May 6, 2014

HE Ambassador Oh Joon
Chair
Security Council Committee established under UNSCR 1540
By Email: sc-1540-Committee@un.org

Your Excellency,

The Permanent Mission of Australia to the United Nations and the Permanent Mission of the Federal Republic of Germany to the United Nations have the honour to convey the attached document outlining effective practices in relation to UNSCR 1540 (2004).

The document, entitled 'Export Controls: The Importance of Engaging Industry', seeks to share experiences and identify effective practices in the areas covered by UNSCR 1540, and is intended to be used by States on a voluntary basis in implementing UNSCR 1540.

Please accept, Excellency, assurances of the highest consideration.

Yours sincerely

Ms Claire Elias
First Secretary
Permanent Mission of Australia to the United Nations

Mr Peter Winkler
First Secretary
Permanent Mission of Germany to the United Nations

EXPORT CONTROLS: THE IMPORTANCE OF ENGAGING INDUSTRY

With the overarching objective of preventing proliferation activities and financing, this paper outlines effective practices to engage industry[1] in implementing United Nations Security Council resolution 1540 (2004) with particular regard to i) strengthening export controls, ii) controlling access to intangible transfers of technology, and iii) controlling information that could be used for WMD and their means of delivery. The paper aims to support the 1540 Committee in delivering its mandate to identify, collect, and promote the sharing of effective practices for the implementation of UNSCR 1540 (2004).[2]

In accordance with UNSCR 1540, States shall establish, develop, review, and maintain appropriate effective national export and trans-shipment controls over prohibited 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 exports and trans-shipments such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls.[3] UNSCR 1540 also calls upon States to develop appropriate ways to work with and inform industry regarding their obligations under these laws.[4]

Foreign trade needs to adhere to prohibitions and licensing requirements. Individuals, organisations, and industry associations are uniquely placed to monitor compliance, understand and report on evasion techniques, inform control lists, and provide technical expertise gathered in the field. Compliance for controlled exports is a **shared responsibility** between government and private sector exporters and service providers.[5] Accordingly, the Governments of Australia and Germany have respectively established a **partnership with industry** to develop, implement, and monitor strategic trade controls.

A **consultative approach** ensures the needs of the business community are taken into account from initiation. Early engagement with industry on sensitive technologies is critical in supporting strategic trade controls and positive economic outcomes. This facilitates subsequent monitoring and implementation of strategic trade controls by industry. Establishing a government-industry partnership in this manner contributes to a shared understanding of strategic trade controls **facilitating rather than hampering trade and economic development**.[6] The cyclical process of engaging with industry is encapsulated in the following flowchart.

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[1] 'Industry' is referred to by way of broad definition in this context, and is intended to include businesses, exporters, universities, and the research sector.
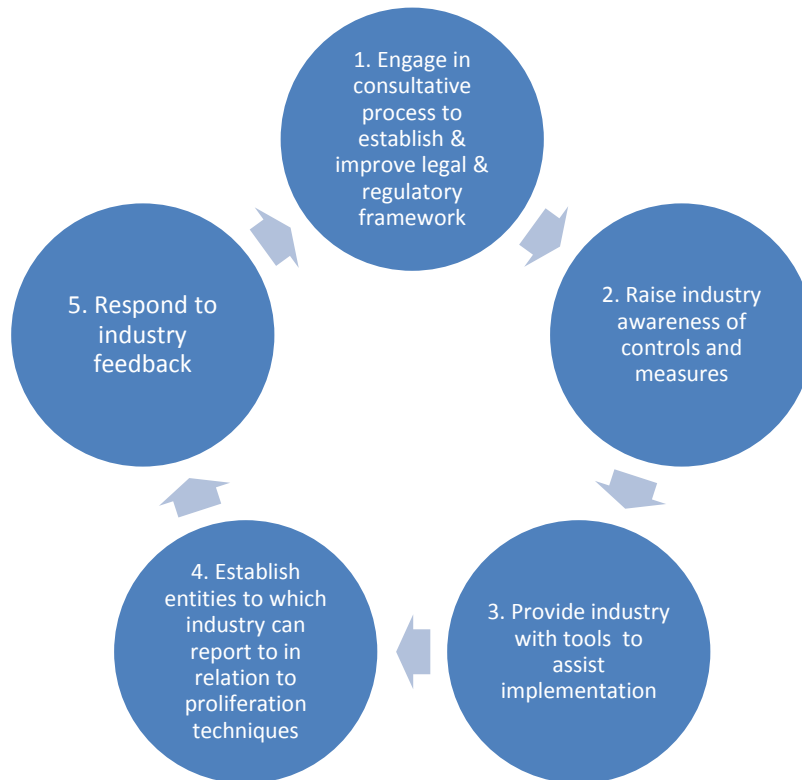[2] UNSCR 1977 (2011) OP8, OP10 and OP12
[3] UNSCR 1540 OP 3(d)
[4] UNSCR 1540 OP 8(d)
[5] DECO website, training module; BAFA's website, information leaflet on export controls.
[6] See 'Chairperson's Summary Outcomes' document, World Customs Organisation Conference on Strategic Trade Controls Enforcement, 14-16 November 2012.

1. Engage in consultative process to establish & improve legal & regulatory framework

2. Raise industry awareness of controls and measures

5. Respond to industry feedback

4. Establish entities to which industry can report to in relation to proliferation techniques

3. Provide industry with tools to assist implementation

1. Engage in consultative process to establish legal and regulatory framework

It is vital that industry be directly consulted in the preparation and drafting of relevant legislation. This allows legislation to take into account relevant industry-specific operational factors. Engaging industry might involve releasing 'consultation drafts' of legislative instruments, or seeking industry submissions on improving existing legislation. It might also involve consulting with industry on updating control lists and official hearings to discuss administrative changes. This process may also include discussing simplified procedures and consideration of current trade and business trends.

Involving industry at the legislation drafting stage addresses industry misconceptions of strategic trade controls imposing on or hampering trade and business. Instead, involving industry ensures controls are understood as essential for preventing proliferation while facilitating trade and business continuity. Such engagement also fosters a shared sense of ownership and responsibility between States and relevant industry sectors.

2. Industry awareness of strategic trade controls (Industry Outreach)

2.1 Relevant Contents

Industry should be made aware of relevant legislation and regulations, exemptions, licensing/permit processes, and penalties for non-compliance. Therefore, industry should be informed about:

· Relevant legislation and control lists;
· Details of national strategic export control legislation;
· License application forms and procedural details, including advice on required documents and certificates;

- Conditions for using individual, global, and general export licences, and required registration procedures;
- Guidelines on end-use control and possible red flags;
- Guidance on product classification;
- Sanctions and embargoes in force;
- Applicable penalties for infringements of export controls.

2.2 Relevant Sectors

Relevant sectors of industry must be made aware of threats faced by proliferation of nuclear, chemical, and biological weapons, as well as their means of delivery.[7] Through understanding that States are required to take and enforce domestic controls to prevent proliferation, relevant industry sectors gain an appreciation of the key role they play in implementation and monitoring of strategic trade controls.

a. Exporting

Manufacturers and exporters must understand the control status of a good or technology they are proposing to supply before any business transaction takes place. This includes industry awareness of what technologies are considered sensitive and why they are sensitive. Accordingly, individuals or organisations should be aware of relevant control lists enabling them to check whether their goods or technology are listed, and to assess the potential of their product to be used for WMD.[8] It is also important for manufacturers and exporters to have in place and apply "risk assessment procedures" for supply transactions; ideally, they should know their customer and how the customer uses the product.

Identifying and engaging dual-use industry is a particular challenge for governments. Where possible, governments should work with organisations dealing with sensitive technologies early in development and planning cycles to assist in understanding the strategic environment they are operating in, and the impacts this may have on their businesses. Early appreciation of these factors provides organisations with an understanding of their marketplace, and will assist them to develop export-suitable technologies along with effective strategies to maintain and grow their business.

Some governments have found that significant outreach is required for small and medium sized enterprises (SMEs) as these are often less aware of relevant legislation and regulations, less likely to know the potential of their product being used for manufacturing WMDs and generally more vulnerable to higher returns offered by proliferators.[9]

Involvement with, and advocacy through industry bodies and associations may provide effective avenues for engagement with entities that may not be aware of their obligations under the legislation.

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[7] UNSCR 1540(2004) PP1 and UNSCR 1977(2011) PP2

[8] https://exportcontrols.govspace.gov.au/faq/

[9] Ministry of International Trade and Industry of Malaysia, *Strategic Trade Act 2010, Reaching out to SMEs: Malaysia's initiatives*, presentation given at the 21st Asian Export Controls Seminar, Tokyo, 26-28 February 2014.

b. Brokering

UNSCR 1540 obliges States to develop and maintain appropriate effective controls to illicit brokering in prohibited items.[10] Since brokers are often not physically or closely involved in a transfer but rather arrange for exports remotely, they are often less aware that they are equally subject to regulations prohibiting the sale, supply, or transfer of prohibited items or technology as the exporters in their own country (even if the item is exported from among third countries). Brokering conducted by so called front companies and intermediaries can serve to mask the end-use of items and impede the enforcement of controls over defence and dual-use goods and technologies.[11] Effectively regulating the brokering industry can help prevent misuse of brokering services for proliferation purposes. Therefore, government outreach is particularly important in the brokering industry in order to raise awareness of relevant regulations, broker certificate requirements and procedures, as well as the severe penalties of non-compliance. As a result, brokers should have similar risk assessment procedures in place as their clients ideally, should know the end-user and end-use of the product.

c. Financing

UNSCR 1540 obliges States to adopt and enforce laws which prohibit the financing of activities also prohibited by the resolution.[12] The banking and finance industry should be aware of red-flag indicators, and governments should consider working with industry associations to prepare best-practice guidelines to identify and deal with high-risk customers or transactions.[13] Individuals or organisations should have a clear and simple mechanism by which to report any suspicious transactions.

d. Transit/Trans-shipment

The shipping industry (including shipping lines, shipping agents and port operators) should be aware of practices such as obscuring actual destinations of illicit shipments by using circuitous shipping routes and multiple intermediate trans-shipments.[14] Industry liaison should be encouraged, where businesses can share relevant experiences and best practices. Individuals or organisations should have a mechanism by which to report any suspicious transactions and industries should be made aware of sanctioned destinations. As with other areas of industry, States should consider working with industry associations to prepare best-practice guidelines for transhipment.[15]

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[10] OP3(c) of UNSCR 1540 (2004).

[11] https://exportcontrols.govspace.gov.au/faq/#whatBROKER

[12] OP2, OP3(d) of UNSCR 1540 (2004).

[13] FATF Guidance "The Implementation of Financial Provisions of United Nations security Council Resolutions to counter the Proliferation of Weapons of Mass Destruction' June 2013

[14] http://www.state.gov/t/isn/rls/rm/200582.htm

[15] Examples of best practice guidelines in relation to preventing transhipment diversion include those provided by the US Department of Commerce Bureau of Industry and Security, at http://www.bis.doc.gov/index.php/other-areas/office-of-technology-evaluation-ote/transshipment-best-practices

e. Training

Education and training providers should be made aware of potential proliferation threats if a controlled technology is unwittingly transferred to an end user that may contribute to the manufacture or development of WMD. Training providers should have in place a risk assessment and mitigation framework. Specific tools should be provided to industry to allow assessments of technology falling under a control list; the likelihood of sensitive information being leaked; and whether permits are required.[16] In that regard industry sectors should be provided with best-practice training guidelines.

f. Services

Technical service providers should be made aware of potential misuse of their services, i.e. repair, development, production, or assembly of goods. It is important that service providers have in place risk assessment procedures. They should know their customers and the products related to their services. Therefore, service providers should gather sufficient information to assess the potential risk of misuse of their services.

3. Tools to assist implementation

Implementation tools may include an array of items including guidance manuals, self-assessment tools, and training modules.

The Governments of Australia and Germany, through various specialised departmental agencies, aim to provide industry with useful tools to assist in navigating a complex system of strategic trade controls.

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[16] https://exportcontrols.govspace.gov.au/pilot-program/pilot-tools/intangible-transfer-flowchart/

Practical example A: Defence Export Controls Organisation (DECO)

DECO is responsible for regulating the export of defence and strategic goods and technologies from Australia. In this role DECO acts as a liaison between government, industry, and the research and education sectors.

DECO raises awareness of Australian controls on the export of defence and strategic goods and technologies by engaging with stakeholders in the defence, dual-use, and research and education sectors through its website and outreach program.

DECO endeavours to engage early in organisations' development and planning cycles to support effective trade and business outcomes, and to enable exporters of controlled goods and technologies to meet their obligations under the legislation.

DECO participates in whole-of-government programs to provide stakeholders with an understanding of which government agencies are responsible for the various aspects of strategic trade controls.

DECO recently launched a **free online export control awareness training package**. The online training is part of an enhanced outreach program that aims to be more **agile and responsive to business and industry needs**. Training modules provide users with an understanding of Australian export controls legislation, regulation, and compliance.

DECO is also developing an **online self-assessment tool** that will assist exporters in establishing the control status of their goods or technology. It is anticipated that the tool will become available in late 2014.

DECO encourages industry to address 'The Four Ws of Export Controls Compliance'

· What is being exported?

Could the goods be used in a WMD program?

· Where is it being exported?

Is the destination country a strategic ally or an adherent to a multilateral export control regime?

Is the destination of the export a county subject to UN sanctions or Australian autonomous sanctions?

· Why is the customer ordering it?

What is the end use?

Do we know if the item being exported will be used in a military application or for chemical, nuclear or biological weapons proliferation?

· Who will be receiving the export?

Is the customer involved in any military or chemical or biological weapons proliferation activities?

Has the customer been screened?

Practical example B: Federal Office of Economics and Export Control (BAFA)

BAFA is responsible for the administrative implementation of the Federal Government's export control policy. It is a licensing authority working in close co-operation with other federal agencies. In a complex export control system, BAFA is the single point of contact for exporters for any export control issue or question.

BAFA raises awareness of German and European export controls directed towards suppliers, manufacturers and users of controlled goods (including controlled tangible and intangible technology) emphasizing the benefits of compliance and the need for ethical corporate behaviour

Key tools are:

a.) Homepage and Export Control Newsletter

Providing companies with an information headstart means offering information rapidly and up to date. Therefore, BAFA offers direct information access on its website (www.bafa.de) and through a daily newsletter providing information on latest legal and procedural amendments being implemented. Moreover, BAFA publishes a monthly newsletter ("Newsletter Export Control") providing, inter alia, updates on embargoes and modifications of control lists.

b.) Information Events

BAFA is organizing two major update events biannually. Additionally, it regularly hosts, together with various Chambers of Industry and Commerce, joint information events on current export control issues. BAFA also participates in working groups hosted by the Federation of German Industry (BDI) and presents at trade association events.

c.) Books and leaflets

Among BAFA's numerous publications is a loose-leaf collection of relevant laws and guidance ("HADDEX") and an export control guide ("Export Control in Practice"). In responding to the high demand of companies for information on specific issues, BAFA also provides special topic publications, for example on Internal Compliance Programmes (ICP).

4. Establish reporting structures to address evasion and diversion

Clear points of contact should be readily available as a mechanism by which industry can not only seek guidance on the implementation of laws and regulations, but also to report instances of suspicious behaviour or transactions, or patterns of suspicious behaviour or transactions.

5. Respond to industry feedback

Industry feedback, particularly in relation to operational obstacles, inconsistencies or loopholes, emerging patterns of evasion or diversion, should be recorded, analysed, and ultimately addressed in future legislative amendments. In this regard, establishing end-user reference groups might provide governments with an important source of feedback and information on drafting effective legislation. End-user reference groups might also serve as a potential resource for industry self-regulation. Legislative amendments from industry feedback can also take into account changes in definitions, penalties and procedures.

Industry provides valuable information to governments on the evolution of technologies and the relevance and effectiveness of controls. Industry feedback on the application of control lists assists governments to contribute effectively on regime controls.

OUTREACH: THE WAY FORWARD

"Know your industries"

It is paramount that States identify 'high risk' industries and therefore target outreach efforts. This **risk management approach** assists governments to funnel scarce resources directly into high risk industry sectors.

Some examples of outreach strategies are shown below.
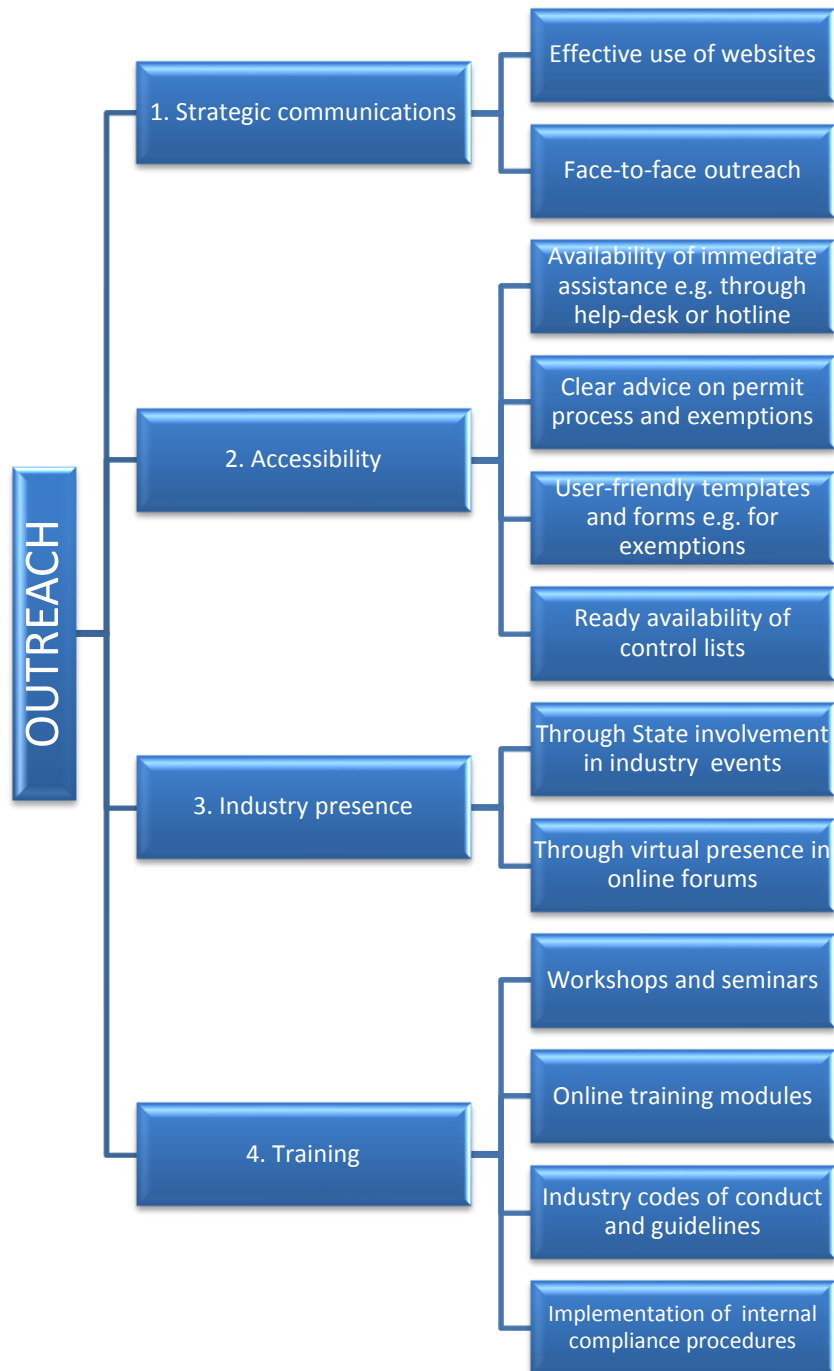
1. Strategic communications

Through:

- The availability of accessible and understandable online resources, including websites, which provide an outline of industry obligations and responsibilities.
- Clear information on which government agencies in the regulatory framework are responsible for the various aspects of strategic trade controls – i.e. export controls, sanctions, compliance, and enforcement.

2. Accessibility

Through:

- Availability of immediate assistance, for example through the provision of a 'helpdesk' or 'hotline'.
- Ease of access to relevant information and documents, such as control lists, permits and exemption application forms.
- Ease of access to relevant legislation and regulations.

3. Presence in the industry

Through:

- Government initiated outreach and roundtable discussions on strategic trade controls with representatives of key business sectors.
- Partnership with industry associations in order to reach industry representatives and support guidance on good practices and codes of conduct.
- Early engagement with organisations in their development and planning cycle.
- Involvement in industry events.
- Providing incentives to industry to implement internal controls and procedures by offering trade facilitation.
- The importance of developing sound working relationships with industry associations cannot be underestimated, as such associations provide an important source of valuable information with regard to technological advancements and suspect enquiries.

4. Training

Through:

- Providing workshops, seminars, and training.
- Providing industry guidelines and codes of conduct relating to implementation[17], including provision of sector-specific guidance.
- Providing free on-line training modules on implementation and enforcement of trade controls.
- Leveraging existing tools, such as those of OPCW and WCO, by drawing awareness to the existence of such resources.

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[17] Australian Customs and Border Protection Service provides a comprehensive online Export Control Manual to assist industry navigate the complex landscape of export controls. Similarly, the Australian Trade Commission provides export risk management guidance online. The German Federal Office of Economics and Export Control's Handbook of German Export Control (HADDEX) specifies export control legislation currently in force (Volume 1) and outlines most relevant laws, regulations and announcements (Volumes 2-4).