

Transparency and accountability in arms export systems: the United States as a case study

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The US arms export control system is among the most transparent and rigorous in the world. By weaving together the efforts of literally thousands of individuals in dozens of government offices, media outlets and civil society organizations into a web of checks and balances, the system discourages excessive or ill-conceived arms sales and prevents the misuse and diversion of arms that are exported. This article explores the reporting requirements, review processes and external oversight that promote accountability and transparency in the US arms export system.¹

Accountability

Holding arms export recipients accountable to US laws and regulations—and ensuring that the arms export control system itself promotes and balances the diverse policy objectives that are pursued through arms sales—is achieved through two categories of checks and balances: *recipient accountability* and *systemic accountability*. In the first case, recipients of US defence articles are held accountable to the US government through the arms sale authorization procedures, contract provisos and end-use monitoring mechanisms that comprise the US defence trade control system. Through this system, the US government restricts who receives its arms exports and how they are used, monitors compliance with end-use restrictions and punishes recipients (and others) who violate these restrictions.

The second category of accountability is achieved through checks and balances on the arms export system itself. Congress, the media and civil society act independently and occasionally together to discourage ill-conceived or excessive arms sales, and to highlight and correct shortcomings in arms export controls. Combined, these safeguards help to ensure that US arms exports are used to advance the full range of US interests, and help to maintain a degree of balance between these interests.

RECIPIENT ACCOUNTABILITY

The US arms export control system consists of several overlapping layers of processes and safeguards. The first layer is the arms sales authorization process, which weeds out sales to recipients that are likely to use the arms in ways that undermine key US interests. All proposed arms sales are reviewed against criteria that range from the recipient's records on human rights, proliferation and

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terrorism to the effect of the sale on the US defence industrial base.² While all arms export requests are screened, large requests and requests for sensitive military technology are subjected to exceptionally rigorous scrutiny that taps the expertise, perspectives and concerns of a large pool of government officials. A good example is the approval process for those government-to-government sales that require congressional notification. (The Departments of State and Defense must notify Congress of sales exceeding certain dollar value thresholds.)³ At the Department of State, these requests are reviewed by:

- the Office of the Legal Adviser for Political-Military Affairs;
- the staff of the Under Secretary for Political Affairs;
- the staff of the Under Secretary for Arms Control and International Security Affairs;
- the Bureau of Democracy, Human Rights and Labor;
- the relevant regional bureau; and
- the Bureau of Legislative Affairs.⁴

At the Department of Defense, the requests are reviewed by:

- the Defense Technology Security Administration;
- the Office of the Secretary of Defense;
- the Joint Chiefs of Staff;
- the Combatant Commander; and
- several officials in the Defense Security Cooperation Agency, including country and financial officers, weapons specialists, process specialists and officials in the director's office.⁵

Embassy and congressional staff, the National Disclosure Policy Office and the National Security Council also provide input.⁶

While this level of scrutiny is reserved for a small percentage of requests, many receive at least some interagency review. The Department of State signs off all requests for government-to-government sales, and roughly 30% of commercial license requests are sent to other agencies for review.⁷

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Sales requests that make it through the review process are approved only after the recipient agrees to conditions and restrictions on use, storage, transportation and disposal of the defence articles. Governments that violate these restrictions face sanctions that range from Department of State démarches protesting the violations to complete arms embargoes.⁸ A recent example of the latter is the 2002 embargo on arms sales to Zimbabwe. The Bush Administration imposed the embargo in response to the Zimbabwean government's "... subver[sion of] the democratic process through a badly flawed presidential election, a campaign of violence and intimidation against its political opposition, and a blatant disregard for the rule of law and serious human rights abuses".⁹

Restrictions on the use of exported weapons are largely meaningless if the recipient believes it can violate them with impunity. Recognizing this, the US government established the Blue Lantern and Golden Sentry end-use monitoring programmes, which are run by the Department of State and Department of Defense, respectively. Through these programmes, US officials conduct a variety of pre- and post-shipment checks to make sure that the recipient is a legitimate end user, that the shipment is not diverted en route to a third party, and that the recipient complies with US restrictions on end use.

Officials also study the documentation associated with the sale for irregularities and other signs of malfeasance. They compare the names of the recipient and other parties to the sale against watch lists of individuals and organizations that are prohibited from receiving US arms. They also check to make sure that the request is consistent with the defence needs of the proposed recipient, and that none of the documentation is fraudulent. These checks have foiled dozens of attempted diversions. In 2004, for example, a vigilant licensing officer thwarted an attempt by a Central American firearms dealer to import US pistols through a front company. At the time that the dealer submitted the request, he was under investigation by his own government for violating export laws.¹⁰

End-use monitoring continues after an arms shipment leaves a US port. Most monitoring of less sensitive items is completed by US officials in the course of their other duties. More rigorous monitoring is reserved for particularly sensitive political situations and weapon systems,¹¹ such as the Stinger surface-to-air missile. Exported Stingers must be physically inventoried once a month by the recipient government and once a year by US officials. The US also reserves the right to inspect the recipient country's physical security measures and procedures to make sure that they comply with the long list of requirements for Stinger missiles.¹²

Over the past five years, US end-use monitoring programmes have expanded steadily. In 2004, eight on-site inspections were completed through the Golden Sentry programme—a fourfold increase over 2003. This year, the programme's staff will increase from two to five employees.¹³ Similarly, the number of checks performed through the Blue Lantern programme increased from 360 in 1999 to 530 in 2004.¹⁴ Despite these increases, recent reports from the Government Accountability Office (GAO)—the audit, evaluation and investigation arm of Congress—have revealed shortcomings in both programmes. In 2004, for example, it reported that neither the Department of State nor the Department of Defense had conducted more than a handful of post-shipment verifications of cruise missile and unmanned aerial vehicle (UAV) exports—weapon systems that pose a particularly grave threat to US national security.¹⁵ To their credit, both departments have taken steps to correct these shortcomings.¹⁶

SYSTEMIC ACCOUNTABILITY

As established above, the Departments of State and of Defense operate a complex and rigorous export control system to prevent and punish misuse of US weapons. The resulting recipient accountability helps to ensure that US arms are only used by the intended recipients and only for authorized purposes. Ensuring systemic accountability, i.e. that the system itself is accountable to US citizens and their diverse interests, is achieved through the combined efforts of Congress, civil society and the media.

Congress

Congress is the only one of the three entities listed above that has an official oversight role in the arms export process. It fulfils this role in several ways. First and foremost, US law gives Congress the power to block certain arms sales outright. The Arms Export Control Act requires the executive branch to notify Congress of all major arms sales (i.e. arms sales that exceed a specific dollar value) at least 15 days in advance. Congress can then block the sale by passing a joint resolution of disapproval. While passing such a resolution is extremely difficult (it has never been done), the notification process itself has a significant effect on executive branch decision-making: sales that require congressional notifications are subjected to particularly rigorous, preliminary scrutiny. This is primarily due to the nature of the requests—they are the largest in dollar value terms and often include sensitive weapon systems, and

therefore would attract intense scrutiny within the Departments of State and Defense even if Congress were not involved. Yet, as veteran congressional staff member David Fite points out, congressional oversight provides extra incentive:

Even though [joint resolutions of disapproval] are unlikely to succeed, they can focus unwanted negative attention on the sale and the recipient. Such attention by the US public and non-governmental organizations can pressure an administration to either stop or modify the sale. The recipient country itself might choose to cancel the purchase.¹⁷

The oversight responsibilities of Congress extend beyond individual sales to the arms export control system itself. Any changes to arms export laws must pass through Congress, and the executive branch is required to notify relevant congressional committees of key regulatory changes (such as changes to the US munitions list and exemptions from licensing requirements granted to another country).

In addition to its official oversight roles, Congress exerts influence through other mechanisms. For example, lawmakers use congressional hearings to obtain information, stimulate debate on key issues and, on occasion, derail policy proposals. Studies and reports sponsored by Congress serve similar purposes. There are two agencies through which lawmakers initiate studies on arms transfers and arms export controls. The first is the Congressional Research Service (CRS)—the public policy research arm of Congress.¹⁸ CRS produces a steady stream of reports on military aid, arms sales and related issues. Recent reports include *Combat Aircraft Sales to South Asia* and *Conventional Arms Transfers to Developing Nations*. The second agency is the previously mentioned GAO. Through GAO reports, Congress has had a profound impact on the arms export control system. For example, a recent study on end-use monitoring of cruise missile and UAV technology requested by Congressman Chris Shays prompted both the Departments of State and Defense to increase monitoring of missile and UAV technology.¹⁹

No example better illustrates the power that Congress wields over the arms export process than the recent battle over licensing exemptions. In 2003, the Bush Administration completed negotiations on agreements that would permit US firms to export defence articles to the United Kingdom and Australia without having to obtain a license from the Department of State. US law permits such agreements but requires that the export control systems of participating countries be at least comparable to the US system in several key ways. British and Australian negotiators agreed to adjust their systems in ways that satisfied some but not all of these requirements. The administration responded by requesting “legislative relief” from the remaining requirements.

The Senate was receptive to the request and introduced a bill exempting the United Kingdom and Australia from some of the requirements. However, passage of the bill required cooperation from Henry Hyde, Chair of the House of Representatives’ Committee on International Relations. Hyde balked at the amendment and the Senate bill went nowhere.

Anticipating continued resistance from Hyde, the Senate and the administration attached the amendment to legislation over which Hyde had no direct control (the Department of Defense authorization bill). Hyde responded with an impressive display of political brinkmanship, teaming up with the chair of the House Armed Services Committee²⁰ and using the levers of congressional influence—hearings, reports and the media. In May 2004, the House International Relations Committee released a damning report on the exemption agreements. It highlighted potential threats that the licensing exemptions posed to law enforcement and border security efforts.²¹ The report caught the attention of the *Financial Times*, which ran a feature story on it.²² At approximately the same time, Hyde scheduled a hearing for July entitled “Arms Export Controls and the Global War on Terror”. The prospect of intense congressional grilling of key administration officials during an election year proved too much for the administration, which allegedly cut a deal with Hyde shortly before the July hearing. Hyde agreed to cancel the hearing in exchange for assurances that the licensing exemption amendment would be shelved for the rest of the year.²³

As shown by this case, the levers of influence held by the legislative branch are remarkably effective. This robust oversight capacity helps to ensure that the interests of US citizens—which are represented most directly by their congressional representatives—are reflected in decisions about major arms sales and changes to the arms export control system. The potential downside of this capacity is that well-placed lawmakers who know how to work the system can single-handedly derail major policy initiatives. Public vigilance is necessary to ensure that this power is not used by future congressional leaders to undermine unambiguously beneficial arms export policy initiatives.

Civil society and the media

Civil society promotes systemic accountability by working with sympathetic policy makers and grass roots networks to promote (or stymie) defence trade policy initiatives and to increase transparency in the arms export system.

Civil society influences defence trade policy through strategies that range from overt, public campaigning to “under the radar” consultations with key policy makers. Large grass roots organizations use mass mailings and other forms of direct action to shape the views and positions of key congressional representatives on major defence trade issues. In recent years, large, multiorganization campaigns have been rare due to a waning interest in arms trade issues. However, the recent flurry of activity generated by the Control Arms Campaign—which is co-sponsored by three large grass roots organizations (Amnesty International, the International Action Network on Small Arms and Oxfam)—could indicate a renewed interest in this type of campaigning.

At the other end of the continuum are the largely invisible efforts of NGOs that work directly with policy makers on the minutiae of defence trade policy. These groups quietly shape pending legislation and pitch ideas for new bills and regulations. This is slow, time-consuming work that yields few spectacular breakthroughs. The cumulative effect of such efforts is significant, however. Over the years, these groups have raised congressional awareness of little known but potentially problematic policy initiatives, fought off attempts to eliminate key reporting requirements, and laid the groundwork for significant, if uncelebrated, legislative changes.

Arguably the most important role played by civil society is ensuring transparency in the arms export system. Transparency is the lynchpin of accountability; without the scrutinizing eye of the public, parochial interests of government power brokers and bureaucracies would dominate defence trade policy objectives. Civil society helps to prevent such distortions by collecting and disseminating data on the arms trade and by calling attention to key arms sales and defence trade policy debates.

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NGOs troll obscure online and print resources for data on arms sales and defence trade policy, which they post online or incorporate into articles and reports. Data not already in the public domain are obtained through interviews with government officials and through requests filed under the Freedom of Information Act (FOIA). Each year, FOIA requests submitted by the Federation of American Scientists yield hundreds of pages of previously unreleased government documents on the arms trade. These documents are made available to the public through the organization’s website.

Simply collecting and posting data and analysis is not enough to shape policy. NGOs must get the attention of policy makers and the public, convince them of the importance of their data and analysis, and sell them the merits of their policy recommendations. NGOs accomplish these goals in many

different ways, but the media is by far their most effective tool. Opinion pieces, letters to the editor and feature articles based on NGO research are read by dozens of policy makers and tens of thousands of their constituents. This is particularly true in the internet age. The audience for an opinion piece in the *Washington Post*, for example, now includes not only the paper's print readership of 738,000²⁴ but also users of the paper's online service and other electronic news services, such as LexisNexis. When the article is re-posted on a free website, the audience expands to everyone with access to the internet and an interest in the topic. Radio, television and newspaper interviews are other effective ways of shaping policy debates and educating the public.

Evaluating the US system—human rights criteria

Space constraints prohibit a comprehensive evaluation of the US export control system. Instead, this article concludes with an illustrative example: compliance with human rights criteria.

The US regularly comes under fire for appearing to ignore its own arms transfer criteria by selling weapons to human rights abusers, dictators and unstable regions. While some of this criticism is justified, the critiques themselves often paint a distorted picture of US practices and gloss over the difficulties of complying with human rights criteria.

It is true that the US has shipped billions of dollars of sophisticated US military technology to oppressive and corrupt regimes, like the Shah of Iran and the Suharto regime in Indonesia. Even today, many governments with questionable commitments to human rights and democracy receive US arms and military aid. According to Amnesty International, of more than 140 countries that imported US defence articles in fiscal year 2003, 44 had human rights records that the Department of State described as "poor" in its annual *Country Reports on Human Rights Practices*.²⁵

But focusing too heavily on these examples overshadows the many instances in which US policy makers do cut off arms sales to abusive and antidemocratic regimes. Currently, the US prohibits arms transfers to 19 governments²⁶ because of eligibility criteria violations, including human rights abuses, antidemocratic practices or state sponsorship of terrorism. Arms sales to other abusive regimes are denied or scaled down on a case-by-case basis. This restraint is attributable, at least in part, to the robust system of checks and balances in the US arms export system.

Furthermore, critics often gloss over the difficult dilemmas that confront policy makers who attempt to strengthen human rights criteria. For years, US policy makers have been assailed for failing to uphold the spirit of human rights provisions contained in arms export laws. One such provision that critics often cite is Section 502B of the Foreign Assistance Act, which bans arms sales and other security assistance to governments that engage in a "consistent pattern of gross violations of internationally recognized human rights", except in extraordinary circumstances.²⁷

Section 502B was enacted in 1974 but was "openly disregarded" by the Nixon and Ford Administrations, according to former Department of State official Stephen Cohen.²⁸ Even the Carter Administration, which identified human rights as the "soul" of US foreign policy,²⁹ rarely cut off military aid and arms sales in response to human rights abuses: the administration banned sales of new weapon systems to eight countries—all in Latin America. Other egregious human rights abusers, such as regimes in Indonesia, Iran, the Philippines and Zaire, continued to receive military aid. Even among the eight Latin American countries, five continued to receive spare parts and support equipment.³⁰

Theoretically, implementation of Section 502B could be improved by tightening key definitions, creating mechanisms that automatically cut off arms sales when human rights abuse thresholds are crossed, and limiting the executive branch's ability to waive restrictions on arms exports to certain countries because of "extraordinary circumstances". Such changes would undoubtedly reduce arms exports to regimes that abuse human rights, but could also damage other foreign policy objectives. US arms exports support a wide variety of clearly beneficial activities and programmes, including peacekeeping, search and rescue operations and disaster relief. The sudden termination of arms exports could undermine these programmes, especially if the president's ability to waive arms export restriction is sharply curtailed. One possible solution is for lawmakers to include exceptions for defence articles that support life-saving activities. But not all cases are that clear cut. For example, items essential for peacekeeping operations (e.g. small arms and component parts for military transport planes) are also useful for offensive military operations and the violent suppression of internal dissent.

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The political barriers to strengthening provisions like 502B are equally daunting. Most administrations depend upon the cooperation of at least a few abusive or antidemocratic regimes to advance their foreign policy goals and are likely to oppose policy changes that could result in embarrassing sanctions on these regimes. Furthermore, many country-specific foreign aid programmes are fiercely protected by influential lobbyists and congressional patrons. These groups will not hesitate to use their significant resources and access to stymie policy changes that threaten aid to these countries.

Finally, in isolation, curtailing US arms transfers to human rights abusers does little to address the willingness of other arms exporters to sell weapons to abusive governments. The absence of universally recognized (and enforced) arms transfer criteria, coupled with the steady proliferation of conventional arms production capacity, means that targets of unilateral US arms embargoes can simply buy their weapons from another, less scrupulous, exporter. Shrinking export markets have made the international arms trade extremely competitive. With so many exporters vying for scarce defence dollars, the incentive to sell weapons to any country with the money to pay for them is very powerful.

The resulting prisoner's dilemma reduces the effect of unilateral arms embargoes and undermines arguments for restraint. Forgoing lucrative, job-creating arms contracts is difficult for policy makers to justify when they know that the profits from those sales will go to competing companies from other countries. Through its *Code of Conduct on Arms Exports*, the European Union has attempted to curtail this type of undercutting, but its record is mixed within the EU itself and the code has little effect on arms exporters outside Europe. Such measures will remain only marginally effective until they are universalized, made more robust, and supplemented with aggressive bilateral efforts.

The purpose of this example is not to dissuade activists from calling for stronger human rights criteria, or to justify complacency amongst policy makers. Indeed, the stewards of the arms export control system—both inside and outside government—have an obligation to pursue new and better ways of promoting key norms. But it is important for critics to be fully aware of the difficulty of this task and the pitfalls that confront policy makers who attempt it. Despite these difficulties, US policy makers have made several critical improvements to the arms export control system in recent years. While far from perfect, this system has much to teach students of export controls about how to preserve and promote accountability in national arms export systems.

Notes

1. In the United States, commercial and government-to-government sales are processed through different programmes, one coordinated by the Department of State (Direct Commercial Sales) and the other operated by the Department of Defense (Foreign Military Sales). The Department of Defense also exports arms as excess defence articles, drawdowns and leases. For a thorough overview of the US arms export system, see M. Schroeder and R. Stohl, 2005, "US Export Controls", in *SIPRI Yearbook 2005: Armaments, Disarmament and International Security*, Oxford, Oxford University Press.
2. See United States, The White House, Office of the Press Secretary, 1995, "Fact Sheet: Conventional Arms Transfer Policy", 17 February, at <www.fas.org/asmp/resources/govern/whfacts.html>.
3. The threshold for congressional notifications ranges from US\$ 1 million for firearms sales to US\$ 200 million for military design and construction sales. For more information, see Sections 36(b) and 36(c) of the Arms Export Control Act of 1976, at <fas.org/asmp/resources/govern/aeca01.pdf>.
4. Correspondence with a Department of State official, 24 May 2005.
5. *Ibid.*
6. *Ibid.*
7. US Department of State, Directorate of Defense Trade Controls, "Defense Trade Controls—License Processing Times", at <www.pmdtc.org/processtime.htm>.
8. For more information, see R.F. Grimmett, 2005, *U.S. Defense Articles and Services Supplied to Foreign Recipients: Restrictions on Their Use*, Congressional Research Service, updated 14 March.
9. "Suspension of Munitions Export Licenses to Zimbabwe", *Federal Register*, vol. 67, no. 74, 17 April 2002, p. 18978, at <www.gpoaccess.fv/fr/index.html>.
10. United States, Office of the Secretary of State, 2005, *Congressional Budget Justification, Foreign Operations, Fiscal Year 2006*, 15 February, pp. 584–85, at <www.fas.org/asmp/profiles/aid/aidindex.htm#BudgetRequests>.
11. A stockpile of US-origin firearms located near a conflict zone is an example of a sensitive political situation that could result in more rigorous end-use monitoring. Stinger missiles, unmanned aerial vehicle technology and night vision devices are examples of sensitive weapon systems.
12. United States, Department of Defense, 2004, *Golden Sentry End-Use Monitoring (EUM) STINGER Missile and Gripstock Inventory Standardized Procedures*, Defense Security Cooperation Agency Policy Memorandum 05–10, April, at <www.fas.org/asmp/campaigns/MANPADS/DSCAMemorandum0510.pdf>.
13. United States, Office of the Secretary of State, 2005, *op. cit.*
14. United States, Government Accountability Office, 2005, *Arms Export Control System in the Post-9/11 Environment*, Government Accountability Office, February, at <www.fas.org/asmp/resources/govern/109th/GAO05234.pdf>.
15. United States, Government Accountability Office, 2004, *Improvements Needed to Better Control Technology Exports for Cruise Missiles and Unmanned Aerial Vehicles*, January, at <www.fas.org/asmp/resources/govern/gao_04_175.pdf>.
16. See note 19.
17. D. Fite, 2003, "A View from Congress", in T. Gabelnick and R. Stohl (eds), *Challenging Conventional Wisdom: Debunking the Myths and Exposing the Risks of Arms Export Reform*, Washington, DC, Federation of American Scientists and the Center for Defense Information, p. 155.
18. For more information on the Congressional Research Service, see <www.loc.gov/crsinfo/whatscrs.html>.
19. During a March 2004 congressional hearing, the director of the Defense Security Cooperation Agency linked improvements in Department of Defense end-use monitoring of UAV and cruise missile technology to the GAO report: "... we agree with the GAO on the importance of controlling cruise missiles, UAVs, and related technologies, [and] I am directing that these systems be included on the 'Golden Sentry' Enhanced EUM [End-Use Monitoring] listing of defense articles". Similarly, the Department of State directly attributes recent increases in end-use checks on cruise missile and UAV components to the 2004 GAO report. See Lieutenant General Tome Walters, Statement before the Committee on Government Reform, Subcommittee on National Security, Emerging Threats and International Relations, US House of Representatives, 9 March 2004, at <fas.org/asmp/campaigns/control/WaltersTestimony9march04.pdf> and Department of State, no date, "End-Use Monitoring of Defense Articles and Defense Services: Commercial Exports FY04", at <www.fas.org/asmp/resources/govern/109th/StateEUMfy04.pdf>.
20. The House Armed Services Committee is responsible for the annual Department of Defense authorization bill.
21. US House of Representatives, Committee on International Relations, 2004, *US Weapons Technology at Risk: the Department of State's Proposal to Relax Arms Export Controls to Other Countries*, Washington, DC, US Government Printing Office, at <www.fas.org/asmp/campaigns/control/U.S.%20Weapons%20Technology%20at%20Risk/U.S._WEAPONS_Report.pdf>.
22. P. Spiegel, 2004, "Bush Rebuked Over US Arms Waivers", *Financial Times*, 4 June.

23. W. Matthews, 2004, "Waffling on Trade Waivers for the UK", *Defense News*, 2 August.
24. Available at <www.washpostco.com/business-newspapers.htm>.
25. Amnesty International USA, 2005, *Hazardous Ventures: US Arms Transfers During the "War on Terror"*, information sheet. For the Department of State's 2003 *Country Reports on Human Rights Practices*, see <www.state.gov/g/drl/rls/hrrpt/2003/>.
26. These countries are Belarus, China, Cote d'Ivoire, Cuba, Cyprus, Democratic Republic of the Congo, Democratic People's Republic of Korea, Haiti, Indonesia, Iran, Liberia, Libya, Myanmar, Somalia, Sudan, Syria, Viet Nam, Yemen and Zimbabwe.
27. United States Foreign Assistance Act of 1961, Section 502B, at <www.fas.org/asmp/resources/govern/FAA-502B.pdf>.
28. S.B. Cohen, 1982, "Conditioning US Security Assistance on Human Rights Practices", *The American Journal of International Law*, vol. 76, no. 2 (April), p. 249.
29. *Ibid.*, p. 264.
30. *Ibid.*

