



# Report

## International efforts to prevent diversion of arms and dual-use goods transfers: challenges and priorities<sup>1</sup>

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## 1. Introduction

Diversion is one of the greatest challenges to the responsible regulation of the international trade in arms and dual-use goods. The diversion of conventional arms from the state and into the hands of unauthorised end-users such as non-state actors (including armed groups) is a major cause for concern in regions of conflict and instability. In the absence of such diversion, it is likely that a number of current conflicts would significantly shrink in scale and intensity, leading to a reduction in the harm done to civilian populations in particular. The diversion of dual-use goods is known to have contributed to illicit and clandestine weapons of mass destruction (WMD) programmes as well as supporting military programmes in states that are subject to United Nations (UN) Security Council sanctions, including arms embargoes. Preventing the diversion of dual-use goods would significantly limit the scope of such programmes and could help to reduce tensions and to build confidence among states in potentially unstable regions.

Compounding these problems are the challenges associated with controlling transfers of arms and dual-use technologies. The extent and application of controls in this area is unclear, with particular debate centring on how to exercise control over transfers of technologies that are derived from open-source information containing fundamental theoretical or experimental investigative research – so-called ‘basic scientific research’. Moreover, the transfer of technology by intangible means (i.e. electronically) poses further oversight and enforcement challenges. As such, controls in this area are particularly reliant on self-policing by the scientific and industrial sectors backed up by compliance checks by government authorities. Identifying and preventing diversion of intangible technology thus adds a further layer of complexity to ongoing efforts to prevent diversion. This report is concerned primarily with preventing the diversion of tangible arms and dual-use goods.

Efforts to highlight and tackle the diversion of arms and dual-use goods have been underway for more than two decades in response to the growing threat from the proliferation of all types of weapons – from small arms and light weapons (SALW) to WMD. During this time, a succession of UN Reports – including on the implementation of UN Security Council sanctions – has drawn attention to the problem of diversion and highlighted the complex web of actors and processes that are often involved.

Despite an increasing awareness of the problem, there is much that remains to be done in order to further international understanding of the motivations and mechanisms that encourage and facilitate diversion of arms and dual-use goods. This paper contributes to the debate as to how, and to what ends, the diversion of arms and dual-use goods takes place in order to help develop a wider appreciation of the measures required to tackle this problem.<sup>3</sup> It begins by exploring the complex nature of diversion and some of the challenges faced by those who seek to tackle the phenomenon, before reviewing current international agreements that seek to prevent and reduce diversion. It then considers the variety of ways in which arms and dual-use goods transfers may be diverted and explores options for mitigating the associated risks. The paper ends by setting out some priorities for states seeking to make an impact on the diversion of arms and dual-use transfers. The report touches on the developing international norms around preventing unauthorised technology transfer; however the bulk of the ensuing discussion centres upon diversion in relation to the trade in tangible goods.

It is important to recognise, however, that the measures outlined in this report can only make a meaningful contribution towards the goal of preventing diversion if those government and non-government actors involved in regulating and conducting the trade in arms and dual-use goods are prepared to act in good faith and to implement appropriate provisions in both spirit and letter.

## 2. The complexity of diversion processes and factors contributing to the diversion of arms and dual-use goods

While there are general, often relatively superficial understandings of the problem, there is no universally accepted definition of diversion as it relates to the ownership or possession of conventional arms and dual-use goods. This reality was highlighted during the Arms Trade Treaty<sup>4</sup> (ATT) negotiations of 2012 and 2013,

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<sup>3</sup> This paper, in part, draws upon an in-depth report discussing diversion issues relating to small arms and light weapons. See *Preventing diversion of small arms and light weapons: Issues and priorities for strengthened controls*, Owen Greene and Elizabeth Kirkham, Saferworld/Biting the Bullet, 2009.

<http://www.saferworld.org.uk/resources/view-resource/376-preventing-diversion-of-small-arms-and-light-weapons>

<sup>4</sup> The text of the Arms Trade Treaty can be found at <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>

where debate centred on whether diversion should be considered as taking place from an authorised end-user, or should be framed in terms of authorised end-use, or both.

## I. Diversion from authorised end-user

Diversion from an authorised end-user can occur in a number of different contexts and in different ways. Broadly speaking, diversion can take place as follows:

- Diversion from state stockpiles/facilities can occur:
  - by theft (often small-scale)
  - through seizure (e.g. capture of state armouries during conflict or on the battlefield)
  - through sale or re-transfer (by government or government officials) in contravention of end-use undertakings
- Diversion between state forces/agencies (reassignment)
- Diversion from private stocks/sources can occur:
  - by theft
  - through unauthorised sale or re-transfer
- Diversion during transfer (transit) to an authorised recipient.

However, within each of these contexts there are many factors and circumstances that complicate any assessment of diversion and the formulation of appropriate responses. These include, but are not limited to:

- the extended time-frame during which diversion may take place (i.e. diversion of arms/dual-use goods transfers may occur during transit, or immediately upon arriving with the authorised end-user; it may also take place some months or even years later)
- the potential for a range of actors, both government and non-government, to be involved in diversion
- the potential for diversion to be a deliberate premeditated act on the part of a state, group or individual, or to be the result of loss, theft or neglect
- the different perspectives that exist among supplier and recipient states as to whether recipient states have the right to re-transfer or reassign arms or dual-use goods that have been purchased legally
- the need for all states involved in the transfer (from export, import and transit to transshipment and brokering) to play an important role in preventing and responding to diversion.

## II. Diversion from authorised end-use

Diversion from authorised end-use primarily concerns the actions or jurisdiction of state authorities and, as such, it remains a contested area. Exporting states often require importing authorities to subscribe to an end-use or end-user undertaking, which may include a pledge not to use the items for certain proscribed purposes – for example in the manufacture of WMDs or in violation of international law. Whereas some states accept such constraints on their use of imported arms and dual-use goods, others do not, arguing that once they take lawful possession of any such items they are fully entitled to use them as they see fit. In the latter case, the onus falls upon the exporting state to conduct a thorough and detailed pre-licensing risk assessment and to refuse the transfer of arms and dual-use goods where there is a significant risk of their diversion for what the exporting state regards as unauthorised purposes.

The diversion of arms and dual-use goods is widely recognised as undesirable, so states are generally willing to discuss measures to tackle the problem. However, the lack of a universal definition or understanding of what constitutes diversion presents a key obstacle to concerted international action.<sup>5</sup> Moreover, most of the discussions that take place on the issue of diversion do so within the main proliferation technology control regimes<sup>6</sup> which do not include all current and potential future suppliers of arms and dual-use goods. This means that a significant number of states with a potential interest in preventing and combating diversion are not included in international conversations on these issues. Only by sharing information on all manifestations of the problem among all concerned states will a convergence of

<sup>5</sup> Some attempts have been made to define diversion, particularly of arms. One definition reads: “Arms diversion is the process by which holdings or transfers of arms (including associated parts, components and ammunition) that are authorised by relevant State(s), and are subject to their legal controls, are acquired by or delivered to unauthorised end-users.” See Greene and Kirkham, *Saferworld*, *Ibid*.

<sup>6</sup> The main proliferation technology control regimes include the Nuclear Suppliers Group (NSG), the Australia Group (which deals with export control of chemical and biological agents), the Missile Technology Control Regime (MTCR), and the Wassenaar Arrangement (which deals with export control of conventional arms and related dual-use goods and technologies).

opinion be possible, paving the way for practical international action to tackle diversion of conventional arms and dual-use goods.

### 3. Multinational standards to prevent and reduce diversion<sup>7</sup>

#### I. Dual-use goods

In the context of the international trade in dual-use goods, diversion has been a significant issue for several decades, although specific measures to tackle the problem have developed somewhat gradually over time as concern has grown regarding the proliferation of WMD – and in particular nuclear weapons.

The most significant international actor in this area is the **Wassenaar Arrangement**.<sup>8</sup> This body was established in 1996, inter alia to promote transparency and greater responsibility among states in relation to transfers of conventional arms and dual-use goods – including by preventing their diversion. Since its inception, a range of non-binding best-practice guidelines have been adopted in order to give practical effect to the aims of the Wassenaar Arrangement. These incorporate measures that would be useful in preventing and combating diversion of dual-use goods, and include the following.

#### *The 2016 Best Practices for Effective Enforcement*<sup>9</sup>

This document sets out a range of measures for effective export control enforcement (including related brokering, transit and transshipment activities) with respect to preventive enforcement measures, effective penalties, investigations and international cooperation and information exchange. Preventive enforcement measures include provisions relating to:

- threat (risk) assessment techniques for evaluating parties in a proposed export transaction
- consignee, end-use and end-user confirmation
- assurances regarding the end-use and the non-transfer/re-export of licensed items
- consignment and documentation checks
- documentary or on-site confirmation of delivery of items
- conducting export control outreach programmes and encouraging internal compliance programmes among industry
- penalties for violations of transfer controls
- training and adequate resources for law enforcement.

Participating states are also encouraged to share a range of information relevant to the conduct and enforcement of export controls both bilaterally and in the context of multilateral export control arrangements.

#### *The 2006 Best Practices for Implementing Intangible Transfer of Technology Controls*<sup>10</sup>

This document emphasises the need to control transfers of technologies for conventional weapons and dual-use goods. While acknowledging the 'inherent complexities' of intangible technology transfers (ITT), the Participating States agree to include clear controls on ITT in their national laws and regulations, setting out what constitutes an ITT export and when it can be said to have occurred. At the same time, it is noted that such controls should not apply to information that is in the public domain or to basic scientific research. The guidelines further agree upon the need to promote awareness of ITT controls within industry and academia, including through targeted outreach efforts, and encouraging the adoption of internal compliance programmes and proper record-keeping. The need for authorities to carry out regular compliance checks on relevant entities is highlighted while surveillance and monitoring is proposed for those entities suspected of carrying out unauthorised ITT. Finally, Participating States are encouraged to exchange information in relation to suspicious attempts to acquire controlled technologies.

<sup>7</sup> A summary of additional instruments and agreements with relevance to efforts to tackle diversion can be found in the Annex to this report.

<sup>8</sup> See [www.wassenaar.org/](http://www.wassenaar.org/)

<sup>9</sup> The Wassenaar Arrangement Best Practices for Effective Enforcement were first agreed in 2000 and amended in 2016. The current version is available at <http://www.wassenaar.org/wp-content/uploads/2016/12/Best-Practices-for-Effective-Export-Control-Enforcement-1.pdf>

<sup>10</sup> See [http://www.wassenaar.org/wp-content/uploads/2015/06/ITT\\_Best\\_Practices\\_for\\_public\\_statement\\_2006.pdf](http://www.wassenaar.org/wp-content/uploads/2015/06/ITT_Best_Practices_for_public_statement_2006.pdf)

## ***The 2007 Statement of Understanding on Implementation of End-Use Controls for Dual-Use Items***<sup>11</sup>

This statement argues that a proper evaluation of each export licence application is an essential part of efforts to reduce diversion risks. As such, the case is made for intelligent risk management and the evaluation of the sensitivity of a proposed export. Dividing an export licence application into three phases – pre-licence phase, application procedure, and post-licence phase – an Annex to the statement outlines a series of ‘basic elements’ and ‘additional elements’ that may be applied on a case by case basis by the ‘competent authority’ on the one hand, and by the ‘exporter’ on the other. A range of measures are included from a ‘plausibility check’ on information provided in an export licence application to post shipment controls (PSC) where follow-up checks are carried out on the use of the goods once they have reached their final destination.

## ***The 2015 Best Practice Guidelines for Transit or Transshipment***<sup>12</sup>

These guidelines specifically address the problem of diversion of both dual-use goods and conventional arms. Specified provisions include the need for:

- adequate and effective transfer control legislation which enables the interdiction, seizure and disposal of suspect shipments
- a transfer control/authorisation process to be applied to arms and dual-use goods as well as unlisted goods where there are concerns over their end-use
- information exchange, particularly between exporting and importing states
- an intelligence-led approach to identifying potential cases involving diversion
- outreach programmes for inter alia industry, brokers and freight forwarders
- training for customs and law enforcement officials and enhanced cooperation among relevant agencies
- the adoption of technical solutions, including screening of cargo
- information exchange between states on relevant policies and practices.

## **II. Conventional arms**

Whereas efforts to prevent the diversion of dual-use goods have been primarily driven by states that have high-tech military and industrial manufacturing bases, similar efforts in the field of conventional arms have been shared more broadly.

The 2005 **International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons**<sup>13</sup> (ITI) is particularly relevant to efforts to tackle the diversion of SALW and provides an important global framework for the tracing of illicit SALW. Its main obligations include:

- a requirement that each SALW should be uniquely marked at the time of manufacture – stipulating the minimum contents, characteristics and placements of marks; it also strongly recommends that weapons also be marked at the time of import given that this significantly increases the likelihood and timeliness of a successful trace
- a requirement to establish and maintain accurate and comprehensive records for all marked SALW within their territory or under their jurisdiction – manufacturing records must be kept for at least thirty years; all other records must be kept for at least twenty years; however, to ‘the extent possible’, states – have undertaken to retain such records indefinitely
- a requirement that states respond in a timely and reliable manner to any legitimate request for a trace by a state which has seized or discovered illicit SALW.

The **Arms Trade Treaty** (ATT)<sup>14</sup>, which entered into force in December 2014, provides a legally-binding framework for global efforts to tackle diversion of conventional arms and, in this regard, is undoubtedly the most significant instrument that has been concluded to date. Article 11 of the ATT takes a comprehensive

<sup>11</sup> See [http://www.wassenaar.org/wp-content/uploads/2015/06/End-Use\\_Controls\\_for\\_Dual-Use\\_Items.pdf](http://www.wassenaar.org/wp-content/uploads/2015/06/End-Use_Controls_for_Dual-Use_Items.pdf)

<sup>12</sup> See <http://www.wassenaar.org/wp-content/uploads/2015/12/Best-Practice-Guidelines-for-Transit-and-Transshipment.pdf>

<sup>13</sup> See [http://www.poa-iss.org/InternationalTracing/ITI\\_English.pdf](http://www.poa-iss.org/InternationalTracing/ITI_English.pdf)

<sup>14</sup> See *Arms Trade Treaty*, *Ibid.*

approach to the issue of diversion and acknowledges the responsibility of all states in the arms transfer chain to prevent it, although it draws particular attention to the key role that exporting states have in preventing and combating diversion.<sup>15</sup> Exporting states are also required to assess the risk of diversion and to consider mitigation measures that may be adopted jointly by exporting and importing states. While there is no explicit obligation to refuse an export where there is judged to be a risk of diversion, Article 11 is nevertheless clear on the imperative to prevent diversion by whatever means are necessary. Prevention measures cited include 'examining the parties involved in an export, requiring additional documentation, certificates, assurances, not authorising the export'. In addition, Article 11 also calls upon States Parties to respond to cases of diversion by taking appropriate measures, and to alert other States Parties that may potentially be affected.

In addition to agreements that seek to prevent the diversion of dual-use goods and technology (see above), the **Wassenaar Arrangement** has also issued a series of recommendations that are relevant to preventing diversion of conventional arms transfers.<sup>16</sup> These include:

- the 2002 **Best Practice Guidelines for Exports of SALW**<sup>17</sup> (amended 2007) which require Participating States to take account of the risk of diversion or re-export of SALW, particularly to terrorists, when considering exports
- the 2003 **Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS)** (amended 2007)<sup>18</sup> which address the risk of diversion or misuse of exports within the recipient country in addition to the potential for re-transfer, loss, theft and diversion
- the 2003 **Elements for Effective Legislation on Arms Brokering**<sup>19</sup> (amended 2016) wherein Participating States agree to strictly control the activities of brokers within their jurisdiction.

In 2005, the Wassenaar Arrangement agreed on a consolidated indicative list of **End-User Assurances Commonly Used**<sup>20</sup> which sets out a list of requirements for end-user certification by exporting states, including:

- an undertaking on the part of the final end-user not to tranship or re-export the goods
- a clause that prohibits re-export of the goods without approval from the original exporting country
- an assurance from the final end-user that any re-export will be done under its own authority
- an undertaking from the final end-user that they will not divert or relocate the goods to another location within country.

The agreements, guidelines, treaties and conventions referred to above (see also the Annex to this report) clearly illustrate the extent to which the issue of diversion has been deliberated by states, and could provide a solid foundation for international efforts to tackle the problem. This points to three particular priorities. Firstly, those states that have subscribed to any or all international measures to prevent and combat diversion must take steps to adopt these commitments in full within their national arms transfer control systems. Secondly, they must act in good faith in the implementation of these measures so as to ensure that arms and dual-use goods are not diverted to non-state actors, including armed groups, or for violations of international law. Thirdly, as noted above, multilateral discussions on ways and means of identifying and addressing diversion should be expanded to include all states with a serious interest in these issues thereby helping to disseminate international good practice more widely.

In furtherance of these aims, the following sections of this report seek to highlight the various ways and contexts in which diversion of arms and dual-use goods can occur, while drawing upon existing best practice in seeking to prevent and combat this phenomenon.

<sup>15</sup> Article 11.2 of the ATT obliges that "[t]he exporting State Party shall seek to prevent the diversion of the *transfer* of conventional arms..." [emphasis added] thus emphasising the responsibility of exporting States throughout the transfer chain.

<sup>16</sup> See <http://www.wassenaar.org/public-documents/>

<sup>17</sup> See [http://www.wassenaar.org/wp-content/uploads/2015/06/SALW\\_Guidelines.pdf](http://www.wassenaar.org/wp-content/uploads/2015/06/SALW_Guidelines.pdf)

<sup>18</sup> See <http://www.wassenaar.org/wp-content/uploads/2015/06/Elements-for-Export-Controls-of-Manpads.pdf>

<sup>19</sup> See <http://www.wassenaar.org/wp-content/uploads/2016/12/Best-Practices-for-Effective-Legislation-on-Arms-Brokering-1.pdf>

<sup>20</sup> See [http://www.wassenaar.org/wp-content/uploads/2015/06/End-user\\_assurances\\_as\\_updated\\_at\\_the\\_December\\_2005\\_PLM.pdf](http://www.wassenaar.org/wp-content/uploads/2015/06/End-user_assurances_as_updated_at_the_December_2005_PLM.pdf) This agreement was elaborated and supplemented in 2014 by the *Introduction to End-User/End-Use Controls For Exports of Military List Equipment* <http://www.wassenaar.org/wp-content/uploads/2015/06/End-User-Use-Controls-Export-ML-Equipment.pdf>

## 4. Assessing and reducing diversion risks through the transfer control system

Any effective national system for controlling transfers of arms and dual-use goods and for preventing their diversion will be composed of a number of different elements, including:

- legislation that provides a legal basis for controlling international transfers of conventional arms
- a competent authority responsible for administering the system
- a control list of items subject to authorisation
- a licensing or authorisation system
- a risk assessment process whereby the risks associated with a proposed transfer are assessed
- enforcement capacities
- outreach to industry so that they are fully aware of their obligations and responsibilities within the transfer control system.

With respect to outreach to industry, in some cases exporters of dual-use goods may not be fully aware of how the goods may be used, or may fail to understand the motivations or intentions of a prospective recipient. Such risks can be reduced by conducting education and outreach activities with exporters before export activities can occur.

China offers interesting experience in this regard. According to current Chinese laws and regulations, a business owner must apply to the Ministry of Commerce (MOFCOM) for registration before they can seek authorisation for the export of dual-use goods. In submitting the registration application, the business owner must provide proof of the following:

- that they have an operation licence from the Chinese government
- that they have no outstanding criminal or administrative penalties for illegal business activities within the past three years
- that they understand the performance, parameters and main uses of the items for which an export licence is sought
- that their business has a department or agency for managing exports and after-sales services.

If these requirements are satisfied, MOFCOM will then issue a certificate of registration to eligible business owners. This certificate must be presented when applying for an export license for dual-use goods. This registration system allows the exercise of pre-export supervision, ensuring that exporters understand the uses to which their goods may be put and that they take responsibility for after-sales service. In addition, MOFCOM has also published a number of guides and manuals on the export of dual-use goods in order to support the communication of policy with respect to dual-use exports and to provided exporters with information on registration, export licences, customs clearance processes and other related matters. This supervision and education of exporters has helped China prevent and reduce risks associated with the transfer of dual-use goods.

Notwithstanding the role of industry, the principal responsibility for controlling transfers and preventing diversion of arms and dual-use goods falls to government authorities and centres upon a rigorous transfer licensing or authorisation process. An international transfer of arms or dual-use goods cannot legally take place without the specific authorisation of a competent government authority in the exporting state and possibly also in importing and transit states, or those that are a locus for brokering or transportation agents. A full and proper assessment of the risks of diversion of arms and dual-use goods should be a central part of any such transfer authorisation process, particularly on the part of the exporting state – although the responsibility to prevent diversion falls to all those in the transfer chain.

Assessing the risk of diversion of proposed arms and dual-use goods transfers to well-known partners or allies trusted to have high standards of controls and a good track-record of compliance with agreements, and using established and well-regulated shipment arrangements, will not be particularly challenging. However, not all transfers are like this. Particular care is required with regard to assessing licence applications for arms or dual-use transfers to an unfamiliar end-user in a country whose control systems and officials may not be well-known, where the recipient is a non-state actor and/or where a variety of brokering, transportation or freight-forwarding agents are involved. Particular care should be taken in cases where either the importing country or transit countries are near conflict zones or are in regions where controls may be weak.

When assessing an application for the export of arms and dual-use goods, some proposed transfers may be ruled out virtually at first glance. For example, if the proposed destination country or end-user is ruled out for national foreign policy reasons or because they do not meet the standards set by national criteria for export controls or relevant international obligations such as the need to adhere to UN Security Council arms embargoes. It is also important to encourage companies wishing to obtain an export authorisation to explore any obvious restrictions that may apply so as to avoid applying for a transfer licence that would never be granted. Given that such cases can provide intelligence that is useful for supporting non-proliferation efforts, it will also be important for companies involved in the transfer of arms and dual-use goods to inform the government of any suspicious activities in this regard.

Beyond such general considerations, a systemic risk assessment for proposed arms and dual-use exports should include the following.

**Checking for forged or inauthentic documentation – whether importation certificates, transit state approvals, or end-user or end-use documentation.** Government authorities need to be alert to the possibility that documentation submitted in support of an export application may be forged, corruptly approved, or not authorised according to proper procedures. Often this can be revealed by elementary checks using existing information databases, the internet and telephone. However, unless licensing officials are thoroughly familiar with the required documentation, approved signatories and regulatory procedures of all parties to the transfer, some direct confirmation is likely to be necessary.

**Assessing the legitimacy and credibility of the stated end-user and end-use.** The risk of diversion will be substantial if the stated end-user or end-use is not legitimate nor credible. It is important for exporter governments and companies to remain vigilant and look for certain warning signs or ‘red flags’ which help gauge how serious the risks of diversion are. For example, an application to export sensitive nuclear dual-use goods to a state with an unsafeguarded nuclear power programme and with known nuclear weapon aspirations raises obvious warning signs, pointing to the possibility that the items could be diverted internally for illicit purposes. The US Government has identified a number of such red flag indicators, including:

- the customer or purchasing agent is reluctant to offer information about the end-use of the item
- the product’s capabilities do not fit the buyer’s line of business
- the item ordered is incompatible with the technical level of the country to which it is being shipped
- the customer is willing to pay cash for a very expensive item
- the customer is unfamiliar with the product’s performance characteristics
- routine installation, training, or maintenance services are declined by the customer
- delivery dates are vague, or deliveries are planned for remote destinations
- a freight forwarding firm is listed as the product’s final destination
- the shipping route is abnormal for the product and destination
- the buyer is evasive and especially unclear about whether the purchased product is for domestic use, for export, or for re-export.<sup>21</sup>

**Assessing risks of diversion posed by all known parties involved in the proposed transfer, including exporter, brokers, shipping agents, freight-forwarders, and intermediate consignees.** Licensing authorities should require that, to the extent possible, details of all known parties involved in a proposed transfer are provided as part of the licence application process. Where insufficient information is provided, the applicant should be given a set period of time in which to provide all necessary details; failure to satisfy this requirement should result in the return of the application. Provision of comprehensive details relating to the transfer and those involved will enable vetting of such actors and checking for red flags or evidence of past involvement in diversion activities. Concerns relate not only to the risks that any of these might knowingly facilitate diversion, but also that they may take inadequate precautions against diversion or may not report suspicions to relevant authorities. Case-by-case risk assessments for each of the parties involved may be relatively resource intensive, but this could be reduced through investment in relevant data-bases or by adopting registration requirements for brokers and shipping agents, as well as information-sharing with partner governments.

**Assessing risks of diversion posed by the proposed shipment arrangements.** In order to be able to carry out such an assessment, the licensing authorities must first of all require that relevant information be submitted to them. Where there is information to suggest that transit or transshipment will occur through

<sup>21</sup> See *Best Practices for Industry to Guard Against Unlawful Diversion through Transshipment Trade*, US Department of Commerce, Bureau of Industry and Security [https://www.bis.doc.gov/index.php/forms-documents/doc\\_view/625-best-practices](https://www.bis.doc.gov/index.php/forms-documents/doc_view/625-best-practices)

several countries or will involve a number of different companies, this is often a strong indicator of risk – particularly if the goods will pass within close proximity of regions where there is high demand for the arms or dual-use goods involved.

**Assessing the possible demand among unauthorised users for the arms or dual-use goods in the proposed transfer.** Such demand may arise in relation to criminal activity, armed conflict, terrorism or because an embargoed or proscribed entity seeks to purchase certain arms or dual-use goods. This assessment will require understanding of a range of possible demands and risks, requiring local and regional knowledge that may not be readily available to most licensing officials. The involvement of all relevant national ministries and agencies in assessing arms transfer proposals is becoming increasingly recognised as good practice and can help provide a wider view of the context of a particular transfer.

**Assessing the risk of the authorised end-user putting the weapons to unauthorised uses.** This requires an assessment of the intentions and interests of the end-user, the context in which they operate, and whether they have a record of misusing imported arms or dual-use goods. Case-by-case assessments of these risks may require detailed local knowledge which might be beyond the capabilities of some export control agencies. At a minimum, general risk factors relating to the internal or regional situation of the country should be taken into consideration.

**Assessing risks of diversion with regard to the reliability of controls in the importing country.** Risks of diversion within the destination country are reduced if authorities maintain strong and reliable controls on their own arms and dual-use transfers and on arms holdings within their jurisdiction. This provides reassurance against unauthorised re-export, as well as diversion from national stocks. In this regard, an assessment of the condition and reliability of the national controls of the importing state is useful. Risks of diversion may become substantial in a country with weak controls, or facing risks of conflict or instability, irrespective of the reliability of the end-user itself.

**Assessing risks that arms or dual-use transfers would increase the risks of diversion or irresponsible export of the existing holdings of the end-user.** Experience shows that holdings, particularly of SALW, that have been rendered surplus to requirements following the importation of additional weapons may become more vulnerable to diversion. This is because the stockpile management and security of surplus or less-valued arms can attract less attention and fewer resources. Further, the end-user may be willing to sell these surplus weapons to recipients that the original exporting states would not want to supply directly. These potential implications should be assessed at the licensing stage – where weapons are rendered surplus by an arms transfer, destruction or other safe disposal should be encouraged.

It is clear that a proper risk assessment is required for each arms and dual-use transfer licence application and that such an assessment needs systematically to address each of the above categories of risk. The use of 'general' or 'global' licences could be considered for less sensitive items, but these should only be available in respect of transfers to known, reliable, legitimate end-users. National officials responsible for risk assessments need clear and elaborated guidelines on the factors that need to be taken into account and on how to gather and assess the relevant information. In situations where transfers are proposed to new recipients, efforts could be made to check on the bona fides of the end-user via the exporting state's embassy in-country; where the exporting country has no embassy, enhanced international cooperation could help.<sup>22</sup>

Such assessments will need to be based not only on relevant open source information concerning re-transfer of dual-use goods – which can be scarce – but also on government intelligence reports. This also places the onus on cooperation and information sharing among states – bilaterally and within the various proliferation technology control regimes – in order to close down lines of supply to illicit actors.

## 5. Reducing risks of diversion through better end-use/user controls

Over the past two decades the flaws and inadequacies in end-use certification provisions that are relied upon by many states have been well-documented. Previously widespread minimalist practices have proven to be inadequate for the reliable assurance of the end-use of arms transfers. The ease with which end-use certificates could be copied and forged, along with the willingness of unscrupulous governmental actors to provide false end-use certificates, for some years undermined the integrity of written assurances.

<sup>22</sup> For more information relating to diversion risk assessment as part of arms transfer licensing see *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 20 July 2015, pp 121-139 <http://data.consilium.europa.eu/doc/document/ST-10858-2015-INIT/en/pdf>

Since the early 2000s, efforts have been made internationally to raise overall standards in relation to end-use certification practices. Much of this work, including by the OSCE and the Wassenaar Arrangement has been based on identifying the information that should be provided in end-use or end-user certificates. Current good practice thus centres around disclosure of the following information:

- exporter's details (company name, contact name, address)
- consignee's details (company name, contact name, address)
- end-user's details (company name, contact name, address)
- country of final destination
- a description of the goods being exported (type, characteristics)
- quantity and/or value of the exported goods
- signature, name and position of the end-user
- the date of the end-user certificate
- end-use clauses – these may include guarantees that the goods will not be used for purposes other than the declared use, or in connection with the development, production or use of WMD
- a re-export clause – this may prohibit re-export of the goods, or it may prohibit their re-export without the prior written consent of the exporting authorities
- details of the end-use of the goods
- details of any brokers or intermediaries and, where known, transportation agents.

In addition, through its *Introduction to End-User/End-Use Controls For Exports of Military List Equipment*<sup>23</sup>, the Wassenaar Arrangement has also sought to clarify certain debated issues relating to end-use or end-user certification processes and requirements. For example:

- The decision as to whether controls should focus on the end-user or on the end-use is considered a matter of national discretion, noting that some states address both in their end-use controls, while others focus on one or the other.
- It is noted that, for arms transfers, the end-user will normally be a national government, national military forces, national security forces or other law enforcement agency but that in some cases an industrial end-user may be appropriate for certain components or subsystems; other actors, such as trading entities or arms brokers are, however, not considered to be legitimate end-users of arms.
- Where a component or subsystem transfer is to be integrated into a larger system, it is noted that some exporting states accept 'integration' as the final declared end-use, leaving the matter of the onward export of the final product to the authorities in the recipient state. However, alternative approaches involve the exporting and recipient states agreeing on certain export restrictions for the final product, such as a list of acceptable export destinations.
- Acknowledging that forgery and fraud exists in the context of end-use or end-user assurances, it is recommended that anti-fraud features are included in national end-use certification procedures. These could include checks on intermediaries involved in the transfer and on the individual that signs an end-use or end-user undertaking. Also, in the event that the final recipient is not a state entity, checks should be undertaken to verify that they are operating under state legal jurisdiction and are entitled to import the items in question.

While the requirement for some form of end-use certification is now accepted practice among states, the extent to which end-use or end-user and other similar documents are routinely authenticated by exporting states is less clear. This is despite the fact that acceptance of end-use or end-user certificates at face value by exporting governments is, on its own, insufficient to prevent illicit transfers of arms and dual-use goods.

For those states that do routinely check the authenticity of end-use certificates, a variety of procedures are followed. For example, the most rigorous checks appear to involve consular verification in the recipient state to check that the information contained in the documents is correct and that the documents have been signed by those authorised to do so. This may entail embassy staff of the exporting state carrying out checks with the authorities in the recipient state to ensure that the end-user is a reputable entity and that official documents for the particular transfer have in fact been issued by these authorities.

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<sup>23</sup> See footnote 18.

Beyond the use and verification of end-use or end-user certificates, some states also require the recipient of transferred arms or dual-use goods to provide a delivery verification certificate as proof that the shipment has reached its authorised destination and end-user. A handful of states – including Switzerland and the US – go even further and reserve the right to conduct follow-up checks so that they can be satisfied that exported items remain in the possession of the authorised end-user.

Despite a growing recognition of the need for *bona fide* end-use certification for transfers of arms and dual-use goods, examples of questionable practice persist. According to reports<sup>24</sup>, some European countries have sold in excess of €1bn of weapons since 2012 to states in the Middle East that are known to have transferred arms to warring parties in Syria.<sup>25</sup> Shipments include “[t]housands of assault rifles such as AK-47s, mortar shells, rocket launchers, anti-tank weapons and heavy machine guns [which] are being routed through a new arms pipeline from the Balkans to the Arabian Peninsula and countries bordering Syria”. End-user certificates reportedly issued by the Saudi Arabian Ministry of Defence to a Serbian arms dealer illustrated the scale of the transfers which included hundreds of T-55 and T-72 tanks, millions of rounds of ammunition, missile systems and rocket launchers. The shipments included weapons and ammunition from the former Yugoslavia, Belarus, Ukraine and Czech Republic, material which is present in large quantities in Syria.<sup>26</sup> This example is illustrative of the fact that, despite the central importance of end-use or end-user certificates within the arms transfer licensing processes, they are of little practical use in situations where states are aware of diversion risks yet lack the political will to halt transfers.

## 6. Reducing risks of diversion by brokers

Brokers are key actors in the trade in arms and dual-use goods and can play a role in facilitating both the legal and illicit trades. They operate in a number of ways, including by sourcing arms or dual-use goods from suppliers on behalf of recipients and arranging their transfer, or by buying goods and selling them onwards. Often brokers do not reside in the country from which the items originate, in the countries through which the items pass, nor in the country of destination. As a result, international brokering in arms and dual-use goods has proved difficult to trace, monitor and control.

The role of brokers in the diversion of arms and dual-use goods is facilitated by poor export, import and transit controls, breakdown of end-use and re-export undertakings, and corruption and poor enforcement practices. However the main reason for the continuing involvement of brokers in the illicit trade lies in the continuing absence or inadequacy of arms and dual-use brokering controls in many states, indicating that there remains a lack of understanding of the problem and how to tackle it. This is often the case among states that do not play a major role in the international trade in arms and dual-use goods – as exporters or importers. The lack of controls is particularly acute in the context of the trade in dual-use goods: while around forty states have some form of control on arms brokering, fewer have controls that extend to cover dual-use goods.

Over the past 20 years, concern over the role of unscrupulous brokers in fuelling the illicit and irresponsible trade in arms has grown significantly. Numerous investigations, including by the UN Panels of Experts, have highlighted the problems caused by unregulated arms brokering and the role of brokers in breaching UN arms embargoes and facilitating arms transfers that fuel conflict and grave violations of human rights.<sup>27</sup> Such brokers were found often to conduct their activities in countries and regions where controls are inadequate or poorly enforced and to have used false end-user certificates and other forged documentation in order to facilitate their trade. One such case involved the participation of a Serbian-based arms brokerage company, Temex, in the diversion of six shipments of arms, including SALW, to Liberia between June and September 2002 in contravention of a UN arms embargo. The shipments were licensed by the then Yugoslav authorities

<sup>24</sup> *Arms Exports to Middle East: A Question of Legality*, Balkan Insight, 27 July 2016 <http://www.balkaninsight.com/en/article/arms-exports-to-middle-east-a-question-of-legality-07-26-2016> Revealed: the £1bn of weapons flowing from Europe to Middle East, *The Guardian*, 27 July 2016 <https://www.theguardian.com/world/2016/jul/27/weapons-flowing-eastern-europe-middle-east-revealed-arms-trade-syria>

<sup>25</sup> *The Guardian*, *Ibid*.

<sup>26</sup> *The Guardian*, *Ibid*.

<sup>27</sup> See, for example *Final Report of the UN Panel of Experts on Violations of Security Council Sanctions Against UNITA' (Fowler Report)*, S/2000/203, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Sanc%20S2000%20203.pdf> 10 March 2000; also *Report of the Group of Experts submitted pursuant to paragraph 2 of Security Council resolution 1708 (2006) concerning Côte d'Ivoire*, S/2006/964, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Cote%20d'Ivoire%20S2006964.pdf> 12 December 2006; also a more recent account of the complex web of actors that can be involved in illicit arms brokering can be found in *Brokers without borders: How illicit arms brokers can slip through gaps in the Pacific and international arms control system*, Oxfam, 2010 <https://www.oxfam.org/en/research/brokers-without-borders>.

based on the provision of a Nigerian end-use certificate of which the Nigerian authorities had no knowledge.<sup>28</sup>

The involvement of brokers in the diversion and illicit trafficking of sensitive dual-use goods is also an ongoing problem for government authorities. For example, in 2003 a South African-based Israeli citizen, Asher Karni, arranged the transfer of two hundred triggered spark gaps<sup>29</sup> from the US to Pakistan via South Africa and Dubai, using a US-based intermediary. The US intermediary provided false end-user information to the manufacturer (i.e. that the items were intended for a hospital in South Africa) before shipping the spark gaps without a US export licence. In early 2004 a sting operation involving the US manufacturer led to the arrest of Karni in the US and his subsequent prosecution and conviction.<sup>30</sup>

Brokers often work very closely with transport or shipping agents, contracting transport facilities, carriers and crews in order to move cargoes by sea, air, rail or road, sometimes employing a range of dubious techniques such as shell companies and flags of convenience in order to conceal the true origin and nature of their business. Where they are involved in the arrangement of the transportation of arms and dual-use goods, brokers may be in a position to exploit opportunities that exist to divert arms while in transit. In this regard, the UN Panel of Experts established pursuant to UNSC Resolution 1343 (2001) concerning Liberia, described a number of techniques – including the use of fraudulent aircraft registration numbers and the filing of false flight plans – that traffickers use in order to disguise the ultimate destination of their cargo.<sup>31</sup>

Efforts to prevent diversion of arms and dual-use goods by brokering agents must begin with the adoption of national laws providing for brokering controls. This legislation must precisely define the activities that are to be controlled as well as their scope – both in terms of the items that are covered and the extent of state jurisdiction. At a minimum, the laws must cover the core brokering activities of mediation, buying and selling. They should apply to persons or companies located within national territory who are arranging the transfer of restricted items between two foreign countries.

The majority of states with controls on arms brokering have adopted a case-by-case licensing system whereby agents must seek prior authorisation before engaging in brokering of arms; in some countries, for example South Africa, these controls are extended to cover brokering in dual-use goods. A number of states, including Belgium, Hungary, Portugal, South Africa and the US, also require brokers to first register with national authorities before they can become eligible to apply for an individual brokering transaction licence. Other states, such as Russia, have taken a different approach whereby arms brokering is prohibited except when undertaken by a designated state organisation on behalf of the state.

The control of brokering-related activities – such as transportation, logistics, freight-forwarding, insurance and financial services – connected to the international trade in arms and dual-use goods has also been undertaken in some states. While brokers can and do undertake such brokering-related activities alongside the core activities of mediating deals, and buying and selling, these activities can also be undertaken by specialist individuals and companies that would not be affected by controls on core arms brokering activities. Accordingly, comprehensive efforts to prevent the diversion of arms and dual-use goods should seek to address the role of such actors in the brokerage of arms and dual-use goods.

Finally, in view of the significant potential for brokers to be involved in the diversion of arms and dual-use goods, it is essential that government licensing authorities conduct a thorough assessment of diversion risks associated with all proposed brokering transactions. This will involve ensuring that brokers of arms and dual-use goods are bound by the same documentary and information requirements as are applied to prospective exporters of these items. Equal effort should also be made to verify the information provided as well as the *bona fides* of the proposed recipient and other actors involved in the transfer.

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<sup>28</sup> See *Report of the UN Panel of Experts established pursuant to UNSC Resolution 1343 (2001) concerning Liberia*, UN Doc S/2002/1115, 25 October 2002, paras 64-74 <http://reliefweb.int/sites/reliefweb.int/files/resources/D5FA5B63184345C5C1256C7E00456BF3-UNSC-LIB-25OCT.PDF>

<sup>29</sup> Triggered spark gaps are very sensitive dual-use goods that can be used as nuclear weapon triggers or to separate missile stages but can also have medical uses.

<sup>30</sup> *Asher Karni Case Shows Weakness In Export Controls*, Jacob Blackford, Institute for Science and International Security, 8 September 2008, <http://isis-online.org/isis-reports/detail/asher-karni-case-shows-weakness-in-nuclear-export-controls/13#note1>

<sup>31</sup> For a detailed list of the techniques employed by traffickers moving illicit arms shipments by air see *Report of the UN Panel of Experts established pursuant to UNSC Resolution 1343 (2001) concerning Liberia*, *Ibid*, para 62.

## 7. Reducing risks of diversion during transit or transshipment<sup>32</sup>

Transit controls can represent a weak link in the chain of transfer controls and their inadequacy can be a major contributing factor to the illicit trade in arms and dual-use goods. Arms and dual-use goods in-transit are susceptible to diversion from the authorised end-user to unauthorised or illicit entities; many such cases are difficult to detect and prevent.

With regard to the transit or transshipment of conventional arms, for most states the primary focus of controls is to prevent diversion or “leakage” from a consignment during transshipment or as it transits national territory destined for another state. In this respect, transit and transshipment controls can help prevent arms from entering the illicit market and reaching illegitimate end-users.

Concerns have also focussed on the diversion of goods in transit by air and by sea, for example, in circumstances where aircraft or sea-going vessels purportedly heading for one specific destination ultimately arrive in another.<sup>33</sup> The UN Panel of Experts on Iran<sup>34</sup> reported on a case that emerged in 2011 when Swedish customs checked on a shipment which was being exported by a company – Petroinstrument HB – owned by Shahab Ghasri, a Swedish citizen of Iranian origin. The shipment contained vacuum pumps and corrosion-resistant valves which, although not listed for export control in Sweden, could nevertheless be of use in uranium enrichment and thus would require a licence for export to Iran. According to the documents provided for customs clearance, the shipment was due to be loaded onto an aircraft and flown to Dubai. However, it was discovered that, after customs clearance, the air waybill for the shipment had been altered by the exporter with the actual destination named as Iran. In 2013, a Swedish court found Ghasri guilty of violating international sanctions against Iran.<sup>35</sup>

Factors contributing to the risk of diversion during transit include: the high, and growing, level of legitimate dual-use transit and transshipment trade; the increased interest of would-be proliferators in acquiring dual-use goods; difficulties involved in investigating, searching or seizing suspect cargo among a high volume of legitimate trade; and a negative view of enforcement of controls among businesses.<sup>36</sup> The challenges involved in regulating and monitoring the transit or transshipment of dual-use goods are further compounded by the increased complexity of global supply chains and international supply routes.<sup>37</sup>

The 2014 Report of UN Panel of Experts pursuant to resolution 1874 on the Democratic People’s Republic of Korea (DPRK) highlights the techniques and methods that can be employed to disguise illicit shipments in transit – such as the use of false manifests and route-plans. The Panel noted that the characteristics of the maritime industry – where complex arrangements exist for ownership and operation of vessels – presents a significant complicating factor, making dubious operators difficult to trace.<sup>38</sup> Similar issues are also relevant in the air freight sector.<sup>39</sup>

Identifying and combating cases of diversion in transit is therefore a difficult task, one that is reliant on the adoption and enforcement of effective controls on the export, transit and transshipment of arms and dual-use goods alongside controls on brokering and transportation agents (see above). Only by adopting and enforcing such controls will states be able to maximise opportunities to prevent diversion of transfers of arms and dual-use goods. Transit and transshipment controls allow a state to monitor, verify, permit, deny or seize shipments passing through their territory. This can help to reinforce state control over arms and dual-use goods in transit at points where they are vulnerable to diversion, helping to prevent destabilising arms transfers in their country or region.

The establishment of a transit or transshipment licensing regime could be based on a number of possible options. One option could involve requiring a licence to be obtained, in advance, for any shipment of arms or

<sup>32</sup> Transit occurs when items from one country are shipped or pass through a second country en-route to a third country; the shipment does not clear customs in the second country. Transshipment occurs when items from one country are offloaded (typically in a bonded warehouse or free trade zone) in a second country en-route to a destination third country; the shipment does not clear customs. See *US Department of Commerce Bureau of Industry and Security*, *Ibid*.

<sup>33</sup> Several examples of diversion of SALW in transit are documented in the Small Arms Survey 2008: Risk and Resilience pp 120-122. [http://www.smallarmssurvey.org/files/sas/publications/year\\_b\\_pdf/2008/CH4%20Transfer%20diversion.pdf](http://www.smallarmssurvey.org/files/sas/publications/year_b_pdf/2008/CH4%20Transfer%20diversion.pdf)

<sup>34</sup> See *Report of the UN Panel of Experts established pursuant to resolution 1929 (2010)*, UN Doc S/2013/331, 5 June 2013 [http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2013\\_331.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_331.pdf)

<sup>35</sup> See *Swedish Man Found Guilty of Violating Iran Sanctions*, Iran Watch, Wisconsin Project on Nuclear Arms Control, 8 August 2013 <http://www.iranwatch.org/our-publications/international-enforcement-actions/swedish-man-found-guilty-violating-iran-sanctions>

<sup>36</sup> US Department of Commerce, *Ibid*.

<sup>37</sup> US Department of Commerce, *Ibid*.

<sup>38</sup> *Report of the Panel of Experts established pursuant to resolution 1874 (2009)*, UN Document S/2014/147, 6 March 2014 [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2014/147](http://www.un.org/ga/search/view_doc.asp?symbol=S/2014/147)

<sup>39</sup> See *Report of the UN Panel of Experts established pursuant to UNSC Resolution 1343 (2001) concerning Liberia*, *Ibid*, para 62.

controlled dual-use goods seeking to transit state jurisdiction. Alternatively a state may seek to impose a licence requirement upon transit of specific types of arms or dual-use goods; or it may impose a transit licensing requirement upon certain forms of transit, for example by land, sea or air.

Ensuring the monitoring and security of arms and sensitive technology in transit is an important aspect of preventing their diversion, and of guarding against their leakage into the illicit market within a transit state. Measures to assure the physical security of arms are especially important when consignments are transiting by road, rail or internal waterway. State authorities should also ensure that they have the power and, as far as possible, the capability to interdict consignments where there are grounds for believing that they will be diverted from their intended recipient and would pose a threat to national security, or where a shipment is adjudged to be destined for proscribed or illicit end-users (including those subject to a UN or other arms embargo).

Whatever form they take, effective transit controls are dependent upon cooperation and information sharing among all states in the transfer chain. Transit states will be in a much better position to identify those shipments that pose a diversion risk if they are alerted in advance, by exporting states, regarding those shipments that are legal and properly authorised. This will ensure that transit states are better placed to focus their scrutiny on those shipments that have not been pre-notified or which, for some reason, raise suspicion. States should also seek to alert others when they are aware of diversion risks associated with a particular shipment in transit: ideally this would be done in a timely manner to allow preventive action to be taken. But if this is not possible, information should be shared after the fact, in order to facilitate the dissemination of lessons learned and to inform future risk assessments.

## 8. Tracing diverted arms and dual-use goods

Given the international concerns relating to diversion of all types of arms and dual-use goods, it is important that efforts are undertaken to identify how and for what ends diversion has occurred. Properly conducted, tracing efforts can assist in:

- identifying and disrupting ongoing lines of supply of diverted arms and dual-use goods
- identifying and exposing points of diversion
- promoting accountability for neglectful, complicit or inadequate arms and dual-use transfer controls or licensing decisions
- deterring national authorities from taking irresponsible decisions
- reducing the risks that countries are wrongly implicated or criticised in the diversion process.

Efforts to trace diverted dual-use goods face distinct challenges due to the difficulty of ascertaining the ongoing correct usage of industrial products in facilities abroad. This is illustrated in the case involving the Australian export of a mass spectrometer to Iran in 2002, ostensibly for medical and agricultural purposes. In 2003, inspections undertaken by the International Atomic Energy Agency (IAEA) discovered that Iran had conducted uranium enrichment experiments in violation of the nuclear safeguards agreement. Subsequent examination of two undeclared mass spectrometers at the Iranian Centre for Agriculture and Medicine at Karaj showed that they had at some point been used for isotope enrichment.<sup>40</sup> Notwithstanding the efforts undertaken by the IAEA under the international safeguards regime, detecting the re-export, unauthorised reassignment or misuse of exported dual-use equipment is very difficult and beyond the capabilities of most governments. Whereas the US Government does engage in on-site inspections of industrial facilities in order to identify cases of diversion and misuse of dual-use goods, few other states have the resources to carry out regular checks of this nature.

Tracing of diverted arms also poses challenges. These are particularly acute in relation to the illicit international trade in SALW. Despite the need to ensure traceability of all transferred arms, due to their size and the relative ease with which they can be moved and used by any individual or group of individuals with limited training and technical support, SALW are more susceptible to diversion than major conventional weapons systems. In addition, the significant role that the illicit trade in SALW has played in sustaining many current and recent conflicts means that international attention has focussed on combating this trade *inter alia* by increasing the possibilities for effective tracing of these weapons, and norms have developed around the

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<sup>40</sup> GBC Scientific Equipment Pty Ltd, Iran Watch, Wisconsin Project on Nuclear Arms Control, 29 April 2011  
<http://www.iranwatch.org/suppliers/gbc-scientific-equipment-pty-ltd>

International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (International Tracing Instrument, or ITI).<sup>41</sup>

The ability to trace lines of supply of SALW that have been diverted from authorised transfers or holdings is vital in order to identify and close down diversion points and to promote accountability for neglectful, irresponsible or criminal activities associated with such diversion. However, efforts to trace illicit SALW in a timely manner are not always possible due to inadequate marking, poor record-keeping or lack of international cooperation in tracing. These factors may be compounded by the length of time it may take for cases of diversion to come to light.

There are two main contexts in which efforts are made to trace SALW. Firstly, there is the criminal context where a weapon has been used in crime. In such cases tracing may be necessary to prosecute those involved and prevent their engaging in further criminal activity. Mechanisms such as the International Weapons Electronic Tracking System (IWETS) of Interpol, along with national systems, can be used in order to facilitate this type of tracing. Secondly, tracing can be part of efforts to identify lines of supply and diversion points for SALW or ammunition that are internationally trafficked to areas of conflict and instability (including those under UNSC arms embargo), or to non-state armed groups. Given the scale of the latter, and the fact that many countries suffering conflict lack the capacity to conduct effective tracing obligations, much international effort has focused on facilitating tracing in the context of the large-scale illicit trade in SALW linked to national and regional conflicts.

Despite the progress that has been made in establishing international norms and provisions around marking and tracing of SALW, publicly-available information on the nature, extent and outcomes of tracing cooperation taking place between states remains limited. Most tracing activities reported by states appear to relate to criminal investigations rather than to larger scale movements of arms into conflict zones. This means that there is little evidence of progress towards increased tracing cooperation that has helped to identify diversion points for arms to non-state armed groups or embargoed entities.

In order to begin to fulfil the objectives underpinning the ITI, all states need to take steps to increase cooperation and information exchange in relation to ITI implementation. This should include bilateral cooperation and, as appropriate, cooperation at regional and international levels to ensure the optimal execution of their responsibilities relating to marking and tracing of SALW. In addition, regular and systematic national reporting on ITI implementation is required, including where possible placing information on actual tracing efforts and outcomes into the public domain.<sup>42</sup> Assistance should also be provided to those states experiencing challenges in implementing any aspects of the ITI.

## 9. Reducing risks of diversion by re-transfer

Re-transfer of arms and dual-use goods by the authorised recipient is a significant factor in the illicit trade in these items. In some cases, unauthorised re-transfer can take place shortly after the shipment has been received. Often, however, the re-transfer may take place in the years following receipt of the original shipment.

The extent to which prior authorisation of a re-transfer of arms or dual-use goods is required from the state of origin depends upon the terms of the end-use agreements and understandings associated with the original export; this may in turn depend upon the nature of the original recipient (whether government or non-government) or the items in question (whether arms, basic dual-use goods, or sensitive dual-use goods). In practice, re-transfer controls are often unclear or contested and seen as a 'grey' area; nevertheless it is very important that such controls are fully and clearly specified in any export authorisation and end-user undertaking so that recipients – whether government or industry actors – fully understand their obligations. A clear and explicit statement prohibiting re-transfer (at least without the prior authorisation of the original exporting state) should help to deter such activities, particularly if it is also made clear that further exports will not be permitted to the end-user in question if the re-transfer undertakings are breached.

Unfortunately, even when such undertakings are requested and received, these are not always sufficient to prevent the re-transfer of materials for which there is a high demand, particularly among proscribed end-users. In their final report of June 2014<sup>43</sup>, the UN Panel of Experts pursuant to UN Security Council

<sup>41</sup> See *International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons*, *Ibid.*

<sup>42</sup> See *Expert Presentations: Marking and Tracing – Simonetta Grassi, UN Office for Drugs and Crime*, in the report of the Regional Seminar on the Marking and Trading of Weapons, SEESAC, Belgrade, 14-15 September 2010 <http://www.seesac.org/res/files/publication/376.pdf>

<sup>43</sup> Final report of the Panel of Experts established pursuant to UN Resolution 1929 (2010), [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2014/394](http://www.un.org/ga/search/view_doc.asp?symbol=S/2014/394)

Resolution 1929 (imposing additional sanctions against Iran as a result of its nuclear programme) highlighted the problems that can exist. Having consulted with a number of manufacturers of products that were found in shipments destined for Iran, the panel noted that:

*“In one case, the company required all recipients of its product in certain countries to submit a letter of assurance for each shipment. The letter of assurance forbade the reselling, retransfer or re-export of the product without the prior consent of the company. However, the recipient and its subcontractors misunderstood or failed to comply with the letter of assurance. In a second case, the company concerned had a written arrangement with its distributor to ensure that its equipment would not be transferred to the Islamic Republic of Iran. In both cases, the written arrangements proved ineffective and could not preclude the delivery of the items to unintended recipients.”<sup>44</sup>*

Given this experience, exporting state authorities should consider encouraging industry to take a more proactive approach, similar to that adopted by MKS Instruments Inc, a US-based manufacturer of high-tech dual-use products. MKS found that, despite its best efforts to comply with US export controls, there were instances whereby their products were being diverted to unauthorised recipients. As a result, since 2012 the company has implemented its own ‘controlled delivery’ programme, otherwise known as the ‘Direct Factory Shipment Program (DFSP)’. This initiative prohibits the export of particular sensitive dual-use goods to intermediaries or consignees; instead they can only be shipped directly to the ultimate end-user or to the manufacturer of a relevant complete system, thereby reducing the risk of unauthorised domestic re-sale or unauthorised re-export.<sup>45</sup>

In the case of arms exports, re-transfer of major conventional weapons systems is relatively uncommon for a number of reasons, not least because it is more difficult for the parties involved to conceal. Re-transfer of SALW and ammunition is, however, one of the primary sources of the illicit trade – a fact recognised by a number of multilateral agreements including the UN Programme of Action which refers explicitly to the need to regulate the re-export of SALW.<sup>46</sup> However, the majority of the agreements that address the re-export of arms are politically binding or voluntary in nature. Accordingly, no clear international norm has yet been established beyond the need to consider seriously the inclusion of a non-re-export clause in relevant end-user or end-user documentation and possibly also to request certified proof that the goods have been delivered to the designated end-user.

Nevertheless, emerging best practice points to a more proactive, preventative approach centring on two distinct options. Neither are yet widely in operation, however they do point to a potentially effective means of guarding against re-transfer and proliferation. The first approach has been adopted by the government of Germany and applies in situations where the state is considering authorising the export of SALW. Termed the “new for old” principle, this requests sales contracts to include a provision that calls for the recipient to destroy the SALW that are to be replaced by the proposed export. In addition, wherever possible, the exporter of SALW is expected to secure a commitment from the importer to the effect that the newly-imported SALW should be destroyed (as opposed to re-exported) when no longer required. As such, the aim is to ensure that exports of SALW from Germany do not contribute to the uncontrolled proliferation of SALW worldwide.<sup>47</sup>

The second approach involves the use of follow-up inspections to check on the ownership and use of exported arms and dual-use technology. Only a handful of exporting states – including the US and Switzerland – currently reserve the right to carry out such checks with most citing either resource problems, political sensitivities or sovereignty issues as the principal barriers. The Swiss experience detailed below, however, strongly suggests that these issues are not insurmountable:

In 2012, Swiss-made hand grenades that had been exported to the Middle East in 2003-04 were found in Syria. This occurred despite the inclusion in the relevant end-user certificate of a clause excluding the re-transfer of the delivered goods without Switzerland’s prior approval. As a result, since November 2012, the Swiss Government has anchored a new provision within the national War Material Ordinance that creates the legal basis to conduct post-shipment verification of Swiss arms exports. As a result, the Swiss licensing

<sup>44</sup> Ibid para 87.

<sup>45</sup> *Beyond Compliance: Preventing the Diversion of Sensitive Vacuum Measuring Equipment - The “Controlled Delivery Model”* Ian J. Stewart & John McGovern, September 2013, Centre for Science & Security Studies, Kings College London, CSSS Occasional Papers 3/2013 <http://www.kcl.ac.uk/sspp/departments/warstudies/research/groups/csss/pubs/beyondcompliance.pdf>

<sup>46</sup> *UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, Section II, para 13. Ibid.

<sup>47</sup> See *Report by the Government of the Federal Republic of Germany on Its Policy on Exports of Conventional Military Equipment in 2012*, p 13 <http://www.bmwi.de/English/Redaktion/Pdf/2012-military-equipment-export-report,property=pdf,bereich=bmwi2012,sprache=en,rwb=true.pdf>

authority can legally oblige industry to provide, together with its export licence application, an end-user certificate signed by the foreign end-user and containing a clause granting the right to conduct a post-shipment verification (PSV) of the delivered goods. The respective clause reads as follows:

*"We certify that the Swiss authorities have the right to verify the end-use and end-use location of any supplied item at any time on their demand."*

This post-shipment clause is now, in principle, part of every end-user certificate covering the export of complete weapons systems. However, member states of the main proliferation technology control regimes benefit from an exemption and are not obliged to sign a PSV-clause. Since 2012, Switzerland has conducted at least 10 PSV all over the world and has gained some good practical experience with this instrument. While recognising that PSV can be a delicate issue for other countries, the Swiss Government has taken steps to explain the rationale behind it to prospective importing states and, as a result, the initiative has met with understanding and cooperation. Indeed, the Swiss experience points to the possibility of PSV helping to create a basis of mutual trust and comprehension, which makes future cooperation easier.<sup>48</sup> Although cost concerns may be raised as an impediment to such a programme, where exporting governments reserve the right to conduct follow-up checks in all cases but carefully select those instances where checks are actually carried out, this can serve as a cost-effective deterrent to unauthorised re-export of arms.

For exports of dual-use goods, checks on the end-use of items will in most cases only be possible where a recipient has accepted the need for follow-up checks by an exporter state or an international agency under a non-proliferation programme. As noted above in relation to efforts to trace and verify the end-use of dual-use goods, where a state has adopted IAEA safeguards on a domestic nuclear programme, it may be possible to verify the end-use of nuclear dual-use goods. However, where such arrangements do not exist, the possibility of follow-up checks to confirm continued legitimate use of dual-use goods is likely to prove more limited – particularly where items are expended, or incorporated into other items, during industrial processes and where inventory checks and residue analysis will be required.

## 10. Key issues and priorities for strengthened controls and cooperation

In the field of arms and dual-use transfer controls, the multifaceted and complex nature of diversion means that preventing and combating this phenomenon is an extremely challenging task and one that must be met with a comprehensive, multi-level response. Broadly speaking, such an approach will involve adoption of best international practices by states in three key areas:

- the establishment and implementation of domestic arms and dual-use transfer control laws, regulations, administrative procedures and enforcement capacities
- conducting outreach to industry to ensure that they are fully aware of the risks of diversion and how they should respond
- enhanced information exchange, cooperation and assistance among states in order to maximise information flows and encourage timely and effective responses to cases of diversion.

### I. A comprehensive transfer control system<sup>49</sup>

#### i. Legislative and regulatory framework

A comprehensive transfer control system based on best practice is critical to effective action against the diversion of arms and dual-use transfers. At its core is a legislative, regulatory and administrative framework based upon governmental jurisdiction over the trade in strategic goods. Key elements of this framework include:

- setting out the key principles underpinning national transfer controls, including preventing diversion
- clearly defining the scope of controls in terms of items (by way of a control list) and activities subject to control (see below)
- providing for case-by-case licensing and authorisation of transfers

<sup>48</sup> Information provided in correspondence between Saferworld and the Swiss State Secretariat for Economic Affairs, September 2016.

<sup>49</sup> *Implementing the ATT: Essential elements of an effective arms transfer control system*, [5<sup>th</sup> Briefing Output of the Expert Group on ATT Implementation] Saferworld, July 2016 <http://www.saferworld.org.uk/resources/view-resource/1081-implementing-the-att-essential-elements-of-an-effective-arms-transfer-control-system>

- enabling the interdiction, seizure and disposal of illicit shipments consistent with international law.

In terms of activities subject to control, prior licensing or authorisation should be required for all physical transfers (export, import, transit, transshipment and brokering) of arms and controlled dual-use goods and potentially also in relation to transportation, freight forwarding and logistics, insurance and financial services linked to transfers of arms and dual-use goods. In addition, clear controls should be defined in relation to the intangible transfer of arms and dual-use goods, in line with best practice. Also desirable is the adoption of a 'catch-all clause' prohibiting the unlicensed or unauthorised transfer of goods that are not included on the control list but which are intended for military end-use in an embargoed destination, for use in connection with WMD programmes or where there is knowledge that the goods will be used to violate international law.

Administrative provisions should include the designation of a competent authority, a point of contact for international cooperation, and a government interagency co-ordination structure.

## ***ii. Transfer licensing and authorisation process***

### ***a. Information and documentation requirements***

In terms of individual transfers of arms and dual-use goods (excluding general or global authorisations which will have their own particular terms and conditions attached) the transfer licensing and authorisation process should require a variety of written information to be submitted to the licensing authority. This will provide the basis for the subsequent risk assessment and the resultant decision on whether or not to authorise the transfer. Such documentation requirements should include:

- submission of a transfer (export, import, transit or transshipment, brokering) licence application which includes information relating to all known actors involved in the transfer of arms or dual-use goods, including exporter, importer, consignees, intermediaries and end-users as well as details of transportation, and possibly financing arrangements
- an end-use or end-user certificate (see below)
- (post-transfer) provision of an import certificate or a delivery verification certificate by the importing state or entity.

### ***b. End-use or end-user controls***

Requirements for pre-transfer authorisation end-use or end-user controls should include clear restrictions imposed by the exporter and equally clear undertakings on the part of the importer, such as:

- provision by the importing state or entity of an end-use or end-user certificate (see below) signed by an appropriate individual empowered to do so
- a re-transfer clause in the licence or authorisation document prohibiting internal re-transfer or reassignment, transshipment, or re-export of items without the approval of the original exporting state
- clear penalties set out in the licence or authorisation document – such as refusal to provide follow-up servicing and spare parts – if end-use assurances are broken
- the exporting state reserving the right to conduct follow-up checks to ensure that the items remain in the possession of the authorised end-user.

End-use or end-user certificates should form a central part of the documentation required in order to process an export authorisation and should include the following information:

- exporter's details (company name, contact name, address)
- consignee's details (company name, contact name, address)
- end-user's details (company name, contact name, address)
- country of final destination
- a description of the goods being exported (type, characteristics)
- quantity and possibly value of the exported goods
- signature, name and position of a duly authorised representative of the end-user
- the date of the signature of the certificate
- details of the end-use of the goods

- an end-use or end-user clause – for example an undertaking that the goods will not be used for purposes other than the declared use, in connection with WMD, or in violation of international law, and that the goods will not be used by any other than the authorised entity
- a re-export clause – for example, an undertaking that there will be no re-export of the goods without prior authorisation of the original exporting state
- details of any brokers, intermediaries, transportation agents or other known parties to the transfer.

### **c. Risk assessment**

Prior to authorisation of a transfer, a comprehensive risk assessment should be undertaken – particularly with respect to export and brokering licence applications. This risk assessment should consider a range of factors – including the risk that the items will be used: to threaten national, regional or international security; in violation of international law; or in connection with WMD programmes. It will also involve assessing the risk of diversion. The assessment process should begin by reviewing the information provided – both in terms of its quality and quantity – and checking for forged, inauthentic or incomplete documentation. It should also involve verification that signatures on documentation are from duly authorised entities.

Pre-licensing or authorisation efforts to prevent diversion should centre upon an intelligence-led, multifaceted risk assessment based on detailed criteria that include *inter alia* consideration of the following:

- the previous history of the recipient as an importer of arms and dual-use goods including any involvement in diversion, unauthorised re-assignment or misuse of items
- the legitimate defence, domestic security and commercial interests of the importer including whether it is a sovereign state or a non-state actor
- a legitimate requirement for the items on the part of the importing entity
- the technical capacity of the recipient to use the items in question
- the controls and security procedures within the recipient country
- the proximity of the importing state to regions of tension or conflict, or to an embargoed entity
- the risk of unauthorised re-export or diversion to proscribed end-users
- the risk that a transfer of arms or dual-use goods into a state may lead to irresponsible export of existing stocks.

Insofar as the information is available to the licensing authorities, this assessment should include consideration of the risks posed by all known parties to the transfer, including brokering and shipping agents, freight-forwarders and other intermediaries as well as risks associated with the transit route of the shipment.

### **iii. Security and enforcement measures**

A range of security and enforcement measures are required in order to minimise the risk of diversion in the post-licensing and authorisation phase of a transfer, during transit, and up to and potentially beyond the arrival of the arms or dual-use goods with the intended end-user. These will necessitate training and adequate resources being provided to law enforcement, including:

- clear marking and record-keeping of arms and ammunition manufactured and transferred in line with international standards
- reporting of arms transfers in line with international commitments
- ensuring physical security measures for items stored or in transit
- provision for secure transit sheds close to border control points to allow for storage goods prior to declaration and clearance
- technical measures including screening of cargo
- delivery verification of goods
- post-shipment controls (PSC) – e.g. on-site follow-up checks on the location and use of goods
- international law enforcement cooperation in tracing diverted arms and dual-use goods.

## **II. Outreach to industry, academia and freight forwarders or transporters**

While governments retain ultimate responsibility for the implementation of transfer controls, outreach to industry and academia is vital to ensure that those involved in the manufacture, trade and transfer of arms

and dual-use goods are fully aware of national export controls and the need to prevent diversion. All such parties should be required to adopt internal compliance programmes and to ensure that required records and documentation relating to international transfers of arms and dual-use goods are maintained and made available to authorities for inspection.

Particularly in the area of dual-use exports, industry is often the first point of contact with any prospective recipient of controlled goods, and so heightened awareness on their part will be essential to the early identification of potential diversion risks. In addition to understanding their responsibilities within the transfer licensing system, manufacturers and academic or research facilities also need to be encouraged to follow best practices that will assist in identifying and responding to the possibility of diversion, including as follows:

- ensure familiarisation with relevant arms and dual-use control lists and with controls on transfers of these items to categories of end-users e.g. NATO members, Wassenaar participants, states that are the subject of international sanctions
- ensure familiarisation with key diversion indicators and “red flags” such as those identified by the US Department of Commerce Bureau of Industry and Security
- avoid using or working with intermediaries and transportation agents that have a known history of involvement in unauthorised activities
- ensure that customers are bona fide and have a legitimate need for the items
- avoid the transfer of particularly sensitive goods to intermediaries or consignees, instead shipping directly to the ultimate end-user or system manufacturer
- ensure that all relevant documentation arising during the transfer including bills of lading, air waybills, contracts and other commercial documentation are checked for suspicious activity.<sup>50</sup>

In addition, governments should reach out to freight forwarders and other transportation agents to ensure that they are apprised of the nature and extent of national arms and dual-use transfer controls and that they are also familiar with the key diversion indicators mentioned above. Such agents should also be encouraged to pass on to government any relevant information and intelligence they may receive regarding diversion or proliferation risks.

### III. International cooperation and information sharing

While information on diversion risks is shared by states at EU level, within the Wassenaar Arrangement and also within the main proliferation technology control regimes (NSG, Australia Group, MTCR) these exchanges are limited to those states involved in these regimes. There are many – including in Africa, Asia and Latin America – that remain largely ‘outside the loop’ in terms of up-to-date information on diversion risks. The lack of widespread, detailed and common understanding of diversion risks – both general and specific – is thus one of the key obstacles to concerted international action in this area.

Expanding the membership of the aforementioned proliferation technology control regimes should be a key aim. Beyond this it is also worth considering the development of new initiatives and measures to prevent and reduce diversion of arms and dual-use goods so that relevant information can be more widely shared. At a basic level, bilateral discussions and information sharing between exporting and importing states in relation to diversion risks posed by specific transfers are vital. At the international level, while truly global opportunities to discuss diversion risks are infrequent, it should be possible to engage in information exchange and cooperation on a region-to-region basis through relevant regional organisations. This could involve:

- identifying norms and developing good-practice guidelines for diversion prevention
- supporting states to have adequate national systems of laws, regulations, procedures and practices to meet their responsibilities to prevent diversion as far as possible, and to properly respond to diversion when it takes place
- enhancing bilateral, regional and international cooperation in order to share information, resources and expertise
- sharing information in relation to diversion risks posed by particular exporters, transportation agents and others that fail to comply with export control laws

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<sup>50</sup> For further information see US Department of Commerce, *Ibid.*

- developing international and regional mechanisms to identify, disrupt and close down points of diversion, including information-exchange and consultation arrangements or the establishment of databases containing information on illicit procurement activities
- developing cooperation among law enforcement agencies and mutual legal assistance in relation to the pursuit of those suspected of violating export control laws
- engaging in greater cooperation and enhanced reporting and transparency in relation to implementation of the ITI.

## Annex: Additional agreements relevant to addressing the diversion of arms and dual-use goods

### I. Dual-Use Goods

One of the central aims of the **Nuclear Suppliers Group**<sup>51</sup> (NSG), established in 1974, is to prevent transfers for peaceful purposes from being diverted to unsafeguarded nuclear-related activities. In 1992 the NSG established guidelines for transfers of nuclear-related dual-use equipment. These guidelines state that supplier states should not authorise transfers of dual-use nuclear equipment where there is an unacceptable risk of diversion, taking into account the previous history of a prospective recipient, and where there is reason to believe that there is a risk of diversion to “acts of nuclear terrorism”.<sup>52</sup>

The adoption, in 1994, by the **European Community** of Council Regulation 3381/94 establishing a community regime for the control of exports of dual-use goods was also, in part, driven by a desire to eliminate the risk of diversion of dual-use goods.<sup>53</sup> In 2000, following the adoption of the 1998 EU Code of Conduct on Arms Exports (see below), the operative provisions of the EC dual-use regulations were amended to include a requirement that Member States pay consideration to the intended end-use and the risks of diversion, as well as to the EU Code itself, before authorising the transfer of dual-use items.<sup>54</sup>

In 2006 the **Wassenaar Arrangement** agreed **Best Practice Guidelines for the Licensing of Items on the Basic List and Sensitive List of Dual-Use Goods and Technologies**.<sup>55</sup> This sets out provisions that Participating States may adopt, at their own discretion, in respect of the transfer of dual-use goods on the Wassenaar Basic List and Sensitive List. These provisions allow for the use of global<sup>56</sup> or general<sup>57</sup> licences in relation to export of these goods and technologies, providing that the exporter is required to keep certain documentation detailing each transfer that has taken place. They also stipulate that general or global licences should not be used for transfers intended for prohibited or military end-use, while the possibility of Participating States revoking relevant licences is envisaged.

### II. Conventional Arms

#### i. Small arms and light weapons

Given the growing concern over the proliferation and misuse of SALW over the past two decades, combined with the understanding that these weapons are particularly susceptible to diversion, a significant number of relevant multilateral agreements are focused solely on SALW.

The first international agreements to specifically address SALW control – the 2001 **UN Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition**<sup>58</sup> (UN Firearms Protocol) and the 2001 **UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects**<sup>59</sup> (UN Programme of Action) addressed the issue of diversion in only limited terms. The UN Firearms Protocol refers to the importance of physical security measures for firearms and the need for effective transfer and border controls in order to prevent diversion. On the other hand, the UN Programme of Action calls on states to control the production and

<sup>51</sup> See <http://www.nuclearsuppliersgroup.org/en/>

<sup>52</sup> Nuclear Suppliers Group *Guidelines for Transfers of Nuclear-related Dual-use Equipment, Materials, Software and Related Technology*, June 2013 [http://www.nuclearsuppliersgroup.org/images/Files/Updated\\_control\\_lists/Prague\\_2013/NSG\\_Part\\_2\\_Rev\\_9\\_clean.pdf](http://www.nuclearsuppliersgroup.org/images/Files/Updated_control_lists/Prague_2013/NSG_Part_2_Rev_9_clean.pdf)

<sup>53</sup> Preamble to *Council Regulation EC No 3381/94 of 19 December 1994*, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31994R3381&from=EN>

<sup>54</sup> See *Council Regulation (EC) No 428/2009 of 5 May 2009*, Article 12.1 (d) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:134:0001:0269:en:PDF>

<sup>55</sup> See <http://www.wassenaar.org/wp-content/uploads/2016/01/09Best-Practice-Guidelines-for-the-Licensing-of-Items-on-the-Basic-List-and-Sensitive-List-of-Dual-Use-Goods-and-Technologies.pdf>

<sup>56</sup> A global licence is defined as one whereby ‘a named exporter may export unrestricted quantities of specified goods to a specified group of countries or to specified end-users in a specified country or group of countries’. See *Wassenaar Arrangement Best Practice Guidelines for the Licensing of Items on the Basic List and Sensitive List of Dual-Use Goods and Technologies*, *Ibid.*

<sup>57</sup> A general licence is available for use by any eligible exporter and allows ‘the export of unrestricted quantities of identified list entries or range of goods, software and technology to a specified group of countries’ See *Wassenaar Arrangement Best Practice Guidelines for the Licensing of Items on the Basic List and Sensitive List of Dual-Use Goods and Technologies*, *Ibid.*

<sup>58</sup> See [https://treaties.un.org/doc/source/RecentTexts/18-12\\_c\\_E.pdf](https://treaties.un.org/doc/source/RecentTexts/18-12_c_E.pdf)

<sup>59</sup> See <http://www.poa-iss.org/Poa/poahtml.aspx>

transfer of SALW to prevent illicit trafficking and diversion and urges states to factor the risk of diversion into any export risk assessment.

At regional level, the 1997 **Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials**<sup>60</sup> (OAS Convention) was the first to specifically address SALW control issues. Given that the OAS Convention provided the basis for the UN Firearms Protocol, provisions relating to diversion are similarly limited (see above).

In 2000 the **Organisation for Security and Cooperation in Europe** (OSCE) agreed a **Document on Small Arms and Light Weapons**<sup>61</sup> as the principal collective statement of OSCE states *vis a vis* controlling the illicit trade in SALW. The aims of the OSCE Document include combating illicit trafficking in SALW and preventing and reducing destabilising accumulations of SALW, with specific provisions relating to prevention of diversion. In particular it requires that participating states avoid transfers of SALW where there is a clear risk that they would be 'diverted to territories whose external relations are the internationally acknowledged responsibility of another state' or that they would be 'either re-sold (or otherwise diverted) within the recipient country or re-exported for purposes contrary to the aims of [the] document'. Moreover, the document states that when importing into or exporting SALW from their territory, Participating States should ensure that they 'retain adequate control over such transfers...to prevent the diversion of the small arms to any party other than the declared recipient.' Finally, it notes that '[i]n order to prevent the illegal diversion of small arms, the participating States are encouraged to establish appropriate procedures that would permit the exporting State to assure itself of the secure delivery of transferred small arms', possibly including 'a physical check of the shipment of small arms at the point of delivery'. In 2003, the OSCE published **The Handbook of Best Practices on Small Arms and Light Weapons**,<sup>62</sup> a compendium of information relating to SALW control, which addresses a number of issues that are important within the context of preventing diversion of SALW, in particular:

- National controls over manufacture of SALW
- Marking, record-keeping and traceability of SALW
- National procedures for stockpile management and security
- National control of brokering activities
- Export control of small arms and light weapons

The need to trace SALW from the time of manufacture in order to detect possible points of diversion is identified in the handbook as a major rationale for the adoption of provisions relating to marking, record keeping and tracing and for international cooperation in this field. At the same time, the need to avoid transfers of SALW that might be re-exported or diverted to unauthorised end-users or for unauthorised purposes is a central tenet of the Best Practices for the Export Control of SALW.

In Africa, the 2000 **Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons**<sup>63</sup> provided a comprehensive overview of the problem of SALW trafficking and co-ordinated African States' positions around the 2001 UN Programme of Action negotiations. While the issue of diversion is not explicitly addressed, related measures – such as the need for adequate SALW control legislation and capacity among enforcement agencies – are highlighted.

In the decade following the Bamako Declaration sub-regional agreements were reached in West, Central, East and Southern Africa. Both the 2006 **ECOWAS Convention on Small Arms and Light Weapons and Other Related Materials**<sup>64</sup> and the 2010 **Kinshasa Convention on Small Arms and Light Weapons and all Parts and Components that can be used for their Manufacture, Repair and Assembly**<sup>65</sup> require that a transfer of SALW should not be authorised (or should be denied) if it is likely to be (or might be) diverted in transit or by the importing country, or be re-exported. By comparison, neither the 2000 **SADC Protocol on the Control of Firearms, Ammunition and Other Related Materials**<sup>66</sup> nor the 2000 **Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region**

<sup>60</sup> See <http://www.oas.org/juridico/english/treaties/a-63.html>

<sup>61</sup> See <http://www.osce.org/fsc/20783?download=true>

<sup>62</sup> See <http://www.osce.org/fsc/13616>

<sup>63</sup> See [http://www.un.org/en/africa/osaa/pdf/au/cap\\_smallarms\\_2000.pdf](http://www.un.org/en/africa/osaa/pdf/au/cap_smallarms_2000.pdf)

<sup>64</sup> See <http://www.poa-iss.org/RegionalOrganizations/ECOWAS/ECOWAS%20Convention%202006.pdf>

<sup>65</sup> See <http://disarmament.un.org/treaties/t/kinshasa/text>

<sup>66</sup> See [http://www.sadc.int/files/8613/5292/8361/Protocol\\_on\\_the\\_Control\\_of\\_Firearms\\_Ammunition2001.pdf](http://www.sadc.int/files/8613/5292/8361/Protocol_on_the_Control_of_Firearms_Ammunition2001.pdf)

and the Horn of Africa<sup>67</sup> specifically address the issue of diversion. However, a range of measures are specified which, if implemented fully, would help to reduce diversion risks. The associated 2005 **Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on SALW**<sup>68</sup> addresses diversion in the context of licensing SALW exports and recommends inclusion of a prohibition on (re)transfer, diversion and re-export without the approval of the original exporting state. Additionally, the 2011 **SADC Draft Guideline on the Co-ordinated Border Management**<sup>69</sup> suggests that, in order to prevent diversion of goods, provision be made for transit sheds close to border control points to allow for storage goods prior to declaration and clearance.

## ii. All conventional arms

The legally-binding 2008 **EU Common Position on Arms Exports**<sup>70</sup> (successor to the 1998 EU Code of Conduct on Arms Exports<sup>71</sup>) has specific and relatively detailed provisions for preventing diversion of arms exports. Criterion seven requires Member States to consider the '[e]xistence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions' and, in doing so, to examine the legitimate defence and domestic security interests of the recipient country, the technical capacity of the recipient to use the items in question, the effectiveness or otherwise of export control in the recipient country, the risk of re-export, the risk of diversion to terrorists and the risk of reverse engineering or 'unintended technology transfer'.

In 2007 the **Wassenaar Arrangement** agreed **Best Practices to Prevent Destabilising Transfers of SALW through Air Transport**<sup>72</sup>, setting out a number of provisions that could be useful in tackling diversion. These include, in the context of an export licensing assessment, the possibility to request additional information from prospective exporters concerning the identity of an air transporter, the involvement of any relevant agents, the planned route for the air transportation of the goods and records of previous similar transfers undertaken by air. In addition, proof that the cargo has been unloaded in the end-user country may be requested. Participating States are also urged to exchange information about exporters, air carriers and agents that fail to comply with the relevant requirements. Complementing this agreement and that of the Elements for Effective Legislation on Arms Brokering, in 2011, the Wassenaar Arrangement issued **Elements for Controlling Transportation of Conventional Arms Between Third Countries**<sup>73</sup>. This agreement advances *inter alia* the prospect of Participating States introducing legislation to prevent their nationals from transporting arms between third countries in violation of UN Security Council Embargoes or in violation of arms transfer control legislation in importing and exporting states. The possibility is also raised of Participating States regulating transportation of arms by their nationals similar to the way in which third country arms brokering is controlled.

In 2011, the **Wassenaar Arrangement** concluded the **Best Practice Guidelines on Subsequent Transfer (Re-export) Controls for Conventional Weapons Systems**.<sup>74</sup> These guidelines seek to harmonise Participating States' approaches to re-export controls for conventional arms and encourage the adoption and implementation of end-user guarantees in the form of government-to-government agreements, end-user assurances and export licences for transfers of weapons and their means of production. In addition, it encourages:

- the inclusion of a clause that will not allow for subsequent re-export without the prior authorisation of the original exporting government
- an undertaking on the part of the importer that the arms will not be used for anything other than the declared purposes
- a clause stating that the goods will not be transferred to an unauthorised end-user within the recipient country.

Considerations are also set out which may be taken into account by an exporting state when reviewing whether or not to grant permission for the re-export of conventional arms or production facilities by an

<sup>67</sup> See <http://www.poa-iss.org/RegionalOrganizations/RECSA/Nairobi%20Protocol.pdf>

<sup>68</sup> See <http://www.poa-iss.org/RegionalOrganizations/RECSA/Nairobi%20Best%20Practice%20Guidelines.pdf>

<sup>69</sup> See [http://www.sadc.int/files/7613/7415/0086/SADC\\_Coordinated\\_Border\\_Management\\_Guidelines\\_-\\_Aug\\_2011.pdf](http://www.sadc.int/files/7613/7415/0086/SADC_Coordinated_Border_Management_Guidelines_-_Aug_2011.pdf)

<sup>70</sup> See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:335:0099:0103:EN:PDF>

<sup>71</sup> See <http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf>

<sup>72</sup> See [http://www.wassenaar.org/wp-content/uploads/2015/06/Best\\_Practices\\_to\\_Prevent\\_Destabilising\\_Transfers\\_of.pdf](http://www.wassenaar.org/wp-content/uploads/2015/06/Best_Practices_to_Prevent_Destabilising_Transfers_of.pdf)

<sup>73</sup> See <http://www.wassenaar.org/wp-content/uploads/2015/06/4-Elements-for-Controlling-Transportation-of-Conventional-Arms.pdf>

<sup>74</sup> See <http://www.wassenaar.org/wp-content/uploads/2015/06/3-Re-export.pdf>

importing state. These include assessment of the original exporting state's national security concerns, the effect on regional stability, and the legitimate defence needs of the proposed secondary importing state. It is noted that any decision to allow re-export should be consistent with the terms of the original export contract and transfers to unauthorised third parties should be avoided. Finally, it is suggested that limits be placed on the number of brokers involved in subsequent re-export of conventional weapons.

### ***About the project: Strengthening Technical and Operational Aspects of Chinese Dual-Use Trade Controls***

This project 'Strengthening Technical and Operational Aspects of Chinese Dual-Use and Arms Trade Controls' was jointly implemented by Saferworld and Chinese Academy of International Trade and Economic Cooperation (CAITEC) in 2016, with the aim to examine opportunities and challenges that China and other leading producers and exporters of arms and dual-use goods and technologies have in promoting and further strengthening export controls.

Under this project, the two implementing partners have established an informal dialogue that engages experts from China and other leading producers and exporters of dual-use goods and technologies, trying to explore how implementation and enforcement of dual-use trade controls can be strengthened and mutually reinforced. The engine of the dialogue process is a Technical Expert Working Group (TEWG) of 12 policy experts and practitioners from China, the Republic of Korea, Russia, the UK and the USA.

This project was supported by the Foreign and Commonwealth Office of the UK Government.

#### ***About Saferworld***

Saferworld is an independent international organisation working to prevent violent conflict and build safer lives. With programmes in nearly 20 countries and territories across Africa, Asia and Europe, we work with people affected by conflict to improve their safety and sense of security, and conduct wider research and analysis. We use this evidence and learning to improve local, national and international policies and practices that can help build lasting peace. We believe that everyone should be able to lead peaceful, fulfilling lives, free from insecurity and violent conflict.

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