Strategic Trade Controls

Catch-All Controls and

Implementation ~~EXCUSES~~ Challenges

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Overview

- Countries frequently develop and sustain WMD and WMD delivery system programs by building indigenous production facilities.

- Indigenous production facilities rely on imports of special equipment, materials, systems, and components (some listed, some not).

- Both listed and non-listed items also can be useful for maintaining existing inventories of WMD-related items that were supplied by a third country and not indigenously produced.

"Good Enough" Can be Better than Nothing

- Proliferators <u>increasingly seek non-listed</u> equipment and technology

  - Potentially easier to acquire than listed items and/or needed as part of a production process.
    - Examples: ring magnets, gasket "O" rings, graphite for Electrical Discharge Machines

  - Items with performance levels slightly below that of similar "listed" items may be a perfectly acceptable substitution
    - Examples: specialty steels, less-precise inertial navigation equipment, electronics not specifically "rated" to certain levels

  - Non-listed items may be suitable for the indigenous production of listed items that cannot be openly obtained
    - Examples: chemical production equipment, machine tools, engineering software, range and test equipment

> **Items may be non-listed based on an extremely broad range of industrial applications yet they may also represent an essential part of an indigenous WMD program.**

A Legal/Regulatory Tool

- Control lists are designed to control a targeted list of core/essential items **but cannot account for every item** that could be used in a program of concern.

- Catch-all controls provide a <u>legal and regulatory basis</u> to prevent exports of non-listed items **when there is reason to believe** such exports **could** contribute to end uses of proliferation/WMD concern.

Catch-All Controls

- <u>End-Use</u> and <u>End-User</u> controls rather than specifically listed items.

- Catch-all controls apply to <u>all</u> types of items, but are pursued for those individual transactions where a WMD, WMD delivery system, or military end-use or end-user is suspected.

- Catch-all controls are called for in the multilateral export control regimes:
  – Australia Group,
  – Missile Technology Control Regime,
 – Nuclear Suppliers Group, and
  – Wassenaar Arrangement

Catch-All Controls in UNSCRs

– **UNSCR 1540:** calls on states to establish effective export controls including end-user controls.

– **UNSCR 2231:** puts in place catch-all restrictions to prevent the transfer to Iran, absent UNSC approval on a case-by-case basis, of "any items if the State determines that they could contribute to reprocessing or enrichment-related or heavy-water related activities inconsistent with the JCPOA," or "the development of nuclear weapon delivery systems."

– **UNSCR 2321:** continues catch-all restrictions under UNSCR 1718 and others against North Korea's WMD and ballistic missile programs to : "items, materials, equipment, goods and technology, determined by the State, Security Council or the Committee, which could contribute to DPRK's nuclear-related, ballistic missile-related or other weapons of mass destruction related programmes."

Best Practices for Implementation

- Appropriate and effective <u>legal and regulatory framework</u>.

- Consistent and timely <u>information sharing</u> within government, with industry, and between governments.

- Effective processes for <u>identifying transactions of concern</u>.

- Comprehensive <u>risk assessment</u> procedures.

- Dynamic and adaptable process to "<u>stay current</u>."

- <u>Political will</u>.

Challenges to Implementing Catch-All Controls
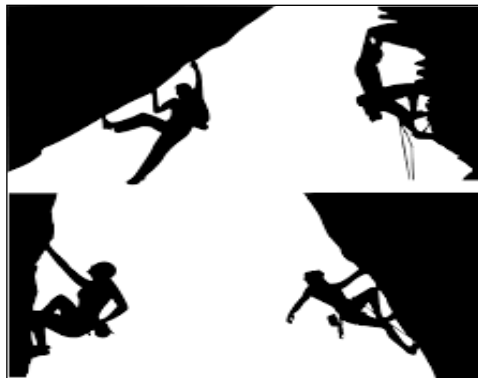
Challenge #13

- **The end-user provided a legitimate end-use statement e.g., for "commercial aircraft production."**

It is both commonplace and expected for proliferators to conceal the actual end use and to fabricate end-use statements. Moreover, catch-all controls can involve items that have legitimate, commercial applications. Investigation and critical assessment is required to determine the risk of the item being used in a problematic manner.

Furthermore, some entities may be involved in legitimate manufacturing as well as supporting WMD and/or missile development and an end-use statement may be "true but not complete."

Challenge #12

- **We do not have any resources or mechanisms to conduct end-use verification, so we must trust the end-use statement.**

End-use checks are valuable adjuncts to nonproliferation efforts. But risk assessment is still required, and even more necessary when end use checks cannot be conducted.

An end-use statement is not a substitute for due diligence.

Challenge #11

- **The item is not listed, so it cannot be a real concern for proliferation... or, the manufacturer does not make specialized WMD or missile equipment.**

This <u>does not</u> mean the item is not useful in a WMD or missile development program.

There are many examples of non-listed items being used and sought by proliferators. This very fact was the reason why catch-all controls were created by export control regimes and addressed in UNSCR 1540. Because of the dual-use nature of non-listed items, it is not possible or practical to list every item with value in WMD and missile proliferation.

Challenge #10

- **The item would need to be upgraded/modified in order to be useful for WMD or missile systems.**

The need for an upgrade does not render an item benign.

An increasingly common tactic of proliferators is to acquire non-listed items and seek to use them in conjunction with other items or to improve/upgrade the item to acceptable standards.

Additionally, catch-all controls must primarily be focused on end-user and end-use concerns rather than the nature of the item. If the end-use and/or end-user point to proliferation, it is highly likely that the item is intended for such use. Items can contribute to proliferation across the full spectrum of research, development, production, testing, and use.

Challenge #9

- **The end-use country already has a version of the equipment from elsewhere.**

Information to this effect can sometimes be wrong and based on conjecture from industry representatives eager to sell.

Furthermore, additional items could prove beneficial in terms of increasing capacity, improving reliability, or providing certain technical upgrades.

Challenge #8

- **The item will be installed at one specific location and not moved.**

If the location is involved in both proliferation-related and benign activities, the static location of the item is irrelevant. In many cases, the item can stay in one place and still be used for proliferation purposes (e.g., by the "night shift"). This kind of "diversion in place" is something that must be thoroughly considered, especially when an entity has a history of supporting both commercial and military applications.

Challenge #7

- **We do not have export control provisions that cover re-transfers, so we can only make our decision based on the stated end-user, even if that entity is a transshipment point or intermediary.**

> If there is an unacceptable risk the item will be diverted to proliferation, it should be denied. Catch-all commitments are based on "the use in connection with WMD or WMD delivery systems."
>
> While regulatory procedures may not require re-transfer licenses, that does not absolve an exporting government of the responsibility to know and assess the ultimate end-use / end-user in evaluating the original export. In fact, UNSCR 1540 obligates all states to prevent the re-transfer of items to sensitive missile programs.

Challenge #6

- **We have reviewed all of our license applications and have not found any applications associated with the transfer … we are aware of "exploratory talks" but that is all.** (Regarding a pending transfer identified by intelligence sources.)

> Since catch-all items only require licenses under certain circumstances, the lack of an application does not show there is no transfer. This is especially true since proliferators frequently seek to evade license requirements.
>
> The lack of a license application provides another reason to investigate, not a reason to stop looking.

Challenge #5

- **If we do not allow this transaction, then someone else surely will provide the item to the end-user, so we might as well be the ones to do it.**

It is unacceptable to ignore proliferation in any instance … the consequences are too great.

Additionally, the item in question may be the "first choice" and forcing the proliferator to seek less desirable alternatives can effectively impede proliferation activities.

Effective information sharing and partnerships can also help prevent proliferators from "shopping around."

Challenge #4

- **We responsibly upheld our legal requirements per the relevant UNSCR.**

Even if the export is not prohibited by UNSCRs, countries with regime-quality export controls have a broader commitment to implement catch-all controls.

In any case, responsible governments have an obligation to control transfers, if they are intended to contribute "in their entirety or part" to proliferation.

Challenge #3

- **We have no legal authority to control a shipment when it is not a listed item.**

> Strategic trade controls should have appropriate and sufficient mechanisms for implementing catch-all controls.
>
> Furthermore, in many instances UNSC resolutions provide an additional legal authority (and responsibility) for items subject to WMD, delivery system and conventional arms-related catch-all controls.

Challenge #2

- **We may be subject to legal repercussions if our decision forces the exporter or end-user to incur financial costs.**

> Laws and regulations must provide enough discretionary authority for national implementation of catch-all controls. Additional mechanisms can be used to establish a licensing requirement for categories of transfers or groups of end-users most likely to be of proliferation concern.

Challenge #1

- **There is no "smoking gun" evidence that the item will be used for WMD or in a WMD delivery system program.**

Risk assessment is performed on a sliding scale and rarely yields a binary "yes or no" answer when dealing with transactions of potential proliferation concern. Just as with listed items, transactions posing an unacceptable risk of use in, or diversion to, programs of proliferation concern should be denied.

Summary

- The transfer of non-listed items represents a significant threat to WMD, WMD delivery and conventional arms nonproliferation efforts.

- Increasing recognition across the international community about the risks posed by non-listed items that could contribute to WMD and WMD delivery systems calls for vigilance and action by responsible countries.

- Effective catch-all controls require a "whole of government" approach that establishes appropriate responsibilities, authorities, and capabilities at all levels.

- Much focus remains on the "process level" of evaluating a given transaction. However, the "will" to implement catch-all controls requires commitment at the political, institutional, and legal levels.