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Challenges: Brokering, Catch-All, ITT, End-Use

1. Brokering

In order to ensure that no undesirable arms transfers are being organized by individuals or companies residing in one of our countries, we must find a precise definition of brokering. Which transactions shall be controlled? What are the goods covered by brokering controls? Are services also subject to controls? What about nationals from one of our countries residing and acting abroad? This is a very important area, where we should put one focus of our work in the coming years. It is essential that we develop internationally harmonized rules; unfortunately, there are still a number of states without sufficient legislation on arms brokering.

To encourage the debate on how to form these rules, let me briefly elaborate some theses – some of them are expressively meant to provoke discussion and do not necessarily reflect official views of the German government:

- The issue of brokering is closely linked to export controls, although not yet always perceived as an integral part; effective legislation to control brokering activities has to take established export controls structures into account, both on a national level and in international cooperation, i.e. information exchange, notifications, objectives, licensing criteria, list of controlled goods, licensing procedures, sanctions, etc.
- Brokering regulations should focus on transfers from one third country to another. We should avoid duplication: transfers with contact to their own territory are to be regulated by standard import/export controls.
- There should be a licensing requirement for brokers, for example by registration; this is in our view an optional element that can be included in national legislation. An obligatory element, however, is the licensing requirement for individual transactions by (registered) brokers.
- International harmonization of legislation is crucial. At least, we need a system of core and optional elements. Examples show that regional approaches may be

helpful: EU common position of 2003, OSCE guideline of 2004 (SALW); the United Nations Program of Action on Small Arms and Light weapons tackles this challenge on a global level.

- For certain sensitive goods (e.g. WMD components, SALW) or special circumstances (e.g. embargoed destination) extraterritorial activities (i.e. carried out by nationals abroad without any other contact to the country) should also require a license – we are currently introducing this element in German legislation.

2. Catch-all

The catch-all topic is a question that has been bothering experts for years: not all potentially harmful items can be included in export control lists without creating unreasonable burdens for industry. Therefore, specific instruments have to be developed to complement the system of item-based controls (through control lists) by an element of end-use related controls. This is to interdict transfers of non-listed items when there is a clear indication that it would undermine export control goals like preserving regional stability, respecting international arms embargoes or combating terrorism. Another timely example for the need for such an instrument is a potential diversion to a WMD program.

We have reacted quite swiftly by introducing a catch-all clause to prevent military end-use of non-listed items in embargoed destinations. The 2003 discussions within the Wassenaar Arrangement, for example, showed broad consensus on such an instrument. Most other export control regimes have developed specific catch-all rules, and also the UN Security Council resolution 1540 does not only address listed items. It is very important that we follow this path and coordinate our efforts internationally. We lack the experience acquired in the area of item-based controls and thus must keep close contact.

The catch-all topic is closely linked to a steady list-review process, which adapts to changed patterns of procurement or technological progress. The great advantage of the (end-use related) catch-all approach is: it prevents control lists (item-related) from covering too much. Automatically, it generates awareness in industry for sensitive exports and thus has a preventive effect.

However, other problems still remain to be tackled; let me show you an example. In Germany, we were informed that a company intended to export non-listed

communication equipment to a country under UN arms embargo. The consignee of the shipment was a governmental agency and there was reason to believe that it would be used for internal repression. It was obvious that this shipment had to be stopped, but how? Since the goods are not listed, no license is required; the catch-all clause cannot be applied either, because there is no military end-use (i.e. no incorporation in or use in the development of weapons). This case shows the usefulness of an additional single action instrument to be applied as a last resort. German legislation provides such an “*Einzeleingriff*”, and we were able to prevent the goods from being shipped to the country in question. Other areas where this instrument could prove useful are non-listed items in danger of being diverted to terrorist end-use or non-listed items being transshipped.

The *Einzeleingriff* approach has a considerable advantage for industry: unlike catch-all the single action instrument does not establish an obligatory licensing requirement for industry. It also prevents authorities from controlling too much, thus binding resources more necessary elsewhere. Still, it allows action of authorities when they get knowledge of a suspicious transfer.

3. *ITT*

In the recent decades, the speed of technological progress has accelerated. This has significant effect on export controls due to the fact that technology is the basis for developing sophisticated weapons. We must therefore apply a similar control standard to related technology as we do to military equipment. The Wassenaar Arrangement has consequently included technology for the development, production or use of controlled items in its munitions list in position 22.

We face, however, a rather new problem: in modern-day business, information exchange uses more and more intangible means, like e-mail, fax or a simple phone call. Even those intangible transfers of technology must be subject to export controls. And despite all difficulties, we must find suitable ways of effective controls for ITT.

In 2004, many of you attended the Berlin Seminar on ITT. A detailed report of this very fruitful meeting was presented at last year’s export control conference. I am very glad about the progress made at the seminar 2004 and hope that we will continue addressing these challenges.

Again, let me encourage discussion by developing some theses:

- A great portion of the difficulties we face when discussing ITT stems from the fact that it is very difficult to find a definition. Thus, we must first agree on a common terminology: what should be made subject to control? Which means of transfer, which type of technology? For which destination countries? Do we even need a rule for in-country transfer?
- The same rules should be applied to ITT that are applied to regular transfers. This includes, for example, catch-all rules.
- In order not to suffocate academic innovation, basic scientific research must be exempted.
- Again, effective controls can only be established by close international harmonization.
- We need a close cooperation with industry (record-keeping, awareness-raising, internal compliance program, self-auditing), but also with key research institutions.
- Alike regular export control rules, ITT rules must be complemented by credible sanction mechanisms. This threat of sanctions should be composed of administrative and criminal elements

International discussion showed that there is one question that is especially polarizing: How can we control the transfer of technology within a country when there is sufficient evidence that the recipient of the information will travel abroad and might proliferate the technology there? It is true that the strength of our universities and research facilities lies in their close network and international exchange of personnel. I feel, however, that it might be worthwhile to include an instrument to control in-country transfer in specific cases; for example, transfer of technology to foreign nationals of certain countries.

4. End-Use Safeguards

I will keep this point short because it was debated in the policy break out group yesterday. My colleagues Mr Berg and Mr Pietsch elaborated on a flexible system of end-use safeguards.

Safeguarding the end-use is essential to export controls: without having sufficient reason to believe that the exported goods stay where they have been shipped to, export control remains a vain illusion.

Three short theses:

- Any international agreement on a system to ensure end-use safeguards must be flexible: not all cases are identical; we have to distinguish between standardized and sensitive cases due to differences in goods, consignees, and destination countries.
- The presentation of end-use certificates is a key element, but not panacea. It must be accompanied by other elements of control before, during and after the licensing procedure.
- Therefore, close cooperation with industry is crucial already before an application is issued. Possible ways are: awareness raising, internal compliance program, early warning lists.

Since we put so much emphasis on developing flexible and effective end-use safeguards, Germany has decided to host a seminar dedicated to this topic next year. I hope that I will see many of you there and that we will be able to make significant progress on this topic.