KCS prior to loading.⁶⁴ In addition, the customs automated system, UNI-PASS, is linked with Yestrade, so that information on export licences and customs clearance is shared.⁶⁵ All goods to be exported must go through the export customs procedure, although the KCS can omit an inspection process for export goods. However, some goods in its export process may be examined as part of the agency's risk-management process.⁶⁶

In questionable cases, the KCS can demand documents with the strategic item's identification information or export licences relating to the item.⁶⁷ In investigation and surveillance, the customs officers perform their duty as judicial police in accordance with the Customs Act.⁶⁸ The officers can search

⁵⁹ Public Notice on Trade of Strategic Goods and Technologies (note 27), Article 2(3).

⁶⁰ Public Notice on Trade of Strategic Goods and Technologies (note 27), Article 37.

⁶¹ Public Notice on Trade of Strategic Goods and Technologies (note 27), Article 2(9).

⁶² When the final destination is Cuba, Iran, North Korea, Sudan or Syria, the imported value should be less than 10%.

⁶³ Public Notice on Export and Import Customs Clearance of Strategic Items, Customs Notice no. 2013-40, 31 May 2013, <<http://www.law.go.kr/admRulLsInfoP.do?chrClsCd=010202&admRulSeq=2000000024014>> (in Korean), Article 3(1).

⁶⁴ Public Notice on Export and Import Customs Clearance of Strategic Items (note 63), Article 3(2).

⁶⁵ South Korean Ministry of Knowledge Economy (MKE) and Korea Strategic Trade Institute (KOSTI), *Online Export Control System of Korea, Your Export Supporter: Yestrade* (MKE/KOSTI: Seoul, n.d.), <http://www.yestrade.go.kr/portl/html/eng/down/YesTrade_brochure.pdf>, p.12.

⁶⁶ Korea Customs Service, 'What is export customs?', <http://www.customs.go.kr/kcshome/main/content/ContentView.do?contentId=CONTENT_ID_000001336&layoutMenuNo=21056>.

⁶⁷ Korea Strategic Trade Institute (note 20), p. 10

⁶⁸ Customs Act, Law no. 11602 as amended up to 1 Jan. 2013, <<http://www.law.go.kr/lsInfoP.do?lsiSeq=131363>>, Article 295



offenders under the Foreign Trade Act and arrest them at the scene.⁶⁹ However, they do not have the right to bring the case to court.

Prosecutions, penalties and administrative measures

On initiation of a legal process, prosecutors have discretion to decide whether to bring a case to court, and the right to bring a case to court is solely decided by the Prosecutors' Office. As Anna Wetter argues, 'in systems that grant prosecutorial discretion, it is crucial that prosecutors are convinced of the severity of a certain crime, since they may not otherwise choose to refer a case to the court'.⁷⁰ Thus, the South Korean system, where detection by customs officers is not sufficient for prosecution, may not provide effective law enforcement.⁷¹

In terms of criminal sanctions, the Foreign Trade Act provides two penalty provisions for export violations related to strategic items. First, anyone who exports items without a licence to facilitate international 'proliferation' of strategic items faces imprisonment for up to seven years or a fine not exceeding five times the value of the exported or brokered items.⁷² Second, anyone who exports items without a licence or who obtains a licence fraudulently

The South Korean system may not provide effective law enforcement

faces imprisonment for up to five years or a fine not exceeding three times the value of the exported goods.⁷³ The first of these penalties emphasizes specific offences that contributed to proliferation of strategic items, while the second is related to any unauthorized transaction. The two penalty provisions may not be different, because by definition illegal exports facilitate the international spread of strategic items. Moreover, 'proliferation' is normally used in reference to WMD, not strategic items, in the field of non-proliferation export controls.⁷⁴ The legal expression used in this provision is thus unique. Penalties for crimes of negligence are not specifically mentioned.

As an example of an enforcement case, in 2011 equipment for the production of shells was illegally exported to Myanmar by 14 former and current staff members of a South Korean company that produces defence items.⁷⁵ The offenders disguised shipments as agricultural machines. They were sentenced to prison terms of 12–18 months, suspended for 2–3 years. They were also fined 5–50 million won (\$4500–45 000). In another example, between 2005 and 2008 a company exported around 200 dual-use machine tools without the necessary licences to China, India and nine other countries. The company was fined 50 million won (\$45 000) and one month of export restriction.

⁶⁹ Customs Act (note 68), Article 296

⁷⁰ Wetter, A., *Enforcing European Union Law on Exports of Dual-Use Goods*, SIPRI Research Report no. 24 (Oxford University Press: Oxford, 2009), p. 67.

⁷¹ There are few studies regarding effective enforcement of non-proliferation export controls. For lessons and challenges from European prosecution cases see Bauer, S., 'WMD-related dual-use trade control offences in the European Union: penalties and prosecutions', EU Non-Proliferation Consortium, Non-proliferation Papers no. 30, July 2013, <<http://www.nonproliferation.eu/activities/activities.php>>.

⁷² Foreign Trade Act (note 26), Article 53(1).

⁷³ Foreign Trade Act (note 26), Article 53(2).

⁷⁴ The author is grateful to Sibylle Bauer for highlighting this point.

⁷⁵ Korea Strategic Trade Institute (KOSTI), [Annual report 2011] (KOSTI: Seoul, 2011), p. 109 (in Korean).



The Foreign Trade Act contains three administrative sanctions. First, the Minister of Trade, Industry and Energy or the head of a relevant administrative agency can ban all exports or imports of strategic items for up to three years by a person who has exported any strategic items without an export licence or situational licence.⁷⁶ Second, the Minister of Trade, Industry and Energy or the head of a relevant administrative agency may issue an 'educational order' to take a training course of up to eight hours to (a) any person who has exported strategic items without an export licence or a situational licence; or (b) any person who obtained an export licence or a situational licence by fraud or other wrongful means.⁷⁷ Third, a civil fine not exceeding 20 million won (\$18 000) can be imposed on any person who has failed to submit a report or data or has submitted a false report or data.⁷⁸

In 2011 the Minister of Trade, Industry and Energy ordered 21 administrative measures for violations of the Foreign Trade Act.⁷⁹ These included warnings and educational orders for 15 companies, export restrictions up to two months and fines for 3 companies, and 3 cases where export and import restrictions were imposed for up to three months.

VI. Conclusions

Although South Korea began to establish its export control system in the late 1980s, the South Korean Government seems to have initially hesitated to fully implement the controls. On the one hand, companies that produced strategic items and sought new markets demanded that the South Korean Government pursue an economic engagement policy with Communist countries. On the other hand, South Korea, a newly industrialized country, faced increasing pressure from the USA to control exports of these items to the Communist bloc.

By the 1990s South Korea's economic landscape had changed. South Korea became a major player in the global market, with a larger share in merchandise trade. The collapse of the Soviet Union and the dissolution of COCOM contributed to the success of South Korea's engagement policy with the former Communist countries. Nonetheless, South Korea maintained tight controls on the export of strategic items to North Korea.

Today, the South Korean Government has successfully implemented and is further improving its export control system. The rationale for the commitment derives from a view that compliance with multilateral export control norms and regulations is essential to protect trading companies, so that they can avoid risks of illegal exports, and thus promote exports.

Since South Korea amended its Foreign Trade Act in 2007, the implementation of export controls has accelerated. The establishment of the Yestrade online system has been one of the most important achievements in the prompt and effective implementation of the national export control system. The online system facilitates identification services and outreach activities, which are provided in order to promote awareness of strategic

The South Korean Government has successfully implemented and is further improving its export control system

⁷⁶ Foreign Trade Act (note 26), Article 31(1).

⁷⁷ Foreign Trade Act (note 26), Article 49.

⁷⁸ Foreign Trade Act (note 26), Article 59(1)3.

⁷⁹ Korea Strategic Trade Institute (note 22), p. 128



items and export controls among companies and the academic community. The establishment of KOSTI is an example of how government can play a role as an implementing facilitator by raising awareness of export controls among exporting companies and by assisting the companies to increase their compliance capacities.

South Korea could refine its export control system by addressing three issues. First, it could consider resolving the possible conflict between the munitions list (Annex 3) and defence industry materials. While the former

Government can raise awareness of export controls and assist companies to increase their compliance capacities

is defined by the Wassenaar Arrangement munitions list for non-proliferation purpose, the latter is categorized by DAPA for promotion of the national defence industry. The South Korean Government should consider merging the two lists in order to streamline arms export regulations. Second, it seems that the Council for Control of Exportation and Importation of Strategic Items does not provide much information on its tasks and issues. More transparency in the work of the council would enhance understanding of inter-agency coordination. Finally, effective enforcement is essential to achieve the goal of non-proliferation export control. To improve South Korea's export controls, a study could delve into the function of customs officers and the role of prosecutors in this field.



Abbreviations

BTWC	Biological and Toxin Weapons Convention
COCOM	Coordinating Committee for Multilateral Export Control
CWC	Chemical Weapons Convention
DAPA	Defense Acquisition Program Administration
EU	European Union
IC/DV	Import certificate/delivery verification
KCS	Korea Customs Service
KOSTI	Korea Strategic Trade Institute
MTCR	Missile Technology Control Regime
MOTIE	Ministry of Trade, Industry and Energy
NSG	Nuclear Suppliers Group
NSSC	Nuclear Safety and Security Commission
WMD	Weapons of mass destruction



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STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE

Signalistgatan 9
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Fax: +46 8 655 97 33
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SOUTH KOREA'S EXPORT CONTROL SYSTEM

JAEWON LEE

CONTENTS

I. Introduction	1
II. The development of export controls in South Korea	2
From the cold war to the 1990s	2
Recent developments	4
III. Legal structure and control lists	6
Control lists of strategic items	6
Defence industry materials	7
IV. Licensing	9
Major agencies	9
Groupings of destinations	10
Types of licence	11
V. Enforcement	13
Customs authorities	13
Prosecutions, penalties and administrative measures	14
VI. Conclusions	15
Abbreviations	17
Box 1. KOSTI and identification services	10
Box 2. Situations listed in the Public Notice on Trade of Strategic Goods and Technologies	12
Table 1. South Korea's export control system	8

ABOUT THE AUTHOR

Jaewon Lee (South Korea) was a SIPRI–Korea Foundation Intern with the SIPRI Dual-use and Arms Trade Control Programme. He is a graduate of the Graduate School of International Studies at Seoul National University. He previously worked for a short period at the Korea Strategic Trade Institute (KOSTI). His research interests include nuclear policy and non-proliferation export control in North East Asia.