Rajiv Nayan

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How India Adjusts its Export Control System for Accommodation in the Global System

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Dedicated to
Shri K Santhanam
and
Shri R P Singh

Preface

In 2016, India joined the Missile Technology Control Regime (MTCR). This was followed by India joining the Wassenaar Arrangement and the Australia Group. All three are multilateral export control regimes. India is also seeking to become a member of the fourth important multilateral export control regime—the Nuclear Suppliers Group (NSG). Actually, in 2016, all versions of the media discussed the issue intensely after India had submitted its formal application for the membership of the Nuclear Suppliers Group. Discussions on the subject highlighted the existence of wide gaps in the understanding of the subject. This study is an attempt to fill in these gaps.

Export control, strategic trade control and strategic trade management often appear in the policy literature. All the synonyms convey different stages of the journey of the phenomenon of the regulation of goods, technology and services with the military, especially Weapons of Mass Destruction, implications going out of the country. The phrases need special understanding when embedded in global politics and in various levels of security.

The strategic trade management tradition is normally connected to the developed industrialised nations which supply a large number of items to the world and involve a number of practices which look simple but contain special meanings. However, the United Nations Security Council Resolution 1540 has heralded a new era in strategic trade management. To a great extent, the dominant practices of strategic trade management are now harmonised in the international community, with a vast array of countries having adopted them.

On the surface, strategic trade control and its practices appear like any other terms of economics and foreign trade. However, many of these practices have different meanings, which need to be understood and explained. Practices existing in other trade or security activities are applied for strategic trade management, but some specific ideas for strategic trade management have also been evolved or invented by the international community. This book discusses the key ideas of strategic trade management which have been adopted by a large part of the world.

When the context is India, a work on the subject has to resolve several complicated problems. With changes in India's world outlook, the country has had to change a large number of policy areas at different stages. India's association with strategic trade management or export control has been in existence for a long period of time. However, its even deeper engagement with the subject in the twenty-first century necessitates a study that examines its relationship with *all* the practices and values of the phenomenon. In fact, India has shared a very uneasy and troubled past with strategic trade control or export control. The UNSCR 1540, combined with India's engagement with and accommodation in the multilateral export control regimes, has begun a new era in India's outlook on strategic trade management.

Any study of India's policy regarding strategic trade management which involves multiple principles and procedures is always challenging. The idea of strategic trade control has been evolving very quickly in the Indian system, especially in the last decade and a half. As a result, laws and regulations as well as India's global engagement threaten to outpace any attempt to capture the current state of affairs relating to India's strategic trade management. This speed deters any writer from taking up the task of writing a definitive book—although this is also true, to an extent, for even those countries which have relatively settled or stable national export control systems. However, the fast-paced changes seem to have settled down greatly after the 2017 harmonisation of the Indian export control system with the Wassenaar Arrangement and the Australia Group. Relatively minor changes do not appear to be disturbing the broad contours of the now considerably crystallised Indian strategic trade management system.

It is this encouraging serenity in the Indian strategic trade environment that has made it possible to write this book. This does not rule out the possibility forthcoming procedural changes because of new technological developments or fresh security challenges. However, it is hoped that these changes will be easily accommodated and placed within given policy parameters and the now highly evolved legal and regulatory framework. Today, the pillars of Indian strategic trade management policy look firmly fixed.

Global Strategic Trade Management: How India Adjusts its Export Control System for Accommodation in the Global System is the first full-length book written on India and strategic trade management or global export control. Generally, the authors publish their papers in journals or as chapters in books. The different chapters of this book discuss both the different strategic trade management practices which India has adopted and how they have been simultaneously integrated into the global system. The book is designed to introduce readers to the Indian strategic trade management system in the context of global practices of strategic trade management which are discussed in the initial chapters. These initial chapters examine global practices in order to elucidate and illuminate how India's strategic trade management has been integrated and accommodated into the global system—the subject of the subsequent chapters.

I am grateful to all those who encouraged me to write a book on India's strategic trade management or export control system. I would especially like to thank Dr. Ajey Lele for giving me the idea to write a book on the subject and

Dr. Amandeep Singh Gill for always encouraging me to finish it. I am especially indebted to Shri R. P. Singh who initiated me into the subject; to Shri K. Santhanam who asked me to focus on it at the Institute for Defence Studies and Analyses, New Delhi, and develop an expertise on subject; and to the late Professor Matin Zuberi for supervising my thesis on Missile Technology Control, my first work on the subject completed more than two decades ago. I am thankful to Dr. Uttam K. Sinha, Ms. Preeti Singh and Ms. Radha Joshi for editing and giving shape to my manuscript.

Springer is indeed an exemplary and extremely understanding publisher. I am grateful to the entire team, especially Mr. Anil Chandy who introduced me to Springer and Ms. Sagarika Ghosh for signing the contract and remaining uncomplaining and cool. I missed several deadlines, but she was always considerate. This book would not have been possible without Springer's Ms. Nupoor Singh who may have acted tough but forced me to finish it.

Last but not least, special gratitude to my family—my mother, my wife and my two daughters. I used the time that should have been reserved for them to work on this book. All provided unending inspiration, though at times, they were—like many others—sarcastic and sceptical regarding the completion of the book. Needless to say, the news of the conclusion of the book has cheered them all.

New Delhi, India Rajiv Nayan
August 2018

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About the Author

Rajiv Nayan is a Senior Research Associate at the Institute for Defence Studies and Analyses, New Delhi, India. He has been working with the Institute since 1993, where he specializes in international relations, security issues, especially the politics of nuclear disarmament, export control, non-proliferation, and arms control. Rajiv was a Visiting Research Fellow at Japan Institute of International Affairs, Tokyo, where he published his monograph, 'Non-Proliferation Issues in South Asia'. He was also Senior Researcher at Peace Research Institute, Oslo, a Senior Visiting Research Fellow at King's College London, and a Visiting Fulbright Scholar at the Center on International Cooperation, New York University. He holds a PhD and a Master of Philosophy in Disarmament Studies and a Master of Arts in International Relations from Jawaharlal Nehru University, New Delhi. In his doctoral dissertation, he studied implications of the missile technology control regime for Indian security and economy.

Nayan is an Indian partner of Fissile Materials Working Group (FMWG) which is a Washington-based group of Non-Governmental Organisations active on nuclear security. He is a member of expert-level committees of organizations such as the Ministry of Defence and the Indian Council of Social Sciences Research. He is on the Advisory Council of Delhi School of Transnational Affairs, University of Delhi. He is a member of Governing Council/Society of the Maulana Abul Kalam Azad Institute of Asian Studies. Additionally, Nayan was a Member, Regional Network of Strategic Studies Centers Weapons of Mass Destruction/Border Security Working Group, a member of the governing council of the International Export Controls Association, hosted by University of Georgia in Washington, DC, and a member of the Export Controls Experts Group and Multilateral Security Governance in Northeast Asia/North Pacific of the Council for Security Cooperation in Asia Pacific (CSCAP).

Chapter 1
Introduction

Abstract Strategic trade management, strategic trade controls and export control all indicate a common phenomenon of security-economy interface in international political economy and international trade. India's relationship with the strategic trade management has evolved over the years. Factors such as the United Nations Security Council Resolution 1540 and the United States-India Civil Nuclear Energy Initiative have brought India and the strategic trade management close to each other. India's membership of the multilateral export control regime has further solidified its commitment to the strategic trade management. The book discusses India's integration with and accommodation in the global strategic trade management system. The dominant practices of the strategic trade management have been taken as indicators for the analysis of India's integration process in the global system. These dominant practices are spread in the legal, regulatory, and enforcement frameworks. India is active for outreach and international cooperation, which are also the focus areas of strategic trade management.

The book discusses the relationship of India with strategic trade management. The phrase—strategic trade management—has entered into the lexicon of policy studies in the twenty-first century. It is interchanged with phrases such as strategic trade control and export control. The increasing use of the phrase strategic trade management/control, since the beginning of this century, gave an impression that it would replace the phrase, export control, which has been in use for, at least, several decades, and possibly, sporadically for a few centuries. Later, in the first decade of the century, some writings, statements and seminar presentations started using the expression—strategic trade management. The idea, it seems, is to replace the negative word-control, and injects a positive connotation into the entire phenomenon.

However, the old phrases—export control and strategic trade control—are still dominating academic writings and policy documents. For the policy-making community, the older idiom—export control—is still popular, at least, for reference. Moreover, for the proper understanding of the phenomenon, the need for consulting old literature or policy statements is necessary. This further makes interchangeability of the three phrases necessary. Keeping this complexity in mind, the book uses the phrases export control and strategic trade control synonymously with the phrase

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strategic trade management. The book treats all the three phrases with the same meaning. As understood, export control is a technical fix to advance a desired strategic and security policy goal during peacetime. So do strategic trade control and strategic trade management.

In security or policy studies, strategic trade management refers to regulation of international commerce of domestic technology, services and goods which may be used for development of weapons, especially Weapons of Mass Destruction (WMD). Strategic trade management or export control denotes regulation, not ban. Strategic trade management basically regulates high-technology intensive commerce. Generally, it is perceived as a mechanism for regulating dual-use goods, technology and services. To a great extent, this perception is not wrong. The predominant concern of strategic trade management is dual-use items, including technology and services. However, strategic trade management covers purely military goods, technology and services as well. It promotes the objectives—national security, non-proliferation, foreign policy and regional stability.

Strategic trade management or export control, once known as a denial regime, is transforming itself into an approval regime.[1] Strategic trade management is basically a licensing act. This act involves a number of activities. Whether strategic trade management is primarily an economic activity or is a security issue depends on the context it operates. The fundamental principle of strategic trade management is balancing national interests: economic or trade interests and security interests of the country. A country has to manage this delicate balance leading at times to a jurisdictional overlap of institutional arrangements designed to undertake export control or strategic trade control.

The idea of export control became a dominant tool of statecraft with the beginning of the Cold War. Its need was felt by the Western Bloc to deny technology to the socialist or the Soviet Bloc. Of the Western countries, the United States (US) was most apprehensive about the Soviet acquisition of advanced Western commercial technology and its application for developing advanced weapons systems which could have detrimental effect on Western security. The idea was pushed in the US system vigorously. After realising that the US alone could not be successful in stemming the flow of advanced technology to the Soviet bloc, the US roped in its allies of the Western alliance system and friends from even outside the alliance system.

In 1949, the US and its allies started cooperating through an institutional framework, known as the Coordination Committee on Multilateral Export Controls (CoCom). Notwithstanding the participation of some of the US allies, the control of export business to the East European countries witnessed strong resistance from the European friends and allies of the US. Even the European countries participating in the CoCom looked reluctant to control commercial items. The North Atlantic Treaty Organisation (NATO) allies struggled over the harmonisation of their export controls systems. Frequently, incidents of the supply of sensitive goods to the Eastern Bloc surfaced, which led to acrimonious exchanges between the US and its allies. Yet, by

[1]The term was used in National Academy of Sciences (1991).

and large, the CoCom was shrouded in controversy, though the rules and regulation of export controls were in the public domain.

The period of détente started a new phase in strategic trade management. The advent of the Nuclear Non-Proliferation Treaty (NPT) seemingly began to shape the strategic trade management. The idea of non-proliferation overshadowed the old objective of high-technology denial to the Warsaw countries. The 1970s and 1980s witnessed the advent a few more multilateral export control regimes. In the 1970s, the Zangger Committee and the Nuclear Suppliers Group (NSG) were constructed to control nuclear commerce. The Zangger committee derived its mandate from the Article III.2 of the NPT. The NSG appeared to bring non-NPT countries like France into the control framework. Initially, it was called the London Suppliers Group. Informally, it was known as the London Club. In 1987, the Missile Technology Control Regime (MTCR) arrived at for controlling missiles and space items. The Australia group was established in 1985 for controlling chemical and later, even biological agents. Gradually, not only the US allies and friends started joining the control framework, but also Eastern European countries and the Soviet Union joined the multilateral export control regimes.

The multilateral export controls regimes underwent changes in the post-Cold War period. The most significant changes came in the NSG, which incorporated a dual-use list and the full scope safeguards as the criteria for supplying any NSG item to nonnuclear weapons state/country of the NPT. The end of the Cold War also saw the lapsing of the CoCom. It was replaced by the Wassenaar Arrangement, which controls munitions and some dual-use items. The 1990s witnessed the conclusion and the entry into force of the Chemical Weapons Convention (CWC). The CWC has fairly detailed arrangements for export control of some of the chemical agents. The earlier treaties like the Biological and Toxin Weapons Convention (BTWC) and the NPT had the provisions for control but did not have details for it.

The beginning of the twenty-first century was greeted with events like the September 11 incidents. The spectre of non-state actors acquiring WMD loomed large. International laws and treaties were modified to meet the emergent challenge. Export control also adapted itself to meet the new challenge. The multilateral export control regimes reflected the need for new changes to meet the challenge of WMD terrorism. Meanwhile, the ongoing clandestine proliferation network shook the world by revealing the extent and the intensity of its operation. The existing fear of WMD terrorism was further aggravated by the AQ Khan or the Pakistan led proliferation network.

Yet another phase of strategic trade management happened in 2004, when sinking its differences the international community passed the Resolution 1540 of the United Nations Security Council (UNSC). This resolution has been guiding the international endeavour to control WMD items. A large number of countries hitherto either alien or marginal to the idea of strategic trade management have adopted export control mechanisms in their domestic control or regulatory systems. The UNSC Resolution 1540 has been institutionalised to assist in implementation of this endeavour. Countries have either started adopting new laws or adapting old laws for export controls because of the UNSC Resolution. Practices for strategic trade management have

entered into regulatory systems of these countries to manage advanced technology trade. Some of these practices are useful for munitions controls. The UN took a few initiatives to regulate small arms and light weapons. It also facilitated the conclusion of the Arms Trade Treaty (ATT), which entered into force in 2014. Although 130 countries have signed the ATT, as of May 7, 2018, yet only 94 have ratified it. India has not signed it.

Interestingly, for a long period, India opposed the Western export control regimes in general and the multilateral export control regimes, in particular. These technology denial regimes forced India to become self-reliant and self-sufficient in several technological areas. Admittedly, because of these regimes many of the peaceful and military projects were delayed and became costlier. But this did not mean that India was opposed to reasonable and responsible controls for maintaining international security and global stability. In fact, immediately after its independence in 1947, India had formulated a policy to control the export of Monazite and Thorium Nitrate. Over the years, India, too, is developing its export controls system through various mechanisms, and has already integrated itself with the global export controls arrangement. For its integration with the global system, India has adopted prevalent best practices for export controls.

India, as a potential supplier of sensitive items contributing to WMD and conventional weapons, is considered extremely important for the global export control order evolving over the years, and rapidly developing in the last decade. India is a nuclear weapon country. Although in 1974, India demonstrated its technical prowess to develop a fission device through its Peaceful Nuclear Explosion, yet it exercised restraint and refrained from weaponising even after demonstrating its capability. But in 1998, through a series of nuclear tests in different categories, it declared its intention to become a nuclear weapon country. Like other Asian countries such as China and Israel, India has not declared the size of its nuclear weapon stockpile. It has a vibrant nuclear industry, which is catering to the need of the Indian nuclear weapons programme.

Similarly, India has indigenously developed its capability to produce nuclear energy and many other peaceful applications of nuclear science and technology. It has indigenously developed power reactors with the capacity of 540 MW. It is developing four 700 MW reactors. These reactors have crossed key milestones and are in the final stages of completion. In total, it is operating 22 nuclear reactors,[2] including two 1000 MW Russian designed rectors in Kudankulam. India is also in the advanced stage of development of fast breeder reactors in Kalpakkam. The Indian nuclear industry, including private companies, has been contributing substantially to the construction of the Indian nuclear reactors. India has an impressive base of supply chain companies, which produce NSG controlled items.

India has also leaped in space programme. The country has made impressive achievements in developing satellites, launch vehicles and many other applications of space technology. Of all the accomplishments, the most significant for strategic trade management is the development of various launch vehicles—the Polar Satellite

[2]Nuclear Power Corporation of India Limited (2018).

Launch Vehicles and Geosynchronous Satellite Launch Vehicle (GSLV). Currently, the country has fourth-generation launch vehicle. The indigenously developed cryogenic engine gives the third stage flight to the GSLV. In 1992, India was put under sanctions for procuring cryogenic engine from Russia. India is placing a number of satellites, including foreign through its launch vehicles. It has successfully achieved its Moon and Mars missions. It is also developing reusable engines.

India has also indigenously developed ballistic missile programmes. The Agni-series is the key ballistic missile development programme. The Agni series has ballistic missiles of all the ranges—medium, intermediate, long and intercontinental. India has developed engines of these ballistic missiles indigenously. India also has cruise missiles. Drones are being designed and developed even in universities and by private companies. Drones are being considered the vehicle of the future. At present, the Indian drone programmes may not be world class. However, considering its design capability and industry supplying items to the space and missiles programmes, in the near future, the country may emerge as an important player in the global drone market.

Joint efforts of the Indian government and the private sector have created 'a globally competitive biopharmaceutical industry' in years. It is progressing very fast and is ranked within top 15 countries in biotechnology. However, the most important part is its great potential. It is entering into collaboration with many developed and leading countries in the biotechnology sector. Besides, the Indian government has announced several incentives to boost this sector. Under the Make in India programme, biotechnology industry is going to witness further progress. This sector is eyeing the global market to sell its quality products. It has already established interactions and relationship with the global marketplace.

Similarly, chemical industry of India is the sixth largest in the world in terms of production. India produces many chemicals listed on the CWC and the Australia Group. India's chemical industry has been growing very fast in recent years. India has also come out with a policy for developing some specialised chemicals which have domestic and international markets both. It has been exporting chemicals to different parts of the world. Some leading private companies such as Tata Chemicals and United Phosphorous Limited are active in the international market. Other Indian companies are also entering into the global market in Asia and elsewhere.

Now, India seeks to get accommodated to the global non-proliferation and export controls regimes. India's adherence to the NSG and the MTCR eventually led to the clean NSG exemptions for India. Gradually, even critics started supporting not only this deal, but also a merit in engaging a responsible exporter like India. The harmonisation of the Indian export controls system with the guidelines and technological lists of these two regimes has further integrated India with the global system. This was also a big step towards India's accommodation with the global system. A strong section of the strategic and policy-making communities of the member countries of the multilateral export control regimes has been demanding inclusion of technologically emerging countries like India into these regimes. The idea behind India's inclusion is that the regimes may turn more robust with the entry of a potential supplier of sensitive goods.

The book examines whether India is successfully integrating or trying to get itself accommodated to the global strategic management system. It also assesses the level of India's integration with the global export control order if regulation has really happened. The book describes the mechanisms that India is adopting for the task. It has used published primary sources. The United Nations and other international organisations documents, Indian Parliament proceedings, Indian officials' speeches and statements along with notices and notifications released by the Indian Directorate-General of Foreign Trade, the Ministry of External Affairs, the Department of Customs and Excise and the Department of Atomic Energy are used in the book. These chapters have also used secondary sources and study reports published on the subject wherever required. To fill the gap, the book has also used the interview technique. Indian and international officials, and experts and industry leaders have been interviewed. The objective of the book is to demonstrate the shift in the Indian approach towards strategic trade management from a strong critic to a supporter.

The reader will get an insight into the evolution of export controls of goods which may have implications for the development of Weapons of Mass Destruction of nuclear India with a robust biotechnology, chemical and nuclear industrial base. Politically, the country was sceptical of the idea of export controls because it was a target of such a system. The reader will learn about the tools, the forces and the incentives because of which it has decided to evolve its policy vis-à-vis export controls or strategic trade management.

Chapter 1: Introduction—contains the global best practices of export control. This chapter maps common export control practices existing in the world. This also has international organisations and institutions playing major or minor role in export controls or strategic trade management. It will itemise broad legal, regulatory and enforcement mechanisms existing in the world.

Chapter 2: Dominant Practices in Strategic Trade Management—has discussed a number of practices of strategic trade management, which are known as best practices. These practices are mechanisms, which are needed for operation of strategic trade management. It lists these practices ranging from legislation to regulatory procedures for licensing to enforcement mechanisms. It has more detailed discussions on emerging and old practices of licensing.

Chapter 3: Enforcement Practices in Strategic Trade Management—has the global practices for enforcement of strategic trade management. This chapter finds that an international organisation like the World Customs Organisation (WCO) has started playing a very active role in strategic trade management. Different practices are devised with the help of the member countries, and voluntarily other members are embracing these practices. This chapter describes dominant tools of enforcement in practice globally.

Chapter 4: Comparing the Major Systems—A comparative analysis of the systems of the traditional export controls countries and new export controls countries are done in this chapter. This chapter basically covers major and minor differences within the strategic trade management systems of the Western countries which have had the oldest systems of export controls. Then Western systems and individual countries' systems will be contrasted with the Russian and major supplier countries.

The objective of this chapter is to demonstrate that each country adopts a strategic trade management system for its requirements. India has also set up its system to suit its requirements. So, there is no need to copy the western model. This chapter overwhelmingly uses primary sources.

Chapter 5: Philosophy of Indian Strategic Trade Management—Although India has joined hands with the developing world in opposing unreasonable restrictions on advanced technology transfers, yet for a long period it has adopted a moderately good control system. In recent years, the Indian system has evolved considerably. This chapter focuses on both the constant and evolutionary philosophies of export controls in India.

Chapter 6: Indian Legal Framework for Strategic Trade Management—This chapter provides details of the legal framework existing in India. To provide statutory authority to export controls, the India legal system already had many laws. These laws are used for export controls. However, in 2005, the Weapons of Mass Destruction Act was passed to fill in the gap. This Act was basically brought in to implement the United Nations Security Council Resolution 1540. Later, a few more acts such as Foreign Trade Development Regulation and Chemical Weapons Convention Act were amended to reflect changes for the new export controls laws and requirements. This chapter essentially uses the bare acts and provides some background of the introduction of recent laws.

Chapter 7: Indian Regulatory Framework for Strategic Trade Management—This chapter enumerates the regulatory system of India for export controls. This chapter uses notifications of the Directorate-General of Foreign Trade and the Department of Atomic Energy. However, it will rely on the interview technique to fill in the gap.

Chapter 8: Indian Enforcement System for Strategic Trade Management—This chapter provides details of the enforcement framework. Outside India, there are misgivings about the enforcement system for export controls of India. Some complain lack of information and others feel the literature provides incorrect information. True, there is little published information on the subject. However, interactions with the Customs Department indicate that the country has a very advanced system for enforcement. The Risk Management System used for other controls is now also being used for Export of Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET) controls. Training programmes are also in full swing. World Customs Organisation is providing inputs to the Indian system. This chapter uses primarily field trip and interview techniques. The author's interaction with the industry is also recorded in this chapter.

Chapter 9: International Cooperation and Indian Strategic Trade Management—This chapter provides details about India's bilateral and multilateral cooperation on export controls. This chapter provides the emerging contours of international cooperation and examines the possibility of the emergence of international/global export controls regime. This chapter will rely on published documents and interview with key officials involved in the task. This chapter may be divided into two parts. One part could be devoted to India's evolving relationship with the multilateral export controls regimes.

Chapter 10: Conclusion—The concluding chapter will discuss the principal question whether India is integrating with the best global practices or not and what is the level of India's integration.

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Chapter 2
Dominant Practices in Strategic Trade Management

Abstract Strategic trade management is an important tool of global governance after the passage and implementation of the United Nations Security Council Resolution 1540. Strategic trade management needs operation through a number of practices which are known as best practices. Although the very use of the term—best practices—may convey the idea that these mechanisms are the ultimate solution to strategic trade management, in reality, all the practices have evolved over the years. Best practices, in governance, are basically the dominant practices embraced by policymakers and implementing agencies. In strategic trade management, these practices range from legislation to regulatory procedures for licensing to enforcement mechanisms. However, among all the practices, licensing practices are the most dynamic. The legislation provides statutory authority for export controls or strategic trade management. As strategic trade management involves trade, domestically, the commerce ministry is expected to be the natural nodal agency for licensing. However, in practice, it is not the rule. In different countries, different ministries and departments occupy the central or coordinating position for licensing in particular and strategic trade management in general. In most of the cases, dual-use and military items have different licensing agencies. The countries, which export civil nuclear items, may also have separate agencies to license nuclear items. Yet, the idea of a single agency for strategic trade management is gaining ground. Several countries are developing a single list of control of sensitive items, which may have implications for security.

2.1 Introduction

Strategic trade management, over the years, has developed some practices to regulate goods, which have WMD or pure military implications. These practices are called or are popular as best practices. These are rules and regulation adopted by most or dominant countries of the world. The dictionary meaning of a best practice refers to as 'a working method or set of working methods that is officially accepted as being the best to use in a particular business or industry, usually described formally and in detail'.[1] Supposedly, the term 'best practice' has its origin in the medical and

[1]Cambridge Dictionary (2018).

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legal professions where it was used as an everyday term 'to describe solid, reputable, state-of-the-art work'.[2] Later, several disciplines started using the term. At times, the term is considered synonymous with good or appropriate practices.

Ironically, in the policy literature, the use of the term 'best practice' means the only available solution to a problem. A similar problem is also found with the use of the term of good practice. A suggestion for the use of the term 'Excellent Practice' is made.[3] The argument is that use of the term an excellent practice is more liberal and indicates a scope for 'an improvement on best'.[4] Whether it is the use of good, excellent or best, the question remains about the basis or bases on which the judgement is made. In each case, 'One True Model' is imagined, and this model is to be either invented or discovered.

In reality, each field or policy area has its own set of good practices or sets of good practices. On some practices there could be a consensus, thereby giving the impression that a perfect model is constructed or invented. Usually, there are differing views on certain practices. As the best practices are considered subjective in nature, these are also called 'best guesses'.[5] However, despite the problem of definition, in each policy area, best practices keep evolving and quite significantly, stakeholders recognise and understand this truth. At times, best practices are called so because these are universally accepted and recognised by the dominant section.

The same concept of best practices operates for strategic trade management as well. The complexity of technology and the changing character of threats are making the best practices become dynamic. In strategic trade management, global best practices are basically a set of laws, rules, guidelines and other mechanisms which intend to help licensing and enforcement authorities as well as industry. The objective is to prevent any risky transaction falling into unauthorised or wrong hands.[6]

2.2 Laws

Laws are necessary to implement export controls. Laws provide a framework for different regulations which in turn help licensing authorities in implementing a policy. In fact, strategic trade management or export control derives its statutory authority from a country's legislative system. Legislation gives legal sanctity to policy goals of strategic trade management. As a result, consistency is maintained in policy decisions even if licensing authorities scrutinise various parameters for granting licenses for different items supplied to different destinations. If a decision goes wrong or is perceived wrong, an applicant has the option of getting it rectified through judiciary. In the absence of laws, the national authority cannot impose penalty or punishment.

[2] McKeon (1998).

[3] Coffield and Edward (2009).

[4] Coffield and Edward (2009).

[5] Kalev et al. (2006).

[6] United States Department of Commerce, Bureau of Industry and Security (2018).

Laws also assist the executive branch in understanding its responsibilities well. Thus, a good legislation draws a clear-cut line of authority for managing strategic trade.

Then comes the question: what is a good legislation for strategic trade management or export controls? Is there any model legislation for it? For years, the international community in international bodies, meetings and platforms have debated over ideal elements for legislation for strategic trade management. Some prefer explicit and detailed provisions, but others support a broad mandate which may help the licensing and enforcement authorities in managing strategic trade in a dynamic situation.

National laws of different governments, as a result, are broad as well as detailed. Similarly, while some countries use the general/unspecific law of the land for strategic trade management others have specific laws for the purpose. Generally, the nature of domestic legislation of a country is mixed. It uses both the general law of the land and specific export control-related legislation. Increasingly, even older export control countries are passing specific export control-focused laws.

International organisations have not yet developed any template which automatically finds its way into a country's legislative system. Yet as discussed, over the years, meetings and institutions have thrown certain provisions which are considered indispensable components for the legislation required for strategic trade management or export controls. Some leading export control countries like the US are also working out a model of legislation containing some basic elements for strategic trade management. For example, one of the US Government documents lists some components of the legislation for strategic trade management. The components listed by the document are as follows:

> I. Legislative purpose or intent; II. Establishment of jurisdiction over territory, transactions, and people; III. Establishment of jurisdiction over items; IV. Authority to implement export control processes; V. Assurances of transparency; VI. Responsibilities of the parties; VII. Requirements for documentation; VIII. Confidentiality and procedures for information sharing; IX. Authority to enforce the law and the penalties for violations[7]

Though export control is enforced through national laws, yet a country party to a treaty has to incorporate responsibilities, obligations, liabilities and privileges accruing from a treaty or bilateral or multilateral agreements and understanding into its domestic laws. The Chemical Weapons Convention (CWC) and the UNSCR 1540 are the most dominant international legal forces, though there are other international legal entities which enter into national legal systems. Similarly, guidelines in different international bodies and organisations are also finding way into the national legal systems. At times, the guidelines issued in the multilateral export controls regimes are implemented through domestic legislations of the member countries. Moreover, the guidelines for export controls are adopted not merely by the members of these bodies and organisations, but also by other countries. Some of these countries like to call themselves adherents. As a result, strategic trade management is gradually moving towards some kind of international standardisation.

The passage of the UNSCR 1540, which is a binding resolution, began a new phase for global strategic trade management. The UNSCR 1540 underlined the significance

[7] United States Department of State (2017).

of the legal framework to outlaw proliferation. The resolution has a number of operating paragraphs highlighting the significance of laws and rules for WMD control. The resolution urged that 'all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-state actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery….' A new set of countries was encouraged to adopt laws for WMD control. The UNSCR 1540 committee created a data base of legislations of member countries of the UN. Countries use or may use the data base to improve their legal systems.

Export controls laws for strategic trade management are legislated for a variety of reasons, though they may have a narrow focus in the beginning. On February 28, 1949, the US enacted the Export Control Act. Although it was considered the first peacetime comprehensive system for export controls, yet it was merely seen as an extension of the Trading with the Enemy Act of 1917 against designated countries. The short supply criterion is added to national security and foreign policy criteria for controls in several countries. Non-proliferation related control falls in both types of control-national security and foreign policy. The UNSCR 1540 has illuminated the significance of WMD related controls, though provisions for this kind of control existed much before.

Generally, all the countries control sensitive export through multiple laws. The US, which is considered the leader in export controls, has the Arms Export Control Act for controlling conventional weapons, and the Atomic Energy Act for controlling nuclear items. Earlier, to govern dual-use goods, it had Export Administration Act, which lapsed in 1979. The US tried to legislate a new law for dual-use goods control. In the absence of such a law, the International Emergency Economic Powers Act is providing statutory authority to the US Administration to administer exports of dual-use goods. There are other laws, which are used, for export controls for specific purposes. Australia takes help of laws such as the Defence Trade Controls Act 2012 and Weapons of Mass Destruction (Prevention of Proliferation) Act 1995. In Canada, the Export and Import Permits Act, the Nuclear Safety and Control Act and the Chemical Weapons Convention Implementation Act are some of the laws which provide the statutory framework in the country.

Likewise, the established countries in Europe, too, have multiple laws for administering export of sensitive goods. Although the UK has the Export Control Act 2002, yet it has the Customs Act to assist enforcement of export controls. Germany has laws such as the Foreign Trade and Payments Act and the War Weapons Control Act; France has different laws such as Act No. 80-572 of July 25, 1980, Act No. 98-467 of June 17, 1998 and Act No. 72-467 of June 9, 1972. Sweden has laws such as the Nuclear Activities Act and the Military Equipment Act. However, in recent years, the countries are discussing merits of a single legislation. Some new entrants like Malaysia are preferring a single legislation for strategic trade control. Such a legislation may become the principal legislation but it is always assisted by other laws, mostly existing in a country for a long period. Some of the countries, initially used old laws for strategic trade control, and later, to bridge the gap, enacted more focused laws.

2.3 Regulation

For strategic trade management, regulation is considered as necessary as enacting a law. In the EU system, 'a "regulation" is a binding legislative act'.[8] A World Bank study explains regulation as 'the diverse set of instruments by which governments set requirements on businesses, citizens and the public sector. Regulations include laws; formal and informal orders and subordinate rules issued by all levels of government; and rules issued by non-governmental or self-regulatory bodies to whom governments have delegated regulatory powers'.[9] Several countries include some provisions in their legislative systems, which should otherwise be included in the regulatory system. Though many laws and acts possess specific provisions relating to the subject matter, yet laws or acts or legal codes basically provide broad frameworks or principles. The stage of regulation generally comes after the enactment of law. Even when certain specific issues are incorporated in the legal body, for administrative purposes, much more detailed information is required. Regulation is to provide further details. It is the practical aspect of the legal process. It is also called secondary legislation. There are other entities such as order and ordinance which are also called secondary legislation.

As regulations are merely details of legislations, regulations for export controls are generally formulated by the administrative or executive organs of the national governments. Different procedures and rules emerge out of the regulatory system to cater more specialised need of strategic trade management. Details help in an efficient, effective and transparent export controls operation in a country. A general law, in some countries, may provide statutory mandate for licensing or enforcement of strategic goods. Yet, regulation is expected to be more specific in nature so that it provides solution to emerging issues relating to strategic trade management. Regulation specifying issues in greater details are supposed to guide authorities better.

A better or properly specified regulatory system encourages predictability in the decision making. In fact, a good regulatory system is considered indispensable for global security and trade governance. A World Bank study notes, 'Good regulatory governance is grounded in the view that ensuring the quality of regulation is a permanent and essential role of government, not a one-off set of improvements, and that institutional capacities should be designed around a clear view of the appropriate use of regulation in society'.[10]

Globally, the emerging norm is that a regulatory mechanism consisting of cumbersome rules and procedures accompanied with the highly intrusive inspection regime needs to be replaced with a compliance-oriented system. In the strategic trade management, some stakeholders like Industry have been demanding simplification of the regulatory system, yet by and large, all the countries, including old export controls countries are amassing rules and procedures to meet challenges. Even the process to

[8] European Union (2017).

[9] World Bank (2010).

[10] World Bank (2010).

discard redundant rules is very slow. With the increasing intervention of the multilateral bodies, the regulatory body is fattening up.

As some countries have multiple regulatory systems for different sets of items, different departments and ministries formulate regulations for their needs. The Internet revolution has enabled countries to make their regulatory systems available online. It has made possible the 'One-stop shop' experiment of some countries. As of now, publishing all the rules on one website may not have become a reality for most of the countries. But gradually, it is on the path to become the most dominant practice. Even changes made in the regulatory systems become available to an interested party. This has greatly promoted transparency in the strategic trade management which was earlier marked with secrecy and opaqueness. Online applications are making the task of companies easier, but the results and details of the applications are still not easily available. This is true not only for new export controls countries but also for older countries. So, a great deal of regulatory transparency is witnessed but details of implementation and enforcement are not available so easily across the world.

Introduction of major changes in the regulatory systems often takes time because just like legislation it also engages discussions of different stakeholders. Still, when an executive body introduces new provisions in the regulation or brings about new changes in existing provisions, changes occur faster than a law or an act promulgated by a legislative body. This is partly because of meeting the operational requirements and partly because of the less cumbersome process or even a simple procedure of regulation or rulemaking. After getting the statutory authority or mandate from a legislative body, an executive body keeps making changes to address new challenges or meet new requirements. For example, if a government introduces a system of online application, or for that matter, a paper application form, it is generally easier to introduce minor instructions or guidance to fill up forms.

In the contemporary world, there are multiples sources for enriching regulatory practices or development of practices for strategic trade management. As discussed, domestic legislation is one important source for development of regulatory practices. A country like the US, which has been managing strategic trade since the beginning of the Cold War or before, may have some original provisions coming through its legal system. Interestingly, many countries, including allies of the US, have been adopting provisions of the US legislation.

Gradually, the multilateral export control regimes have been contributing to several best practices, which are enlisted in the regulatory systems of countries. The multilateral export controls regimes are becoming the reference points for the regulatory systems of several new export controls countries. Benchmarking or harmonisation is becoming another feature or trend of the global practice. During the Cold War period, harmonisation of export control regulatory practices was a major issue for US and its European allies. The UNSCR 1540 and the matrix of its committee have greatly helped in harmonising the export control systems of a large number of countries.

The treaties are another source of the regulation making. The CWC schedules are common among the member countries of the Convention. Earlier, the NPT implementation led to the formation of at least two export controls regimes, which in

order to do a faithful interpretation of the treaty, developed guidelines and drew lists. These are generally found in the regulatory systems of controlling countries. Over the years, both members and many non-members of the regimes have adopted these guidelines and lists.

2.4 Traditional Practices

2.4.1 End-Use and End-User Control

End-use or end-user control has become a universal feature of strategic trade management. Generally, an end-user is referred to as an entity—a person or an organisation—that ultimately makes use of a product. The Merriam-Webster dictionary defines 'end-use' as: 'The ultimate specific use to which a manufactured product (such as paper) is put or restricted'; and for the Oxford dictionary: 'The application or function for which something is designed or for which it is ultimately used'.

Even official documents define end-use more or less the same way. For example, the Handbook on Export Controls of the Canadian government defines: 'In general, the end-user is the entity that employs or uses the goods or technology that were exported from Canada for the purpose for which they were intended.'[11] In many cases, the Consignee is the end-user of an exported good or technology. In other cases, when there are several foreign parties, the end-user may be more difficult to identify. The international community and organisations undertake studies to refine the end-use/end-user issue from time to time.[12]

The basic objective of end-use control is to ensure that an exported item is not diverted for the purpose or use that has not been authorised in the license. A supplier company is expected to give an end-use certificate along with its export application. It is important not only for licensing purposes but also for enforcement. Credibility of the end-user helps the authorities in deciding the grant of license or the approval of an export application. The text of the end-user certificate is generally a product of understanding between supplier and recipient countries and parties. The multilateral export control regimes like the Wassenaar Arrangement[13] and other countries[14] and bodies[15] in their guidelines may provide details of end-use but the basic philosophy remains the same that any item is to be used for what it is stated to be used.

An end-user could be security agencies/government departments or a commercial company/a manufacturing unit.[16] A company or an entity is an end-user when it uses

[11] Government of Canada, Global Affairs Canada (2015).

[12] United Nations Office of Disarmament Affairs (2011).

[13] For examples, the Wassenaar Arrangement (2015b, 2016a, b).

[14] For example, the United Nations Institute for Disarmament Affairs (2016) and Australian Government Department of Defence (2017).

[15] United Nations (2017).

[16] Wassenaar Arrangement (2014).

goods for the making of even components, or it uses an imported technology to manufacture new products. Even when an entity integrates technology and different goods into new products, it may be called the end-user of the good or technology. Subsequently, the new products may be sold by the foreign manufacturer to a third party. When an importer of an item sells it in the original form, it is not an end-user. When the importer sells or exports the item to an entity of its own country or another country, and that entity uses the item; then the third party will be the end-user. Significantly, if an item is repaired but the owner of the item is not the entity which is repairing but the entity which is getting it repaired, then the end-user is the entity that owns the item. A sound practice is that if there is an element of uncertainty regarding end-users, a supplier needs to provide as much information as possible. All the copies of contracts and invoices are to be submitted to licensing authorities.[17]

2.4.2 List Based Control

List making of sensitive goods and technology occupies a central place in strategic trade management or export control. The existence of such a list helps the task of a licensing authority. It enables licensing authorities in assessing a license application for export. Although a single list for controlled items is gaining ground, yet for regulating strategic trade, multiple lists exist in the control systems of different countries. Typically, in the big supplier countries, dual-use goods and military lists have existed separately. A developed country may also have three lists—military, dual-use and nuclear.

However, the countries that keep multiple lists of items shift items from one list to another. Even some items are delisted when it is concluded that the particular item has lost relevance for control. A country is free to make its own list of items for control. Some advanced industrial countries, which have a long history of export control of sensitive items, have evolved their own criteria and mechanisms for constructing the list of these items. The general dilemma while constructing the list is that whether it is comprehensive or focused and effective. The phrase—taller walls around smaller items—became a dominant issue in the post-Cold War period not only in the US, but also elsewhere.

A list may contain both categories of items: prohibited and controlled. Prohibited items are not sold outside the country. These are generally banned. A control list contains items which are transferred with a great deal of restraint. These items require licensing.

After the passage of the UNSCR 1540, several new countries, which are not so industrially advanced and are new into export control of sensitive items, have also constructed their own lists. The lists of old export control countries also act as guides to new export control countries. Yet, for these countries, the lists of multilateral export control regimes have emerged as the most convenient reference points for

[17] Wassenaar Arrangement (2011).

constructing their national lists. The multilateral export control regimes, in turn, adopt several criteria to create their lists. The Wassenaar Arrangement has two lists: munition list and dual-use goods and technologies list. The Wassenaar Arrangement undertakes a review of the lists 'regularly to reflect technological developments and experience gained by Participating States, including in the field of dual-use goods and technologies which are critical for indigenous military capabilities'.[18]

Besides, the Wassenaar Arrangement has its own criteria for making the list for dual-use goods and technology, which is further divided into two categories: sensitive and very sensitive. The Wassenaar Arrangement uses criteria[19] such as foreign availability outside participating states, the ability to control effectively the export of the goods, and the ability to make a clear and objective specification of the item for creating the dual-use list.

The NSG tasks its Consultative Group and Technical Experts Group to keep the list 'complete and up-to-date with technical advancements'.[20] For the purpose, the NSG Consultative Group asks Technical Experts Group that meets at least once a year to take a few issues into account for updating the lists. These issues are: 'Are there control entries that should be added or deleted? Are there control entries for which technical parameters have become obsolete or outdated and need to be changed/updated? Have new and emerging technologies and recent developments applicable to nuclear activities been duly accounted for as appropriate and needed?'[21]

In the 2010 plenary meeting of the NSG participant countries agreed to create 'a technical group for a fundamental review of these lists'[22] to keep them updated. The 2010 Group was known as Dedicated Meeting of Technical Experts group.[23] It undertook a 3-year fundamental review of the two control lists. It suggested 54 changes in both the lists and out of which 28 amendments were accepted.[24] However, 2013 plenary took a decision to publish all the 54 recommendations.[25] In 2013, the Group gave way to the formation of Technical Experts Group.[26] The Technical Experts Group further refines the criteria for determining both the lists of the NSG (Table 2.1).

The Missile Technology Control Regime (MTCR) has an annex in which two categories of technology are listed.[27] The list is restructured intermittently to add intelligibility. Moreover, the restructuring is done to incorporate any new technology relevant for the objective of the regime. The MTCR advises stricter control for the Category I items. The guidelines suggest 'an unconditional strong presumption of

[18] Wassenaar Arrangement (2015c).

[19] The Wassenaar Arrangement (2015a).

[20] Nuclear Suppliers Group (2010a).

[21] Grossi and Goorevich (2015).

[22] Nuclear Suppliers Group (2010b).

[23] Grossi and Goorevich (2015).

[24] Nuclear Suppliers Group (2013).

[25] Nuclear Suppliers Group (2013).

[26] Grossi and Goorevich (2015).

[27] Missile Technology Control Regime (2018a).

Table 2.1 Criteria for listing items on the NSG lists

List-1	List-2
Do the technologies/commodities meet the 'especially designed or prepared' criteria for the processing, use, or production of special fissionable material? 'All relevant factors should be considered together in context (no single factor may be sufficiently unique for an unambiguous EDP determination)'	Do the technologies/commodities meet the criteria of 'significance' and 'controllability'?
Physical dimensions	Is it useful to control these?
Dimensional tolerances	Have proliferants actually sought these?
Material(s) of construction	Must alternative technical paths also be controlled?
Performance specifications/characteristics	Will controls have a significant effect?
Installation-specific features	Is it feasible to control these?
Manufactured to customer-supplied specifications?	How many suppliers, magnitude of non-nuclear usage, quantities needed?
Quantity	Extent of non-nuclear commercial use Supply sources outside regime Substitution cost
Procurement in matched sets?	Impact on trade/economics
End-user and stated end-use	Number of suppliers

Source http://www.nuclearsuppliersgroup.org/images/NSGChairCGChairRevConPresentation.pdf

denial regardless of the purpose of the export' and absolute prohibition for Category I items. This category is to be exported only in the exceptional cases. However, the MTCR is flexible for Category II, except when there is a fear that it might go for WMD delivery.

For chemical and biological agents, another multilateral export control regime, the Australia Group, has also drawn control lists. The Australia Group has developed its lists by consulting its member countries. These lists are 'adjusted periodically to ensure their continued effectiveness in the face of technological advancements'.[28] The three schedules of Chemical Weapons Convention also figure on the export controls systems of the member countries of the Convention. However, Biological and Toxic Weapons Convention does not have any detailed list of items. Thus, it leaves its member countries to draw its own list of biological agents or look towards other countries or Australia Group for reference.

A list of countries and organisations, which are under UN sanctions, is also maintained. Some countries prepare a list of countries and organisations, which have poor record on human rights and democracy. This is also called foreign policy related

[28] Australia Group (2018).

controls. Another list is of some entities which are to be denied license of controlled items. At the same time, some countries maintain a list of entities which need extra licensing precautions or restrictions.

2.4.3 Licenses: Types of License

In strategic trade control, export authorisation to a supplier is called license. To supply a controlled item, generally, a supplier has to apply for license from licensing authorities of its country. In case of some items for some or specified countries, there could not be the need for license. License exceptions of strategic trade are normally practiced among countries which share common security interests or threat perception. License exceptions are common to military allies and close political friendly countries both. The need and nature of license depends on factors such as the destination and the end-use of an item.[29] License makes the task of enforcement easier.

At present, a single license or uniform license is not in practice. For different groups of items, different licenses are issued worldwide. A number of countries issue one license for military item, and a different for dual-use. As discussed earlier, some countries separately maintain a list of nuclear items; so, it could have a different kind of authorisation for nuclear items.

Should there be one license for an item to be supplied by the same supplier? Again, the world has no singular practice. Countries issue different types of licenses for the same item and for the same supplier. There are individual license and bulk license indicating the number of times an exporter is authorised to export an item. The idea behind the bulk license is to cut down the application processing time for an exporter if the transaction is not sensitive and the destination is reliable. There are also licenses issued for different activities such as brokering, deemed and transhipment.

Is a type of license indicative of practice of developed or old export control countries? The answer to it is no. The countries are adopting a mixed system of licenses. Even some new countries such as the Philippines are also granting bulk licenses to their suppliers. Though some countries prefer giving license on a case-to-case basis, the growing tendency is to use three types of licenses: individual, general and global. It is basically sculpted on the model European countries are using. For example, the UK issues licenses such as Open General Export Licenses for 'less restricted exports to less restricted destinations', Standard Individual Export Licenses 'for a set quantity and/or value of goods', and Open Individual Export Licenses for 'long-term contracts, projects and repeat business'. These licenses are issued depending on the credentials of the buyer, the seller and the item. The UK also issues licenses for Transshipment controls, brokering and global project license to work with partner countries.

[29] Gov.UK (2013).

Other countries experiment with some other types of license other than the commonly practised. A country like the US issues Validated End-User for trusted recipients. Japan gives four types of bulk licenses: General Bulk Export License, Special Bulk Export License, Special Bulk Export License for Repair or Replacement, and Special Bulk Export License for Overseas Subsidiaries.[30] Different licenses are issued depending on the internal compliance programme and sensitivity of the item and the destination.

2.5 Emerging Practices for New Challenges

2.5.1 Transhipment/Transit Control

The nature of foreign trade, especially in the age of globalisation, has increased the relevance of transit and Transshipment controls, though some maintain that transit and Transshipment are not core issues of strategic trade control. However, some sceptics are ready to concede a complementary role for transit and Transshipment controls. These are considered additional activities in relation to exports. It is understood that transit and Transshipment controls 'allow a state to monitor, verify, permit, deny or seize shipments of arms passing through their territory'.[31] Writers on the subject argue that international legal instruments such as Convention on International Civil Aviation and International Air Services Transit Agreement have already provided the international community the legal instrument for transit and Transshipment control relating to arms transactions and goods having implications of WMD certainly fall under ambit of these tools.

However, at times, some scholars and practitioners find difficulties emanating from the lack of precise understanding of transit and transhipment. The unique European Union (EU) political situation adds to some complexity for both the terms. A EU definition maintains that 'transit' shall mean a transport of non-Community dual-use items entering and passing through the Customs territory of the Community with a destination outside the Community.[32] This definition is considered quite broad,[33] which can cover activities not only under transit but also transhipment. The NSG, too, clubs the terms—transit and Transshipment—and 'in general describes a scenario where an item passes through a given country on its way from the country of consignment to the country of destination'.[34]

Otherwise, the two terms have been given a detailed treatment in international law. The common understanding of transit is movement through one country to another

[30] Center for Information on Security Trade Control (2011).

[31] Holtom and Bromley (2011).

[32] Official Journal of the European Union (2009).

[33] Grayston and Pandey (2012).

[34] Nuclear Supplier Group (2014).

without changing the means of transport or coming out of the Customs Zone of the country through which a consignment or person is passing. The International Air Transport Association (IATA) defines, transit as an 'en route stopping place where cargo remains on board. [CSC]'[35] It further notes, 'Transit is also commonly referred to as Freight Remaining on Board (FROB).'[36]

The World Customs Organisation (WCO) defines, transit as a 'procedure which allows goods to move under Customs control from the Customs office of departure to the Customs office of final destination'.[37] The freedom of transit derives its mandate from Article V of the General Agreement on Tariff and Trade (GATT). The Section 2 of this Article asks the member states not to make any distinction 'based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport'.[38] This Article explicitly mentions that 'operation of aircraft in transit' is not covered under the agreement, but 'air transit of goods (including baggage)' comes under its purview.

Usually, tranship or transshipment is understood as the movement of goods when passing through a country which is not its destination but includes unloading from one mode of transportation to reloading to another.[39] The IATA defines transshipment as 'the unloading of cargo from one flight and loading to another for onward carriage'. Unloading and reloading may be done immediately or after storing the good for some time. Under the IATA rules, the 'short-term storage' should not exceed a stipulated period. There is no restriction on the change of vehicle.[40] The IATA acknowledges that transshipment is complex because of the activities—offloading, break-bulking, re-documenting and reloading.[41]

Countries have varying practices for transit and transshipment control. Some countries do not need license for goods in transition. However, some countries like the UK insist on taking transit license for such goods. Even where a license is not required for transit, the concerned countries are supposed to share and exchange information. Some recommend that for transit and transshipment control, a country must need a legislation, which must have a penalty system to deter violators. In some cases, a country even issues license for transit and transhipment[42] of goods passing through its territory. Even EU regulation has provision for issuing licenses for transit.

[35] International Air Transport Association (2018).

[36] International Air Transport Association (2018).

[37] World Customs Organization (2014).

[38] World Trade Organisation (1986).

[39] Small Arms survey and the New Zealand Government.

[40] International Air Transport Association(2018).

[41] International Air Transport Association (2014).

[42] Nuclear Supplier Group (2014).

2.5.2 Intangible Control

Control of technology is an important component of strategic trade management. Technology, generally understood as 'specific information necessary for the 'development', 'production' or 'use' of a product',[43] is considered as relevant for export control as it is for physical goods. The advent of the internet age and videoconferencing have made the task of technology or information control extremely complex. For technology control, information transmitted through email, fax, telephone, video conferencing, providing access to electronic files, or presentations is considered extremely significant and challenging,[44] though some of the mechanisms such as telephone and fax for transferring information or knowledge have been in vogue for a long period.

Intangible Technology Transfer (ITT) control, also referred to as prevention of 'international knowledge proliferation'[45] or 'the knowledge contained in blueprints and software,'[46] is a dominant and challenging practice of strategic trade management in the twenty-first century. Largely, it is understood as the electronic transmission of controlled strategic goods technology. Over the years, control of ITT is being evolved and promoted through a number of ways, including the multilateral export control regimes[47] and international bodies. Yet for both the international community and national authorities, defining and determining ITT have emerged as key tests. Some countries include technology in goods.

Normally, technology listed for strategic trade control becomes the reference point for intangible version of technology control as well, but complexity for it too comes when it is to be controlled under the catch-all clause. The complexity accentuates when a person from the third country is employed to supply the item through its knowledge and information.

Although some of the best practices common to other controlled goods are used for control of ITT, yet the international community has been inventing and refining tools specifically for this control. Training of people involved in scientific and academic institutions, student vetting, visa vetting, monitoring and special training for financial institutions and so on have emerged as important practices for ITT control. The United Nations Security Council Resolutions such as 1737 and 1874 provide the mandate for ITT control for specific countries.

The international community has also evolved special practice to control ITT at the intersection of academia and industry, especially in Research and Development. The practice of enforcement through the traditional Customs is replaced with 'audit of companies and institutions or intercept telecommunications to detect illegal transfers of software and technology.'[48] Another practice is making it obligatory for scientific

[43] Wassenaar Arrangement (2006).

[44] Australian Government, Department of Defence (2012).

[45] Rebolledo (2012).

[46] Rebolledo (2012).

[47] The Australia Group (2015a, b), the Wassenaar Arrangement (2006).

[48] Rebolledo (2012).

and technical cooperation programmes to advance permission if citizens of certain marked countries or high-risk countries are involved in the programmes.

Deemed export control is an important mechanism of ITT. Any release of information of technology or source code of an item that figures on the control list or comes under catch-all control is to be licensed if information goes to a foreign national whose country needs license for that particular item. This could be in any form—verbal, written, electronic, and/or visual disclosures. This could be in classes, laboratories, at conferences, in publications, including study materials. However, publicly available information or information (but not controlled items) resulting from 'fundamental research' are not controlled or licensed under deemed export controls. Many countries, which have the provision of permanent resident, do not require license for imparting such information to their permanent residents.

Industry is encouraged to adopt certain best practices when it employs a person. It is expected to determine the project on which a foreigner is not supposed to work. For the purpose, it also uses tools such as access controls and right, and segregation of unauthorised data and IT Controls. Industry has to take a license for a project that requires license for employing a foreigner. Similarly, other organisations whether it is a university or a research institute may also have to take license for imparting information on any foreigner undertaking research or academic activities on an item which may result in production of controlled technology or goods. However, it is a tough and complicated exercise.

2.5.3 Brokering Control

For trade in general and international trade in particular, the presence of broker is a common phenomenon. Any person—individual, group or company—that serves as an agent or intermediary in commercial negotiations or transactions is known as a broker. Generally, a broker is a licensed person but an unlicensed person with specialised knowledge is also involved in brokering. Depending upon the nature of trade and transactions, it is considered legal or not.

The strategic trade management underscores the need for brokering control, though understanding brokering activities is also quite complex. There are some grey areas in defining and understanding brokering. Some of the activities associated with brokering may not be called brokering. One of the studies enumerate areas such as 'technical assistance, training, transport, freight forwarding, storage, finance, insurance, maintenance, security and other services'[49], which fall in the grey zone. But in some countries, brokering includes activities such as financing transportation and freight forwarding.[50]

Brokers generally find opportunities for companies involved in the dual-use or arms business. They organise meetings between different concerned parties and even

[49] United Nations General Assembly (2011).

[50] United States Department of State (2016).

support them in drafting and finalising contracts or agreements. Brokers also arrange payment for one party from another after a contract is executed. Sometimes, a broker also acts as a project manager and deals with clients or buyers in the same country where seller is located or may be in another country. Brokers are involved in drop shipping- the activity in which brokers only take the order and supplier send directly to clients.

The international community has been coming out with the solution of control or complete ban of brokers. A number of countries have adopted this control for WMD relating goods after the passage of 2004 UNSCR 1540 resolution, though global arms trade has been facing the issue relating to brokering for a long period. The UN General Assembly and the Security Council have been passing resolutions and taking concrete action plan to deal with illicit brokering of arms. A holistic approach to illicit brokering has resulted in a couple of measures and even a treaty. For conventional arms, too, a number of separate initiatives are existing at the global level. Provisions prescribed by the Arms Trade Treaty and the Wassenaar Arrangement are some of the examples. A UN report defines brokering in small arms and light weapons. It lays down, 'A broker in small arms and light weapons can be described as a person or entity acting as an intermediary that brings together relevant parties and arranges or facilitates a potential transaction of small arms and light weapons in return for some form of benefit, whether financial or otherwise.'[51]

The regulatory systems of different countries have variegated details of the brokering activities and control. The scope of brokering and hence its control ranges from organising supply from foreign facilities to intra-company transfers. Globally prevalent best practices are determining or precisely defining brokering, registration and screening potential brokers, limiting the number of licensed brokers[52]; record-keeping and promotion of transparency in transactions along with other export control practices such as licensing and imposition of penalties for non-compliance. Brokering is also controlled under ITT control. Some countries exempt brokering for a set of countries which do not require license for controlled items.

Some definitions of brokering relating to export control bring in foreign element in it. For example, a definition in Japan considers brokering 'as an overseas transaction in which any goods or technology move from one foreign country to another, and in which a person, including a legal person, in Japan is engaged directly or through its overseas office'[53]. One of the studies noted, 'The increasing globalisation of trade and electronic info-commerce make it easier than ever for experienced arms dealers and operators to circumvent national arms control systems and to exploit the weakest links in a fragile international regulatory chain.'[54] Several factors are attributed to circumventing of the regulatory system. Prominent among them are intricate transportation path, and non-transparent financial deals.

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[51] United Nations General Assembly (2007).

[52] Wassenaar Arrangement (2002).

[53] Center for Information on Security Trade Control (2012).

[54] Butcher et al. (1999).

2.5.4 Catch-All Control

Gradually, in the post-Cold War period, catch-all control has become yet another important component of export control. It refers to control of the items (goods and technologies), which otherwise do not figure on a national control list. It is basically an end-use and end-user related control. However, it is explained that this control should not be 'interpreted as all-inclusive control, but as higher quality control on sensitive end-use'[55]. The judgement is to be made on the case-to-case basis with proper information about the end-use or end-user.

In the beginning, this control was primarily meant to regulate dual-use goods which may contribute to making of WMD. Later, some countries applied this mechanism to control even conventional munitions. Nowadays, its relevance is being seen for cyber-surveillance technologies. The objective of catch-all is also being considered to cover persons and entities involved in violations of human rights and international humanitarian law during armed conflict or for managing internal security.[56] Of late, terrorism is also one of the issues for this control.

Like many other practices of export control it started as a national practice of the US, entered into multilateral export control regimes and through the UNSCR 1540 it has been adopted almost internationally. In the US, it first found a place in the Nuclear Non-proliferation Act of 1978,[57] and then in Enhanced Proliferation Control Initiative of 1991. The EU and European countries also adopted the provision in the 1990s.

The Australia Group was the first multilateral export controls regime to adopt the catch-all clause. It did so in June 2002.[58] The Australia Group encourages members to share information about all the license denials, including those falling under the catch-all provision, yet it clearly informs that undercut policy is not applicable for the catch-all provision.[59] In 2003, the MTCR introduced catch-all export controls in its Guidelines,[60] and 'catch-all' mechanism found the place in the NSG Guidelines[61] in 2004. The December 2002 plenary meeting[62] of the Wassenaar Arrangement discussed the catch-all provision but the statement of understanding on catch-all was issued in 2003.[63]

The export control community has been debating whether catch-all control adds or eases burden on licensing authorities. Generally, it is understood as a mechanism which adds burden on licensing authorities.[64] But some countries maintain that prior

[55] United Nations Office of Geneva (2003).

[56] European Parliament (2018).

[57] Cupitt and Jones (2009).

[58] The Australia Group (2002).

[59] The Australia Group (2015a).

[60] Missile Technology Control Regime (2018b).

[61] The Nuclear Suppliers Group (2004).

[62] Wassenaar Arrangement (2017).

[63] Wassenaar Arrangement (2015d) and Griffiths (2017).

[64] Schmitt (2001).

information of an end-user and its activity may help in taking action in advance, and thus easing the burden.[65] This, in turn, will not only assist licensing authorities but also is helpful for industry in long-term. Some countries and scholars maintain that the national licensing authorities may do well for all the stakeholders by publishing a list of items that may be considered under the catch-all clause.

2.6 Institutions

With the passage of time, a network of institutions is promoting strategic trade management. Over the decades, the international community has evolved a range of institutions, organisations and agencies for export controls. These institutions are of all types: national, regional, multilateral and international in nature, orientation and function. Yet, ultimately, it is domestic legislation and institutions that operationalise export control or strategic trade management. In the twenty-first century as in the twentieth century, the national institutions are actually providing the basic institutional framework for strategic trade management.

Generally, depending on the volume of trade an institution evolves and develops itself. Over the years, a commerce ministry normally has emerged as the nodal agency for licensing. However, in some countries like the Netherlands, the Customs gives license of dual-use items. Otherwise, the Customs does enforcement. A network of institutions exists to assist the principal institutions for export controls. The Ministry of Defence or the defence department is one such organisation that plays an important role in determining the strategic balance of a transfer. Besides, the technical organisations of the defence ministry play a crucial role in providing technical support on a transfer.

It is true that some institutions perform multiple functions, but increasingly institutions performing specialised roles are surfacing. Generally, the legislative bodies legislate or make laws. However, different administrative and regulatory functions search or need for specialised institutions. Some new export control countries may have not many specialised agencies or organisations performing specialised functions. Yet, almost all established and advanced countries have multiple bodies evolved over years for export controls. In the initial years, many of these countries did not have specialised agencies, but functions such as licensing and enforcement were done by different domestic institutions even in most of the advanced technology goods suppliers' countries.

How is coordination done with the network of institutions? Interagency Coordination is the practice in strategic trade management at the domestic level. Even if in most of the countries, the trade and commerce department or ministry occupies the centrality and is the nodal agency for licensing, other agencies and departments give their views and positions. The mode of arriving at a decision may vary from one country to another. In some countries, a decision is taken on a consensus principle. In

[65] For example, United Nations Office of Geneva (2003).

many countries some key departments decide and opinion of other departments may not be obligatory. Nowadays, demand for transparency in interagency coordination is made and considered a good practice.

2.7 Conclusion

Strategic trade management is a dominant practice all over the world for regulating high technology commerce, especially involving sensitive goods, technology and services. This dominant practice, now has many supporting practices, which are popularly called as best practices. Even if disagreement prevails in the use of the term 'best practices' these components are gradually entering into the national systems worldwide. Strategic trade management has become an important tool of global governance. It has been internationalised and globalised because of the UNSCR 1540.

Of all the tools of strategic trade management, legislation is considered the starting point or the first step towards moving to the complicated path of high technology commerce. It is considered an enabling practice without which it becomes difficult for other practices to move. Even in a country that is without focused legislation for strategic trade management, the authority of old laws empowers further action. The strategic trade management focused legislation is coming up in different countries. However, multiple laws exist to play supporting and defining roles for strategic trade control.

The law provides stability but the law-making task is arduous and slow and the need for strategic trade management is fast. This situation necessitates a dynamic role for regulatory practices. Several old practices are evolving to meet new challenges. These laws are becoming detailed and are drawing experiences from other areas as well. At the same time, new practices are also coming up to fill the gap or meet new and emergent challenges. These new practices could be sui generis or originally developed for managing strategic trade. However, many of the practices, which are in vogue, have existed for a long period and merely chiselled to suit the need for strategic trade.

Of late, the international community has realised the significance of controlling technology and services, which may contribute to the making of weapons of all types. The UNSCR 1540 has popularised the need for regulating services and technology among countries. As a result, several countries passed laws or amended laws to control these activities. The focus on technology and services somewhat reoriented traditional strategic trade control institutions and practices.

Domestically, the commerce ministry is generally the nodal agency for licensing, but it is not the rule. Different countries experiment with different ministries and departments. In most of the cases, dual-use and military items have different licensing agencies. The countries, which export civil nuclear items, may also have separate agencies to license nuclear items. However, the international community is nowadays talking about the merit of single licensing agency. Still, in most of the countries,

licensing is an interagency activity. The nodal agency is assisted by several other departments. Strategic trade practices are mostly originating from the developed industrial countries. These countries also refine global practices in the multilateral export regimes and international organisations.

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Chapter 3
Enforcement Practices in Strategic Trade Management

Abstract Without enforcement, any policy or rule and regulation loses relevance. Self-enforcement in form of Internal Compliance Programme is considered the best for enforcement but in practice, it needs to be validated and supported by a number of governmental measures. Both old and new export control countries are encouraging their companies to adopt Internal Compliance Programme. After campaigning for legislation and regulatory practices, the international community and organisation are underscoring the relevance for enforcement and outreach for strategic trade management. Some practices specific or customised for export control may have been developed but most of the practices from other activities are adapted or used for strategic trade management. The United Nations Security Council Resolution 1540 has a paragraph on enforcement of export control. This has further contributed to development, strengthening and incorporation of enforcement practices. Although a network of institutions assists enforcement of strategic trade management, yet Customs is the nodal body for enforcement. Risk management system is in practice in all the key players. New actors are also borrowing or developing this system. Among practices, national governments prefer preventive measures but the post-shipment inspection is becoming an important practice for enforcement. In recent years, the multilateral export control regimes and international institutions like the World Customs Organisation have developed several practices for its members and non-members for strategic trade management enforcement. These organisations have also conducted several training programmes as well.

3.1 Introduction

For effectiveness of a policy, a high-quality enforcement system is necessary. Enforcement has become an indispensable instrument of governance at all levels. In trade, without enforcement, any contract or policy becomes meaningless. Good enforcement practices reduce uncertainty and increase predictability of any trade activity or policy.[1] A weak enforcement system adversely affects trade. Although self-enforcement is considered a primary practice of enforcement, yet a well-developed

[1] Fuhrmann (2007).

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compliance programme is always helpful for enforcement. An OECD document defines enforcement as 'all activities of state structures (or structures delegated by the state) aimed at promoting compliance and reaching regulations' outcomes… These activities may include: information, guidance and prevention; data collection and analysis; inspections; enforcement actions in the narrower sense, i.e. warnings, improvement notices, fines, prosecutions etc'.[2] The same document defines inspection as 'any type of visit or check conducted by authorised officials on products or business premises, activities, documents etc'.[3] However, inspection is an important mechanism of enforcement and is not synonymous with enforcement.

A Q Khan or Pakistan network highlighted the regulatory capacity or capabilities of a large number of states. A number of states lacked proper rules and regulation for effective export controls and preventing smuggling. At the same time, it did highlight the poor enforcement of the countries which had already in possession of export control-related rules and regulation. The basic premise of the export control enforcement is that any item is to be transferred only after it is duly approved. The UNSCR 1540 heralded a new era not only for export controls per se but also for export control enforcement. The UNSCR 1540 in its operating para 3(c) lays down: 'Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law…'. The 1540 Committee and the international community first campaigned that the national governments develop laws and regulation, and later moved to enforcement of export control.

In general, licensing and enforcement both are complex, yet enforcement of activities like intangible technology transfer is traditionally considered far more complex than transfer of goods.[4] Proper enforcement is also supposed to ensure that any licensable commodity does not fall in wrong hands. A good enforcement system provides a second line of defence if a company somehow succeeds to export controlled items without taking proper licenses. What are best practices for a good enforcement system for export controls or strategic trade control?

3.2 Network of Specialised Institutions

Enforcement of export control needs law, regulation and institutions. A sound legal and regulatory system contributes to the robustness of an export control system and its activities such as licensing as well as enforcement. Without proper, realistic and adequate law and regulation, a violator may tend to overlook compliance. Generally, countries have Customs or similar act for enforcement, especially for search,

[2]OECD, Regulatory Enforcement and Inspections (2014).

[3]OECD, Regulatory Enforcement and Inspections (2014).

[4]Evans and Valdivia (2012).

inspection, investigation and interdiction purposes. For enforcement, many countries have separate Customs acts or laws. The specialised laws of Customs are basically meant for authorising it to undertake operational activities. One of the documents of the WCO observes: 'Customs law typically gives Customs Administrations omnibus authority and flexible powers to detain goods, search without warrants, access computerised data, conduct investigations, etc. These are often collectively referred to as "Customs powers"'.[5]

Similarly, a network of general and specialised enforcement agencies is considered a model institutional framework for enforcement. Enforcement institutions or agencies for strategic trade control are generally different from licensing authorities. However, the overlapping of institutions is also common. Moreover, some of the institutions involved in the licensing process are also closely associated with enforcement activities.

Nowadays, some countries and policy analysts recommend a single window or single agency for the best solution to enforcement. However, is a single agency really a solution to all the complexity involved with strategic trade control? Certainly, a single agency may not be a solution to address or solve all the complexities of strategic trade control. Enforcement is an arduous and at times, an extremely complicated task, which requires the involvement of a number of institutions. Globalisation of defence industrial bases has thrown a new kind of challenge to national and international organisations. Globalisation has induced and promoted a new role for non-governmental or transnational entities. Some of the writings have been highlighting that this kind of 'shift' is creating a 'gray zone—a combination of weak states, open borders, lack of controls and a ready market of buyers and sellers of weapons of mass destruction'.[6]

National governments are disaggregating the task among different domestic institutions to ensure sound enforcement. The decentralisation trend is also witnessed internationally when national governments delegate the authority to enforce to relevant international institutions.

As discussed, export control activities involve a number of institutions. Yet, in most of the countries, it is the Customs that is the nodal agency for enforcement of exports. It is considered the first as well as the last line of defence. The Customs—the prime enforcement body in most of the countries—is also supposed to curtail hindrances coming in the supply chain of international trade without compromising supply chain security. It conducts inspection or investigation either solely or jointly with domestic or international organisations. It takes both pre-shipment and post-shipment action for strategic trade management.

In some countries with rich experience in strategic trade control, the Customs may have developed some specialised bodies for strategic trade control. New export control countries, however, generally rely on the traditional infrastructure of the Customs; possibly, because these countries transact less. Besides, they are still learning. However, the Customs is under pressure to either develop specialised bodies or train

[5] World Customs Organisation (2018).

[6] Warrick (2003).

its staff to meet new challenges. It is encouraging the online transmission of relevant data to connect different agencies engaged or involved in strategic trade management so that better coordination becomes possible among different agencies. Stakeholders do not face unnecessary difficulties. The electronic transmission also helps in risk assessment of not only the Customs department but also other concerned bodies.

Although the primary task of the Customs may not be general law enforcement, yet it usurps the power to enforce export controls laws and regulation under its basic duty 'to detect, inspect and interdict shipments'.[7] Even for strategic trade management, the Customs coordinates with other law enforcement bodies like police. A country that believes in the rule of law needs to have not only laws and regulation but also judiciary to enforce the law and prosecute or penalise any individual or entity that is found violating law and regulation. In fact, the quality of the inspectorate and court determines the overall character of the enforcement system. If coordination among agencies is necessary for proper enforcement, equally relevant is gathering and securing sufficient evidence for proceedings in court. The court imposes administrative penalties on errant organisations to deter not only violation of rules and regulation by that particular company that is penalised but also other potential violators. Over the years, laws relating to export controls are including not only pecuniary penalty but also criminal punishment. As violation may lead to imprisonment, the involvement of all levels of judiciary is adopted.

For enforcement, information is to be authentic because it acts as an evidence when the matter goes to court. The agencies procure information through all the available means whether technology or human. The role of intelligence agencies is not just key to licensing but also for enforcement of export controls. Information and its analysis are done by intelligence agencies. Countries use agencies involved in internal intelligence or focused on economic intelligence. The intelligence agencies, which are active to counter other nefarious activities such as narcotics trade, money laundering and terror financing, assist in export control enforcement. Some advanced industrial countries with rich export control experience have been evolving its intelligence agencies to cater to the needs of strategic trade control. The personnel dedicated to the task is given training for the purpose. External intelligence agencies of the countries provide vital inputs for export controls enforcement. Industry is another institution that is involved in data gathering relevant to strategic trade control. Yet only a few countries use this source of data collection.

The countries, which do not have very effective external intelligence agencies, procure data from friendly countries. At times, countries procure intelligence or information from the countries[8] with which they do not share good relations. International cooperation or 'cooperative exchange' is promoted through different international organisations such as WCO and Interpol but in the contemporary world, there are instances of the national Customs departments coexisting with the arrangements such as Customs Union of the EU. The bilaterally and regionally, too cooperative

[7] World Customs Organisation (2018).

[8] Medeiros (2005).

exchange[9] is taking place. One of the issues of export control in court has been extraterritorial jurisdiction of exporting countries. Some exporting countries maintain that their jurisdiction extends to any other country which has received strategic trade controlled items from them. Several recipient countries refuse to accept it. However, international agreements and international organisations are bridging this difference. Moreover, the increasing scope of strategic trade control and prevalent ambiguities about many terms such as specially designed and intangible control require rigorous scrutiny in the court of law so that injustice is not done.

3.3 Preventive Enforcement Activities

Nowadays, enforcement does not prefer a post-incident action. The idea is to monitor the place and activities where the chance of rules violation is very much possible. In fact, in the strategic trade control prevention has become an integral part of enforcement activities. Its basic objective is to deter a potential violator. This is based on the assumption that potential violator may or may not intend to violate rules and regulations knowingly. Over the years, the international community has developed a number of practices for preventive enforcement of strategic trade control. These practices use traditional or general Customs and specific mechanisms for strategic trade control. For the purpose, the physical presence of officials and technology are used.

The Wassenaar Arrangement prescribes the non-transfer/re-export of licensed items, 'on premise checks of the consignee, end-user and end-use'.[10] The best practices for preventive enforcement even favour holding up of suspected consignment and if required to 'seize unauthorised or illegal exports, which may also include items that are passing in-transit or being transhipped'.[11]

The traditional enforcement mechanism like routine inspection is also used for the preventive task. In some cases, it is conceived as an alternative to risk analysis, though the increasing view is that it should complement the risk assessment system. Some studies maintain that as routine inspection is frequently conducted, it ceases to be a very efficient and good mechanism to detect violation.[12] It is also viewed that normal documentary checks may do the same task which routine inspection does. Whether the routine inspection needs to go beyond auditing is still being debated in the international community.

Another preventive enforcement practice is the development of onsite capacities, especially at export hubs. Although this is not a universal practice, yet many countries keep such enforcement machinery at busy export centres. For more advanced work, however, the countries have to rely on 'Technical Reach-back' which means 'the

[9] Center for Information on Security Trade Controls (2016).

[10] The Wassenaar Arrangement (2016).

[11] Wassenaar Arrangement (2016).

[12] For example, World Bank (2005).

process of obtaining support from organisations that are not on the front line'.[13] Generally, opinion relating to science and technology is taken under this practice.

Some forums are encouraging national authorities to adopt routine inspection in national governments enforcement systems. For example, the ASEAN, in one of its statements, recommended: 'Legal authorities should permit routine advanced review of detailed manifest data (including electronic manifest) to analyse for suspicious transfers'.[14] At the same time, some argue that an important stakeholder like the business community finds repetitive checks harassing.[15] As a result, instead of cooperating, it resists an enforcement measure like routine inspection. As strategic trade control has to deal with dual-use trade with both military and commercial applications, it adds further complications. The target of enforcement will not be the item per se but its end-use and end-user.

3.3.1 Information

Information flow is extremely important for enforcement of law, regulation or policy in general. Consistent and precise information is needed for enforcement. Information may be derived through the rules and procedures laid down for strategic trade control, whereby concerned parties are supposed to provide information, enforcement action or intelligence gathering. As discussed, a nation normally gathers required intelligence through multiple agencies. However, the very process of licensing generates enough information for enforcement agencies to take any required action. The licensing process is mostly generating information through electronic means.

However, confidentiality of information at times becomes an issue. In many cases, classified information is not revealed to the public by intelligence agencies. One of the practitioners underlined the significance of robust intelligence analysis revealing understanding of international and national market where private and other players operate.[16]

In fact, a multilateral export control regime like the NSG is encouraging its members and even its adherents to adopt the British authored 'Efficient Processing of Government to Government Assurances' in which companies are encouraged to build a good information base. Although this guideline is not obligatory, yet both exporting and importing companies may help enforcement agencies with crucial information. This information is complemented with intelligence gathering which further strengthens the information base.

Proper flow of information helps enforcement to become selective.[17] The selectivity in enforcement advances the principle that inspection cannot be conducted for

[13] World Customs Organisation (2018).

[14] ASEAN Regional Forum (2013).

[15] World Bank (2005).

[16] Cohen (2014).

[17] Wulf and Sokol (2014).

each and every case or consignment. The selectivity practice does not mean any kind of discrimination. It supports intervention where it is 'strictly necessary'. The practice to increase efficiency in enforcement as it significantly reduces the number of inspections, and potential corruption.[18] The random selection of declarations is taken to make inspection less intrusive and less time-consuming. The proportionality is based on the idea that the government will put resources for enforcement in proportion of the level of risk a problem poses.[19]

3.3.2 Risk Analysis

In fact, information is also required for risk analysis. This has become the most leading practice in strategic trade control enforcement over the years. Not merely licensing but also enforcement authorities are supposed to take risk assessment measures. The basic objective of risk analysis is to facilitate low-risk consignment without much rigorous examination and to rigorously examine a high-risk consignment. The risk analysis method is based on the premise that only a small percentage, not all the consignments, could be illicit or illegal; so the system should track only that small number and allow legal trade to continue smoothly. This de-stresses the enforcement system, which eventually leads to a more efficient system.

Different countries, multilateral and international organisations, companies and even professional bodies use different indicators for risk analysis for strategic trade control. The WCO has also developed a 'Risk Management Compendium' as 'a common reference document' to guide its members regarding risk management concepts.[20] This compendium has a flexible methodology with numerous tools. It also contains explanation of key terminologies for risk management.[21] Member countries may customise the WCO's risk management methodology to their needs or different 'operating environments'.[22]

Customs and other enforcement authorities may develop a risk profile of a recipient. The WCO defines a risk profile as 'a set of characteristics which tend to correspond to shipments of interest, often representing a picture of a smuggling pattern, a commodity of interest, an entity of concern, or a combination of these'.[23] A profile may consist of data relating to a recipient, the route of the consignment and the nature of an item supplied to the recipient. For development of risk profile, several indicators are taken into account. Some of the prominent WCO's risk indicators are 'late presentation of Customs documentation, documents containing amendments, unusual routing, unusual terms of payment, country of origin not typical for the prod-

[18] Wulf and Sokol (2014).

[19] OECD, Regulatory Enforcement and Inspections (2014).

[20] World Customs Organisation (2018).

[21] World Customs Organisation (2018).

[22] World Customs Organisation (2018).

[23] World Customs Organisation (2018).

uct, unusual destination country for the kind of goods, agent pressing for release of goods, lack of interest in release of goods, transport or insurance costs inconsistent with the goods, first time importers or exporters, shipments to trading companies, and vague commodity descriptions'.[24]

Several mechanisms such as previous transactions, seizures and investigation records and auditing are used. For rating lower or higher risks, the record on countries with license exemptions is used. The negative lists such as denied persons list maintained by the US and Sanctions lists maintained by the UN are also consulted. The 'role of brokers or other intermediaries'[25] is also factored in the risk analysis.

The WCO compendium hierarchically arranges 'Customs clients': '(1) Those who are voluntarily compliant; (2) Those that try to be compliant but do not necessarily always succeed in their endeavours; (3) Those who will avoid complying if possible; and (4) Those that deliberately do not comply'. The level of risk increases from category 1 to category 4. The WCO recommends pushing more clients towards category 1 by different mechanisms, including incentives. The WCO compendium suggests a practice like 'release profile'.[26] This profile indicates that if an exporter complies with rules regarding transactions or export of strategic commodities or consignment, its consignment is released without further rigorous scrutiny.

3.4 Export Control Compliance Culture

Self-restraint is considered the best form of enforcement practice. Closely associated with preventive enforcement is the compliance culture that prevails in a country relating to export controls or strategic trade control. The most ideal situation for enforcement is an effective export compliance culture, which requires extensive self-governing behaviour on the part of companies engaged in export of controlled items. The WCO underlines the significance for preventive and compliance culture for an efficient enforcement system. It has also developed a handbook for STC, which has information for a compliance programme.

When compliance is mentioned, Internal Compliance Programme (ICP) of exporting companies captures the imagination. In reality, it is far more comprehensive. The compliance culture requires obedience to rules and regulation by all the stakeholders or actors of the export control system. Internal Compliance Programmes of companies, universities and individuals certainly contribute to the making of the compliance culture.

Under the self-enforcement practice, an exporter takes several steps such as placement of bonds and terminating of a commercial relationship if anything wrong is

[24] World Customs Organisation (2018).

[25] The Wassenaar Arrangement (2016).

[26] World Customs Organisation (2018).

suspected.[27] But the most dominant form of self-restraint is the development of ICP. The ICP is understood as 'effective, appropriate and proportionate means and procedures, including the development, implementation, and adherence to standardised operational compliance policies, procedures, standards of conduct, and safeguards, developed by exporters to ensure compliance with the provisions and with the terms and conditions of authorisations'.[28] Normally, ICPs come in the form of guidelines, which are not legally binding. It is being promoted as a case of public–private partnership.

A standard ICP is published and an exporter can tailor it to suit its needs. Some multilateral export control regimes like the Wassenaar Arrangement provide models or templates for an ICP. A member or even a non-member can use this model for developing its own ICP. Even an exporting entity from any country is free to use this model. Some countries, which have been exporting sensitive items and have strategic trade control for a long period, also develop ICPs based on their experience. The US, which is considered the leader in strategic trade control, has a number of models for compliance in the country. Its different departments and agencies such as Bureau of Industry and Security of the Department of Commerce and National Security Agency have developed Compliance guidelines to suit their specific requirements.[29]

Similarly, other advanced industrial countries have developed different models for ICP. These countries use their experience with export controls and learn from other sources as well. The EU too has a programme for its members.[30] It has been revised a few times and the updated version is made available for use. However, the EU document acknowledges that there is no consensus among its member states regarding imposing ICP obligation on its exporters. It also acknowledges 'no one size fits all' approach.

A country like Japan has provided a legal framework for ICP. The legal framework of the Exporters' Compliance Standard became operation since April 1, 2010.[31] A company can register its ICP with the government. The nature of compliance document builds the relationship or confidence of the government in the exporting entity. Japan, too, talks about different kinds of exporters and the need for variegated ICP models for diverse exporters. Japan has innovated an institution called CISTEC that mediates between industry and the government so that proper compliance culture is built in the country. It has dynamic models for ICP for different exporters.

As discussed, ICP is emerging as a preferable model of practice of exporters, but it has also emerged that it is difficult to have a structured or homogenous model for all the exporters. As an operational programme, it needs to be practical in its content to manage and comply export business. For example, one of the departments of the US government concedes that 'factors such as the size of an organization, the end-

[27] The Organisation for Economic Co-operation and Development (2018). Contract Enforcement and Dispute Resolution.

[28] European Institute for Export Compliance (2018).

[29] Woodard (2012) and Office of the Director of Compliance of National Security Agency (2016).

[30] Ramaen et al. (2015).

[31] Center for Information on Security Trade Controls (2015).

use and sensitivity of products, the geographic location of business and customers, the relationships with business partners, volume of exports, product restrictions, and complexity of internal export processes will influence how an organization structures its operational EMCP [Export Management and Compliance Programme]'.[32]

Notwithstanding differences, there are some elements adopted by all the ICP models. The first element of any ICP is that the management must have the commitment to comply export control rules and regulation. And all the models prescribe that the guidelines or other relevant documents explaining export controls rules and regulation for employees of a company should be written. Under the ICP, a company is supposed to have sufficient resources to enforce compliance related activities.

Outreach activities are considered highly important for ICP or compliance culture. Employees handling export of a controlled item need to be trained. Many a time violation takes place because of the lack of awareness. Importantly, when a company knows the cost involved with violation of the rules and regulation, it tends to comply. A healthy Customs-industry relationship shapes an ideal export compliance culture. Quite often, through outreach or training activities, the Customs and other enforcement agencies help industry in complying legal and regulatory obligations. The healthy relationship between the Customs and industry addresses the common complaint of delay of the consignment.

A national government uses several methods to organise outreach for exporting groups and provide them information about the compliance literature. An entity is directly approached. At times, business associations are also mobilised for the task. National government may use targeting process[33] to select entities for outreach. For the selection of entities, the government uses mechanisms such as risk analysis and priority to new entrants. The outreach conducted by the government is to make traders aware of legal and regulatory requirements as well as receive information from any dubious enquiries made to the exporting entity.

Authorized Economic Operator is a kind of industry–government or public–private partnership for helping in enforcement of strategic trade. A WCO-promoted practice, it is defined as, 'a party involved in the international movement of goods in whatever function that has been approved by or on behalf of a national Customs administration as complying with WCO or equivalent supply chain security standards'.[34] Some of the security standards specified under the partnership are: demonstrated compliance with Customs requirements; satisfactory system for management of commercial records; financial viability; consultation, cooperation and communication; education, training and awareness; information exchange; cargo security; conveyance security; premises security; personnel security; trading partner security; crisis management and incident recovery; measurement, analysis and improvement among others.[35]

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[32] Woodard (2012).

[33] World Customs Organisation (2018).

[34] World Customs Organization (2010).

[35] World Customs Organization (2010).

The ICP models also advise a nodal point for export control compliance. This nodal point could be any branch of the organisation. The nodal point or empowered person may be located in sections such as accounts, legal, general management and any other section specially created for the compliance purpose. The Wassenaar Arrangement advises the nodal point to be outside the sales department.[36] This section or person is supposed to perform 'cradle-to-grave'[37] security and screening. One of the easiest tasks for an organisation is to keep a 'list of consignees, end-users, and other parties of concern to identify export transactions and related activities deserving closer scrutiny'.[38] ICPs are designed with a proper communication system so that all the messages flow smoothly.

Depending on the sensitivity of an item or consignment ICPs are designed to screen not only clients or buyers but also the entire supply chain. Some ICPs are devised to screen product development to even employees and contractors. Generally, ICPs use risk management tools like red flag indicators and negative lists maintained by countries and international organisations. As university and research institutes are also centres of innovation and transfer, especially transfer of knowledge to foreign entities, ICPs or other compliance mechanisms are becoming popular or being promoted in these institutions, too. Nowadays, governments and international organisations are engaging students, political class and bureaucracy.

The ICPs have other commons elements: record keeping, periodic assessment and auditing, reporting, escalating the matter to higher authorities, emergency notification system and so on. Again where it is relevant, an organisation is supposed to extend its ICP to its subsidiaries and affiliates as well. Performance management of an organisation and its individuals involved in strategic trade is considered relevant for export compliance culture. ICPs are modified or changed after reviews and assessments.

To promote compliance culture, governments are giving incentives as well. An organisation with a sound ICP always enjoys reputation and its trade facilitation becomes easier. Even government machinery, especially the enforcement arm like the Customs is trained for promoting compliance culture in strategic trade control. It is instructed to develop partnerships with exporting organisations to safeguard the compliance system by providing information and improve the compliance apparatuses. The government also keeps reviewing ICPs of exporters.

3.5 Post-shipment Action

When preventive or compliance mechanisms do not materialise and once enforcement authorities find violation of rules through risk assessment method or intelligence, enforcement is escalated to another level. To curb illicit transactions through

[36] The Wassenaar Arrangement (2011).

[37] Woodard (2012).

[38] The Wassenaar Arrangement (2016).

false declaration or other means, enforcement agencies use coercive tools and techniques. Subsequently, investigation, inspection and other required action are taken. Depending upon the time of information about the violation or the need for investigation/inspection the target becomes discernible. The target could be either supplier or recipient or even one or more than one supply chain partners.

National authorities have to be prepared to deal with deliberate violations of export controls rules and regulations. They have to demonstrate high-level policy commitment to take action when violation takes place. The country needs to have necessary intelligence. This comes from intelligence generated by a country strategically means with a long term perspective and tactically means processing information at the field level. An operational intelligence gathers information on already targeted individuals and organisations.[39] The best form of transition is considered to be working out a link or shift from trade control laws to criminal law.

A 'close working relationship' but a clear-cut division of roles among different agencies is needed and considered a good practice. The Wassenaar Arrangement emphasises on coordination with different security and intelligence agencies 'to identify suspicious transactions, such as attempts at trade-based money laundering, irregularities in business registration or licencing, or other commercial frauds involving exporters, consignees, or end-users'.[40] These agencies, including the Customs, derive their power for general law enforcement. Generally, the Customs enjoys a wide-ranging authority to 'detain goods, search without warrants, access computerised data, conduct investigation…'[41] In the entire operation, the enforcement arm of national government needs to be clear in communicating the security operation or its context.

Regarding the appropriate or good practices for enforcement, especially for inspection and investigation, a number of suggestions are made. One of the suggestions is that a national control list is aligned with global or multilateral lists of controlled goods so that law enforcement authorities have clarity about items which are in transaction. Although the general law enforcement authorities may struggle with strategic trade control, yet training given to general law enforcement authorities in key countries over the years has made them develop some or greater understanding about items to be controlled. However, in general, the Customs and forces manning the border want explanation of items listed for control in a simple language.

There are practices such as engagement of economic and technical specialists to maintain a database on proliferation-sensitive exports and supplying information to enforcement personnel when required and using a risk management system to target suspicious cargo. Even in a routine inspection border management or control agencies are supposed to undertake several activities.[42] A good practice should be the creation of a joint database by different investigative or enforcement agencies. Law enforcement agencies must possess resources for the outbound enforcement task as well as

[39] World Customs Organisation (2018).

[40] The Wassenaar Arrangement (2016).

[41] World Customs Organisation (2018).

[42] Fuhrmann (2007).

appropriate technology to manage targeting and end-use screening. Blockchain has emerged as a new concept to monitor supply chain with Internet assisted by smart accounting, which could have some relevant documents uploaded.[43] However, some studies are still sceptical of the entire idea because of security issues.[44]

The border manning forces or departments like the Customs are required to monitor license applications at all borders, including airports and seaports. Enforcement authorities may adopt any means of examination—documentary, physical and technical means using technology. Any false declaration is to be detected at the initial stage so that the consignment is not transported outside the country. Law enforcing authorities, if it is required, search a consignment. This search could be of any consignment whether it is going as an export, transit or transshipment. During inspection, law enforcement authorities may check end-use certificate to confirm that exported items are going to an intended end-user and are not being illegally diverted to a third party. Authorities may also ask for additional information relating to end-user or transported item to establish whether law and rules are properly complied or not. The best practice for an exporter is that it provides all the information to authorities on time.

Authorities check whether any discrepancy exists between the declared document and the despatched consignment. They are expected to investigate and determine whether any gap is found between the two (Table 3.1).

For the purpose of examination, a Canadian government handbook informs: 'If an examination is required, the exporter or the person in control of the goods at the time of the request (normally the freight forwarder or the exporting carrier) will be asked to bring the goods to a sufferance warehouse. In all cases, de-stuffing for examination purposes and other related fees are costs to the exporter'.[45] However, not all countries impose a fee for de-stuffing for examination (Table 3.2).

If a gap is found between the declaration and the dispatch of an item, security agencies determine the nature or the seriousness of violation. They may take action immediately or forward it for further prosecution. The consignment may also be seized or detained before leaving the country. Normally, the investigation does not begin with seizure of goods. A seizure of consignment takes place depending on the pending of the judgement of the case. However, the best practice for seizure is that there should be reasonable grounds for doing so. Without proper justification, law enforcement authorities cannot seize a consignment or goods. However, an exporting person or the organisation is allowed to appeal if the person or organisation feels that the grounds for seizure are not reasonable.

'Ascertained forfeiture'[46] is another legal practice of strategic trade control enforcement. This is applied or used when 'seizure constitutes excessive punishment, or would be impractical or impossible, as in the case of goods that have already

[43] Arnold (2017).

[44] For example, Iansiti and Lakhani (2017).

[45] Export Controls Division, Foreign Affairs, Trade and Development Canada (2017).

[46] Export Controls Division, Foreign Affairs, Trade and Development Canada (2017).

Table 3.1 Verification and commodity identification

Documentary examination (often conducted electronically)
• Documentary examinations are often conducted progressively, as well, starting with the documents most readily available, such as manifests, bills of lading, air waybills or export declarations. If suspicions are supported, or not resolved, additional documentation, such as commercial invoices and packing lists, can be requested and obtained
• Regarding potentially strategic goods, the invoice is particularly useful as it generally identifies the product very specifically and identifies the purchaser, which is useful for end-user screening
• The Risk Management Compendium provides extensive discussion of source elements in documentation and how to use them as risk indicators
Technical examination (often with portal monitors, container X-ray scans or other detection systems)
• While the non-invasive and non-destructive nature of technical examinations are appealing, and they can be instrumental for some commodities, such as for detecting radioactive materials (see discussion under 28.44 radioactive materials), they are often not effective when it comes to strategic goods. Dual-use commercial goods are not typically concealed like contraband, and they do not produce emanations that can be detected
Physical examination (putting eyes, hands, and/or instruments on the goods)
• As with the other examination methods, physical exams are progressive, usually starting with visual inspection of packing lists, shipping documents and outer packaging. If the package is opened, the goods can be examined, as well as labels, nameplates and documentation such as manuals and certifications that may accompany the goods. These are particularly useful for identifying strategic goods. Pictures of the goods, labels and nameplates may be taken and referred for reachback support. If further examination is required, field test kits for identifying chemicals or instruments for identifying alloys can be used, or samples can be sent to a laboratory for analysis

Source World Customs Organisation (2018). Strategic Trade Control Enforcement: Implementation Guide, p. 26 http://www.wcoomd.org/en/topics/enforcement-and-compliance/instruments-and-tools/~/media/7A05799E8D3A46C8B8355175EEBA4322.ashx. Accessed 5 July 2018

been exported. Used under basically the same conditions as a seizure, an ascertained forfeiture normally results in a monetary penalty equivalent to seizure of the goods'.

In the Canadian practice, 'Nearly all seized goods are ultimately destroyed or otherwise disposed of as prescribed by the relevant public authorities'.[47] However, the WCO discusses three options which are reproduced in Table 3.3.

Authorities are supposed to keep a good record of investigation as well. A good practice is to arrange all the investigation reports chronologically. Similarly, 'court documents, Customs documents, immigration documents, fugitive reports, custody receipts, inventory sheets, monetary count sheets, police reports, photographs, fingerprint cards, investigative notes'[48] all are to be kept to manage a case properly. In enforcement, tracking of the supply chain is as important as 'chain of custody'.[49] In the chain of custody, procedures and documents are used to authenticate physical evidence.

[47] Export Controls Division, Foreign Affairs, Trade and Development Canada (2017).

[48] World Customs Organisation (2018).

[49] World Customs Organisation (2018).

Table 3.2 Investigative techniques

- **Controlled delivery**. A controlled delivery is an investigative technique involving the transportation of contraband to a suspect violator while it is under the control or surveillance of law enforcement. This technique can serve to identify violators, disrupt and dismantle the smuggling organisation, broaden the scope of an investigation, identify higher level violators, obtain evidence, etc. Types of controlled deliveries include:
  - Non-cooperating violators. Contraband discovered during a border inspection is allowed to pass through and proceed to its intended destination while under surveillance of law enforcement. The non-cooperating violator is unaware that the contraband has been discovered. Risks include loss of the contraband and possible counter-surveillance by the criminals
  - Cooperating violators. When contraband is discovered and the violator arrested, the violator may agree to cooperate with law enforcement. The cooperating violator is under arrest and in the custody of law enforcement, so efforts must be made to protect their safety and ensure they do not harm others or escape
  - Undercover officer or informant. The violator is arrested and replaced with an undercover officer or informant
- **Flash operation**. Flash operations are used in conjunction with undercover agent/s (UCA). This technique involves using actual or sham versions of the commodity in question and providing targets of investigation the opportunity to visually and physically inspect the commodity
- **Communications exploitation**. Sources of information may be the most important and effective tool in developing criminal cases. Mobile phone and e-mail accounts are key components to many investigations, and Customs investigators are in a unique position to gain access to a large amount of target telephone and e-mail data through their border search authority. Call and e-mail data can make connections between defendants and other investigations. A good practice is to maintain a consolidated database of phone numbers and e-mail addresses for such cross references

Source World Customs Organisation (2018). Strategic Trade Control Enforcement: Implementation Guide. http://www.wcoomd.org/en/topics/enforcement-and-compliance/instruments-and-tools/~/media/7A05799E8D3A46C8B8355175EEBA4322.ashx. Accessed 5 July 2018

Table 3.3 Seized goods

- **Return to a party with a legal interest in the property**. The private sector entity from which the material was seized might not be the only entity which has a valid claim on the good. If another innocent party has a valid claim on the goods and is found to not be complicit with any attempt to illicitly transfer the materials, Customs could return the materials to that party
- **The sale of goods with proceeds deposited into fund for government use**. Given the strategic nature of these goods, the government should ensure that the purchasing party is a trustworthy user with a valid commercial purpose for the materials. It is a good practice to notify the purchaser of any restrictions on their ability to resell or export the goods
- **Retention of property for official government use**. Storage of goods can be costly, and in the case of hazardous goods, compatibility and segregation issues must be considered. International asset sharing. Through existing arrangements and agreements such as mutual legal assistance treaties, the transfer of seized property or the proceeds of sale of such property could occur. In this option, a government could share such goods or proceeds with a foreign government for purposes including the use of those goods at a trial or to offset an international partner's costs related to conducting a seizure

Source World Customs Organisation (2018). Strategic Trade Control Enforcement: Implementation Guide, p. 33 http://www.wcoomd.org/en/topics/enforcement-and-compliance/instruments-and-tools/~/media/7A05799E8D3A46C8B8355175EEBA4322.ashx. Accessed 5 July 2018

These days enforcement literature underlines the significance of inspector liability and indemnification. These mechanisms are required to protect enforcement officials from harassing legal suits. The logic is that inspection may lead to delay and even damage of a consignment. If an investigating official is apprehensive of any personal liability if any damage is done to a consignment, he will hesitate to take proper action. Moreover, the seized document is generally used as an evidence. The WCO mentions that 'procedures must also protect and preserve the value, including evidentiary value, of goods under seizure'.[50] A country's law and policy is to protect official until and unless an act is illegal or carried forward in a negligent manner. Generally, country's strategic trade control system provides precautionary measures and legal and regulatory provisions. In fact, the WCO has acknowledged the need for this kind of protection because it maintains that a great deal of complexity is involved in the strategic trade control which eludes perfect targeting without any flaw. Moreover, the very method, targeting, is considered an imperfect science.

Nowadays, a strong emphasis is given on multilayered and multidimensional training and outreach activities. The need for 'active structured outreach programme'[51] is universally commended. The need for commodity identification training is underscored in most of the meetings and organisations. All important countries are imparting this training to its officials from Customs and other security agencies. The WCO maintains that the joint outreach of Customs, licensing and investigative agencies is the best method to achieve coordination, consistency and collaboration.[52] Increasingly, countries are using the Information Technology infrastructure for outreach. Government officials also interact with industry, universities and research institutes in many countries to develop understanding and get information about their areas of activities. However, in the entire process of strategic trade management, the biggest challenge is to manage confidentiality and data protection. It may become complex with 'export violations that have a nexus with foreign counterintelligence'.[53]

An outreach with industry or an exporting entity has a different use for prosecution. When an outreach is documented, it becomes an evidence for investigative agencies in court. It makes the point that the entity had the knowledge of the rules and laws and that it deliberately indulged in illicit transactions. Quite significantly, the third party review is being pushed to make an outreach effective and useful.

3.6 International Cooperation

Strategic trade control or export control and the associated supply chain management involve several partners residing in several countries. Moreover, the volume and diversity of goods flowing in the international supply chain necessitate stakeholders

[50] World Customs Organisation (2018).

[51] World Customs Organisation (2018).

[52] World Customs Organisation (2018).

[53] United States Government Accountability Office (2006).

to look beyond national boundaries. The involvement of more than one country needs cooperation at the bilateral, regional, multilateral and international levels. Different organisations such as OPCW, WCO and different multilateral export control regimes assist national governments and other bilateral, regional or international efforts in enforcement.

The WCO's *Compendium of Customs Operational Practices for Enforcement and Seizure* is helpful for many countries, which is new in export controls. The four multilateral export control regimes do not have uniform or identical treatment for enforcement. Some have detailed provisions and bodies for addressing enforcement issues, but some expect the national government to do work relating to enforcement. For example, the NSG conducts Licensing and Enforcement Experts Meeting (LEEM). Similarly, the Wassenaar Arrangement also sketches the best practices for enforcement.

Information sharing is one of the requirements not only for domestic enforcement agencies but also at the international level when export takes place often involving a complex international supply chain. For international enforcement, all the international institutions, including the multilateral export control regimes and WCO discuss mechanisms to facilitate information sharing. The Information Exchange Meetings of the NSG basically require meetings of licensing and enforcement experts. The Wassenaar Arrangement recommends even bilateral sharing of information about the high-risk entities. It prescribes countries and international organisations to share information generated during preventive, verification/interrogation and prosecution/convictions relating activities. Its best practices advise international cooperation in information exchanges on risky destination, license denials, 'networks, agents, brokers, consignees and end-users of concern'.[54]

The Wassenaar Arrangement encourages a specialised agency of a country to exchange information with its counterpart from another country. However, it cautions that confidentiality needs to be maintained. Besides, the exchange of information is to take place between only authorised officials. Australia Group also encourages information sharing among members which could be useful for licensing as well as enforcement.[55]

The UNSCR 1540 urges international, regional and subregional organisations related to strategic trade control to improve cooperation and information sharing capabilities.[56] Any organisation or country may share information with the 1540 Committee which further disseminates the information as per the need of the implementation of the resolution 1540. In fact, one of the cooperation frameworks of the 1540 Committee is 'Experience Shared, Lessons Learned, and Effective Practices'.[57]

Article IX of the CWC explicitly obliges a member state to provide information if it is concerning compliance of the treaty. The OPCW, which is the institution to

[54]The Wassenaar Arrangement (2016).

[55]The Australia Group (2018).

[56]The United Nations 1540 Committee (2018).

[57]The United Nations 1540 Committee (2018).

implement CWC, has been campaigning for information exchange and international cooperation since its inception.[58]

The Interpol[59] and the WCO promote international cooperation at the operational level. However, the WCO has the most wide-ranging and elaborate mechanisms for strategic trade control. The WCO operates through 11 Regional Intelligence Liaison Offices in six regions of the world. These offices gather, evaluate and supplement and disseminate information after working on 'trends, modus operandi, routes, and significant cases of fraud'. These mechanisms have been developed for fighting transnational crime, which are considered useful for strategic trade enforcement as well.

As a number of countries lack the technological infrastructure to exchange information on time, the WCO has developed systems for information exchange for its member states and any other organisations interested in information. The WCO has been developing systems such as the Container Targeting System (CTS) and the Customs Enforcement Network (CEN). CTS provides member states 'standardized yet flexible targeting capabilities' for monitoring high-risk movement of containers or cargoes. For this exercise, the help of shipping industry is taken. WCO's CEN Communication System (CENComm) is also useful for transit, transshipment and retransfer of goods. The WCO offers several mechanisms to assist enforcement to its members.

As discussed, WCO's Compendium of Customs Operational Practices for Enforcement and Seizures gives 'working practices'. It helps countries to improve their methods of enforcement and seizure. The Compendium offers assistance in erecting not only operational but also legal frameworks so that prosecution after enforcement is successfully done. It has a compendium for undertaking risk management exercise as well. It also underscores mutual administrative assistance, guidelines for Post-Clearance Audit, the Authorised Economic Operator programme under which the Customs works with Industry and gives incentives for its compliance record, joint investigation and so on.

The WCO has published several non-binding handbooks or 'tools' for its members for enforcement. Some of these are: WCO Handbook on Inward and Outward Processing Procedures; the WTO Trade Facilitation Agreement and the WCO Mercator Programme Approach to Implementation, Transparency and Predictability Guidelines; Study Report on Customs Brokers; National Committees on Trade Facilitation—A WCO Guide; WCO Customs Risk Management Compendium; Global Supply Chain Security; ICT Guidelines; Unique Consignment Reference (UCR); Customs International Benchmarking Manual; AEO Compendium (2016 edition); Customs-Business Partnership Guidance; Transit Guidelines; Transit Handbook; and Voluntary Compliance Framework.

[58] Organisation for the Prohibition of Chemical Weapons (2018).

[59] Interpol, Office of Legal Affairs (2014) and Interpol (2017).

The WCO enumerates advantages of joint investigation as follows:

- Ability to share information directly without the need for formal requests.
- Ability to request investigative measures between team members directly, dispensing with the need for Letters Rogatory and Mutual Legal Assistance Treaty requests.
- Ability for members to be present at searches, interviews, etc., in all jurisdictions covered, helping to overcome language barriers in interviews, etc.
- Ability to coordinate efforts on the spot, and for informal exchange of specialised knowledge.
- Ability to build and promote mutual trust between investigators and prosecutors from different jurisdictions and work environments.
- A platform to determine the optimal investigation and prosecution strategies.[60]

The International Convention on the Simplification and Harmonization of Customs Procedures was adopted in 1973–1974 and was revised and updated by the WCO. This updated Convention, known as the Revised Kyoto Convention, entered into force in February 2006. It has 113 Contracting Parties.[61] The Revised Kyoto Convention, especially its Chap. 6, provides details for laying down 'a foundation for Customs Control' for strategic trade control. The Convention stipulates the legal and technical abilities to verify consignment and seize it if a valid reason is detected.[62]

Training is the primary component of international cooperation. The UNSCR 1540 Committee has been giving training to countries directly or through different regional groups. EU, the US and many developed countries with experience and resources are imparting training for enforcement. The international organisations such as the OPCW, the WCO and the Interpol are active in imparting training to not only enforcement officials but also to industry and academic organisations which are engaged in activities relating to controlled goods. The WCO Basic Customs Intelligence Course, Commercial Fraud Technical Resources; Customs Learning & Knowledge Community (CLiKC!) are also useful for enforcement.

3.7 Conclusion

The developed industrial countries with years of experience have well-developed enforcement practices and institutions. These countries also face several unforeseen challenges which lead to further devising of enforcement practices and specialised institutions domestically. Enforcement of deemed exports or intangible technology has emerged a challenging task worldwide. Even the developed countries find it difficult to manage enforcement of these regulatory practices. Several countries and even practitioners complain that confidentiality and data protection complicate the task of enforcement. Another challenge of enforcement is of resources because immediate

[60] World Customs Organisation (2018).

[61] World Customs Organization (2010).

[62] World Customs Organization (2010).

security sensitive activities are given preference and priority. As result, the common criticism is that enforcement has become, what is called, 'hit or miss nature of enforcement'.[63]

Hardly a couple of countries have the infrastructure and resources to undergo post-shipment verification. Most of the countries do or prefer preventive enforcement. For the purpose, several dominant practices are in operation. Self-enforcement in the form of ICP is the most popular device in the developed countries but other not so developed countries are also encouraging their companies to adopt this programme. A number of models are available but the main components are similar. Some models are customised to suit some big or small countries. However, in almost all countries, small and medium enterprises skip ICPs. In some countries, where companies do not find big foreign orders, they become reluctant to adopt such system.

The UNSCR 1540 shaped export control order has also encouraged an organisation like the WCO to develop practices for enforcement of strategic trade. Most of the dominant practices for enforcement are flowing from the WCO. It has several highly specialised handbooks and compendiums as well. These guidelines or practices are becoming very popular among the Customs authorities worldwide. At the same time, the WCO also involves Customs and other officials from several non-developing countries. These officials also share their experience regarding domestic enforcement. These officials have helped develop manuals and cooperation. International cooperation is the real strength of enforcement. Several international organisation, old and new, are active for enforcement.

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[63] Morris (2006).

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Chapter 4
Comparing the Major Systems

Abstract Although the global export control order is internationalised, certain key countries have been continuously shaping this order. Most of the practices of the export control order emanate from these key countries or the groups of key countries. An understanding of these major systems gives the idea of standardisation that is taking place in the global export control order. The major systems started working on export controls several decades ago. All the major systems are investigated on vital indicators: legislation, regulatory system, institutional framework for implementation and enforcement of strategic trade control, enforcement machinery, international cooperation and outreach. The high volume of trade, the long duration of strategic trade management, the advanced industrial systems and the geographical representation are the principal factors for selecting the major systems. The systems of select countries and the European Union (EU) are analysed. All of them have advanced high-technology industrial systems. The phrase—major powers have been deliberately avoided. The use of this phrase may have pushed the study towards a new set of countries. The major western systems also have a high level of coordination for strategic trade control undertaken in various formal and informal international organisations. Outreach for new export control countries makes these major systems distinct in the global export control order.

4.1 Introduction

The post-UNSCR 1540 global export control order is largely internationalised. The order has been joined in by the countries, which had been hitherto sceptical and even critical of the very idea of export control or strategic trade management. These countries have started adopting basic practices of strategic trade management for nearly a decade and a half. Most of these practices have been existing in the world for years. A few practices may have been created for the post-UNSCR 1540 order but in general, these practices have evolved in the major export control systems. These major systems have been enriched, on the one hand, by interagency interactions domestically and on the other, by the international bodies like the multilateral export control regimes.

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An insight into these major systems gives the idea of standardisation that is taking place in the world today. The major systems took the lead in strategic trade management quite early several decades ago. Some of the major systems are originators of many of the concepts and practices of strategic trade management. These systems have also shaped the system of each other by sharing experiences. During the Cold War, the systems even lacked cordial relations. The state of disharmony existed not only between hostile systems, but also among friends and allies of the same grouping. Yet, gradually, these countries sank their differences on major strategic trade management issues and developed major practices, though some differences do persist.

All the major systems are analysed on the indicators: legislation, regulatory system, institutional framework for implementation and enforcement of strategic trade control, enforcement machinery, international cooperation and outreach. This chapter intends to discern the pattern/trend of export control systems of these countries. A broad standardisation or harmonisation may have taken place in the major export control systems of the world, but depending on the needs of different countries, the systems may have differences in details of each of the indicators.

This chapter has selected major systems on the basis of the high volume of trade, the long duration of strategic trade management, the advanced industrial systems and the geographical representation. All of the countries have advanced high-technology industrial systems. This chapter avoids using the phrase—major powers. The use of this phrase may have forced the study to take a new set of countries into account.

This chapter has analysed the systems of select countries and the European Union (EU). Canada and the US are from the Americas. The strategic trade control system of the EU has been taken but to fill the gap in the analysis, the systems operated by the leading individual national governments have occasionally been brought in. Australia and Japan have been selected from the region known as Asia-Pacific. Both are major economies and have advanced industrial systems. Both are broadly part of the Western grouping, and have been engaged by the Western system for strategic trade control. Japan was the late starter in the strategic trade control business, but soon, it apparently developed a very strict system.

The system of the Russian Federation has also been taken, though it is a later starter in the field. Unlike other countries, it was never associated with or part of the Western system. Admittedly, Russia and its predecessor in many strategic matters, the Soviet Union, are not the same, but interestingly, the general perception in the Western world, as well as elsewhere, has a little distinction between the two. As discussed in the previous chapters, the Soviet Union, the predecessor of Russia was, in fact, the major target of the Western export control system. However, the Western bloc started engaging the East bloc in the Cold War itself. So, the East bloc in general and Russia, in particular, has the advantage of starting early in the field.

4.2 Legislation

All the major players have over the years developed a number of laws or have used many existing laws to manage strategic trade externally. Most of the countries have a combination of old and new laws for the purpose. Generally, the countries have multiple laws to deal with different facets of strategic trade control. Some laws are good for licensing, others are for enforcement.

Of all the major powers, the US has a quite advanced legal system. The US takes help from a number of legislations to manage strategic trade. At present, the US regulates munitions items through the Arms Export Control Act. The Act requires that all the entities involved or interested in "export or brokering of defence articles and services must be registered with the US Government." The Atomic Energy Act of 1954[1] provides mandate of how to undertake international activities, including export of nuclear items for peaceful purposes. The chapters of the Act such as numbers 11 and 12 give details of these activities. Export of nuclear materials and facilities are also guided by the Nuclear Non-Proliferation Act of 1978.

For regulating of US-origin dual-use goods, services and technology, the US is using Presidential order backed by the legislation—the International Emergency Economic Powers Act. Its law for regulating dual-use goods—the Export Administration Act of 1979—lapsed. The US frequently made efforts to revive the act but so far it is without a specific law for dual-use regulation. The lapsed law had provided statutory authority to its regulation for dual-use export controls. Besides, it uses the Trading with the Enemy Act for control purposes.

The EU issues documents for common positions, council decisions and actions along with regulation, strategy and policy for export control of arms and dual-use trade. As it is not a sovereign entity, the task of law-making for export control is done in individual sovereign countries. Many writings[2] on the subject refer EU law to what is generally called regulation. However, most of the EU countries have export control and related laws called national laws to implement and enforce export control obligations of international and European conventions and understandings.

For example, Germany has Foreign Trade and Payments Act of April 28, 1961, War Weapons Control Act of April 20, 1961, Atomic Energy Act of December 23, 1959, Protection against Infection Act, Animal Disease Act, Plant Protection Act and so on for controlling strategic trade. Most of these laws are amended from time to time. In France, relevant national laws for export control are Act No. 2004-204, Defence Code, Penal Code, Customs Code, Maritime Ports Code, and so on. Italy has got Legislative Decree No. 96, Law No. 185, Law No. 197 and so on for export controls. The Netherlands operates its export controls activities mainly through the Import and Export Act of 1962, Strategic Goods Import and Export Decree of 1963, CWC Implementation Act, and the Economic Offences Act of 1950. Quite significantly, an important exporting country like the UK has the Export Control Act, the Chemical

[1] Office of the General Counsel, United States Nuclear Regulatory Commission (2013).

[2] Danish Business Authority (2018) and Government of Germany Federal Office for Economic Affairs and Export Control (2018a).

Weapons Act 1996, Anti-terrorism, Crime and Security Act, Customs and Excise Management Act, Finance Act and so on to provide statutory authority for export control.

In Asia, Japan has the Foreign Exchange and Foreign Trade Act, Export Trade Control Order, Foreign Exchange Order, Ordinance of the Ministry Specifying Goods and Technologies Pursuant to Provisions of the Appended Table 1 of the Export Control Order and the Appended Table of the Foreign Exchange Order, Ministerial Ordinance on Trade Relation Invisible Trade, etc. Export Trade Control Ordinance for strategic trade control.[3] Australia has Customs Act 1901, Customs (Prohibited Exports) Regulations 1958, Defence and Strategic Goods List, Defence Trade Control Act 2012, Weapons of Mass Destruction (Prevention of Proliferation) Act 1995, Charter of the Nations Act 1945, and Autonomous Sanctions Act 2012 for providing strategic trade control authority.[4]

Russia, too, has several laws for strategic trade control. It has Customs Code No. 61-FZ, Federal Law No. 63-FZ, Federal Law No. 183-FZ on export controls, Federal Law No. 164, Government Decision No. 462, Regulation for the Federal Service for Technical and Export Control of Russia (FSTEC) approved by the Decree of the President of the Russian Federation No. 1085 regarding Matters of Federal Service for Technical and Export Control; Russian Federation Law No. 5485-1 on State secrets; Federal Law No. 149-FZ on information, information technologies and information protection; Federal Law No. 152-FZ on personal data; Federal Law No. 294-FZ on protection of legal entities and individual entrepreneurs rights when exercising state control (supervision) and municipal control, Federal Law No. 184-FZ on technical regulation, Federal Law as of June 27, 2011 No. 161-FZ on national payment system through which it manages export controls.[5]

4.3 Regulation

All the industrially advanced countries have evolved their export control systems and had most of the prevailing best practices before the advent of the UNSCR 1540. All these countries kept refining their systems. The use of Internet is helping all of them. Automation is the most dominant regulatory practice in the post-Cold War world. Regulations are available online. The applicants are now applying for licenses online. Gradually, countries are developing software so that applicants track the status of their applications.

Of all, the US has a very exhaustive document—Export Administration Regulation—containing details of the regulatory practices to manage strategic trade. A

[3] Government of Japan, the Ministry of Economy, Trade and Industry Security Export Control Policy Division, Trade Control Department (2017).

[4] Australian Government Department of Defence (2018a).

[5] Federal Service for Technical and Export Control Russia (2018) and United Nations Security Council 1540 Committee (2018a).

number of practices for strategic trade control originated from the US and its allies developed during the Cold War and even after. Even if the US dual-use law has lapsed, its regulatory system is still operational and is updated frequently. The US has been updating its lists and even transferring items from one list to another.

The US has a licensing system for controlled goods. Different licensing agencies use different lists. In an advanced industrial country like the US, online submission is the principal practice. Dual-use license application is known as Simplified Network Application Process—Redesign. It also has System for Tracking Export License Applications (STELA). The US licensing agencies help a company in identifying and classifying its commodity to know whether a license is needed. The US system has Validated End-User Programme for certain organisations of India and China. Under this programme, designated items may be exported to the organisations figuring on the list under general authorisation, skipping the individual licensing application process.

The US maintains several restrictions for strategic trade. Its red flags are in use as a control framework in many countries for screening clients. Its control system has both tangible and intangible technology controls and deemed export control, Transhipment/Transit Controls, re-export control, arms brokering control, control over all intermediary activities, catch-all controls, end-use- and end-user controls, and so on. In 1996, the US denied only 0.9% of applications for dual-use goods.[6] The US controls an item of a foreign country if it has specified US-origin item or it is going to specified destination. If even a plant located outside uses US-controlled items, the company may have to take US permission for producing and exporting any item. The US maintains Entity List, under which any American company exporting any controlled item to the entities figuring on the list will have to face additional restrictions. For strategic trade control purposes, the Denied Persons list, and the Consolidated Screening List are also maintained.

The Regulation (EC) No 428/2009 is the common EU control rules for control of dual-use items in the EU countries. The regulation has a common EU list of dual-use items as well as detailed guidelines for implementation of the regulation. This regulation is binding and all the EU member countries have to harmonise their national control systems with it. However, member states are free to adopt additional or 'complementary' measures. The EU control list is based on the lists of four multilateral export control regimes. The catch-all clause, other items may be controlled for licensing. Besides, the EU member countries are free to put additional items on their country lists for reasons of public security or human rights consideration.[7]

The EU has set up a community regime, which establishes a common control system and harmonises policies for enforcement and monitoring, as well as for the free movement of dual-use items inside the community. The EU has brokering services control, transit control for goods from non-EU countries, intangible technology control, re-export control, sanctions-related control, and other best practices. The EU has four kinds of licensing or export authorisations: First, EU General Export Autho-

[6] United States Department of Commerce, Bureau of Industry and Security (2017b).

[7] European Commission (2014).

risations, National General Export Authorisations, global licenses and individual licenses. For all these licenses, the EU has specified guidelines and conditions.

The EU has a common position on arms export and a common military list.[8] The member countries are helped with the EU's 'User Guide'. It has developed mechanisms for consultation and notification for the denial of license of arms export. License denials are to be kept confidential. However, the most important part of its arms export control is the eight risk assessment criteria such as the behaviour of the buyer country, respect for human rights, regional peace, security and stability, and the possibility of retransfer for granting license.[9]

Russia has also developed several regulations over the years to manage strategic trade. Through the Presidential decrees, Russia maintains several lists such as military, nuclear and dual-use for export control purposes. Like other advanced industrial countries, Russia requires license for export of controlled items, including technology and services. There are individual and general licenses. But, the Russian regulation has provisions for license exemptions. It also has deemed export control, catch-all, end-user control, end-use control, tangible technology controls, brokering control, re-exports and temporary export controls, transit and transshipment control, and so on.[10]

Japan is one of the oldest export control countries in Asia. It has seemingly the strictest system of export control system as well. Like the US and the European countries it also maintains multiple lists for export controls. It added military export control list later. Except a few countries Japan generally does not permit export of arms or arms-related goods under its very old policy. It keeps updating its lists. The Japanese control system, too, has the prevalent best practices such as control of brokering, deemed export, catch-all control. Like the American entity list, it maintains a foreign end-user list.

Australia also has an advanced regulatory mechanism for strategic trade control. Like other countries, it too has a control list. However, it maintains only one list—Defence and Strategic Goods List.[11] The first part of the list has pure military items and the second has dual-use goods. It also controls technology and services. Australia gives case-by-case licensing. Like other countries it also has all the best practices such as brokering control, transit/transhipment and catch-all control.

Canada has been very active on export control and it has developed its regulation reflecting all the practices followed by any developed country. It too has a single list and different categories of items figure in the seven 'groups' created to segregate these items. As Canada enjoys a liberal licensing system from the US, it has special provision for controlling US-origin goods. Like other advanced export control countries, Canada has the prevailing special practices such as intangible controls, brokerage controls, deemed export. For destination control, it has other than end-use control a system like Area Control list and Automatic Firearms Country Control List.

[8] European Union External Action Service (2015).

[9] European Union (2018).

[10] United Nations Security Council 1540 Committee (2018b).

[11] Australian Government Department of Defence (2018b).

4.4 Institution

As discussed in the previous chapters, for licensing purposes, a network of institutions is required. As the task of licensing is becoming complex, strategic trade control requires specialised agencies to handle the job. For licensing, a nodal agency is required, but in a number of countries, for regulating and licensing dual-use and military goods separate agencies are created. Some countries exporting nuclear items also create an agency or organisation focused to regulate nuclear items. Depending on the licensing task and complexity of items to be exported, several specialised bodies are created inside the organisation or department or ministry. Although different agencies may exist, yet the effectiveness of the system will be measured on the level of coordination.

Of all the important export control countries, the US has multiple agencies for licensing. A number of agencies assist the nodal licensing bodies. In the US, the Bureau of Industry and Security (BIS) of the Department of Commerce is the nodal agency for dual-use goods, technology and services. Earlier, the BIS was known as the Bureau of Export Administration. Different offices of the Bureau such as Non-proliferation and Treaty Compliance and Strategic Industries and Economic Security help the licensing work of BIS. The Directorate of Defence Trade Controls (DDTC) of the US Department of State gives license for export of Defence goods, technology and services. It also has support offices to assist the work. One of the most significant organisations for licensing of defence items is the Defence Threat Reduction Agency. The National Nuclear Security Administration (NNSA) is the body in the US that authorises civil nuclear commercial activities outside the US.

In addition to these three licensing agencies, the US has other institutions, which play the supportive role. The Bureau of US Customs and Border Protection (CBP) and Customs-Trade Partnership against Terrorism operating under the US Department of Homeland Security have several bureaus which are involved in implementation and enforcement of the US export control system. The Office of Foreign Assets Controls under the US Department of Treasury is responsible for managing sanctions related control. The US not only implements sanctions imposed by the UN but also it imposes sanctions unilaterally if it feels that a country or an entity is involved in terrorism, narcotics and illegal transactions of weapons, including WMD.

The US has an interagency system for licensing, though the US is trying to build a single licensing agency.[12] Any license application for dual-use technology under the jurisdiction of the BIS is reviewed by other departments such as the Departments of Defence, Energy, State and the Arms Control and Disarmament Agency.[13] The BIS is free to consult other agencies if it is required. Other departments and agencies are required to send their feedback within a stipulated period.[14] Interagency dispute resolution and escalation procedures exist in the US system to resolve the disagreement among the departments. The US has a three-layered system—First, Escalation to

[12]The United States Government Department of State (2011).

[13]United States Department of Commerce, Bureau of Industry and Security (2017a).

[14]United States Department of Commerce, Bureau of Industry and Security (2017a).

the Operating Committee, second, Escalation to the Advisory Committee on Export Policy and third, Escalation to the Export Administration Review Board to resolve disagreements among different departments.[15] The US President has the last word in the matter. Similarly, for military items, about thirty percent of the applications are sent to other offices and agencies like the Department of Defence for opinion.[16] In case of disagreement, an escalation mechanism is available to resolve the matter for ITAR items as well.[17]

In EU, the European Parliament and the European Commission play a role in drafting the regulation for export control. The Commission also reviews regulation periodically. Although the EU provides regulatory framework for its members, licensing and enforcement are undertaken by the national governments. As a result, for the strategic trade management, EU countries use different sets of institutions. Other institutions such as the EU Customs Union and the European Institute for Export Compliance coordinate EU efforts in compliance and outreach.

All the member states of the EU are considered licensing authorities for EU. These countries have a range of organisations for licensing and enforcement. Some of these institutions act as nodal bodies for licensing and enforcement and some provide specialised services to the strategic trade management. For example, in Germany, the Federal Office for Economic Affairs and Export Control (BAFA) is the principal body for strategic trade control. But it consults the Federal Ministry of Economics and Energy as well as the Federal Foreign Office.[18] In France, the Ministry of Economy gives license for dual-use items and the Ministry of Defence for munition items. In Sweden, the Swedish Agency for Non-proliferation and Export Control gives license to all applications except some nuclear items. These nuclear items are licensed by the Swedish Radiation Safety Authority Office of Nuclear Non-proliferation. The UK, which has decided to come out of EU, has the Department for Business, Innovation and Skills as its nodal licensing agency. However, the Department of Defence and other agencies are also important for control of strategic trade in the UK.

In Russia, the Federal Service for Technical and Export Control issues licenses for exporting of strategic goods. It is the principal body for implementing and coordinating activities relating to export controls. It also has a body, the Commission on Export Control of the Russian Federation, which performs several functions such as interagency coordination on export controls and recommendation of decisions on export controls. However, the process of export control involves the Russian President, the Ministry of Foreign Affairs and the Ministry of Defense among other agencies and ministries.

In Canada, the Export Controls Division of Foreign Affairs, Trade and Development is the principal export control body. It is the nodal centre for licensing and making information available to applicants interested in exporting controlled goods. The Handbook of the Canadian Global Affairs Ministry informs ‘Depending on the

[15] United States Department of Commerce, Bureau of Industry and Security (2017a).

[16] United States Department of State Directorate of Defence Trade Controls (2018).

[17] The United States Government Publishing Office (2018a).

[18] Government of Germany Federal Office for Economic Affairs and Export Control (2018b).

nature and destination of the export commodities, consultations with other government departments may be required as part of the export permit approval process (such as the Department of National Defence, Canadian Nuclear Safety Commission, etc.).'[19] Certain nuclear items need license from the Canadian Nuclear Safety Commission.

There is no requirement of consultation to supply an item to 'Open Policy Country'. However, for other countries consultation is necessary. The Canadian National Authority for the Chemical Weapons Convention, the Explosives Regulatory Division of the Natural Resources Canada and many other departments and agencies are involved in the strategic trade control process. Finally, the Canada Border Services Agency is responsible for compliance and enforcement.

Other major countries such as Japan and Australia too have central bodies for strategic trade management. In Japan, the Security Export Control Policy Division in the Trade Control Department of the Ministry of Economy, Trade and Industry (METI) is the nodal body for strategic trade control. It manages licensing of sensitive/controlled goods. However, it consults other important organisations such as Ministry of Foreign Affairs and Ministry of Defence. Japan has evolved a unique institution like the Centre for Information on Security Trade Controls (CISTEC) that acts as a bridge between industry and the government. In Australia, licenses for both dual-use and military goods are issued by Defence Export Controls, Department of Defence. Like other countries, different agencies or departments are consulted when there is a need. However, the Strengthened Export Control Steering is an Australian institutional innovation involving industry, academia and government officials to advise the government on emerging export control issues and their implementation.

4.5 Enforcement

The US has developed a complex system of enforcement. As a large number of licenses are issued in the US for strategic trade, including munitions items, the country has a network of organisations to enforce evolving and updating rules and regulation. The ultimate objective is to ensure that illicit transactions do not take place. In the US, the CBP which, as discussed, is now under the Department of Homeland Security, is the nodal agency for export control enforcement. Exercising its general duty of enforcement of export and import, it checks controlled items going out of the country.

The enforcement task of the US is also assisted by the Department of Commerce. The BIS that has the primary responsibility of granting license for dual-use goods also has an Office of Export Enforcement (OEE). The OEE has three offices under it: The Office of Export Enforcement (OEE), the Office of Enforcement Analysis (OEA) and the Office of Anti-boycott Compliance (OAC). It has to make sure that sensitive items do not go to the state or non-state entities, which are inimical to American

[19]Export Controls Division Foreign Affairs, Trade and Development Canada (2015).

interests. It also targets companies or individuals engaged in onward proliferation. The task of enforcement of the OEE is also to pursue 'appropriate criminal and administrative sanctions against export violators prohibited boycott activities.'[20]

The OEE has been empowered to 'make arrests, execute search warrants, serve subpoenas, and detain and seize goods about to be illegally exported.'[21]

Enforcement machinery secures information and intelligence for the mission from diversified sources. For preventative and investigative enforcement, it coordinates with other enforcement agencies of the country. For the Department of Justice, it has to gather precise and methodical testimony and evidence of violators. It takes help of attorneys working with the Department of Justice and 'the Office of Chief Counsel for Industry and Security to prosecute criminal and administrative cases.'[22]

For munition items, the US law explicitly provides that the US Immigration and Customs Enforcement and the US Customs and Border Protection officers are authorised to take action against any violation of US regulation for munitions exports.[23] The US has the Department of Defence National Industrial Security Program Operating Manual[24] to help enforcement of defence data and articles. In addition to seizure and forfeiture of goods, the penalty may be both imprisonment and fine. For nuclear items regulated by NNSA, the same enforcement machinery takes action. Besides, the US makes use of several compliance programmes for raising awareness among its industry and educational institutions. The US also uses initiatives like the Project Shield.

The EU has a complex web of machinery for enforcement. On the one hand, the EU Customs Union performs several tasks, and on the other, it expects all its member states to have a contact persons or points to do the job. The EU itself has a multilayered risk management system in which it involves several stakeholders ranging from government officials and international organisations to industry. The EU's approach to enforcement has two paths: first is through Customs and the second is through working with the Authorised Economic Operators (AEO). The EU regulation discusses the status of the AEO. It lays down that if one member gives AEO status to an economic entity, it is advised that another member, too, recognises that status to the entity. However, the regulation clarifies that it will not be automatic.[25] It underlines the need for simplification.

The same simplification logic makes the EU to not just have a Community Customs Code but also to make changes in it. The EU has also been making changes in its regulation to update direction and guidelines for enforcement in other spheres of enforcement. All modes of transport are to be monitored under the EU regulation. Exporters are supposed to forward information about their consignments well in advance. The EU regulation requires sharing of 'risk-related information' on export

[20] United States Department of Commerce, Bureau of Industry and Security (2018a).

[21] United States Department of Commerce, Bureau of Industry and Security (2018b).

[22] United States Department of Commerce, Bureau of Industry and Security (2018a).

[23] The United States Government Publishing Office (2018b).

[24] The United States Government Publishing Office (2018b).

[25] Council of European Union (2005).

between the Member States and the European Commission. For this purpose, it prescribes setting up of 'a common, secure system'[26] for the members to 'access, transfer and exchange'[27] information in a 'timely and effective manner'.[28] This information may be exchanged with third countries, which have signed any international agreement for this purpose. The EU has signed agreements with the countries such as the US and China for mutual assistance and cooperation in Customs-related work. Nowadays, it pays attention to programmes such as the Global Shield launched by the WCO.

Canada's Border Services Agency is the nodal body for enforcement of strategic trade control. Like other countries, Canadian authorities also demand basic and 'additional documents, including conveyance reports, cargo reports and bills of lading' from exporters and their transport and other agents. Officers of the Agency are authorised to search, detain, seize and forfeit any unauthorised transactions by the Canadian law and regulation. Canada has an Administrative Monetary Penalty System for stimulating corrective rather than punitive action for exporters.[29] Canada allows its exporters to choose either of the two: the Canadian Automated Export Declaration software or the G7 electronic data interchange (EDI) for reporting of goods. The Canada Border Services Agency and Statistics Canada have jointly developed both the systems.

In other countries such as Russia, Australia and Japan, the Customs are the nodal bodies for enforcement of export controls. In Russia, the Federal Customs Service is the authority to manage border and ports. Its Department of Trade Barriers, Currency and Export Control[30] is mainly responsible for enforcing export control relating activities. Time to time, it keeps improvising technology and procedures of reporting and other mechanisms of enforcement. It gathers information and shares with other government agencies and partner countries and international organisations. It also organises 'professional training, retraining and raising of qualification of public individuals of Customs bodies'[31] through seminars, workshops and other training programmes.

Other countries such as Australia and Japan also have institutions for enforcement. In Australia, Customs and different agencies are assigned enforcement. It also trains its industry to comply. Over the years, Australia, too, has developed and refined its risk management system which it employs for enforcing strategic trade control. It has been given the power to suspend license order if the allegation is found true. In Japan, where METI is the nodal export controls activities, enforcement is also coordinated by METI. It coordinates enforcement of export control with Customs, National Police Agency, Ministry of Foreign Affairs (MOFA), Japan Coast Guard and

[26] Council of European Union (2005).

[27] Council of European Union (2005).

[28] Council of European Union (2005).

[29] Government of Canada Border Service Agency (2018) and Government of Canada Justice Laws (2018).

[30] Russian Federal Customs Service (2018).

[31] Russian Federal Customs Service (2018).

many other agencies. The US has strengthened Japanese compliance programmes to prevent unintended violation.

4.6 International Cooperation and Outreach

International cooperation has been central to the very idea of strategic trade control. In the beginning of the Cold War, when peacetime control of high technology goods started gaining ground, even if the real implementation and enforcement were happening at the national governmental level, the need for international cooperation was realised to make the idea of strategic trade control or export control really effective. As the leader of the Western/capitalist bloc, the US felt that it alone cannot carry forward this kind of control. It needed the support of other countries of the bloc. As a result, the first multilateral export control regime came into being. Initially, several countries, especially from Europe were reluctant to join the regime. Gradually, a number of countries of the Western bloc joined it and later, even the non-western countries joined the multilateral export control regimes.

At present, of the four multilateral export control regimes—the NSG, the MTCR, the Australia Group and the Wassenaar Arrangement—Russia is not a member of the Australia Group but it is a member of other three regimes. Canada is not a member of the Wassenaar Arrangement but is a member of other three regimes. Australia, Japan and the US are members of all the four multilateral export control regimes. The EU itself is a member of only Australia Group. Most of the EU countries, including the leading countries such as the UK, France and Germany, are members of all the four multilateral regimes.

In these regimes, these countries work together to formulate global rules for high technology goods. Although in theory the guidelines or best practices may appear applicable only to the members of the regimes, in practice, not merely adherents but new export control countries embrace the guidelines, best practices and the lists developed in these regimes. These countries are leaders in high technology. With their better resources and capabilities, these countries update controlled lists in different regimes.

As these regimes work on the principle of consensus, the countries have to develop a great understanding on emerging threats, technologies and the best practices to ensure that controlled items do not fall into wrong hands. All the major powers promote outreach of these regimes to relevant countries, especially emerging and potential suppliers. They encourage these countries to adhere and adopt the practices and the lists developed in the regimes. Eventually, some of the adherents or other relevant countries are becoming members of the regimes.

The UNSCR 1540 committee, which has been steering global strategic trade control, is well supported by all the major powers. As it is an initiative of the UN Security Council, quite obviously, all the permanent members had an agreement to launch it. However, afterwards, for this binding resolution, other UN members also contributed to providing assistance to new countries, which started developing their

own export control systems. All the major countries have sent their experts to serve on the 1540 expert committee, other committees and working groups. The US had the longest serving expert on the UNSCR 1540 expert committee. The US, Canada, Australia and European countries have been financially supporting outreach and other programmes of the committee. These countries participate in different outreach events organised all over the world by different bodies.

The OPCW has been created to implement the CWC. All the countries with the major systems are members of the convention. The Convention has detailed provisions for export control of scheduled chemicals. Member states of the Convention have incorporated those provisions in their national systems. All the member countries are committed to international cooperation prescribed in Article XI (b) in several areas. These could be supporting chemical research, ensuring legal assistance; developing and improving laboratory capacity, specialised internships, training in CWC implementation, safe chemical management and so on.[32] All the developed capitalist countries have been supporting and sponsoring a number of programmes under the international cooperation. Even Russia has sponsored some workshops under the international cooperation programme. For example, in October 2017, Russia hosted training workshop on Best Practises for developing the responsible care programme for the chemical industry.[33]

The WCO has EU and all the EU member countries, Australia, Canada, Japan, Russia and the US as its members. Over the years, WCO has emerged as an important international organisation for the enforcement of strategic trade management. The WCO has developed best practices for enforcement. There are a number of committees such as Finance Committee and Harmonised System Committee as well as working groups where the great powers contribute. Exchange of information and intelligence is one area where the WCO is expected to cooperate and coordinate with the member states. The big powers with their strong resource base is expected to contribute to the information and database, yet the flow of timely information has been a challenge. But where interests are common and a consignment is to be intercepted, information and intelligence exchange does take place. The major export control countries have been playing important role in developing online services such as the Customs Enforcement Network and Information and Intelligence Centre. Besides, the big powers support various workshops on significant strategic trade control issues.

These countries are also active in many other organisations and initiatives, in which they work on issues relating to strategic trade control. All the major powers are members of the IAEA. The Agency is important for providing safeguards mechanisms as well as a platform for discussion and debate about nuclear energy and science and technology cooperation. Most of these countries were active for nuclear security and nuclear security summit process. Promotion of strategic trade control has been a component of practices pondered over in the summit process and

[32] Organisation for the Prohibition of Chemical Weapons (2018).

[33] For example, Organisation for the Prohibition of Chemical Weapon, Technical Secretariat (2018).

even later. INTERPOL, the Financial Action Task Force are the bodies where major powers cooperate to prevent smuggling and illicit transactions of controlled goods.

For several decades Russia and before that the Soviet Union had started cooperating with Western countries on non-proliferation. Russia has joined the American programme, Proliferation Security Initiative, with other European countries and Japan. The Global Initiative to Combat Nuclear Terrorism witnesses participation of all the major countries. In this initiative, the US and Russia are co-chairs. The Global Partnership Against the Spread of Weapons and Materials of Mass Destruction (the Global Partnership), which was started at the G8 Summit in Kananaskis had all the major countries. However, the membership of Russian has been suspended in the G-8 because of the Ukrainian/Crimean issue. It is G-7 now. However, the Global Partnership has 31 members now. The major powers minus Russia collaborate with regional organisations such as the African Union, ASEAN Regional Forum and the Caribbean Community for export control outreach and assistance.

4.7 Conclusion

The major systems seem to have converged on the objectives of managing strategic trade. All the major Western systems, and the countries associated with them have the common threat perception. Russia may not have been the principal target of the Western system, yet the lack of political cordiality between the Western system and Russia does not allow them to work on many issues in recent years. Interestingly, both sides despite sharing security interests on fighting terrorism and working together in many forums, including the Nuclear Security Summit process, disagree on fighting terrorism in West Asia and North Africa. But, in the past, they came together on many issues, including non-proliferation and worked to promote strategic trade control.

All the major systems are backed by elaborate legislative frameworks. No system has a singular law for strategic trade control. All are guided by a range of laws from licensing to enforcement. As all these countries are into export control for a long period, the laws of some of these countries directly dealing with strategic trade have also been existing for long. However, this may not be true for all the countries. Increasingly, the countries, which lacked specialised laws for strategic trade control, are incorporating such laws. Not only Russia but even many of the Western European countries are incorporating these laws.

However, it is the regulatory framework and enforcement which are most lively in these countries. The regulatory framework of different countries may have differences in details and nomenclature, but broadly all are emanating from the same practices. Details are merely refinement in the practices to suit the need of the individual countries. Some of the unique regulatory practices like the Denied Persons List are used in the Risk Management System in many of the countries. However, some countries may disagree with the persons or entities placed on the list and may exclude them for their country analyses.

All the countries have specialised licensing and enforcement agencies but take help of multiple agencies. The coordination work is done mainly by the nodal agency, though the nodal agency could be different in different countries. European countries have more a coordinated enforcement system in comparison to others. The major western systems also have a high level of coordination for the enforcement or other activities relating to strategic trade control. Most of the work of coordination is accomplished in various formal and informal international organisations. Of many activities, it is the global outreach for new export control countries, which makes these major systems distinct. For the purpose, they allocate dedicated resources. The outreach work is done through different regional and international organisations or even bilaterally.

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Chapter 5
Philosophy of Indian Strategic Trade Management

Abstract The Indian philosophy of export control has witnessed an extraordinary evolution. It is striking a balance between its core philosophy and pragmatic needs to adjust its policy. The transformation in the international strategic/security environment and the new global order force combined with India's progress to a rising economy and a nuclear weapon country necessitated a new level of engagement with the global technological order. India's philosophy towards export control has largely been shaped by its attitude towards non-proliferation as well. India has moved away from identifying export control as the technology denial regime. This transformation has led India to become a collaborator or partner of strategic trade management or export control. It is no longer a critic. India has been taking a number of steps to enliven its new role. India is active for strengthening the export control system domestically as well as externally. India accepts that negotiations for export control may be done in the bodies other than the UN. It now acknowledges that informal guidelines and soft laws can also manage strategic trade. Entering into the new groupings and announcing new policies have not dissuading India from promoting scientific cooperation with developing countries.

5.1 Introduction

The Indian philosophy of export control has been evolving over the years. The beginning of the twenty first century appears to have heralded a new era in the Indian philosophy of export control. Admittedly, predominantly in India, export control regimes were called technology denial regimes in the large part of the twentieth century. Actually, this impression was basically created because of the non-proliferation-shaped multilateral export control regimes; but it was also carried forward to the very idea of export control or strategic trade control. Changes in the international strategic/security environment and the global order compelled India to have a rethink of its policy even further.

To a great extent, India's policy towards export control has been accompanied with that of non-proliferation. Yet, India has not accepted all of the components of non-proliferation. For example, India has not signed the Comprehensive Test Ban Treaty

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(CTBT) and the Nuclear Non-Proliferation Treaty (NPT). When the multilateral export control regimes changed their focus from East–West to North–South, India came in the direct line of fire of these regimes. It had to manage the implications of strategic trade control/multilateral export control regimes of the member countries. Now, India has shifted its policy enormously on strategic trade control or export control from that of being a critic to becoming a collaborator or partner. And, this shift has taken place because of the change taking place in India's philosophy, policy and approach to non-proliferation. In other words, because of the change in India's non-proliferation policy, its export control or strategic trade control policy is also changing.

However, the challenge before India is to maintain the core philosophy of the country, and adjust its trade, security, and foreign policies in a balanced way. To strike a balance between its core philosophy and pragmatic needs to adjust its policy, India has been taking a range of factors into account. India's progress from a developing country to a rising economy needs a new level of engagement with the global technological order. Initially, India was dependent on the outside to build its technology base in general and the defence industrial base in particular. Despite being technologically better placed now, India nevertheless cannot ignore the dynamics of an interdependent world. In an interdependent world, all countries—developed or developing—cooperate with each other to procure technology and other goods to bring down the cost of technology. India signed an agreement with the USA for cooperation in space as well as in nuclear and advanced technology.[1] Consequently, there is more demand for the tightening of export controls.

The Indian government and the Indian strategic community have started underscoring the importance of improving the export control system to face the new challenges, but they have not abandoned the philosophy of sharing advanced technology for global growth even when they engage with the multilateral export control regimes. They strike a balance between different interests, and between the developed and developing world. Today, India's evolved philosophy of export control is characterised by a synergy between India's national as well as global economic and security interests and responsibilities.

5.2 Development

When a peacetime control system like export control or strategic trade control was introduced in the international system, India was not its primary target. It was a Western system aimed at denying goods with military implications to the Eastern or socialist system. However, the fear of leakage, or the third-party transfer, made India an indirect target of the export control practices of Western countries. Over the years, with the advent of the NPT and associated export control regimes and practices, a developing country like India became the principal target of restrictive practices.

[1] The US Government, White House (2004).

India maintained that the export control systems of advanced industrial countries are based on an erroneous philosophy. When the non-proliferation policy was extended in other areas, such as space/missiles and chemical and biological sciences, India was forced to articulate its views against restrictive practices promoted by the multilateral export controls regimes and a small group of countries. India described this as 'technological apartheid'. India resented these restrictive policies, which were adversely affecting its sustainable development and economic growth. It pronounced that although India is an ancient civilisation, it has a young developing society, and its aspirations need to be respected.

India wants to fulfil the basic needs of a large section of its society. At the same time, it also understands the need to improve the quality of life of the people through new and advanced technologies. India claims that any 'permanent economic and technological disadvantage' caused by the restrictive measures is against one of the international pledges contained in the Final Document of the United Nations Special Session on Disarmament.[2]

India has been leading the campaign for the role of science and technology in the context of international security and disarmament. It has been using the UN platform to highlight the issue of dual-use technology transfers. India has been supporting the issue of transfer of dual-use technology for development in other international organisations as well.

In the UN, along with other countries, India has been urging the developed nations to maintain and encourage the civilian applications of scientific and technological developments, though it has never been forgetting the role these developments can play in modernising advanced weapon systems, especially the WMD. India has tried to take a balanced position between the negative impact of scientific and technological developments for international security and disarmament and the economic and social development of states.

For this purpose, it has both proposed and supported resolutions in the UN General Assembly. These resolutions have been passed with an overwhelmingly majority in the UN General Assembly. Indian Prime Minister Manmohan Singh has said

> The limitations of the present non-proliferation regime should not be further accentuated by artificial restrictions on genuine peaceful nuclear applications. Technology denial and closing avenues for international cooperation in such an important field is tantamount to the denial of developmental benefits to millions of people, whose lives can be transformed by the utilization of nuclear energy and relevant technologies.[3]

India has been supportive of the free exchange of scientific ideas. India strongly conveyed its reservations 'about the tendency to apply restrictive policies in regard to the provision of technical assistance in the form of fellowships, scientific visits, etc'.[4] An Indian official has stated

> Scientific discoveries [can]not remain perpetual secrets. History had taught that science could never be the preserve of only some nations, a lesson that was equally applicable to technology.

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[2] International Atomic Energy Agency General Conference (1980).

[3] Singh (2004).

[4] International Atomic Energy Agency General Conference (1978).

> Further, unethical practices by some countries infringing on committed international norms had undeniably resulted in sensitive scientific and technological know-how being passed on indiscriminately.[5]

India supported the resolutions of the NAM asking developed countries to transfer dual-use technologies to developing countries. The NAM has, for years, been proposing the developed world to foster international cooperation through the transfer of technology, material, and equipment by removing discriminatory restrictions. In all NAM meetings, India supports the resolutions and declarations made for the transfer of technology for sustainable development. India has also emphasised in NAM that the Organisation for Prohibition of Chemical Weapons (OPCW) should promote international cooperation. It also has provisions for export controls. Similarly, India supports international cooperation in the peaceful uses of biotechnology provided under the BTWC. India supports the XVII NAM Declaration:

> The Heads of State or Government reaffirmed the inalienable right of developing countries to develop research, production and use of nuclear energy for peaceful purposes without discrimination. They continued to note with concern that undue restrictions on exports to developing countries of material, equipment and technology, for peaceful purposes persist. They again emphasized that proliferation concerns are best addressed through multilaterally negotiated, universal, comprehensive and non-discriminatory agreements. Non-proliferation control arrangements should be transparent and open to participation by all States, and should ensure that they do not impose restrictions on access to material, equipment and technology for peaceful purposes required by developing countries for their continued development. They expressed their full confidence in the impartiality and professionalism of the IAEA and strongly rejected any politically motivated attempts by any State to politicize the work of the IAEA, including its technical co-operation programme, in violation of its Statute, as well as any pressure or interference in the Agency's activities which could jeopardize the efficiency and credibility of the IAEA and the inalienable right of developing countries to develop research, production and use of nuclear energy for peaceful purposes without discrimination.[6]

India also does not support targeting in the name of controlling sensitive technology because there is no universally agreed definition of sensitive and non-sensitive technology.[7] India has stated in the IAEA

> Fissionable material might be the life-blood of a country's future economy and the withholding of such material by mechanisms such as those proposed for international plutonium storage and control could easily halt the economy of such a country and expose it to all manner of pressures.[8]

India also considers spent fuel as a 'valuable resource rather than a form of radioactive waste', and hence is opposing any move to restrict its use. The Indian stand was echoed by the IAEA chiefs like Mohamed El Bardaei when he said, 'Many types of

[5] International Atomic Energy Agency General Conference (1991).

[6] Venezuelan embassy Nairobi (2016).

[7] International Atomic Energy Agency General Conference (1991).

[8] International Atomic Energy Agency General Conference (1984).

sensitive nuclear equipment are "dual use"—meaning that they could have both civilian and military applications—which makes it harder to justify export restrictions and, more importantly, to control trade of these items'.[9]

As a founder member of the IAEA, India views the 'primary' function of the Agency 'to encourage and assist research, development and practical applications of atomic energy for peaceful purposes throughout the world'.[10] India believes that, in the initial years, the IAEA promoted nuclear science and the transfer of technology without any discrimination; but later, because of the different types of restrictive practices, started deviating from its original mandate. India opposed the political discrimination based on the NPT. India continuously protested the NPT-inspired Guiding Principles and General Operating Rules in providing technical assistance. Earlier, India also opposed the introduction of phrases such as 'nuclear weapons states' and 'non-nuclear weapons states' in the IAEA annual reports and Safeguards Implementation reports.[11]

The Indian scientific community has been highlighting that India has to rely on energy mix to boost electricity generation in different forums; for this, it has to go beyond hydroelectric and thermal energy sources,[12] and add nuclear energy to it. Decades ago, Homi Bhabha articulated the same view on the issue in the light of the need to reduce global carbon dioxide emissions. Moreover, India has communicated the belief that nuclear science and technology are not merely used in electricity generation but also in fields such as communications, health care and agriculture. In India's view, the IAEA focus on regulatory activities has led it to pay less attention and funds to promote activities for nuclear science and technology. Improper restrictions may affect other social and economic sectors as well.

India has also declared that

> it was no longer interested in receiving technical assistance from the Agency since, as a matter of principle it would not be able to give its consent to any undertaking that was not in conformity with the Statute. However, in consideration of the importance that it attached to the promotional activities of the Agency and in deference to the views of other Member States, India would continue to provide technical assistance to developing countries. It has made a modest contribution over the years to the technical assistance programme by providing fellowships and services of experts, besides facilities for scientific visits.[13]

In the IAEA, India has been expressing its willingness to supply 'know-how, equipment and materials to other developing countries' through the IAEA. In fact, it has assisted several countries. It is involved in a regional cooperative agreement for Asia and the Pacific region (RCA) for years.

Quite significantly, India has not abandoned the emphasis on the developmental role of a high-technology flow in the world. After it got the IAEA approval of India's

[9] ElBaradei (2006).

[10] Tiwathia (1999).

[11] International Atomic Energy Agency General Conference (1982).

[12] International Atomic Energy Agency General Conference (1980).

[13] International Atomic Energy Agency General Conference (1980).

umbrella safeguards agreement and the clean exemptions in the NSG in 2008, the then Chief of the Department of Atomic Energy stated in the IAEA that

> The Board's approval by consensus of the Agreement with the Government of India for the Application of Safeguards to Civilian Nuclear Facilities in August 2008 and the Statement on Civil Nuclear Cooperation with India issued by the Nuclear Suppliers Group in September had created the conditions for India to make an even bigger contribution to the growth of international civil nuclear cooperation.[14]

5.3 Non-proliferation

For a number of years—or at least for about three decades—India had a very uneasy relationship with non-proliferation. Ironically, before the conclusion of the NPT, India was a great champion of non-proliferation. In fact, in 1964, it was India which had introduced 'the concept of the non-proliferation of nuclear weapons'.[15] India maintains that the introduction of the concept of non-proliferation was not a product of 'historical interest' but actually reflects the continuity of

> India's proposal in 1954 for a complete cessation of all nuclear weapons tests, a proposal which had been based on the valid premise that both horizontal and vertical proliferation were integral parts of the same problem and had to be dealt with simultaneously if the problem of the proliferation of nuclear weapons was to be solved.[16]

As just mentioned, the term came into prominence in the 1960s; but the idea existed much earlier. Way back in 1947, the Indian Prime Minister Jawaharlal Lal Nehru talked about control over the exports of materials such as Monazite and Thorium Nitrate.[17] Because of a number of factors—such as the nature of the NPT and the focus on the principle of prevention of only the further spread or dissemination of nuclear weapons[18]—India turned critical of the way non-proliferation was being promoted in the world. India made it clear that any treaty for non-proliferation should not leave any scope for direct and indirect proliferation. It also wanted an 'acceptable balance of mutual responsibilities and obligations' from both nuclear weapon and non-nuclear weapon countries. Interestingly, India even then supported the right of any country or group of countries to sign any regional treaty for the absence of nuclear weapons. However, the Western bloc preferred to make the Irish proposal as the basis of negotiations for the NPT because it suspected some hidden agenda behind the Indian proposal.[19]

India's philosophy is of verifiable global disarmament, or that any arms control agreement needs to be verified. India is a strong supporter of the verification of the

[14] International Atomic Energy Agency General Conference (2009).
[15] International Atomic Energy Agency General Conference (1980).
[16] International Atomic Energy Agency General Conference (1980).
[17] The Government of India, Ministry of External Affairs (2004).
[18] International Atomic Energy Agency General Conference (1975).
[19] Perkovich (1999), p. 100.

Chemical Weapons Convention (CWC) and is a signatory to the Fissile Materials Control Treaty (FMCT). It has also evolved its perception and position on safeguards. In 1956, Homi Bhaba had expressed his scepticism of the formation of a safeguards system.[20] In the early 1950s India, along with the Soviet Union, resisted the implementation of a comprehensive safeguards approach. India asserted that developing countries should not be reduced to mere suppliers of nuclear materials, and the developed countries the controllers of the operations of reactors. India reluctantly adopted the principle of safeguards. Even if it embraced safeguards, in the nuclear domain it maintained that the goal should be nuclear disarmament, and not merely the development of a multi-layered safeguards system.

Today, India has moved away from its long-estranged relationship with non-proliferation. India maintains that any infirmity in the non-proliferation regime is not in the interest of India's security.[21] It wants a state that has signed an international treaty and agreement to 'fully and effectively' comply with the obligations arising from it. It is against an arms race, including a nuclear arms race. India has been exercising restraints on nuclear testing, and it has not conducted a single nuclear test even though a section of the Indian security community feels the need for a few more tests. It is also in favour of concluding a FMCT under the Shannon mandate. In 1998, India supported the proposal for the setting up of a working group on nuclear fuel cycle options, and wanted negotiations for it.[22]

India has been working with the responsible sections of the international community against the proliferation network as well as clandestine transactions of WMD materials. India's security is affected because of the operation of the proliferation network as it feeds the nuclear weapons programmes of the nuclear-armed countries around India. When the USA and other countries highlighted the growing arsenals of North Korea, India pointed out that just focusing on North Korea would not yield any results. Instead, the need is to focus on the proliferation network that involves several countries in the region. It sees a role for export controls in preventing materials from falling into the wrong hands.[23]

The twenty-first century has seen a growing consciousness in the international community regarding the malicious use of nuclear and radioactive materials by unscrupulous elements and terrorists. A victim of terrorism for many decades, India has joined in the efforts for nuclear security. It has attended all the nuclear security summits. It is also active in the IAEA, the UN and other forums for stemming the danger of nuclear terrorism. In fact, it was because of its philosophy to counter the dangers of WMD that India shifted its position on the UNSCR 1540. Earlier, along with the NAM countries, India had opposed the UNSCR 1540. India also started its own Global Centre for Nuclear Energy Partnership (GCNEP) for promoting safe and secure nuclear energy. India wants the international community to work

[20] International Atomic Energy Agency General Conference (2000).

[21] Ministry of External Affairs, Government of India (2009).

[22] International Atomic Energy Agency General Conference (1997).

[23] For example, International Atomic Energy Agency General Conference (2000) and United Nations Office of Disarmament Affairs (2016).

towards reducing nuclear dangers arising from accidental or the unauthorised use of nuclear weapons. It has been supporting the UN General Assembly resolutions for avoiding nuclear dangers through a review of nuclear doctrines and de-alerting and de-targeting nuclear weapons.[24]

India has been drawing the attention of the international community to the non-discriminatory nature of the CWC and the BTWC, and wants this kind of the Convention for nuclear weapons as well. For the destruction of Syrian chemical weapons, it contributed USD 1 million.[25] Though India supports the disarmament aspect of both the treaties, yet it is fully conscious of the danger of chemical and biological agents falling in the wrong hands. Both the CWC and the BTWC provide mandates for the regulation of chemical and biological materials; but export control has received special treatment in the CWC. India has incorporated the mandate of both the treaties.

For Chemical weapons, India appears reluctant to use the term 'proliferation'. However, it clearly mentions that the 're-emergence'[26] of chemical weapons will be more complex. It underlines that chemical agents with whom war may be waged are easily available, especially for non-state actors. New innovations in toxic molecules, as well as in deployment and dispersal tools are making the task of control extremely challenging. It maintains that it may happen in any part of the world with new or old chemical agents. The most disturbing part of this danger is that it may give hardly any warning. India's support to the OPCW Open-Ended Working Group on Future Priorities demonstrates India's policy of stopping this possible danger.

On 2 June 2016, India joined the Hague Code of Conduct (HCoC) against Ballistic Missile Proliferation.[27] For a number of years, it stayed away from the Hague Code, though India had participated in its negotiations. HCoC is formally known as the International Code of Conduct against Ballistic Missile Proliferation.[28] Its principles and commitments are non-binding as it is considered a voluntary mechanism for confidence building. In a press release, the Indian government has stated, 'India's joining the Code signals our readiness to further strengthen global non-proliferation objectives'.[29]

India has continuously been stressing that its 'impeccable non-proliferation record' and commitment 'to working with the international community to advance our common non-proliferation and disarmament objectives so that we are able to fulfil the vision of a world free of nuclear weapons'.[30] Indeed, India has not given up its long-standing policy of nuclear disarmament. In fact, India is the only nuclear weapon country that has been supporting the idea of the conclusion of the Nuclear Weapons Convention. It is a fact that Article VI of the NPT has been made a dead and decorative clause.

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[24] For example, United Nations General Assembly (2016).

[25] Ministry of External Affairs, Government of India (2013).

[26] Rajamony (2017).

[27] Ministry of External Affairs, Government of India (2016).

[28] United States Government Department of State (2018).

[29] Government of India, Ministry of External Affairs (2016).

[30] Ministry of External Affairs, Government of India (2009).

Although India considers the NPT an unequal legal instrument which is discriminatory in nature, yet it has abstained from campaigning against the treaty. Despite being forced by security considerations to become a nuclear state, India has been opposing—and is still opposed to—the perpetual existence of nuclear weapons and their proliferation. India maintains that it will be more secure in a world without nuclear weapons.

5.4 Responsible State: Commitment to International Obligations and Treaties

In 2017, when India had a military standoff with China in the Doklam region, it exercised enormous restraint in its language despite the grave provocation from the Chinese government and media. Some of the writings continuously underlined India's conventional weakness vis-à-vis China. Unlike Pakistan, India did not flash its nuclear weapons capability to counter its so-called conventional weakness. It demonstrated the idea that nuclear weapons and its science and technology are to be managed responsibly; more so, in international relations, including trade. In fact, for a long period, the international community has witnessed the Indian reiteration: 'We have always tempered the exercise of our strategic autonomy with a sense of global responsibility'.[31]

After going nuclear, Prime Minister Atal Bihari Vajpayee stated in the Indian Parliament (27 May 1998) that

> India is now a nuclear weapon state. This is a reality that cannot be denied. It is not a conferment that we seek; nor is it a status for others to grant. It is an endowment to the nation by our scientists and engineers. It is India's due, the right of one-sixth of humankind. Our strengthened capability adds to our sense of responsibility. We do not intend to use these weapons for aggression or for mounting threats against any country; these are weapons of self-defence, to ensure that India is not subjected to nuclear threats or coercion. We do not intend to engage in an arms race.[32]

In the same speech, he also stated, 'The present decision and future actions will continue to reflect a commitment to sensibilities and obligations of an ancient civilisation, a sense of responsibility and restraint, but a restraint born of the assurance of action, not of doubts or apprehension'.[33]

The same point—that India is a responsible nuclear power—has been echoed by subsequent Prime Ministers notwithstanding party affiliations. Prime Minister Manmohan Singh also asserted that India is 'fully conscious of the immense responsibilities that come with the possession of advanced technologies, both civilian and

[31] For example, Ministry of External Affairs, Government of India (2009).

[32] Vajpayee (1998).

[33] Vajpayee (1998) Statement on nuclear tests in Pokhran.

strategic'.[34] He gave a commitment to the international community that 'the larger goals of nuclear non-proliferation' would be respected. He reassured the world that

> India will not be the source of proliferation of sensitive technologies. We will also ensure the safeguarding of those technologies that we already possess. We will remain faithful to this approach, as we have been for the last several decades. We have done so despite the well-known glaring examples of proliferation which have directly affected our security interests.[35]

Prime Minister Manmohan Singh repeated India's responsible behaviour on different platforms. In one of the platforms, he restated this:

> …we have an impeccable record of export control so that any unauthorized use of this sensitive nuclear material can be effectively prevented and we are interested in working with like-minded countries to strengthen the non-proliferation system. We ourselves are victims of the gaps that exist in the present non-proliferation arrangements. I do not want to talk about it. We have seen, for example, the clandestine export of nuclear material in our regions. So we are also committed to work with like-minded countries to strengthen the non-proliferation regime to prevent unauthorized proliferation.[36]

He clarified that India was 'voluntarily fulfilling all the commitments that go with a responsible nuclear power acting with due restraint'.[37]

Foreign Minister Jaswant Singh encapsulated India's approach to export control in one of his lectures.

> As far as the Export Control Regime is concerned, India's record has been impeccable and, indeed, better than some of the P-5 countries themselves. India's export control record has been impeccable because successive Governments have approached this issue with a very high sense of responsibility and have approached the issue of the non-proliferation weapons of mass destruction as a discharge of international and human obligations. The Prime Minister had in May itself announced that we shall, wherever necessary, make our export control more stringent. The Chemical Weapons convention is a recent example of how our export control mechanism has been brought up to-date. The Foreign Trade (Development and Regulation) Act authorizes the Government to restrict the exports, and these provisions have been used to place sensitive equipment, technologies and materials on the control lists. These lists are notified in the Exim Policy annually. It is an open document for the world to see and the country to see. We have nothing to hide in this regard. These lists can be expanded and, wherever necessary, shall be expanded. New licence forms can be devised; follow-up, monitoring, and use can, of course, be strengthened, and must be strengthened. All these are ways of making our system more stringent. This is precisely what the Prime Minister had meant when he made this announcement earlier, and this is precisely what we intend to do in future. In this regard, if somebody is willing to make suggestions as to how we can make our system better, how we can make it more effective, certainly we will listen to him. We will take advice from whoever can give advice in this regard because in the realm of weapons of mass destruction, what has guided me as a brief from the Prime Minister is that we must conduct ourselves as an ancient civilization and as a great nation…[38]

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[34] Singh (2004).

[35] Singh (2004).

[36] The Government of India, the Ministry of External Affairs (2004).

[37] The Government of India, the Ministry of External Affairs (2004).

[38] Singh (1998).

As India was put under restrictions and sanctions because of export controls, India opposed the violation of well-established codes of international trade and law. India has been supportive of respecting a contract. It considers that it is unfair to leave any obligation unfulfilled 'because they did not comply with legal provisions or regulations adopted by supplier countries subsequent to their conclusion'.[39] For a number of years, India complained to the international community that despite having a 'proven record of self restraint', India was not given due importance in the management of high-technology global commerce. India rightly reiterated: 'We are a responsible nuclear weapon state. We are also the largest democracy in the world. Our non-proliferation credentials are impeccable; no equipment, material or technology exported by us to any country has been misused. We have never violated any treaty obligation'.[40]

5.5 Multilateralism

India maintains that the threat that export control wants to address has acquired 'a qualitatively and frighteningly new dimension', and 'a global approach based on international consensus' is the only reasonable way to manage it. In the early years, India insisted on a 'universal, comprehensive and non-discriminatory' non-proliferation approach, linked to the goal of complete nuclear disarmament. It considers 'unilateral restrictive measures as unjustified and counter-productive'.[41] India wants equality and non-discrimination-based arrangements for genuine global peace and stability. India discourages a regional approach in non-proliferation because nuclear weapons have a global reach.

Supporting the statement of the Secretary General of the UN to the General Conference of the IAEA, an Indian official also stated that, 'any non-proliferation regime should involve a truly worldwide system which would be generally accepted, and uniformly and fairly administered'.[42] At the same time, India along with a large number of developing countries, has been recommending that any internationally negotiated guidelines for the transfer of high technology must recognise the legitimate defence needs of the countries, as well as peace and security in the international system.

However, India gradually started taking a more pragmatic approach to deal with non-proliferation that export controls want to manage. The earlier insistence on the treaty-based universal system paved the way to working in small group regimes. Thus, one could ask: has India completely changed its position on multilateralism? The changes in the international system, and India's own understanding of its national interests, may have made India adapt its position. But, it has not completely aban-

[39] International Atomic Energy Agency General Conference (1985).

[40] International Atomic Energy Agency General Conference (1998).

[41] Government of India, Rajya Sabha (1999).

[42] International Atomic Energy Agency General Conference (1982).

doned its policy on multilateralism. It wants a world free from nuclear weapons through the Nuclear Weapons Convention negotiated in the Conference on Disarmament. India is still opposed to the idea of South Asia as a Nuclear Weapons-Free Zone because it is not a serious proposal. To promote strategic trade control, it works with South East Asian and other countries in the ARF. It still supports universal treaty like the Chemical Weapons Convention or international organisations like the UN. It is working through the UNSCR 1540 committee for the internationalisation of export controls.

Quite significantly, as discussed earlier, India was not supportive of the 1540 resolution. It supported the opposing Non-Aligned Movement (NAM) group of countries. The NAM countries maintained that the UN Security Council is not the right body for legislating international law. Later, India along with other countries withdrew their opposition and supported the passage of the resolution to counter the dangers of WMD. A 27 April 2004 letter from the Permanent Representative of India to the United Nations addressed to the President of the Security Council, stated India's changed position on UNSCR 1540. The letter announced India's 'unwavering commitment' to fighting the proliferation WMDs. Afterwards, India worked with the UNSCR 1540 committee, and organised workshops at the governmental and non-governmental levels. India always supported the extension of the committee, and the comprehensive review conducted by it.

India has also been highlighting the CWC as the model treaty ever since it was concluded in the CD. It praises its character that is 'a universal non-discriminatory, multilateral, disarmament treaty that bans the development, production, acquisition, transfer, use, stockpile or retain chemical weapons'.[43] It demonstrates a 'shared political will'[44] to undertake an endeavour, which not merely sets the task of eliminating chemical weapons but also to encourage international cooperation in the peaceful development of the chemical industry. It also has laid down modalities for international trade in chemicals. India maintains that the success of the CWC and the OPCW—the organisations set up to implement the treaty—symbolise the collaborative efforts of the international community. The Indian government underscores the emergence of the OPCW as a 'forum for consultation and cooperation'. India also praises the development of best practices in the organisation for different activities relating to the chemical industry.

As mentioned before, India has always been emphasising the development aspect of strategic trade control. In the nuclear domain, it supports the centrality of the IAEA. In the IAEA, India strongly supports the promotion of the peaceful uses of nuclear energy. It strongly supports International Technical cooperation. India is interacting with the IAEA under the Technical Cooperation Programme to undertake a number of Regional cooperative agreements in various fields. India also underlined the relevance of setting up of a Committee on Assurances of Supply to permit a multilateral dialogue between suppliers and consumers. The supply assurance was

[43] Government of India, Department of Chemicals & Petrochemicals, Ministry of Chemicals & Fertilisers, Government of India (2010).

[44] Advani (2012).

an important issue for India. But, it clarified that 'any multilateral solution for the problems of assurances of supply had to take into account existing bilateral rights and obligations'.[45]

For years, India was not very positive towards multilateral export control regimes because it felt that it undertook activities which should have been discussed in an organisation with an international character. Realising the fact that multilateral export control regimes have most of the important suppliers of advanced technologies, and even if its membership base is small, it is still multilateral. Thus, India has joined three of the four relevant multilateral export control regimes for advanced technology. The participation of a number of countries in these bodies and the entry of India into these bodies will help it in shaping its own threat perceptions and making the rules for high-technology commerce. Admittedly, a body like the UN has its own advantage; yet the small multilateral regimes could be better than dealing with countries bilaterally, trilaterally or quadrilaterally. The multilateral groupings drawing on countries from different regions are, to an extent, better than regional organisations.

5.6 Pragmatism in Balancing Interests

Obviously, like any other country, India tries to balance its national interests. It even wants a balance between the inventions of new technologies/emerging technologies and their destabilising implications for international society. India wants new challenges and concerns arising from new technologies and situations to be objectively assessed. In fact, way back in 1953, India was asked to deny the possibility of selling two tons of thorium nitrates to China. After some considerations, India declared that it had no intention to sell thorium nitrate to China, or any other country.[46] It did not support the US proposal in the 1950s, which could have brought India's thorium under international control. In the 1956 Conference too, India and the USA demonstrated understanding, and arrived at a consensus on international plutonium storage.[47] This discussion was for the use of plutonium for research, and feeding nuclear reactors then in use. That decision is relevant even today.

Before this announcement, the Indian government and the US Administration had some angry exchanges on this matter. India had a policy of restraint in nuclear assistance and understood the need for the physical protection of nuclear materials and facilities.[48] India embraced the policy of regulating the export of sensitive items without calling it export controls. This approach seemingly directed it to take a middle position[49] with the EU and NAM countries on Iran. India supports Iran's access to nuclear energy; but it also wants Iran to comply with international obligations it has

[45] International Atomic Energy Agency General Conference (1982).
[46] Perkovich (1999).
[47] International Atomic Energy Agency General Conference (1988).
[48] Singh (2004).
[49] Malhotra (2003).

undertaken after signing the NPT. It also expects a country like China to fulfil its NPT obligations, and not indulge in proliferation activities. The Indian government continuously expresses its concerns over the China–Pakistan nuclear nexus, and the China-led proliferation network in Asia.

Prime Minister Manmohan Singh made this appeal.

> We call upon other advanced nuclear powers, and all those who have a stake in the future of nuclear energy, to come together for a constructive dialogue to evolve more effective measures that would stem the tide of proliferation without unduly constraining the peaceful uses of nuclear energy. Constraining those who are responsible amounts, in effect, to rewarding those who are irresponsible. The international community must face up to the implications of this choice. We in India are willing to shoulder our share of international obligations provided our legitimate interests are met. India has actively embraced globalization. There is no reason why nuclear energy production should be an exception.[50]

India may not have accepted full-scope safeguards, but has accepted safeguards on its civil nuclear facilities. It has also signed an additional protocol. As discussed, after showing scepticism India has attached great weight to safeguard activities over the years, and has been active in the IAEA meetings for increasing their efficiency.[51]

Indian officials have also continued to proclaim in bodies like the IAEA that it will '[agree] to improvements in measures for their application and willingly [allow] the Agency to install any proven new equipment capable of detecting the diversion of nuclear material as long as the equipment did not interfere with normal operations'.[52] India has always supported the provision in Article III.A.5 of the IAEA Statute that safeguards are to be applied 'at the request of the parties, to any bilateral or multilateral arrangement, or at the request of a State, to any of that State's activities in the field of atomic energy'.[53]

India has also opposed restrictive practices in the name of safety, though it supports all the measures, including the signing of the Convention for Nuclear Safety. It also showcases its record on safety. Except for a few freak cases, the Indian nuclear establishment has done well. The Indian stand is echoed by the informed or the enlightened section of the international scientific community. This section acknowledges the risks associated with nuclear science, but believes that these risks may be managed. However, the potential benefits of nuclear energy outweigh the minimal risks associated with it.

India has been underscoring the need for safety measures, and has been highlighting its own good track record. The Atomic Energy Regulatory Board set up in India has been promoting safety measures of international standards in all activities. However, the Indian stand is that 'Safety could not be divorced from technology, a link understood by experts while formulating the Convention on Nuclear Safety.

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[50] Singh (2004).

[51] International Atomic Energy Agency General Conference (2003).

[52] International Atomic Energy Agency General Conference (1985).

[53] International Atomic Energy Agency General Conference (1989).

Unfortunately, technologies continue to be denied even for systems important to safety. India had been one of the early signatories to that Convention'.[54]

In the age of globalisation, India wants export control to reorient itself. It believes that the market place has become highly competitive and complex. Goods are moving from one country and find new meanings in other countries. The norms of international trade and behaviour need to be changed accordingly. Old actors need to understand the new reality, which may be harnessed to benefit a country.

An MEA Official has expressed it well.

> Just as export controls are vital for national security and global non-proliferation objectives, they are also essential for the pursuit of growth and national development by harnessing the benefits of globalization. Export control standards are increasingly the norm for global trade in sensitive material, equipment and technology and thus necessary if we are to increase the quantum of high technology items in our external trade and commercial exchanges. As India's integration with global trade patterns and supply chains deepens, it would increasingly become an important hub of manufacturing and export of high technology items. Foreign investment including through offsets for governmental procurement will strengthen our global links. Our export control system would add to the reliability and credibility of Indian companies in the global market and thus increase their competitive edge. High technology companies would invest in India confident that apart from favourable commercial returns, access to a huge market and skilled workforce and protection of IPR, there would be no risk of unauthorized diversion or re-exports. That export controls are an added burden on industry is a mistaken and short sighted notion. At the same time, Government is conscious that there be no unreasonable restrictions on legitimate trade and commercial activities and export control procedures are clear and implementable without undue delays.[55]

5.7 Conclusion

Quite obviously, Indian philosophy on export controls has responded to global developments, and will continue to change its orientation with the demand of changing times. India has developed a positive attitude towards strategic trade management. Now, it talks of strengthening the export control system not only domestically but also externally. India has moved away from its position that instruments of strategic trade management are to be negotiated only in the UN negotiating body. It has gradually started accepting the fact that informal guidelines and soft laws can also manage strategic trade. The treaty-based system is welcome, but the dynamism of the current security reality can be better captured with the flexible guidelines of informal groupings.

India had once turned against non-proliferation because of the NPT. It felt that the discriminatory treaty would not only affect its security but also its economic development. As a leader of the developing world, India has been a strong champion of interests of developing countries. It has felt that the non-proliferation policy of the developed world has led to several restrictive practices which have affected the

[54] International Atomic Energy Agency General Conference (2002).

[55] Bhasin (2013).

economic development of the developing world. India has voiced these concerns in a number of international organisations.

However, almost all of the countries of the developing world have gradually joined the NPT, and have given broad support to the global non-proliferation order. The export control order is part of the non-proliferation order. India now shares the overwhelming thinking of the international community on the non-proliferation order that moulds the export control order. The changed Indian position on non-proliferation made India rethink its philosophy of export control as well. India now pronounces its support for non-proliferation on a number of occasions. India's support for non-proliferation is witnessed whenever the announcements of the Indian membership of the three multilateral export control regimes were made. It finds itself a stakeholder of the non-proliferation order because it provides global stability and international security, though it has not joined all the components of non-proliferation.

However, these changes should not mean that India has completely abandoned all the elements of its philosophy of export control. In any case, supporting export control for fighting terrorism is basically a continuance of its old policy. India has always voiced its concerns against the operation of the clandestine proliferation network involving a number of state and non-state actors. The core of its philosophy still remains intact. It supports the balancing of economic and security interests. This implies that the development part of the balancing act will not be disturbed. Even after joining new groupings and announcing new policies, India reiterates scientific cooperation with the developing countries. Moreover, India seemingly has realised the complementary role that informal organisations or the multilateral export control regimes play; but the UN and its family of organisations still remain an integral part of the Indian philosophy of export controls.

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Chapter 6
Indian Legal Framework for Strategic Trade Management

Abstract As in any country that has the rule of law to sculpt governance, India relies on its legal system. For strategic trade control management, too, India has a legal framework. Some of these laws are old, and mirror India's national philosophy, and a broad policy towards developments in science and technology as well as the country's idea of national and international security. These laws tell India's international understanding to undertake some enduring obligations arrived at in negotiations with nations in multilateral organisations as well as in bilateral diplomacy. The broad legal framework through which India manages its strategic trade may not be originally drafted or conceived for strategic trade control; however, after realising that the objective of strategic trade control can also be met with a particular legislation, the Indian government uses the existing law or act for providing statutory authority to concerned officials or institutions. It should not indicate that the framework does not have a new law or specific law for strategic trade control. The Weapons of Mass Destruction Act of 2005 entered into India's body of law to bridge the gap that existed for strategic trade management. The Indian legal system has usual practices for strategic trade management. Quite significantly, the Indian legal framework has a layered punishment structure. Some of the practices, to be found in the regulatory system, are in the Indian laws. Remarkably, some of the old laws have modern or current strategic trade control practices.

6.1 Introduction

India has the rule of law. As in any country that believes in the rule of law to shape the behaviour of the government or governance, India also relies on its legal system for proper and effective governance. On the one hand, the rule of law helps the government, especially the administration, by providing the required statutory authority to govern matters of public policy and to provide support for prosecuting the violator; on the other hand, it keeps a check on the authority and ensures that an authority does not turn authoritarian. Even if the rule of law, at times, appears burdensome to all the stakeholders, ultimately all reconcile to the fact that the absence of law may make matters worse for all.

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The rule of law as a norm, even if it was once associated only with the liberal democratic tradition, is globalising in some ways. Even an authoritarian regime has to implement or enforce at least, an international/global treaty. A liberal democratic country like India has implemented its international obligations, and passed legislations in its lawmaking body through its lawmaking process. To provide statutory authority to implement any international obligations, the legal document is absolutely necessary. India is considered a quasi-federal state; yet for the issue of national security, the federal or the central government legislates.

For strategic trade control management or export controls too, India has a body of laws. These laws have an old history, and reflect India's national philosophy, and a broad policy towards developments in science and technology as well as the country's vision of national and international security. These laws echo India's global vision articulated in its foreign policy, and its international understanding that it may have to undertake some enduring obligations arrived at in negotiations with nations in multilateral organisations as well as in bilateral diplomacy. As a result, these laws have been formulated at different points in time. Laws have been evolving with the changing demand for strategic trade regulation. The evolution is taking place both through the amendments of old laws as well as the passage of new laws.

The body of laws through which India manages its strategic trade may not be originally drafted or conceived for strategic trade control; however, after realising that the objective of strategic trade control can also be met with a particular legislation, the Indian government uses that law or act for providing statutory authority to concerned officials or institutions. The Indian legal framework is useful for different activities in different areas. It has laws for the management of nuclear science and technology as well as chemical and biological science and technology. It has special laws for licensing and enforcement. However, it passed a new legislation, like the Weapons of Mass Destruction (WMD) Act, when it had found a gap in its laws.

6.2 Heritage Laws

6.2.1 The Atomic Energy Act, 1962

India has the Atomic Energy Act, which has been amended a few times to meet new or emerging requirements. It manages activities relating to nuclear science and technology. The current version of the Indian law for atomic energy is the Atomic Energy Act, 1962 amended. Interestingly, the original version of the Indian Atomic Energy Act was legislated in 1948 because of the activism of the legendary scientist Homi Jahangir Bhabha.[1] The Act gave comprehensive power and mandate to the central government to undertake varied activities relating to the Indian nuclear fuel

[1] Indian National Science Academy (2017).

cycle.[2] It also included educational activities. Because of fast developments in nuclear science and technology, the government of India was forced to replace the 1948 Atomic Energy Act in 1962. The central government was given the power to make rules under the Atomic Energy Act, 1962.

As is well known, during the Cold War, India was not a key export control country and, predominantly, strategic trade control was a tool of the Western Capitalist Bloc. Later, it was joined by a number of socialist countries. India basically became active in the past decade of the twentieth century, and more prominently in the twenty-first century. However, as mentioned in the previous chapter, it has had its own vision, policy and strategic trade control system, especially for nuclear materials, for a long time. Quite interestingly, many of the current practices of strategic trade control have also been in the Indian legal system for a long period, though they were not called or known by the same names. For example, the ideas of both deemed export and intangible controls[3] are found in the Atomic Energy Act, 1962.

However, the word foreign or alien has not been used. But, as the restriction is broad in nature, it is used for extending the mandate for deemed export. Section 3(c) of the Atomic Energy Act asks the Indian government

> to declare as "restricted information" any information not so far published or otherwise made public relating to …(ii) the processing of prescribed substances and the extraction or production of fissile materials from them; (iii) the theory, design, construction and operation of plants for the treatment and production of any of the prescribed substances and for the separation of isotopes; (iv) the theory, design, construction and operation of nuclear reactors; and (v) research and technological work on materials and processes involved in or derived from items (i) to (iv)….[4]

The provision for the control of information is found in other sections of the Act as well. Section 14(3)(1) also authorises the central government to decide about the 'extent'[5] of information that may be permitted when a license is granted to any company. Similarly, Section 18 also gives a mandate for restricting disclosure of information. The disclosure of information is restricted in all available forms—-document, drawing, photograph, plan, model and so on.[6]

Other sections and articles of the Atomic Energy Act are also used for export control purposes. The Act mentions that the central government may delegate its power means to create different agencies in the central government, and work with the state government on activities relating to nuclear science and technology. Yet the final power or ultimate power of deciding any matter relating atomic energy lies with the central government. Section 30 of the Act empowers the central government to formulate rules for the governance of nuclear science. The law allows the government

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[2]The Department of Atomic Energy (1962).

[3]For example, Section 3(iii) of the Atomic Energy Act, 1962. The Department of Atomic Energy (1962).

[4]The Department of Atomic Energy (1962).

[5]The Department of Atomic Energy (1962).

[6]The Department of Atomic Energy (1962).

agencies to charge a fee for licensing.[7] It also has the provision for enforcement in Section 16 of the Act that authorises the central government to control the export of radioactive substances. This section explicitly refers to the fact that the central government can make export-relating rules.[8] But the most comprehensive provision for the grant, denial and revocation of license to export is in Section 14(1)(2) that grants the central government the licensing authority to formulates rules for the export[9]

A. Of any of the prescribed substances or
B. Of any minerals or other substances specified in the rules, from which in the opinion of the central government any of the prescribed substances can be obtained or
C. Of any plant designed or adopted or manufactured for the production, development and use of atomic energy or for research into matters connected therewith or
D. Of any prescribed equipment.

The NSG, in its guidelines, emphasises the need for physical protection and safety standards.[10] The Indian law on atomic energy, in different sections, has the provision for physical protection and safety. The Indian law asks authorities to create prohibited areas where movement may be restricted. The Atomic Energy Act is full of references for handling nuclear materials safely. There are also provisions for controlling the transportation of nuclear goods. Of late, transportation has emerged as an important issue in nuclear security and export controls. Enforcement, especially preventive, and the authority to seize material have also been provided in the Act.

Sections 24–26 deal with prosecution, offences and penalties regarding a person or company violating the rules for the export of nuclear items. As for the company, any person who is involved in the export business deliberately indulges in violation of the rules for export, will be punished. The Atomic Energy Act, 1962 lays down that the individuals of a company will be punished in an offence whether it is 'committed with the consent or connivance or is attributable to any neglect on the part of any director, manager, secretary, or other officer of the company'.[11] The Act makes all the offence 'cognizable under the Code of Criminal Procedure, 1898'.[12] At the same time, the Act adds a caveat that 'no action shall be taken in respect of any person for any offence under this Act except on the basis of a written complaint'.[13] Under the Act, a person may be punished 'for one year or with fine or with both' for general non-compliance, and up to 'five years or with fine or both' in case of violation relating to the procurement of information.[14]

[7]The Department of Atomic Energy (1962).
[8]The Department of Atomic Energy (1962).
[9]The Department of Atomic Energy (1962).
[10]The International Atomic Energy Agency (2016).
[11]The Department of Atomic Energy (1962).
[12]The Department of Atomic Energy (1962).
[13]The Department of Atomic Energy (1962).
[14]The Department of Atomic Energy (1962).

6.2.2 The Arms Act, 1959

The Arms Act, 1959[15] is another law that explicitly deals with export-related activities, and provides statutory authority to the government to administer or regulate. This Act has also been amended on a number of occasions to reflect the need of changing times. As this Act administers activities relating to arms (mainly relating to internal or domestic activities), it has more detailed discussions about licensing and enforcement. Section 2 also defines acquisition, licensing authority, prohibited and general arms and ammunition and so on. Although a number of sections/articles of the Act discuss the license and sale of weapons, yet Sections/Articles 10, 11 and 12 are mainly devoted to the international trade of arms.

The three sections of the Act deal with the different dimensions of both the export and import of arms. Section 10 has the provision for the licensing of the export or import of arms. Regarding export, it states that 'no person' shall 'take out of India'[16] any arms and ammunition by any means without a license made under this Act. Section 11 mentions that the central government has the power to prohibit the export of arms. Section 12 gives power to the central government to restrict or prohibit the transport of arms. This section authorises the Indian government to handle the trans-shipment of arms and ammunition.

Although Sections 13 and 14 under Chapter III of the Act have provisions relating to licenses, it is basically designed for domestic license management. The subsequent sections of the Act deal with the duration and renewal, fee, variation and the suspension and revocation of licenses. These sections are general in nature, and are relevant for the external and internal transfers of arms and ammunition. Section 17(c) states that if a license is obtained by providing wrong information or suppressing information, the license will be cancelled.[17] But the Act demands that authorities will have to provide the reason for the revocation of the license in writing. However, the Act allows the licensee or a fresh applicant to file an appeal against the denial or revocation of a license.

Sections 23 and 24 of the Act provide the authority for enforcement. These sections empower the government to search vessels or any vehicle, seize and detain any arms and ammunition even if a license is granted to a person. Section 24 empowers the central government to maintain public peace and safety. The reason for safety and peace are also objectives of the export controls of arms and ammunition.

Section 25 of the Act has provisions for offences and penalties. In 1983, 1985 and 1988, the Act was amended to incorporate changes in the duration of punishment.[18] Any person found unlawfully exporting arms may be punished for a period from 1 year to 7 years. If a person is involved in the sale of prohibited arms and ammunition—which could be export as well—the person may be imprisoned for at least 7

[15] India Code, Digital Repository of Legislations (2018a).
[16] India Code, Digital Repository of Legislations (2018a).
[17] India Code, Digital Repository of Legislations (2018a).
[18] India Code, Digital Repository of Legislations (2018a).

years, and the period may be extended up to life imprisonment; the person may also be fined for this activity.

The Act also provides punishment for illicit transportation, including assisting in the trans-shipment of illicit arms. In 1983, Section 26 was amended to deal with 'secret contraventions'[19] of the Act relating to export and transportation. Any public servant or person working for or on 'railway, aircraft, vessel, vehicle or any other means of conveyance'[20] found breaching the act or concealing or attempting to conceal any arms or ammunition will be imprisoned between 6 months and 10 years. This has a layered punishment structure.

For several years, the Indian regulatory system was silent about the description of arms to be controlled by India for exports. This was true for not only the system maintained by the Ministry of Defence for years but also the system maintained by the DGFT.[21] In 2015, the MOD published its munitions list or Military Stores list.[22] As late as 2017, the category for arms and ammunition was populated in the SCOMET.[23] However, other categories of the SCOMET had a description of arms components. Quite interestingly, an old act like the Arms Act, 1959—basically made in 1878—has the description, definition and interpretation of different weapons and ammunition. Arms have been defined as an article of 'any description designed or adapted as weapons of offence or defence, and includes firearms, sharp edged and other deadly weapons'. Section 2(e) describes firearms as projectile or projectiles of any kind by the action of any explosive or other forms of energy, and includes

(i) artillery, hand-grenades, riot-pistols or weapons of any kind designed or adapted for the discharge of any noxious liquid, gas or other such things,

(ii) accessories for any such firearms, designed or adapted to diminish the noise or flash caused by the firing thereof,

(iii) parts of, and machinery for, manufacturing, firearms, and

(iv) carriages, platforms, and appliances for mounting, transporting and serving artillery[24]

Section 2(b) describes ammunition as

(i) rockets, bombs, grenades, shells 2[and other missiles,]

(ii) articles designed for torpedo service and submarine mining,

(iii) other articles containing, or designed or adapted to contain, explosive, fulminating or fissionable material or noxious liquid, gas or other such thing, whether capable of use with firearms or not,

(iv) charges, for firearms and accessories for such charges,

(v) fuses and friction tubes,

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[19] India Code, Digital Repository of Legislations (2018a).

[20] India Code, Digital Repository of Legislations (2018a).

[21] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate General of Foreign Trade (2015).

[22] Government of India, Ministry of Defence Department of Defence Production (2015).

[23] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate General of Foreign Trade (2018).

[24] India Code, Digital Repository of Legislations (2018a).

(vi) parts of, and machinery for manufacturing, ammunition, and

(vii) such ingredients of ammunition as the central government may, by notification in the Official Gazette, specify in this behalf[25]

6.2.3 The Environment Protection Act

The Environmental Protection Act,[26] which became the law in 1986, was subsequently amended. The last amendment was made in 1991. The basic objective of the law is to protect the environment from hazardous materials. Although the text of the Act does not mention export or sale anywhere, yet under the Act, the government formulated rules[27] for regulating the export of hazardous micro-organisms, genetically engineered organisms or cells. The Indian government has been maintaining that the Environmental Protection Act has been extending a 'legal basis for exercising export controls'[28] apparently for biological agents. However, enthusiasts keep seeing its role in the control of export of biological agents. The act may be useful for providing technical and enforcement support to export controls for biological agents.

6.2.4 The Explosive Substances Act

The Explosive Substances Act, 1908[29] is another old Act, which provides statutory authority to the Indian central government for strategic trade control. Section 6 of the Act is for the punishment of even abettors, and under this section of the Act, there is a provision for the punishment of those who supply explosive materials or provide counselling to the person or persons involved in manufacturing explosives. Quite significantly, this law is applicable not only to Indians but also to Indians living abroad. The Act provides punishment starting from 10 years of rigorous imprisonment to life imprisonment. A violator may also be given the death sentence. The Act also has a provision for fines, which may accompany the punishment.

This small Act defines explosive substances, and gives some details or examples. Section 2 of the Act considers an explosive substance as 'any materials for making any explosive substance'[30] as well as 'any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any

[25] India Code, Digital Repository of Legislations (1959) The Arms Act, 1959.

[26] India Code, Digital Repository of Legislations (1986).

[27] Government of India, Ministry of Environment, Forest and Climate Change (1986).

[28] The Government of India, Ministry of External Affairs (2004).

[29] India Code, Digital Repository of Legislations (2018a).

[30] India Code, Digital Repository of Legislations (2018a).

explosion in or with any explosive substance'[31] along with 'any part of any such apparatus, machine or implement'.[32]

The same section mentions the expression 'special category explosive substance'.[33] This means 'research development explosive (RDX), pentaerythritol tetranitrate (PETN), high melting explosive (HMX), trinitrotoluene (TNT), low-temperature plastic explosive (LTPE), composition exploding (CE) (2,4, 6 phenyl methyl nitramine or tetryl), OCTOL (mixture of high melting explosive and trinitrotoluene), plastic explosive kirkee-1 (PEK-1), and RDX/TNT compounds and other similar types of explosives and a combination thereof as well as remote control devices causing an explosion and any other substance and a combination thereof'.[34]

6.2.5 The Explosives Act, 1884

One of the mandates of the Explosives Act 1884[35] is to regulate the export of explosives. Unlike the Explosive Substance Act, this law is applicable only to India. But, like the Explosive Substance Act, it has been amended a few times. The Explosive Act, 1884 regulates the manufacture, possession, use, transport, import and export of explosives. The word 'export' was inserted in the Act through an amendment in 1983. The act defines aircraft,[36] carriage,[37] explosives[38] and vessel,[39] among many other terms.

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[31] India Code, Digital Repository of Legislations (2018a).

[32] India Code, Digital Repository of Legislations (2018a).

[33] India Code, Digital Repository of Legislations (2018a).

[34] India Code, Digital Repository of Legislations (2018a).

[35] Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion (2018).

[36] Aircraft has been defined under the Act as 'any machine which can derive support in the atmosphere from the reactions of the air, other than the reactions of the air against the earth's surface, and includes balloons, whether fixed or free, airships, kites, gliders, and flying machines'.

[37] Carriage has been defined under the Act as 'any carriage, wagon, cart, truck, vehicle or other means of conveying goods or passengers by land, in whatever manner the same may be propelled'.

[38] Explosives has been defined under the Act as 'gunpowder, nitrogycerine, nitroglycol, gun-cotton, di-nitro-toluene tri-nitrotoluene, picric acid, di-nitor-phenol, tri-nitor-resorcinol (styphnic act), cyclo-trimethylenetrinitramine, penta-erythritol-tetranitrate, tetry1, nitroguanidine, lead azide, lead styphnate, fulminate of mercury or any other metal, diazo-di-nitor-phenol, coloured fires or any other substance whether a single chemical compound or a mixture of substances, whether solid or liquid or gaseous, used or manufactured with a view to produce a practical effect by explosion or pyrotechnic effect; and includes fog-signals, fireworks, fuses, rockets, percussion caps, detonators, cartridges, ammunition of all descriptions and every adaptation or preparation of an explosive as defined in this clause'.

[39] Vessel has been defined under the Act as 'any ship, boat, sailing vessel, or other description of vessel used in navigation, whether propelled by oars or otherwise and anything made for the conveyance, mainly by water, or human beings or of goods and a caisson'.

The Act explicitly provides that any business, including the export of listed explosives, is to be accomplished only through a license. It also put an age bar for the sale of arms. Under the Act, the illegal export of any explosive shall be 'punishable with imprisonment for a term which may extend to three years, or with a fine which may extend to five thousand rupees, or with both'.[40] Like other Acts, if a knowing violator is a company, all the officials who have knowledge about the willful violation will be punished. The Act gives the right to appeal against the denial of license as well as against the punishment.

6.2.6 The Unlawful Activities (Prevention) Act, 1967[41]

This law is basically aimed at targeting unlawful, especially terrorist activities. Although this is an Act of 1967, it has been amended a number of times. Some of the amendments implement the UNSC Resolutions for preventing terrorist activities. The Act describes different terrorist activities such as holding the proceeds of terrorism, raising funds for a terrorist act and becoming a member of a terrorist gang or organisation. This Act has given details of different layers of punishment for participating in any of the unlawful activities. Even a company and its officials or societies can be prosecuted for participating in an unlawful activity. Though export control or strategic trade management is not mentioned, yet any activity involving the export of SCOMET items, or arms and ammunition which can benefit a terrorist or a terrorist organisation will come under the purview of this law.

6.2.7 Other Heritage Laws

The Indian legal system has a few more laws, which talk about defence and arms. Some of these acts also talk about the export of these items. The Narcotic Drugs and Psychotropic Substances Act, 1985[42]; the Indian Evidence Act, 1872; the Indian Penal Code; the Police Act, 1861; the Central Reserve Police Force Act, 1949; the Personal Injuries (Emergency Provisions) Act, 1962; the Border Security Force Act, 1968; the Code of Criminal Procedure, 1973; the Delhi Police Act, 1978; the Indo-Tibetan Border Police Force Act, 1992; and so on, are some Indian laws[43] which have been existing for a long period of time. These Acts were not made to administer

[40] Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, (2018).

[41] Government of India, Ministry of Home Affairs (2018c).

[42] India Code, Digital Repository of Legislations (2018l).

[43] Find these acts at India Code, Digital Repository of Legislations (2018) India Code, https://indiacode.nic.in/.

export control; but the general mandate of law enforcement and prosecution activities provided under these Acts could be useful for the enforcement of strategic trade control.

6.3 Fulfilling International Obligations: The Chemical Weapons Convention Act

The opening sentence of the Chemical Weapons Convention Act, 2000 apprises that this is an 'Act to give effect to the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction'.[44] The Act is popularly known as CWC. India signed this convention in January 1993, and subsequently ratified it. Section 2 of this Act defines several relevant phrases and concepts: chemical weapons, enforcement officer, inspector and so on. The Act also establishes a national authority. The CWC has permitted chemical trade. For this purpose, it has created three schedules, and placed chemicals, which may be allowed for international trade, into these three schedules. All the chemicals listed in these annexes have Chemical Abstracts Service registry numbers.

The Three schedules have separate guidelines. Schedule 1 chemicals are considered high-risk items basically meant for chemical weapons, and their transfer or sale requires strict monitoring under the convention. The importer has to import it only for research, medical, pharmaceutical or protective purposes. In each year, not more than 1 tonne of Schedule 1 chemicals can be sold by a member country of the CWC. The Technical Secretariat of the OPCW is to be notified 30 days before the sale. After the sale, India shall have to furnish details of each chemical sold within 90 days of the end of that year. Schedule 2 chemicals could be transferred only to the members of the CWC, with restrictions on endues and re-transfers. Similarly, Schedule 3 too, the Convention cautions on re-transfers and end use for non-members. Even for a member, the government has to ensure that it is not going for purposes prohibited under the CWC.

After the 2012 amendment to the Convention, Chapter III Section 16 of the Act restricts business in Schedule 2 chemicals, or the precursors of the CWC Annex, with a country that is not a member of the CWC. Section 17 of the Act instructs the selling of the Schedules 1–3 in the Annex on Chemicals only under the Export and Import Policy, and the rules of the central government laid down by the Foreign Trade (Development and Regulation) Act. The subsequent section of the Act demands the registration of a person or company involved in the export of these chemicals. Only a person or a company holding valid registration may export. The person or the company has to keep the government informed about its activities.

Section 19 of the Act authorises the government and its agencies to inspect the facility or the activities of a company exporting chemicals listed on the three Sched-

[44] Government of India, Cabinet Secretariat, National Authority, Chemical Weapons Convention (2018).

ules of the annexure. An exporter's compliance with the law and rules requires to be established. However, the act wants the inspection to be carried out in accordance with the provisions for verification given in the CWC annexure. Even the challenge inspection is to be carried out as indicated in the CWC Annex on verification. The Act vests in the Indian government the power of entry, search, seizure and arrest, with or without warrant or authorisation, the authority to stop and search conveyance, authorises police to take charge of goods seized, and so on.

The Act also specifies fines and penalties for the violation and non-compliance of the Act. Under Section 39 of the Act, if an exporter of the three Schedules of chemicals provided in the Annex of the Convention does not register itself with the designated authority, the exporter will be penalised up to one lakh rupees. If it continues to violate, then the fine will be one lakh every day. A non-compliant exporter may be imprisoned for a period which may go up to 3 years. Such an exporter may also be subject to both fine and imprisonment.

Similarly, other sections of the Act, too, have punishment provisions. The CWC demands systematic verification through on-site inspection, and monitoring with on-site instruments for Schedule 1 chemicals. The CWC also wants data monitoring and on-site verification for chemicals and precursors placed in Schedules 2 and 3. Section 41 of the Act has penalty for export in Schedule 1 chemicals, and Section 43 for Schedules 1–3. A violator may be imprisoned for at least 1 year; however, depending on the gravity of the case, it may become even life imprisonment. Besides, the exporter may be fined one lakh rupees. The same amount of punishment is laid down for exporting Schedule 2 chemicals to a non-party to the CWC under Section 42 of the Act.

The Act provides punishment for denying access to an inspection team, and denying information to the government about exporter's activities. The denial of information has been treated as a cognisable offence in the Act. An exporter has a right to appeal under the Act. For penalty awarded by the National Authority, an exporter may move to the higher level of the government. For penalty or punishment given by a court, the normal legal proceeding is to be followed. The Act mentions that the CWC has a provision for consultation on compliance issues with the Executive Council of the OPCW. At the same time, the CWC also talks about economic and technology development of member countries of the CWC, which the implementing Indian act mentions.

6.4 Bridging the Gap: The Weapons of Mass Destruction Act

In 2004, the UNSC passed the binding resolution 1540 to stem proliferation activities. To implement UNSCR 1540, India passed a bill on 13 May 2005, which became an Act—the Weapons of Mass Destruction (WMD) and their Delivery Systems (Prohibition of Unlawful Activities) with Presidential assent on 6 June 2005. This act

also came to fulfil international obligations; but it is known more for covering the gaps in the Indian legal framework for strategic trade control. The Indian government calls this WMD act as an 'overarching and integrated legislation prohibiting unlawful activities'[45] relating to WMD and their delivery systems. It closed some gaps in the legal framework for regulating transfers of items which may have WMD implications. Under the Act, the government can make new rules for regulating WMD. Besides, the Act included some of the best practices for export controls existing in the world or key players of strategic trade control. It also gave a mandate to constitute advisory councils on different aspects of WMD, including dual-use items. The enactment of the WMD had implications for some existing Indian laws like FTDR.

The very preamble of the Act heralds two significant issues. First, 'India is committed not to transfer nuclear weapons or other nuclear explosive devices, or to transfer control over such weapons or explosive devices and not in any way to assist, encourage, or induce any other country to manufacture nuclear weapons or other nuclear explosive devices'[46]; and second, 'India is committed to prevent a non-State actor and a terrorist from acquiring weapons of mass destruction and their delivery systems….' The act defines a non-state actor as 'a person or entity not acting under the lawful authority of any country'. For defining a terrorist, it has accepted the definition of the Unlawful Activities (Prevention) Act, 1967.

These preambular statements, accompanied by several provisions of the Act, took India to a new era of strategic trade control. As this is for WMD control, and India is already a member of the CWC and the Biological and Toxin Weapons Convention, the Act updates the prohibition and control prescribed in these two categories of WMD. The Act also explicitly mentions that it is applicable to the whole of India, including its Exclusive Economic Zone. The emphasis on the Exclusive Economic Zone demonstrates India's strong intention to go for enforcement in the sea. The UNSCR 1540 was brought in to counter challenges posed by the proliferation network involving countries such as Pakistan and North Korea. The proliferation network operated through all the routes; yet the principal route was the sea. An American measure like the Proliferation Security Initiative along with other initiatives, are already targeting sea-based proliferation.

The Act is very comprehensive. It covers five categories of entities under its scope. The Sub-section 4 of Section 3 lays down the scope as follows:

(a) citizens of India outside India;

(b) companies or bodies corporate, registered or incorporated in India or having their associates, branches or subsidiaries, outside India;

(c) any ship, aircraft, or other means of transport registered in India or outside India, wherever it may be;

(d) foreigners while in India;

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[45]The International Atomic Energy Agency (2005) Communication from the Resident Representative of India to the International Atomic Energy Agency regarding India's nuclear export policies and practices, INFCIRC/647, 29 June 2005.

[46]Government of India, Ministry of External Affairs (2005).

(e) persons in the service of the Government of India, within and beyond India.[47]

The Act introduced new practices such as re-transfer provisions, technology transfer controls and brokering controls.[48] The Act has a special focus on punishment and non-state actors. Section 18 has provisions for brokering controls. The most significant feature of the Act is that it has defined some key concepts such as trans-shipment and non-state actors, which are still being debated in the global security community. This adds clarity to Indian authorities, who may have been better placed in managing strategic trade.

The WMD Act defines transit as the bringing of

> goods from any country into India by land, air, or amphibious means of transportation, where the goods are to be taken out from India on the same conveyance on which they are brought into India without any landing in India, but does not include a conveyance in innocent passage through Indian territory, Indian territorial waters or Indian airspace of a foreign conveyance carrying goods.[49]

The Act elucidates some of the terms used in the section on definition. First, a foreign conveyance is the conveyance not registered in India. It is in innocent passage when it is not involved in illegal activities relating to WMD and missiles while passing 'through or above Indian territorial waters or airspace without stopping or anchoring in India'.[50]

Under the Act, trans-shipment is defined as the removal of 'goods from the conveyance on which they were brought into India and to place the goods on the same or another conveyance for the purpose of taking them out of India, where these acts are carried out on a 'through bill of lading' 'through airway bill' or 'through manifest'.[51] All the three bills of lading—airway bills or manifest—are documents for the transportation or shipping of the consignment required for fixing responsibility to an end user or a supplier in strategic trade management.

Further, the Act also defines technology as 'any information (including information embodied in software) other than information in the public domain, that is capable of being used in (i) the development, production or use of any goods or software; (ii) the development of, or the carrying out of, an industrial or commercial activity or the provision of a service of any kind'.[52] The Act explains that services relevant for the development, production or use of technology and related goods may also be treated as technology.

A graded penalty system is another characteristic of the WMD Act. An exporter will be punished if it is found violating the law knowingly. The term of punishment

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[47] Government of India, Ministry of External Affairs (2005).

[48] The International Atomic Energy Agency (2005) Communication from the Resident Representative of India to the International Atomic Energy Agency regarding India's nuclear export policies and practices, INFCIRC/647, 29 June 2005.

[49] Government of India, Ministry of External Affairs (2005).

[50] Government of India, Ministry of External Affairs (2005).

[51] Government of India, Ministry of External Affairs (2005).

[52] Government of India, Ministry of External Affairs (2005).

extends from 6 months to life imprisonment. If a person or a company commits the same offence, the punishment for repeat violations may be greater. A person or company may be fined in addition to the punishment. Depending on the nature of the violation, an exporter may not be imprisoned, only be fined. The Act also lays down that if a violation is deliberately committed by a company, all the persons involved or in charge of the willful violation, will be considered guilty. However, the Act also extends protection for an action taken in 'good faith'.[53] Quite significantly, the Act makes it very clear that if the punishment provided in any other government of India law comes into conflict with that of this Act, the law with the greater punishment for the same violation will prevail.

6.5 Licensing: The Foreign Trade (Development and Regulation) Act

The Foreign Trade (Development and Regulation) Act, popularly known as the FTDR Act,[54] is the main law for licensing in India. Like many of the Acts mentioned before, the FTDR empowers the central government to make rules and regulations in specified areas. The outcome of this law was greatly shaped by the post-Cold War liberalising the Indian economy. The Act replaced the Import and Exports (Control) Act, 1947. It was enacted in 1992. The principal objective of the law is to facilitate trade. This law is one of the initiatives taken after 1991 to depart from the tradition of the command economy. However, the new objective of facilitating trade is not to promote unregulated trade.

The FTDR reflects the balance between two principles of Indian trade policy: to facilitate trade, and to introduce reasonable regulation in it. The FTDR was thoroughly amended in 2010. The amendment replaced the words 'export and import' from the title of Chap. 2 and used 'foreign trade'. It is now synchronised with the WMD act. It reflects the key provisions of the WMD Act. After the synchronisation, the FTDR Act has incorporated services and technology in its provisions. It uses the definition of technology used in the WMD Act. It has treated the explanation of services in a detailed way so that the purpose of this Act as a guide to licensing authorities is served. Section 2(j) explains 'services' as 'service of any description which is made available to potential users and includes all the tradable services specified under the General Agreement on Trade in Services entered into amongst India and other countries who are party to the said Agreement'.[55]

The deemed export and intangible technology transfer controls are laid down in Section 2 when it talks about 'supplying, services or technology

[53] Government of India, Ministry of External Affairs (2005).

[54] Government of India, Ministry of Commerce and Industry, Directorate General of Foreign Trade (1992).

[55] Government of India, Ministry of Commerce and Industry, Directorate General of Foreign Trade (2010).

(a) from India into the territory of any other country;

(b) in India to the service consumer of any other country;

(c) by a service supplier of India, through commercial presence in the territory of any other country;

(d) by a service supplier of India, through presence of Indian natural persons in the territory of any other country… .[56]

Section 2 mentions restrictions, and even prohibition, of export, import, transfer, re-transfer, transit and trans-shipment of 'specified goods, services or technology'[57] which may have WMD implications. Under the Act, restrictions have been imposed because India as a Nuclear Weapon State has to control goods on the grounds of national security, foreign policy, and its 'international obligations under any bilateral, multilateral or international treaty, covenant, convention or arrangement'.[58]

The Act allows only the Director General to issue Importer–Exporter Code Numbers. Without the code number, an exporter cannot export. This includes the export of services. Except specified services or technology, the Act does not require an exporter code for the export of services or technology. The Act also allows the suspension and cancellation of the code if an exporter is non-compliant. However, the person holding the code or license will get a notice and may give representation and, in an exceptional case, the Act permits the licensing authority to issue a special licence for the exporter whose license has been cancelled or suspended. However, the Act authorises the Indian government to suspend or cancel a license even without giving notice. However, in such a case the exporter will be heard within 6 months after the order of cancellation and suspension. The Act puts a restriction on the period of license. For punishment of strategic goods, services or technology, the Act follows the provision of the WMD Act.

This Act authorises the Indian government for all kinds of enforcement. The government is authorised to take preventive action such as search and seize items for export. The Act lays down that an exporter shall have to pay a penalty of at least 'ten thousand rupees or more than five times the value of the goods or services or technology'.[59] The Act also provides detailed ways for the collection of penalty from the non-compliant exporter. The non-payment of the penalty may also lead to the suspension of the Importer–Exporter Code Number. Section 13 of Chapter IV stipulates that penalty or confiscation made by authorities will not come in the way of other punishments.

14C of the Chapter IVA explicitly mentions catch-all controls, and lays down the procedure for its control. This sub-section provides that

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[56] Government of India, Ministry of Commerce and Industry, Directorate General of Foreign Trade (2010).

[57] Government of India, Ministry of Commerce and Industry, Directorate General of Foreign Trade (2010).

[58] Government of India, Ministry of Commerce and Industry, Directorate General of Foreign Trade (2010).

[59] Government of India, Ministry of Commerce and Industry, Directorate General of Foreign Trade (2010).

> No person shall export any material, equipment or technology knowing that such material, equipment or technology is intended to be used in the design or manufacture of a biological weapon, chemical weapon, nuclear weapon or other nuclear explosive device, or in their missile delivery systems.[60]

The Act also allows an appeal against the governmental order, but it is to be done within 45 days of the order. Section 17 of Chapter V lays down that

> Every authority making any adjudication or hearing any appeal or exercising any powers of [review] under this Act shall have all the powers of a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:
>
> (a) Summoning and enforcing the attendance of witnesses;
>
> (b) requiring the discovery and production of any document;
>
> (c) requisitioning any public record or copy thereof from any court or office;
>
> (d) receiving evidence on affidavits; and
>
> (e) issuing commissions for the examination of witnesses or documents.[61]

6.6 Enforcement

6.6.1 The Customs Act

The Customs Act, 1962 is the main law to govern the export and import of goods in and out of India. This Act has been amended a number of times. Section 11 of Chapter IV of the Act gives power to the central government to prohibit or put specified restrictions, on the export of an item. Sub-section 2 of Section 11 of Chapter IV of the Act lists 22 reasons for imposing restrictions or the prohibition on the export of goods. Of course, not all the reasons are relevant for strategic trade management or control. Yet, a few reasons listed in the sub-section could be directly and indirectly relevant for strategic trade control. These are as follows:

- Indian security,
- Deterrence of smuggling,
- Implementation of obligations under the UN Charter for international peace and security,
- Execution of a treaty or an agreement,
- Compliance of imported goods which had implications for the legal status of the same or similar Indian goods,
- Controlling of documents, which have implications for India's relations with its neighbours or friendly countries,

[60] Government of India, Ministry of Commerce and Industry, Directorate General of Foreign Trade (2010).

[61] Government of India, Ministry of Commerce and Industry, Directorate General of Foreign Trade (2010).

- Prevention of violation of the law of the land.[62]

Section 7 of Chapter III of the Customs Act authorises the government of India to designate Customs ports or Customs airports, inland container depots, land Customs stations, warehousing stations and so on. The Act also gives licenses to Customs brokers. The Act holds 'principal and agent' (that is, the owner and the broker) both responsible for any liability. This act wants Customs house agents also to be licensed.

Chapter IVB is on prevention and detection of illegal export of goods. It empowers enforcement officials to get information about specified goods sent for storage. The Act also makes requirements for vouchers and other relevant commercial documents for transportation. It also requires an exporter to have proper maintenance of verifiable accounts. Chapter V has the provision for taking appropriate action for false declaration of the price of the commodity. The section permits the enforcement authority to check the contract, broker's note, insurance policy, catalogue or any other document required for assessing the price. Though the section was made for taxation and tariff purposes, it may be used to check one of the best practices—that is, red flag for inflated price of a sensitive item. Chapter VB discusses advance ruling and the setting up of an authority for the purpose. An advance ruling can be given against an applicant by fraud or the misrepresentation of facts.

The Act gives power to enforcement authorities to supervise any consignment when it is loaded for export. A 'proper officer' means the authorised official, or enforcement authorities may board conveyances carrying the export consignment. Again, Sections 50 and 51 of Chapter VII require the clearance of goods by a 'proper officer'. Section 39 provides that 'Export goods are not to be loaded on the vessel until entry-outwards is granted'.[63] A proper document (like bill of trans-shipment) is required even for the clearance of goods meant for trans-shipment.

Chapter VIII discusses the transit and trans-shipment of goods. Under 'goods in transit', the Act covers both transit and trans-shipment. The Act says that baggage, goods imported by post, and stores are not covered under the Act. Any trans-shipment under an international treaty or bilateral/trilateral/multilateral agreement will have to give a declaration, not a bill of transshipment. The chapter on transit and trans-shipment was basically added from the point of view of the collection or exemption of tax or duty. However, the inspection or verification of documents, in addition to the compliance of other laws such as the WMD Act and the FTDR Act, will make the Chapter relevant for strategic trade control enforcement.

The Act also has a provision for regulating the goods for export kept in a warehouse. If the government has any apprehension that the exported item may come back to India through smuggling, it may prohibit the warehoused item. The Act also has provisions for goods kept for re-export and hundred per cent export-oriented units. The Act also empowers the government to formulate rules for coastal goods and coasting vessels.

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[62]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (1962).

[63]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (1962).

Chapter XIII is devoted to searches, seizure and arrest. Section 100 of the chapter enables enforcement authorities to search suspected persons entering or leaving India. The enforcement authorities are also vested with the power to screen or X-ray bodies of a suspected person if required. A gazetted officer of the Customs, or a magistrate, has to give permission for any such search. However, before the permission is granted, a person can be kept in detention. The law has put some restrictions during a search. Any search is to be done before two persons, and a female can be searched only by a female official. For X-raying the body of a female, the permission of a registered doctor is necessary. All the seized items are to be listed. The Chapter allows enforcement authorities, especially Customs officials, to stop and search conveyances, to inspect premises, to examine a suspected person and to issue summons to give evidence and produce documents to any person relevant to that particular case.

The Act also authorises enforcement agencies to confiscate goods which are being inappropriately exported, and even to confiscate conveyances being used for the purpose. The Act also makes provisions for a penalty for wrongdoing that includes the use of false and incorrect material. In the case of 'contravention, etc., not expressly mentioned',[64] the maximum punishment is one lakh rupees. In each case, the burden of proof lies with the person who is found to be in possession of the seized or confiscated items. However, authorities have to issue a show cause notice to an exporter before confiscating his goods. Chapter XIV lays down procedures for the application for the settlement of cases by the settlement commission. The settlement commission has been given powers to reopen a settled case. The settlement commission basically deals with revenue-related cases. Chapter XV discusses appeals and revision to a higher authority. It provides details and time limits to the appeals to the Appellate Tribunal, and to the courts. It also has provision not to entertain appeals in some cases.

Chapter XVI details offences and prosecution. For making a false declaration or furnishing false documents, the Act provides punishment up to 2 years, a fine or both. Variegated levels of punishment are provided for the obstruction of an officer of the Customs, for not getting X-rayed, for the evasion of duty or prohibitions. The Act also provides punishment, including imprisonment for offences by the officers of the Customs. The Chapter also discusses evidence which can be admitted in court and offences by the companies.

6.6.2 The Indian Evidence Act, 1872[65]

This Act applies to judicial proceedings all over India, except Jammu and Kashmir. The Act helps in the enforcement of strategic trade control by defining some

[64] Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (1962).

[65] India Code, Digital Repository of Legislations (2018g).

key issues involved in judicial proceedings. The Act discusses the relevance of facts forming a part of a transaction, facts necessary to describe the motive of a conduct, conspiracy, accidental incident and so on. The Act also deals with issues such as confessions, oral admission and statements made under special circumstances. This also deliberates matters about how much of a statement is to be proved, and when a statement of a person cannot be called as a witness. Other relevant subjects—the burden of proof, the number of witnesses, the examination of witnesses, cross examination, leading questions, indecent and scandalous questions, accomplices, official communication, presumption to certain offences and so forth, are also deliberated in the Act.

6.7 Conclusion

Thus, this elegant Indian legal system denotes that India has a rich tradition of holding the preliminary practices for strategic trade management. The legal framework extends statutory authority to licensing and enforcement authorities for undertaking activities relating to strategic trade management. The Indian legal system for strategic trade management is extremely dynamic in nature. It is reflective of global trends. It has obtained a new law—the WMD act—to bridge the gap existing in its legal framework. This law, to an extent, signals India's integration with the post-UNSCR 1540 global export control order. This is a specialised law passed in the Indian legal system primarily for managing strategic trade. This law also reflects the voice for details in the legal system for adding precision in the management.

The WMD Act has also shaped the Indian licensing law—the FTDR. It is a relatively a new law, and a product of the post-Cold War reality of India when it moved away from restrictive economic policies and opted for the liberalisation of its economy. However, the post–Cold War law was amended for the twenty-first-century need of integrating with the world. This law may have been amended, but there are a number of other laws which are not amended to reflect the post-UNSCR 1540 export control order.

Interestingly, many of these laws were legislated during the British period, but amended subsequently and, in some cases, several times. These old laws, in fact, deliver startling details which are useful for strategic trade management. Some of them have definitions of weapons and ammunitions as well. The combination of old and new laws establishes India's standing as a country that does not lack laws when it comes to export control. This combination is the salient feature of the major systems of strategic trade management in the world.

The Indian legal system has standard practices for strategic trade management. It has some of the practices which are generally found in the regulatory system. Quite interestingly, some of these laws may be old; but they have modern or current strategic trade control practices contained in them. The Atomic Energy Act has modern provisions—like deemed export control and the physical protection of sensitive installations. The NSG has a section in its guidelines for the physical protection of

exported nuclear items figuring on the NSG lists. The Customs Act has detailed discussions about many enforcement practices, including trans-shipment.

The Indian legal system has a layered punishment structure. A person or a company is fined or imprisoned depending on the extent of the violation of laws and rules. Many of the old laws also have useful details regarding punishment. Indian laws have provisions for individuals, companies and company officials violating any law and rule. The Indian legal system makes a distinction between willing and unwilling, or innocent violation. It also gives the right to appeal against any punishment, fine or an adverse trade order.

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Chapter 7
Indian Regulatory Framework for Strategic Trade Management

Abstract India has a well-developed regulatory system to manage strategic trade control. The Indian government publishes handbook, notices and notifications regularly. Earlier, hard copies of the rules and regulation were the sources of information of the Indian regulation. Today, online information also has increased easy accessibility as well as transparency. The regulatory framework has detailed rules and procedures to implement international obligations. Some Indian laws may follow international best practices; but by and large, specifics or details come through the regulatory system. The Indian licensing system is part of strategic trade management. The Directorate General of Foreign Trade is the key or nodal organisation for licensing, but the Department of Atomic Energy and the Ministry of Defence also give license in different categories of items. In India, the final decision on licensing is taken by the Inter-Ministerial Working Group on a consensus. All the licensing departments lay down detailed criteria for licensing. The Indian strategic trade management system has all the dominant practices used in the world for regulating sensitive trade in its regulatory framework. The momentum released by the India–United States civil nuclear energy initiative and the United Nations Security Council Resolution 1540 brought India closer to the global export control order. In the process of joining the four multilateral export control regimes, India has harmonised its export control system with all the four regimes, and has thus further integrated itself with the global export control order. To keep the regulatory system dynamic, India has been effecting changes in it quite frequently.

7.1 Introduction

To manage the commerce of controlled items, India has a well-developed regulatory system that explains the way the management of these items is to be done. As mentioned in the chapter on the Legal Framework, the Atomic Energy Act was updated in 1962 to incorporate the provision of rulemaking so that detailed procedures for administrative purposes become available to authorities and other stakeholders, including industry. The Indian government publishes handbook, notices and noti-

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fications from time to time.[1] Before the internet age, hard copies of the rules and regulation were the sources of information. Today, the information is available on websites. Online information also has increased transparency. The Modi government has also started providing information on the status of licensing.[2] Over the years, the Indian regulatory system has also evolved. The evolution of the regulatory system is a result of a number of factors.

As India had to pass some laws to meet its international obligations, the regulatory framework has incorporated detailed procedures to implement international obligations in its laws. Some Indian laws follow international best practices; but many others do not provide specifics or details which are globally considered regulatory issues. At the regulatory stage, the mandate of the Act is given a detailed course of action useful for implementation. During the evolution period, Indian regulatory practices are refined from the experiences of the practices of other countries which have been handling a large volume of controlled items for several years, and even decades.

Today, the Indian regulatory framework is harmonised with the guidelines and control lists of the four multilateral export control regimes. For more than a decade, of the four regimes, the Indian system was harmonised with the MTCR and the NSG. This was done to fulfil the commitment given in the 2005 India–US joint statement on the civil nuclear energy initiative.[3] In 2017, the regulatory system was harmonised with the two other multilateral export control regimes—the Australia Group and the Wassenaar Arrangement.[4] Earlier, the items of the Indian control list were drawn from either an internal exercise, or taken from a treaty like the CWC. The CWC has three categories of chemicals.[5] In fact, in the Indian controlled list, only these items have WCO Harmonised System (HS) code.[6]

In India, strategic trade management is done through the Inter-Ministerial Working Group. As a result, notices and notifications regarding administrative rules and regulations for strategic trade management are issued in different ministries and departments. Yet, the Directorate General of Foreign Trade is the key or nodal organisation for the release of documents, and most licenses are issued by it for high technology or strategic trade. Till 2017, the Ministry of Defence (MOD) kept details for licensing of some defence items.[7] Although the MOD is still the licensing authority, yet

[1] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017h).

[2] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2018a).

[3] Government of India, Ministry of External Affairs (2005).

[4] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017f).

[5] Organisation for the Prohibition of Chemical Weapons (2018).

[6] Government of India, Ministry of Chemicals & Fertilizers, Department of Chemicals and Petrochemicals (2010).

[7] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017c).

these military items have now been transferred to the DGFT list.[8] Today, the Indian regulatory system has all the dominant practices of strategic trade control prevailing at the global level, and even in the major export control countries.

7.2 The Indian Control List: SCOMET

In 2017, India adopted a single list of restricted or prohibited items in its regulatory system. The list is called the Special Chemicals, Organisms, Materials, Equipment and Technology (SCOMET) list.[9] Although the list has been in use since 2000, India populated the much-awaited Category 6 of SCOMET in 2017.[10] Category 6 contains all military items.[11] Before SCOMET, the Indian list was known as Special Materials, Equipment and Technology list, or SMET, which was the first dual-use technology list of India.[12] The list, the predecessor of SCOMET, was notified in 1995.[13] As mentioned in the previous chapters, for a long period, the details of arms and ammunition on the SCOMET list were not known, though licensing for arms and ammunition was in practice. On 13 March 2015, the notification for Military Stores was issued.[14] The Military Stores was a kind of Indian munitions or arms list. There were different categories of arms and ammunition or munitions lists in India. The April 2017 DGFT notification merged the Military Stores items in Category 6 (munitions) of the SCOMET list.

The SCOMET, the Indian dual-use technology list, has nine categories for different kinds of sensitive dual-use goods, starting from Category 0 to 8, and ranging from chemicals/biotechnology to aerospace to software. The export of any item figuring on the list needs a license. It is regulated by special provisions and guidelines of India's trade policy. Among Indian officials working in different departments and ministries, the Indian strategic trade control system is popular as the SCOMET system or SCOMET control (Table 7.1).

The list has been refined, and has grown over the years. It is updated to meet international obligations as well as to meet new technological-security challenges. When India implemented the CWC, the Indian list included all the items listed on the Annexes of the Convention. As the CWC has classified chemicals with warfare implications in three schedules—and the third schedule is basically of dual-use

[8]Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017c).

[9]Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017b).

[10]Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017b, d).

[11]Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017b, d).

[12]Government of India, Ministry of External Affairs (2004).

[13]Government of India, Ministry of External Affairs (2004).

[14]Government of India, Ministry of Defence, Department of Defence Production (2015).

Table 7.1 SCOMET categories

Category	Description of items
Category 0	Nuclear material, nuclear-related other materials, equipment and technology
Category 1	Toxic chemical agents and other chemicals
Category 2	Microorganisms, toxins
Category 3	Material, materials processing equipment and related technologies
Category 4	Nuclear-related other equipment, assemblies and components; test and production equipment; and related technology, not controlled under Category 0
Category 5	Aerospace systems, equipment including production and test equipment, related technology and specially designed components and accessories thereof
Category 6	Munitions list
Category 7	~~Electronics, computers, and information technology including information security~~ [Now reserved]
Category 8	Special materials and related equipment, material processing, electronics, computers, telecommunications, information security, sensors and lasers, navigation and avionics, marine, aerospace and propulsion

Source Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017b)

items—the SCOMET has also classified it separately. Category 1A of the SCOMET 'corresponds' to Schedule 1 of the CWC and the Category 1B to that of Schedule 2. Similarly, Category 1C mirrors the Schedule 3 of the CWC. The SCOMET list indicates different guidelines for the licensing or sale of different subcategories of chemicals.

Today, the SCOMET list has been harmonised with those of the four multilateral export control regimes—the MTCR, the NSG, the Wassenaar Arrangement and the Australia Group. Under the 18 July 2005 India-US joint statement, India committed to harmonise its SCOMET list with the MTCR and the NSG lists. As a result, the SCOMET list contained items of these two multilateral export controls regimes. However, the SCOMET list opted for a different arrangement of the NSG and the MTCR lists. In order to make Indian export control more stringent, it opted for several generic items instead of specific items listed in the NSG and the MTCR.

At times, the different arrangement has created an impression outside that not all the items of the MTCR and the NSG were included in the Indian system. Gradually—apparently to remove this misperception—India rearranged the items of the two regimes through subsequent notifications. Quite significantly, the April 2017 notification reflects the new thinking of the Indian licensing system. It mentions that if an item appears at two places in two different headings, the item classified under the 'specific description' will be preferred over that of 'general description'.[15] However, it added that the end-use would be an important factor or criteria in 'determining the

[15]Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017b, d).

classification'.[16] Besides, India keeps updating its own lists when the two regimes introduce changes in the regimes. At present, India is a member of the MTCR and an adherent of the NSG. In the future too, the SCOMET list will reflect changes taking place not only in these two lists but also in all the four multilateral export control regimes.

India became a member of the Wassenaar Arrangement in December 2017, and the Australia Group in 2018. Before becoming a member of these two regimes, India harmonised its export controls gradually through different notifications. Massive changes were carried forward in the April 2017 notification. India officially stated that these changes were effected to join the Wassenaar Arrangement and the Australia Group.[17] The incorporation of dual-use technology listed in the Wassenaar Arrangement led to the creation of the new Category 8 in SCOMET. It is called 'Special Materials and Related Equipment, Material Processing, Electronics, Computers, Telecommunications, Information Security, Sensors And Lasers, Navigation And Avionics, Marine, Aerospace And Propulsion'.[18] Before the April 2017 notification, the SCOMET had only eight categories: Categories 0–7.

The SCOMET list was also subjected to Australia Group related changes. The April 2017 notification amended subcategories 1B and 1C. It also added subcategory 1D—'Other Chemicals'. New entries were added to the Category 2. Category 2H has been thoroughly enriched, whereas category 2G was modified over the years to reflect changes taking place in biological science and technology.[19]

The SCOMET lists these Chemicals by name, CAS number and CWC Schedule (where applicable). The notification informs that

> Chemicals of the same structural formula (e.g., hydrates) are controlled regardless of name or CAS number. CAS numbers are shown to assist in identifying whether a particular chemical or mixture is controlled, irrespective of nomenclature. However, CAS numbers cannot be used as unique identifiers in all situations because some forms of the listed chemical have different CAS numbers, and mixtures containing a listed chemical may also have different CAS numbers.[20]

Today, there are some new entries in 3D001 to 3D015 relating to biological agents. The subcategories 3A201, 3A303, 3A309, 4A003, 4A007, 4A017, 4B006, 5A102, 5A205 have also been amended. The April 2007 notification deleted subcategory 7C. Now, all the subcategories of Category 7 are to be populated in the future.[21]

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[16] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017b, d).

[17] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017i).

[18] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017b, d).

[19] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017i).

[20] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017i).

[21] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017i).

Table 7.2 Value of the export authorisation of SCOMET items

Financial year	USD million
2017–2018 (up to September 2017)	98.18
2016–2017	54.93
2015–2016	193.26
2014–2015	122.52
2013–2014	108.35

Source Government of India, Ministry of Commerce and Industry, Department of Commerce, Annual Reports, 2017–2018; 2016–2017; and 2015–2016

7.3 Licensing

The export of SCOMET items are (Table 7.2)

> governed by the specific provisions of (i) Chapter IV A of the FT (D&R) Act, 1992 as amended from time to time; (ii) Sl. No. 4 & 5 of Table A and Appendix-3 of Schedule 2 of ITC(HS) Classification of Export & Import Items; (iii) Para 2.16, Para 2.17, Para 2.18 of FTP; and (iv) Para 2.73- 2.82 of Hand Book of Procedures, in addition to the other provisions of FTP and Handbook of Procedures governing export authorizations.[22]

In the Indian system, the licenses for SCOMET goods are delivered by three departments. The Department of Atomic Energy gives the license of Category 0 items. The DGFT is in charge of categories other than 0 and 6. The DPP is still responsible for giving a NOC for external trading in Category 6. Licensing for Category 6 is done through the existing Standard Operating Procedure (SOP) of the Department of Defence Production, Government of India. In 2016–2017, the percentage of license approval was 91; but in 2017–2018 (up to September 2018), it came to 76.5.[23]

To procure a license to export a SCOMET item, an application along with suggested documents may be made. As the DAE is the licensing authority of the Category and related items, an exporter needs to submit an application for a licence to export Category 0 items 'in writing' to the Joint Secretary (I&M), DAE, Anushakti Bhavan, CSM Marg, Mumbai 400 001.[24] Paragraph 2.73 provides details of licensing for SCOMET items. An exporter needs to apply in ANF 2 O to the DGFT, along with the prescribed documents. Indian regulation makes it compulsory to submit the application online. Online applications may be submitted through the DGFT URL http://dgft.gov.in/CallModule.asp?sch=SCOMET, or through the MOD URL http://ddpmod.gov.in/myauth/ddp_noc/myauth/users/login.php for Category 6 items. The

[22]Government of India, Ministry of Commerce & Industry, Department of Commerce (2015).

[23]Government of India, Ministry of Commerce & Industry, Department of Commerce (2018).

[24]Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017b, d) and Government of India, the Department of Atomic Energy (2013).

exporter is 'mandatorily' required to file the application 'through the online system under the Icon E-COM on the website of the DGFT'.[25]

The Indian government conducts outreach activities for exporters. Different departments of the Indian government have been holding workshops, seminars and small group briefings to familiarise exporters about the process of filling up an application as well as the obligations and responsibilities of an exporter after procuring a license to supply SCOMET items. The government has been doing these activities at times alone, and several times in collaboration with Indian and foreign non-governmental partners. Some business associations are deeply involved in the outreach process all over India. The government organises outreach activities for its officials as well. A couple of research institutes and think tanks work with the government, and provide training to officials and industry. Some industry captains also give lectures to companies involved in the export business.

The end-user certificates (EUCs) is a compulsory document, which needs to be submitted with an online application. Today, the Indian regulation does not require the simultaneous submission of an application manually. However, an applicant will have to submit the original End-User Certificate(s). Indian rules demand that,

> all entities in the chain of supply viz. the foreign buyer, end user, and intermediary/consignee (if they are different from the foreign buyer & end user), which is/are to be submitted in hard copy to the SCOMET Section of DGFT (HQ), besides electronic submission.[26]

However, sensing or apprehending that an item supplied for the declared purpose may be diverted for prohibitive or non-declared purposes, licensing authorities may attach additional conditions to the license approval. For Category 6, the standard operating procedure (SOP) of the MOD is to ask for a brief note regarding export on the letterhead of the exporter. The note has to mention the subcategory as well as the intent of application. Both are supposed to help MOD officials in 'examining the applications to avoid possible overlaps and take appropriate decision on the application'.[27] Except for the write-up, all the documents which are to be attached with the application are basically the same required by the DGFT.

Subcategory 1A consists of prohibited items, and it cannot be sold. The subcategory 1B can be sold only to the member countries of the CWC after obtaining 'general permission'. However, an exporter shall inform the specifics of the consignment to the NACWC, Cabinet Secretariat; MEA, DISA; Department of Chemicals and Petrochemicals and the DGFT within 30 days of export. In addition, the exporter shall submit to a copy of the Bill of Entry into the recipient country to the DGFT within 30 days of delivery.

Subcategory 1C can be supplied to a CWC member without license. However, the exporter shall have to follow the process of notification to the concerned Indian

[25] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2018b).

[26] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2018c).

[27] Government of India, Ministry of Defence, Department of Defence Production (2017b).

government departments mentioned for the subcategory 1B in the prescribed format (Aayat Niryat Form) with the End-Use Certificate. For non-members of the CWC, an exporter may have to take a license and submit a Government-signed End-Use-Certificate. Subcategory ID chemicals can be exported to the Australia Group members without an export authorisation or a license. However, the regulation puts the same obligation of notification on an exporter that it puts for the supply of 1B items to members of the CWC.

Further, the Department of Defence Production (DDP) divides Category 6 of the SCOMET list in two parts, and puts them in two Appendixes. The DDP has different licensing procedures for both the Appendixes. These are explained in Part-A and Part-B procedures of the DDP SOP. Besides, the DDP has different licensing procedures for other activities and items. Part-C discusses the export of Munitions List items for exhibition and Part-D for testing and evaluation. Part-E lays down the 'in-principle approval' for 'participation in Tenders/Request for Proposal/Notice Inviting Tenders or exploring export opportunities' and Part-F has procedures for the grant of the 'transfer of technology/software for design, development, manufacturing, training, maintenance services, upgrade & overhaul of the munitions list'. The Secretary Defence Production is the competent authority for the items covered under Appendix-II and the Joint Secretary (DIP) for 'the items other than Appendix-II'.

Licensing parameters for Part-A and Part-F are not only different but also the strictest. The application is to be attached with a signed and stamped EUC from the end-user/ultimate end-user government. The government can verify the EUC not only before giving the license but even after that. So, the government has the power and right to also conduct post-shipment verification. When the certificate from the recipient country is not available, the Defence Export Steering Committee (DESC) functioning under the Secretary Defence Production may consider the matter on a case-to-case basis. A number of Indian government departments, agencies and wings are consulted before a license is given for Part-A items of Category 6.

Part-F procedure allows an applicant an option to file an online/offline application to obtain a license. The applicant will have to provide details of the level of technology software it seeks to transfer. The application is to be attached with a EUC, signed and stamped by the government of the end-user or the ultimate end-user. For this part, consultations are held with other government bodies.

For other parts of Category 6, the procedures adopted for granting licenses are less strict. For Part-B, there is no insistence on a EUC signed by the government of the recipient, and the requirement for consultation with other government bodies is only required when the importer is from the negative list of countries maintained by the MEA. However, the MEA is supposed to give comments on any such application within 15 days.

Under Part-C and D procedures, if a license is sought for an exhibition, testing, or evaluation of a Part-A item, there will be consultations with other government bodies; however, there will be no insistence on a government-signed EUC. If a license is sought for an exhibition, testing, or evaluation of a Part-B item, there is no need for consultations with other government agencies or for the government-signed

EUC. But the recipient country figuring on the MEA negative list will invite the Part-B process of inviting comments from the MEA within 15 days.

For Part-E too, the procedures for Parts-C and D are adopted. Under Parts-C, D and E, licensing is not done for sale, and the items should be non-lethal in nature. In all cases, applicants have to submit documentary proof for the activity for which the license is being asked for. However, an exporter who receives the license, under Part-E classification, is permitted to quote in principle the approval of the DDP when it seeks a license for 'actual export'. Moreover, at the time of licensing for actual export, comments from the MEA may be sought for the items notwithstanding comments offered at the time of 'in principle' clearance.

7.3.1 Stock and Sale Control

The government of India has started issuing licenses for 'Stock and Sale'. In Indian regulations, a stockist is an 'entity abroad to whom the SCOMET items are originally exported by the Indian principal/wholly owned subsidiary. The stockist entity should be a subsidiary/principal company abroad of the Indian exporter.'[28] Indian licensing authorities have to follow certain guidelines for giving a license for this purpose. When stock and sale purpose licensing is done for transactions only between the Indian 'principal company/the wholly owned subsidiary'[29] and a 'subsidiaries/principal Company abroad',[30] it may have different documentary requirements.

Indian regulations require the furnishing of 'documentary proof' to establish the relationship between the two. An end-user certificate is required in this case as well. The certificate needs to carry all the countries the stockist may export to in the future. A license is to be given only when security and other issues are satisfactorily resolved. The stock and sale license holder will also have to make an inventory of the items supplied to the final end-user in a calendar year, by January 31. The license holder has to give a consolidated statement within 3 months of the end of the license. The stockist entity has to supply the item to the final end-user before the expiry of the license.

India controls the retransfer of restricted items. In its guidelines, the DAE has a section for guiding the retransfer of sensitive materials. Section 8 of the DAE guidelines demands that not only is the consent of the Indian government required for retransfers but also the same level of safeguards and constrains are required to be applied as were applied by India for the original recipient. As India has retransfer

[28] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017g).

[29] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017g).

[30] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017g).

control, for the supply of a SCOMET item which is to be retransferred from the stockist entity to an end-user entity, the regulatory system has a set of procedures.

For example, if an item is to be retransferred within the same country by the stockist entity, it will have to follow one set of procedures for obtaining a license or permission; but when it does so for an entity based in another country, it has to follow another set of procedures. For the retransfer of an item to an ultimate end-user, an application along with 'End-use/End-user certificate from each link in the supply chain', 'Purchase Order(s)/Invoice(s)' and 'technical specifications of the product to be transferred (only if there is any value addition in the product by the stockist)', are to be submitted.

For a retransfer in the same country, the stockist entity will have to seek the required documents from 'each link in the supply chain' and the end-users in the same country, and send it to the Indian licensee. The Indian licensee will submit all the documents to the DGFT to take prior permission. After risk assessment, licensing authorities may relax the requirement of prior permission. However, the Indian license holder will have to submit the required documents in 3 months if it gets prior permission. Quite interestingly, Indian regulations contain a very important provision in which it explains that by 'country' it means 'an independent sovereign entity which is a distinct national entity in political geography'. It categorically rules out treating an economic union or a Customs union as a country that will qualify for 'same country transfer'.

For re-export in the country outside the stockist entity, all the required documents from 'each link in the supply chain' and the end-users will be sent to the Indian entity which will submit all the documents to the DGFT for prior permission. For repeat orders, the regulation requires that the product, the end-user and all the supply chain entities remain the same.

Indian regulations allow an exporter to apply for spare parts along with the main item in a license. The exporter will have to justify the reason for sending spare parts with the 'main item/equipment'. Indian regulations allow an applicant to appeal against the denial of a license within the stipulated period. For Category 6 of SCOMET items, it is to be done within 30 days. India regulations also control 'supplied or derivative materials usable for nuclear weapons or other nuclear devices'.

7.3.2 Duration of Licensing

An exporter is granted license or authorisation for a period of 24 months.[31] This license may be extended twice for 6 months each on the merits of a case. However, in certain cases, to 'meet contractual obligations/delivery schedule or on specific recommendation of the concerned Technical/Administrative Ministry/Department/or

[31] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017g).

any other agency',[32] a license for a shorter or longer duration than normally given may be considered. Earlier, an exporter used to get a license for 12 months. For the renewal of a stockist license, an exporter will have to follow the normal procedure for the renewal of a license. However, Indian regulations do not permit stock and sale purpose licenses for technology of any SCOMET category, as well as for its Categories 0, 1C and 6.

The Government of India has been making efforts to cut down the processing time of applications under the Ease of Doing Business mission.[33] In fact, 'Online Inter-ministerial consultations' were also launched.[34] However, the situation has not improved much.

Under Category 6 too, licenses are given for 2 years for Parts A and B. For Part C, a licence is given for 6 months. The regulation for the exhibition of item 6 requires that an item should come back to India within 6 months from the date of export. Its import proof is to be submitted within 2 months of the import or within 8 months from the issuing of the license. For testing and evaluation of Category 6 items, a license is issued for 1 year. The license holder has to bring the items back to India within 12 months of export, and submit the proof of having done so within 2 months.

License for participating in a tender etc., classified under Part-E, is issued for a maximum period of 2 years. The item which has gone out is to come back within 6 months, and the proof of return is to be submitted within 2 months of the import. The license holder has to receive the assurance that a transferred item cannot be 'diverted, sold, or transferred to any third party'. The License for the transfer of technology under Part 'F' shall be for 2 years from the date of 'approval, or the completion of contract order, whichever is earlier'. However, it seems the Indian government is flexible about the renewal of Category 6 items. It does not put any time limit; the SOP for it merely notes: 'The validity of authorisation may be extended from time to time based on the requirements and merits by the Competent Authority'.

7.3.3 Criteria for Licensing

Paragraph 2.74 of the Hand Book of Procedures lays down the guidelines/criteria for the licensing authorities.

(a) Credential of end-user, credibility of declaration of end-use of the item or technology, integrity of chain of transmission of item from supplier to end-user and on potential of the item or technology, including timing of its export, to

[32] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017g).

[33] The prominent organisations constituting IMWG are the Ministry of External Affairs; the Department of Atomic Energy; Defence Research & Development Organisation; the Department of Space; National Authority of the Chemical Weapons Convention; Customs; the Department of Biotechnology; the Department of Chemicals and Petro-Chemicals; and Intelligence agencies.

[34] Government of India, Ministry of Commerce & Industry, the Department of Commerce (2017).

contribute to end-uses that are not in conformity with India's national security or foreign policy goals and objectives, goals and objectives of global non-proliferation, or India's obligations under International treaties/Agreements to which it is a State party;

(b) Assessed risk that exported items will fall into the hands of terrorists, terrorist groups and non-state actors;
(c) Export control measures instituted by the recipient State;
(d) Capabilities and objectives of programmes of the recipient State relating to weapons and their delivery;
(e) Assessment of end-use(s) of item(s);
(f) Applicability of provisions of relevant bilateral or multilateral Agreements and Arrangements, to which India is a party, or adherent, including but not limited to the guidelines and control lists of the Nuclear Suppliers Group, Missile Technology Control Regime, Australia Group and Wassenaar Arrangement (and its Sensitive List and Very Sensitive List) as updated from time to time.[35]

For the licensing Category 6 items, a set of questions are posed to the applicants. These questions resemble the criteria or guidelines laid down by DGFT. A 'List of Advisory Questions for Defence Exporters' is as follows.

1. Do you know your customer? If not, is it difficult to find information about him/her?
2. Is the customer or the end-user tied to the military or the defence industry?
3. Is the customer or the end-user tied to any military or governmental research body?
4. If you have done business with the customer before—is this a usual request for them to make? Does the product fit the business profile?
5. Does the customer seem familiar with the product and its performance characteristics or is there an obvious lack of technical knowledge?
6. Is the customer reluctant to provide an end-use statement or is the information insufficient compared to other negotiations?
7. Does the customer reject the customary installation, training or maintenance services provided?
8. Is unusual packaging and labelling required?
9. Is the shipping route unusual?
10. Does the customer order an excessive amount of spare parts or other items that are related to the product, but not to the stated end-use?
11. Is the customer offering unusually profitable payment terms, such as a much higher price?
12. Is the customer offering to pay in cash?[36]

[35] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017g).

[36] Government of India, Ministry of Defence Department of Defence Production (2017a).

Following non-proliferation principle, the DAE has some general guidelines which may resemble criteria of the DGFT and Advisory Questions of the DDP, MOD. These general guidelines are:

1. Export of any prescribed substance, prescribed equipment or related technology shall be permitted only against an export license issued in this behalf unless export is prohibited. Each and every application shall be scrutinised on a case-by-case basis and on the merit of each case. Notwithstanding the specific guidelines as applicable, the general guidelines will be applicable in all the cases and the following relevant factors shall be taken into consideration while examining the applications for export Licenses.
2. Whether the recipient state has a relevant IAEA safeguards agreement in force.
3. Whether the equipment, materials, software or related technology to be transferred is appropriate for the stated end-use, and whether that stated end-use is appropriate for the end-user.
4. Whether the equipment, materials, software or related technology to be transferred is to be used in research on or development, design, manufacture, construction, operation or maintenance of any reprocessing or enrichment facility.
5. Whether governmental actions, statements and policies of the recipient state are supportive of nuclear non-proliferation and whether the recipient state is in compliance with its international obligations in the field of nuclear-related activities.
6. Whether the end-user has been engaged in clandestine or illegal procurement activities.
7. Whether a transfer has not been authorised previously to the end-user or whether the end-user has diverted for purposes inconsistent with the Guidelines any transfer previously authorised.
8. Whether there is a reason to believe that there is a risk of diversion to acts of nuclear terrorism and
9. Whether there is a risk of retransfers of any prescribed substance, prescribed equipment or related technology or software or of transfers of any replica thereof as a result of a failure by the recipient State to develop and maintain appropriate, effective national export and Transshipment controls.[37]

7.4 End-Use Control

As discussed, the Indian regulatory system attaches great importance to end-use control. Thus, any transaction has to conform to the fact that any transferred item will be used for the purpose for which it is being supplied. Any change, modification, or replication can take place only with consent of the Indian government, and retransfer of these altered products also needs the approval of the Indian government. It is an

[37] Government of India, the Department of Atomic Energy (2013).

obligation of the recipient or end-use to arrange verification if it is required. In the section on licensing, the end-use of Category 6 items, the license of which is given by the MOD, has been discussed in detail.

The DAE also insists on the EUC. The DAE guidelines also demand the right of post-shipment verification by the Indian government. The Indian procedure follows the dominant global practice of an end-user certificate carrying 'the name of the item to be exported, the name of the importer, the specific end-use of the subject goods, and details of Purchase Order/Contract'. Besides, the Indian licensing authorities are empowered to ask additional assurances from the recipient government regarding end-use and retransfers. Under Part C of the DAE guidelines, a number of parameters for end-use are set. It demands a statement by the end-user in which the ends uses; the end-use locations; retransfer controls of the item, its replica and its derivative; and the verification provisions are explicitly specified.

The Guidelines of the DAE in Section 1(c) i and ii explicitly mention that prescribed substances, prescribed equipment and related technology can be transferred or licensed only after 'formal governmental assurances'[38] by the recipient country. Indian regulations also require guarantees from the recipient country regarding some items which figure in Category 0—that these items will not be used in 'any nuclear explosive device'. These materials are source material, special fissionable material and non-nuclear materials, such as nuclear grade graphite and heavy water used in reactors. The guidelines also require the recipient government's guarantee for the transfer of 'nuclear reactors, fuel reprocessing plants, fuel fabrication plants, uranium enrichment plants, uranium & plutonium conversion facilities, heavy water production plants, tritium recovery plants and associated equipment specially designed or adapted or used or intended to be used in such plants/facilities'.[39]

Some of these items are also supplied under the IAEA safeguards, 'or any other mutually agreed controls on transferred items'.[40] The government of the recipient entity has to give 'formal governmental assurances'. Section 3(b) ii of the DAE guidelines demands that

> If the IAEA decides that the application of IAEA safeguards is no longer possible, the supplier and recipient should elaborate appropriate verification measures. If the recipient does not accept these measures, it should allow at the request of the supplier the restitution of transferred and derived above referred items.[41]

The guidelines also give an alternative route in 3(c) for sensitive items covered in Section 1. It offers to try 'IAEA safeguards with duration and coverage provisions in conformity with IAEA document GOV/1621'.

[38] Government of India, the Department of Atomic Energy (2016).

[39] Government of India, the Department of Atomic Energy (2016).

[40] Government of India, the Department of Atomic Energy (2013).

[41] Government of India, the Department of Atomic Energy (2013).

Some Category 0 items can be supplied only after the Indian government is satisfied that there will be adequate physical protection. The Indian government has to meet international obligations in this regard. The idea behind the insistence on physical protection is to prevent the unauthorised use and handling of nuclear materials and facilities. Under the DAE guidelines, physical protection is the responsibility of the government of the recipient entity. The guidelines recommend the measures for physical protection contained in the INFCIRC/225. However, the Indian government may set the standard of the physical protection on the basis of the materials, equipment and facilities that are to be transferred. The license will be given only when the Indian government signs an agreement with the government of the recipient country. Besides, Section 2(C) of the DAE guidelines lays down the need for special arrangements and the clear definition of responsibilities for the transport of the controlled items.

If a person or a company applies for sending an item outside for display or exhibition, the licensing authorities may not ask for an end-user certificate provided the item does not figure in categories 0, 1 and 2 in the SCOMET List.[42] However, the display or exhibition of technology of any item figuring on SCOMET is not permitted under the Indian regulation.[43]

7.5 Other Global Best Practices

7.5.1 Record Keeping

The Indian regulatory system assigns importance to record keeping, which can have many uses for strategic trade management. Any SCOMET license holder is supposed to keep records, 'in manual or electronic form, for a period of 5 years from the date of export'. However, the DDP may ask an exporter of Category 6 items to keep records for more than 5 years.[44] Indian export rules for SCOMET ask to maintain the records of:

(a) All documents submitted while making an application for SCOMET Authorization
(b) Correspondence with buyer/consignee/end-user or DGFT or relevant Government agency;
(c) Relevant Contracts;
(d) Relevant Books of account;
(e) Relevant Financial records;

[42] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2018c).

[43] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2018c).

[44] Government of India, Ministry of Defence Department of Defence Production (2017b).

(f) Any communication from any government agency related to an application for authorization for any item on the SCOMET list or a commodity classification request;
(g) Shipping documents including shipping bill, bill of entry and bill of lading.[45]

7.5.2 Catchall Licensing/Control

Paragraph 2.72 of the Hand Book of Procedures mentions the Catchall clause licensing. It asks exporters of those restricted items which do not figure on the SCOMET to apply in ANF 2 N to the DGFT attaching the prescribed documents. The license may be granted or denied depending on the merit of the case. Similarly, if DGFT alerts an exporter of non-SCOMET items, or that the item may be misused for WMD or missile systems, military use, or potential use by terrorists and non-state actors, the license of that item may be denied or permitted following different procedures.[46] Once again, depending on the assessment of the end-use and end-user, the license may be granted or denied.

The Indian regulation has a cautionary note for licensing authorities regarding some items which may not figure on the SCOMET list, but a SCOMET item can be extracted from it. The regulation applies a different kind of Catchall control for this kind of item.

7.5.3 Special Economic Zone

Indian regulations provide guidance about special economic zone (SEZ). Globally, such zones are issues or problem areas of strategic trade management. India has very detailed rules for SEZs. Indian regulation specifies that no export license is needed to supply any SCOMET item from domestic tariff area (DTA) to SEZ. However, the transfer of a SCOMET item is to be reported to the Development Commissioner of the 'respective SEZ by the supplier in the prescribed proforma'[47] within a week of the supply. And, the Development Commissioner of the SEZ will report about the transaction to the DGFT annually. However, when a SCOMET item is exported to outside the country from the SEZ, the exporter will have to take license.

[45] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017g).

[46] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017a).

[47] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017g).

7.5.4 Brokering Control

In Indian law and regulation, the brokering of arms and ammunition is strictly prohibited.[48] However, the Indian legal and regulatory system does see a role for intermediaries or brokers in export transactions, and explicitly mentions them in many of the provisions—such as repeat orders, supply chain control and End-User Certificates. For SCOMET items, the legal and regulatory system oversees brokering activities and gets the sanction in the FTDR Act and the WMD Act. Section 12 of the WMD Act and Section 14 of the FTDR have the mandate for it.

7.6 Sanctions

Globally, one of the objectives of strategic trade control is to implement sanctions to deny key goods with military and WMD implications. Empowered under Section 5 and Section 3(2) of the FTDR Act, 1992 as amended in 2010, the Indian government regulates direct or indirect export of 'all items, materials, equipment, goods and technology which could contribute to Iran's enrichment related, reprocessing or heavy water related activities, or to development of nuclear weapon delivery systems'.[49] Indian regulations restrict transactions of the UN Security Council and NSG listed items with Iran.

Similarly, for North Korea too, the Indian regulatory system has the mandate to implement sanctions-related controls. Authorities derive the mandate from Section 5 and Section 14A of the FTDR as well as Paragraph 1.02, Paragraph 2.17 and the Appendix 1 of the Foreign Trade Policy 2015–2020. Indian licensing authorities impose direct and indirect prohibition[50] on the export of small arms and light weapons; all weapons, which figure on the UN Arms Register; and all the items, materials, equipment, goods and technology in the UNSC and IAEA documents specified for control vis-à-vis North Korea. The 2018 notification also mentions more weapons and other items which are prohibited for supply to North Korea.[51]

If a License is taken for the supply of Categories 0, 3 (other than 3D), 4, 5 and 7 to Iran, the licensing process shall have to take additional measures. The principal licensing authorities—such as DGFT and the DAE—will have to take the 'concurrence' of the MEA. All the authorities have to ensure that sanctions-related regulation is in accordance with the relevant provisions contained in Annex B to the UN Security Council resolution 2231.

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[48] Government of India, Ministry of Defence Department of Defence Production (2017b).

[49] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2011).

[50] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017e).

[51] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017e).

7.7 Institutional Framework

In the Indian regulatory system, there are a number of institutions which are involved in strategic trade management. As discussed, DGFT, the DAE and the MOD give licenses for different categories, but the DGFT is at the centre of activities for managing strategic trade. It coordinates the task of licensing, rules and procedures for license making and, to an extent, the enforcement of some of the provisions of strategic trade transactions. The DGFT is the most visible face of strategic trade licensing; the other two organisations may appear less significant because of their limited licensing mandate. However, in India, for the regulation and licensing of strategic trade, there are more than these three organisations which are active. Several of these organisations are not active, but are the members of the Inter-Ministerial Working Group (IMWG), which actually takes the decisions on the applications for the license of SCOMET items.

Under India rules and regulations for strategic trade, the IMWG generally meets once every month. The decision is taken when all the members of the IMWG issue a NOC on an application. In the case of a disagreement, the postponement/deferring of the decision, and/or 'online Inter-ministerial consultations are initiated for SCOMET items to reduce the processing time of applications'.[52] The regulation prescribes that,

> Where a case has been deferred in the IMWG and subsequently, NOC(s) has/have been received from all concerned agencies with no divergence in views, authorisation shall be issued with the approval of Chairman, IMWG and the case shall be brought before IMWG in its subsequent meeting for approval on ex-post facto basis. Case(s) where a decision could not be arrived at in IMWG shall be placed before Director General of Foreign Trade for appropriate decision on grant of authorization.[53]

When a consensus is elusive in the IMWG, the matter is escalated to the High Powered Committee of the IMWG that takes policy-level decisions and, if the disagreement continues, it is referred to the Cabinet.

Normally, after preliminary scrutiny, a license is issued for Category 6 items falling in Appendix-II within 4 weeks, and 2 weeks for items other than in Appendix-II. It may take an additional 2 weeks if the recipient falls on the negative list of countries maintained by the MEA.[54] For Category 6 items, the interagency system is called stakeholders. The MEA; the concerned service Head Quarters; the Defence Research & Development Organisation; the Policy and International Cooperation Wing of the Ministry of Defence; and 'any other concerned agencies'[55] (that is, any other government department or security/intelligence agencies) all constitute stakeholders for licensing Munitions List items. For example, the approval of the Department of Space is to be obtained for subcategories 6 A010 and 6A011. Generally, a consensus is required for a license of an item in which consultation with stakeholders is required.

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[52] Government of India, Ministry of Commerce & Industry, Department of Commerce (2017).

[53] Government of India, Ministry of Commerce & Industry, Department of Commerce, Directorate-General of Foreign Trade (2017g).

[54] Government of India, Ministry of Defence Department of Defence Production (2017b).

[55] Government of India, Ministry of Defence Department of Defence Production (2017b).

If there is no consensus among stakeholders, a meeting will be held within 15 days at the Joint Secretary level. If a consensus still eludes, a meeting of DESC chaired by Secretary Defence Production is held. The continuation of disagreement is ultimately resolved by the Raksha Mantri (Defence Minister).

7.8 Conclusion

The Indian regulatory system has all international best practices. The current regulatory system, to a great extent, is a product of twenty-first-century developments such as the Indo-US nuclear deal and the UNSCR 1540 passage. These two major developments have dramatically changed the content of the regulatory system of India. The momentum released by the two developments brought India closer to the global export control order. In the process of joining the four multilateral export control regimes, India has harmonised its export control system with all the four regimes, and has further integrated itself with the global export control order. Unlike the legislative system, the regulatory system has to be dynamic because it has to reflect solutions to meet emerging strategic trade management challenges.

The Indian regulatory system, as part of the post-UNSCR 1540 order, incorporated many new practices. Brokering control, Catchall and ITT control are some primary examples. End-use control has also got more weightage in licensing. The Catchall control also requires that authorities pay more attention to end-use. India is using inputs from various sources. As of now, Indian licensing agencies are dealing with only a few hundred applications; therefore, there are fewer burdens on them.

Interestingly, in Indian official circles, the Indian strategic trade management is known as SCOMET control. The control list seems to be more popular than any other practice of strategic trade management. Today, India operates its strategic trade management with a singular list. For a short period, it had a Munitions List known as the Military Stores list. Now the list is merged in the SCOMET list. Although the list is one, yet there are three different licensing agencies. However, India has more than one coordination agency for these three licensing activities. The decision is taken through these IMWGs. The Indian system has the appeal system in cases of both deadlock and denial.

Indian licensing authorities may have a challenging time if the Government of India's programme of export promotion and 'Make in India' are to succeed. Over the years, the Indian government has done well to organise outreach programmes for the industry to know the laws and rules well. Moreover, the modernised online license application system reduces inconveniences. Indian Industry has complaints regarding delays in the approval of license applications. Fortunately, India is integrated with the world, and many of these challenges are faced even by advanced industrial countries. Together, India may find solutions to existing and emerging challenges.

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Chapter 8
Indian Enforcement System for Strategic Trade Management

Abstract If there are best practices for licensing, there are also for enforcement. India is adjusting its enforcement system for strategic trade control. The Customs is the nodal agency for the enforcement of strategic trade control in India even if a number of government departments and agencies are involved in the enforcement of the trading of special chemicals, organisms, materials, equipment and technology (SCOMET) items. The Indian system is evolving and is learning important lessons from other systems. Similarly, it has also learnt lessons from the experiences from its own system. The Customs is continuously adopting several global best practices and some of the procedures have entered into its operational manual through the World Customs Organization. Other enforcement agencies have also been supporting the task of the Customs. The information generated by licensing agencies and other intelligence agencies seems to be enriching the database which is used by enforcement agencies. India has devised a Risk Management system which is improved by the information provided by various sources. Specialised units are coming in different agencies and departments for strategic trade enforcement. The Indian legal system prosecutes violators. India's volume of export of controlled items is still low, and the cases of violation are also low. The increase in the volume of exports may put pressure on the enforcement machinery to gear itself to meet new and specialised challenges.

8.1 Introduction

India has been facing criticism that, like other developing countries, it has problems regarding the enforcement of its policies and programmes. However, for a long period, understanding prevails in India that any robust rules and regulations become meaningless without the presence of proper enforcement machinery. In a democratic country like India, where elections for different levels of polity are held very frequently, the decision-making process faces enormous pressures to deliver. This does not simply mean the delivery only of promises but also of the enforcement of announced policies, plans, regulations and rules that are aimed at reaching the people. Over the years, India has struggled to strengthen its enforcement machinery.

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The strengthening of the enforcement machinery is taking place in different spheres. India has made institutional innovations, but it has to also continue some organisations engaged in the general enforcement of policies. As the world is becoming more complex, the enforcement agencies, too, have had to overcome this complexity to prevent violations or the non-implementation of rules or policies. Several specialised agencies are being created to deal with this. For example, for a number of years, India has an agency—the Enforcement Directorate—for investigating financial matters. It has emerged as a highly professional organisation for implementing the Foreign Exchange Management Act, 1999; the Prevention of Money Laundering Act, 2002 and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Other government departments have also set up other highly professional and specialised agencies. One agency may also undertake multiple other tasks as well. When a number of agencies bourgeon, the biggest challenge is to establish coordination among these agencies to ensure that resources are used optimally, and the specialisation of more than one organisation is also used for a single mission.

As discussed in the previous chapters, India began to upgrade its export control system in the 1990s, and in the twenty-first century. There were many developments in the legal and regulatory areas even as the international community turned its attention away from legislation and best practices towards industry outreach and enforcement. Some of the writings on Indian export controls made the international community believe that India has an implementation problem[1] of strategic trade control. However, these writings are now outdated. As a number of developments have taken place in the Indian export control system in the past decade, most problems have been sorted out.

Today, there are other challenges being faced by the entire world as well as several old export control countries. India needs to be aware that, without properly enforcing strategic trade control, the very endeavour to establish an efficient system be in vain. India has more than 500 exit points—airports, seaports, land border, dry ports, etc. Resources are geared towards the scrutiny of exports, but expertise is also required in the checking of ports and other exit points. Side by side, India is also reorienting its enforcement system for strategic trade control. There are best practices for licensing, and so also for enforcement. A number of Government of India departments and agencies are involved in the enforcement of the trading of SCOMET items. The Indian system is evolving, and is learning lessons from other systems as well as from the experiences from its own system. The Indian legal system has laws to prosecute violators.

[1] For example, Srivastava and Gahlaut (2003).

8.2 Institutional Framework

8.2.1 Customs

The Customs is the nodal agency for the enforcement of strategic trade control in India. In principle, any consignment going out of the country has to cross 'authorised points' manned by the Customs, and the Customs ensures that the consignment meets 'the prescribed legal and procedural requirements'.[2] The final exit point could by sea/air/land/rail routes, but the duty of the Customs is to intercept any unauthorised export or the smuggling of goods, 'legal infringements' and 'commercial frauds by unscrupulous parties'.[3]

The common perception of the Customs is basically one of a revenue collecting organisation. To a great extent, this perception is not false. In fact, the Customs is primarily a revenue collecting body which levies taxes, tariffs, duties, and other charges and fees on the export and import of items. This is an 'apex' body of the Department of Revenue, which works under the Ministry of Finance. However, the Customs all over the world has evolved to manage security-related activities across borders. In India, too, the Customs has assumed the mission of ensuring national security.[4] The management of national and international security is an established practice of the Customs in India also. Under its assigned function of the enforcement of 'border control on goods and conveyances',[5] and the 'assessment, examination and clearance of imported goods and export goods',[6] the Customs has been discharging its duties for the enforcement of export controls for a long period.

Thus, it is the duty of the Customs to check whether the export of SCOMET items is being done in accordance with rules and regulations, or not. All Indian Acts dealing with the export of items are also to be enforced by the Customs. The Customs is responsible for the enforcement of physical exports, and the DGFT is the enforcement authority for intangible goods. The Indian Customs ensure that no SCOMET item is exported outside India without a proper license. The prevention of the smuggling of any goods is one of its fundamental responsibilities. It is supposed to enforce the Government of India's trade policy in a transparent and practical way.

Of the controlled goods or SCOMET items, only some chemicals covered under the three schedules have the Harmonized System Code. Other items are without the HS Code. This is a challenge all over the world, and the Indian Customs, like other

[2]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2015).

[3]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2015).

[4]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2018c).

[5]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2018c).

[6]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2018c).

Customs, is managing trade without the HS code. As the 'international scheme of classification of internationally traded goods known as the Harmonized System of Commodity Classification'[7] has greatly helped the functioning of the Indian Customs, the inclination towards the gradual adoption of other best practices is there, and it is functioning will benefit immensely from this in the future.

As discussed above, the Indian Customs is, on the one hand, an enforcement arm of Indian laws; on the other, the Indian Customs is guided by several Indian laws—the Customs Act being the central law—for enforcement or the discharge of its duties. It enforces Indian laws through several rules—Specified Goods (Prevention of Illegal Export) Rules, 1969; and the Foreign Trade (Regulation) Rules, 1993; Customs Brokers Licensing Regulations, 2013; Export Manifest (Aircraft) Regulations, 1976; Export Manifest (Vessels) Regulations, 1976; Export Report (Form) Regulations, 1976 and Shipping Bill (Electronic Declaration) Regulations, 2011.

The Customs has offices like the Commissioner and the Custodian. A Commissioner appoints a Custodian to take into custody imported goods which are to be transhipped.[8] No imported consignment can move without the permission of these officials. Even containerised cargo moving from different sea ports and the private companies managing the cargo are controlled by these officials. Officials supervise the 'loading/unloading of goods' for further shipment. India has 'comprehensive guidelines for Custodians/Cargo Service Providers (CCSP) for the handling, receipt, storage, and transportation of cargo'. The relevant regulation for the purpose is the Handling of Cargo in Customs Areas Regulations, 2009.

Customs officials perform quasi-judicial functions too. It has a layered system for trial and appeal. The Customs Act, 1962 allows officials from the Customs to award imprisonment to a violator, but this should not interfere with other punishments.[9] However, Indian rules allow the right to appeal against any penalty imposed by Customs officials. An aggrieved party has first to appeal to Commissioner (Appeal). Then, it may move to the Customs, Excise and Service Tax Appellate Tribunal,[10] which is an independent Tribunal. The Commissioner of Customs may also pass an order whereby a party can directly move to the Tribunal.

[7]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2015).

[8]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2015), p. 5.

[9]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2018a).

[10]Government of India, Custom Excise and Service Tax Appellate Tribunal (2018).

8.2.2 Central Bureau of Investigation

The Central Bureau of Investigation (CBI) was set up on 1 April 1963.[11] It is an important institution for strategic trade management in India. In 1963, the CBI was created out of the Special Police Establishment. The original objective of the CBI and all its mother organisations was to investigate corruption in different departments, including war and railways. The CBI has a wing which coordinates with the Interpol. In recent years, Interpol has been playing an important role in strategic trade control. And, 'the Indian state police forces and other law enforcement agencies'[12] have to operate through the CBI with Interpol. Dealing with offences and violations relating to the Export and Import Act has been one of the original mandates of the CBI.

Today, strategic trade control has to deal with clandestinely operating proliferation networks, which not only have WMD traders as their partners but also other non-state actors, such as traffickers in narcotics, drugs, and money launderers. With its reach and specialisation in dealing with all the non-state actors which are partners of a proliferation network, the CBI can effectively enforce strategic trade control. Now well integrated with the global export control system, India uses the CBI for the enforcement of a range of Indian laws as well as for intercepting illicit WMD activities outside India. Working with its counterparts in other countries, the CBI can apprehend a culprit violating Indian strategic trade related rules and regulations. The CBI investigates cases, especially those of a serious nature. It can also use the database of Interpol, and gather information about shady companies or entities.

8.3 Instrument, Mechanisms and Best Practices

The Customs is continuously streamlining and modernising itself. It is adopting several global best practices. Moreover, several procedures have entered into the regulatory framework of the Customs through the World Customs Organization. As a member of the WCO, India has embraced 'various international Customs Conventions and procedures, including the Revised Kyoto Convention'.[13] The IMWGs have been underlining the significance of modernisation of the Customs in their reports. The Indian Customs is enhancing its capability through using modern technology as well.

India is in the process of setting up an advanced automated export control system. The Indian Customs is developing information technology (IT) based information access. The plan is to bring all required documents—such as shipping bills, general declaration, and cargo declaration, etc.—through the remote electronic data interchange (EDI) system on one platform. Several steps have been undertaken to make

[11] Government of India, Central Bureau of Investigation (2018a).

[12] Government of India, Central Bureau of Investigation (2018b).

[13] Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2015), p. 1.

the integrated system functional. Some government departments have started sending electronic documents through the electronic gateway on an experimental basis. The integrated system may reduce the number of documents to be submitted to concerned authorities, thereby reducing time-consuming duplication. Already the number of documents required for licensing has been reduced. However, it does not compromise enforcement since all the key documents are still required to be submitted. However, the SCOMET license information is not yet being transmitted. Information regarding the same comes through the manual mode and enters into the system through the submission of exporters.

8.4 Preventive Enforcement

India has preventive mechanisms in its enforcement machinery. It can take several steps to see that a violation is prevented. Enforcement agencies like the Customs monitor the export wings of 'Customs houses and other service centres'. Indian rules advise all Custom Houses to distribute 'the name and contact details of the Preventive Officer/Inspector and Superintendent concerned of the Custom House granting the permission … to facilitate real time verifications, if required'. Docks, cargo complexes and internal container depots (ICDs) all are under observation of Customs officials. They examine 'goods meant for export on a percentage basis'. At the ICDs, officials examine the Customs manifests, Bills of Entry, Shipping Bills, declarations, for re-export, temporary storage for onward transit and outright export, transshipment and so on.[14]

The Customs appraising staff checks documents such as shipping bills. The detailed information about a consignment is available in the prescribed format called the export general manifest (EGM).[15] A shipment is permitted only when officials do not find any gap in declaration and the actual condition or status of the goods. The loading of goods begins only after the permission comes. This is called the 'Entry Outward of the Vessel'.[16] A consignment will be exported only when a proper officer gives a green signal after finding no problem with the required submitted documents. If any problem or fraud is detected, officials initiate 'appropriate penal action'.

Preventive officers of the Customs may embark on an aircraft, vessels and any other mode of transportation that carries the consignment and verify the declaration.[17] Sections 37 and 38 authorise Customs officials to board a ship, an aircraft or any mode of transportation carrying a consignment, and question the person in charge

[14]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2015), p. 173.

[15]Government of India, Ministry of Finance, Department of Revenue (2015).

[16]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2015), p. 6.

[17]Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs (2010b).

of it. The Customs manual instructs that 'a thorough examination and checking of the vessels/aircrafts—known as rummaging—is also undertaken on a selective basis, taking due note of the past history of the vessels, the port/airport from which these are arriving, the intelligence report, etc.'.[18] Officials can get a package opened and verify details or specifics of an item declared in the approved paper. Customs officials responsible for preventive action remain vigilant regarding the possibility of any illegal act on the docks and the vehicle carrying the consignment.[19]

8.4.1 Seizure

Generally, the Customs have the authority to confiscate any consignment for violating relevant laws under the Customs Act, 1962. Officials may go for detention in place of the seizure of goods under Section 110 of the Customs Act, 1962. When in the case of some chemicals, a pending 'further enquiry/confirmatory test, or expert opinion' is needed, authorities may allow the provisional export of the consignment. However, if any violation is detected, the exporter will have to face punishment or pay a penalty as per the law. When the process of seizure or detention of any consignment is in process, its owner cannot disturb any part of the consignment. Officials can also seize any document which is relevant for investigating any suspicious consignment. Copies of the seized documents will be made available to the owner. However, the investigation of seized items is to be time bound.

Section 115 empowers enforcement officials to confiscate any 'vessel/conveyance' within

> … Indian waters or port or Customs area for concealing items, facilitating in the throwing out of any item out of the fear of seizure, acting as a means of transport for smuggling of any goods or in the carriage of any smuggled goods, unless the owner establishes that it was used without the knowledge or connivance of the owner, his agent, and the person in-charge of the vessel.

The Indian law has the provision that an item 'smuggled into or out of the country, by route other than land routes notified under Section 7 of the Customs Act, 1962 or is attempted to be cleared by way of mis-declaration in quantity, description or value, etc., are liable to be confiscated'. Quite significantly, even postmasters may be asked to detain suspicious parcels.

Section 135 of the Customs act gives special power to Customs officials to arrest anyone or seize any item found indulging in smuggling cases. For intercepting organised smuggling or architects or 'key operators' of dummy exports, or people involved in exporting through non-existent persons, the enforcement authorities have been

[18]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2015), p. 6.

[19]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2015), pp. 31–32.

given special powers. However, the due process of law is to be followed in all cases.[20] An officer has to record all the evidence and reasons for arrest, seizure and detention as well as for not taking any such action. Section 104 of the Customs Act advises officials at the senior level to exercise prudence and due diligence before taking any action for the arrest or seizure or detention of goods. Officers are held accountable for unnecessary and unreasonable detention and thus incurring losses to exporters.[21]

Although Customs may not have the dedicated staff for the management or enforcement of SCOMET items, yet it is training its entire staff to manage items falling on the SCOMET list. The National Academy of Customs, Excise and Narcotics (NACEN) headquarters, and its regional offices, have been organising courses periodically on SCOMET for different levels of officials. The training of Customs, along with border control agencies, for the enforcement of SCOMET regulations is also being given. The NACEN is the principal training centre for Customs officials. Officials working at different ranks are trained in SCOMET rules and regulations, as well as in other issues involved in their enforcement. Other enforcement agencies are also given training in India and abroad. The Kanpur Centre of NACEN has published a manual for training on SCOMET.

The Indian government has also sent different batches of officials abroad for training in the management of controlled items relating to defence and WMD. The most important of these is the Commodity Identification Training Programme. As discussed, DRI now has a deputy director rank official dedicated to SCOMET. However, because of the increase in the volume of SCOMET trade, the Customs may start developing specialised wings and departments for the management as well as the enforcement of SCOMET trade rules and regulations.

8.5 Transshipment

Globally, transshipment is a major issue for strategic trade control. The mismanagement of transshipment may lead to smugglers, unauthorised operators and unscrupulous non-state actors taking advantage of it. Indian enforcement machinery has well-developed guidelines and procedures for managing transshipment. The Indian law—like Section 54 of the Customs Act, 1962; regulations like the Goods Imported (Conditions of Transshipment) Regulations, 1995 and several circulars and instructions issued from time to time—gives proper guidance to enforcement authorities. Preventive measures are taken for consignments marked for transshipment.[22] There

[20] Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2018d), Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs (2017) and Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs (2013).

[21] Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs (2011).

[22] Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs (2007).

are detailed procedures to distinguish between the consignment meant for transshipment and one for domestic use.

Procedures exist for the transshipment of goods from 'the first port/airport of landing' to another Customs station to the port of loading for transshipment.[23] Procedures guide how to manage the transshipment of imported containerised cargo from the gateway port to another port, inland container depot or container freight station in India. A consignment with a broken seal has to face several questions/surveys. Indian law permits action under Section 116 of the Customs Act, 1962 if required. Indian enforcement officials are also equipped to manage the 'transshipment of the goods after unloading to a port outside India'.[24]

The system of transshipment permits adds clarity to all the stakeholders. A company can operate through a shipping agent who is required to submit five copies of transshipment forms, along with the application and other required documents to the Customs authorities. After the documents are found in order, and no alert notice is issued, the consignment is allowed for transshipment.[25] When the transshipment permit is issued and bonds are executed, the authorities ensure that the consignment has a 'one time bottle seal'. This work is done by shipping agents but verified by Customs officials.[26] The loading of a consignment is supervised and endorsed by a preventive officer. The Customs manual informs that the 'transshipment facility for imported goods in a Less than Full Container Load (LCL) is allowed at identified Custom Houses'.

8.6 Couriers and Postal

Today, couriers are used for the fast delivery of goods. India has Courier Imports and Exports (Clearance) Regulations, 1998; and the Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010. Section 7 of the Customs Act, 1962 restricts the movement of goods through couriers to designated or defined places for export-related activities.[27] Indian enforcement officials are allowed to do a

[23]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (1995).

[24]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2015), p. 16.

[25]Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs (2007).

[26]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2015), pp. 74–75.

[27]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2018b).

judicious scrutiny of documents relating to the dispatch of an item through couriers.[28] There are provisions for the scrutiny of couriers marked for transshipment.

Only courier companies or authorised couriers registered with the Customs are allowed in the export business. These authorised couriers are obliged to check the antecedents and identity of their clients. They are also supposed to maintain records and file information regarding the consignment properly.[29] Under the Regulation 13 of the Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010, enforcement authorities can suspend or revoke the registration of an authorised courier if it is found violating the terms and conditions of the registration.

There are also restrictions on the export of items sent through couriers in terms of the price of the imported goods and foreign exchange.[30] A regular shipping bill is needed for the export of goods licensed under the FT (D & R) Act.[31] Courier Shipping Bill-III (CSB-III) for documents in Form G and (b) Courier Shipping Bill-lV (CSB-lV) for goods in Form H are required for transfer through the electronic method. A proper officer is authorised to check any export consignment and its documents sent through couriers.

A Customs circular[32] lays down certain inspection rules for courier consignments going abroad. The entire consignment exported through the courier is to be screened, preferably by machines of Customs. In the case of the non-availability of Customs machines, machines of airlines may be used. On specific intelligence, the physical examination of a consignment is to be done. If the risk analysis system determines that certain consignments are falling in the risk zone, all such consignments are to be examined thoroughly. A Commissioner of Customs can also order a random check of an item going out through couriers.

Indian enforcement authorities also coordinate with postal authorities for proper checks on consignments using postal services. Customs officials work with postal offices. At designated post offices and export extension counters, Customs officials examine items sent through post offices. Any item which is not eligible to be despatched through the post office may be seized, and legal proceeding may be started. Officials can also detain certain packets if they find them suspicious. If these suspicious packets are found illegal, proceedings may be started.[33] A violator is punished under relevant laws, including the Customs Act.

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[28]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2010), Government of India, Office of the Commissioner of Customs (Export) Jawaharlal Nehru Custom House, Nhava Sheva (2011).

[29]Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs (2010a).

[30]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2010) and Government of India, Office of the Commissioner of Customs (Export) Jawaharlal Nehru Custom House, Nhava Sheva (2011).

[31]Government of India, Ministry of Finance, Goods and Service Tax Commissionerate (2018).

[32]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2006).

[33]Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2015), pp. 118–119.

8.7 Risk Management System

The Indian Customs has developed an automated Customs risk management system (RMS). The system provides guidelines to 'local risk managers' or operational personnel. The idea behind the introduction of RMS was to facilitate general trade, and target only those consignments which fall in the high-risk category after going through the RMS process. The Indian Customs had first developed the RMS for import control in 2005.

The 2005 RMS experiment was considered a success. Later, it was adapted and refined for export control as well. In June 2013, the Indian government announced its application for export control. At the time of the launch, it was operational only at 11 Customs stations in a few cities. Those cities were Bangalore, Chennai, Delhi, Hyderabad, Mumbai, Pune and Tuticorin.[34] However, it was assured by the government that, by the end of 2013, all electronic data interchange (EDI) Customs stations will start using it.[35] At present, the Indian Customs EDI System (ICES) has 134 major Customs operational locations which manage about 98 % of India's International trade.[36]

However, the basic principle and some of the tools of the RMS remained the same. P. Chidambaram, the then Finance Minister projected the RMS as

> … a trust based IT system that expects the trade to make correct declarations to Customs. It is a trade facilitation measure which, on implementation, would reduce dwell time from a few days to few hours. In view of its obvious advantages, RMS is also being endorsed globally at all forums, including the WTO.[37]

To get better results, the Customs avoids gradual submissions, and takes all the documents or information from exporters at one go.

The RMS system was developed at the time when India was evolving its export control system. For sure, strategic trade control and the RMS are intertwined. The Indian RMS for exports reflects the principles of strategic trade control adopted all over the world so that the balance between trade and security is made. The Indian RMS too echoes the global practice: 'to strike an optimal balance between facilitation and enforcement and to promote a culture of compliance'.[38]

The Customs RMS is not exclusively for strategic trade control. Besides, India is still in the process of making the interface between DGFT—the licensing authority for SCOMET items—and the Customs. A notification of an Indian government department informs that,

> The Government of India intends to set up an online fully integrated Single Window system for comprehensively providing all information and services to importers & exporters relating

[34] Government of India, Ministry of Finance (2013).

[35] Government of India, Ministry of Finance (2013).

[36] Government of India, ICEgate, Customs National Trade Portal (2018).

[37] Government of India, Ministry of Finance (2013).

[38] Government of India, Ministry of Finance, Office of the Commissioner of Customs House: Vishakhapatnam (2013).

> to the entire canvas of International Trade, inter-alia, involving all EXIM approvals/ clearances/ trade agreements for import and exports of goods, including those related to accessing benefits under export promotion and export incentive schemes, across regulatory /service provision agencies / entities including, but not confined to, Customs, Central Excise / GST, State VAT / GST, Central Board of Direct Taxes, Directorate of General Foreign Trade, … approval agencies for Special Chemicals, Organisms, Materials, Equipment and Technologies (SCOMET) / licensed / restricted / prohibited goods, Seaports, Airports, Inland Container Depots (ICDs)/ Container Freight Stations (CFSs), Carriers, Agents, Banks, Reserve Bank of India, Atomic Energy Regulatory Board (AERB), etc.[39]

The same notification explicitly mentions the

> Electronic exchange of documents between community partners, i.e. Customs and Custodians at Sea Ports, Airports, ICD/CFSs, Central Excise / GST, State VAT / GST, CBDT, DGFT, … Wireless Planning & Coordination Division, approval agencies for SCOMET / licensed / restricted / prohibited goods, Carriers, Banks, RBI, AERB, etc.[40]

Considering that the resources—human and material—have limited availability, the RMS aims at the best use of these resources for 'ensuring the proper and expeditious implementation of existing controls over export under the applicable Allied Acts and Rules'. The RMS also aims at exercising control in a manner that the exporter does not miss the incentives and other benefits for timely supply. Even if the Customs does not have the real-time data, yet it receives information about licensing eventually. This data may be used for RMS as the basic structure and principles of the RMS could still be useful for all the stakeholders—the exporters and the regulators/controllers. Customs officials confirm that the RMS system for exports is useful for the regulation and monitoring of SCOMET items.[41] In fact, even when the official announcement of RMS for exports did not come, Customs officials were using different components of the existing RMS for import to differentiate between high- and low-risk consignments of SCOMET items.[42]

Based on the self-assessment of exporters, the RMS segregates high- and low-risk consignments. This saves time and resources for Customs officials, exporters of low-risk goods, and even high-risk goods. Time is saved for high-risk goods because Customs officials do not indulge in routine inspections, and focus on the smaller number of consignments after the low-risk consignments are cleared. The RMS undertakes quality assessment and examination by the post-clearance audit (PCA) of Shipping Bills. There are guidelines for conducting PCA as well.

The RMS takes 'a series of steps/corridors' to analyse whether the consignment is a fit case for 'self-assessment or examination or both'. An exporter has to check information on classification, valuation and the exemption notifications of exported goods. As India and Indian exporters are new to the system, the Customs provides

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[39] Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion (2017).

[40] Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion (2017).

[41] Interview with senior Customs officials.

[42] Interview with senior Indian Customs officials.

a user document or manual to do the task.[43] The manual explicitly mentions that a SCOMET item means that an exporter has to check the conditions it has to meet or precautions it is supposed to take. A consignment compliant with the Customs Laws and Regulations will still be 'subjected to inspection, i.e. checking of marks & numbers on the packages, and the container no. and seal no. in case of factory stuffed containers'.

A consignment which is marked as high risk will have to pass through designed risk parameters. Some of the consignments may be selected at random. When a consignment meets the applicable compulsory compliance requirements (CCRs), it is sent for the next stage of clearance. RMS tools or instructions guide officials in scrutinising the papers. The RMS allows officials to even go beyond these RMS instructions in sensitive cases. An officer may write his comments if the declaration of a bill does not match RMS instructions. The RMS demands that the 'examining officers must ensure that the goods under examination tally with the declared description, including critical parameters like brand, model, make, number, specification, grade, purity, configuration, capacity, denier etc.'.[44] It is supposed to clear the consignment within 24 h, if all the declarations are found correct and complete.

Today, the RMS has a separate department for the Administration of the RMS, and it has to operate independently. A single local risk manager (Admin) at each location will be responsible for both import and export. The Indian system wants feedback to improve the RMS system. A Risk Management Division (RMD) in Mumbai works with a charter of functions. It devises various risk parameters and risk management tools: collect, organise, assess and examine information, build an intelligence database, review the functioning of the RMS, prepare the training manual and so on. The division coordinates with all Custom Houses, the Directorate of Revenue Intelligence (DRI), the Directorate of Valuation (DOV), the Directorate General of Audit (DG Audit) and Other Government Departments (OGD). The National Risk Management Committee and Local Risk Management (LRM) Committees involve officials, different divisions and partners relevant for operating and improvising the RMS. It also acts as the nodal agency for the Accredited Client's Programme.

A proper officer checks the declaration-related documents if a consignment is intercepted by the RMS. The Customs manual notes that,

> In rare cases, such interdiction may also be made with the approval of the Commissioner or an officer duly authorised by him, not below the rank of Additional Commissioner of Customs, and this will necessarily be done after making a record in the EDI system. On account of interdictions, Bills of Entry may either be taken up for action of review of assessment or for examination of the imported goods or both.[45]

[43] Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2011).

[44] Government of India, Ministry of Finance, Office of the Commissioner of Customs House: Vishakhapatnam (2013).

[45] Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2015), p. 18.

8.8 Intelligence

As discussed in this chapter as well as in previous chapters, information and intelligence are extremely important for strategic trade management. For enforcement, they are most vital. The RMS would collapse without proper information. For any preventive or pre-emptive action, proper intelligence is required. Strategic trade management is based on the balancing of the facilitation of trade and the enforcement of security measures. Without intelligence, quite obviously, enforcement agencies will be under pressure. This will lead to an imbalance between trade and security. There will be either unnecessary delays in the clearance of goods (because of the checking and investigation of a large number of consignments and documents), or a security lapse may occur because of suspicious consignments being overlooked in order to expedite the process of the clearance of goods.

The Directorate of Revenue Intelligence (DRI) is always treated as an important agency for investigation and intelligence gathering for strategic trade control. This has emerged as an officer-intensive unit. It has a vast network of offices and officials spread all over the country. It specialises in both general and commercial intelligence. Like the Customs, its basic duty is to detect problems relating to revenue collection. Generally, it focuses on revenue-related offences, keeping a special eye on activities relating to SCOMET items. In fact, it acts as an intelligence arm for the Customs regarding SCOMET control. Its intelligence is also used for the countering smuggling of SCOMET items.

Since, over the years, the DRI has emerged as a crucial organisation for strategic trade control, it builds data using statistics of seizures, and does a trend analysis of the pattern of smuggling in the country which is helpful in its operation. It is involved in the collection, analysis and the dissemination of intelligence to relevant enforcement agencies. The collection, arrangement and the analysis of data are done in a timely manner so that it is assisted in striking its targets quickly.[46]

The DRI has a dedicated division which manages activities relating to SCOMET.[47] A senior DRI official nowadays is in charge of SCOMET activities, and the official coordinates activities with different ports and points. One of the mandates of the DRI is to point out loopholes in the legal and regulatory framework and recommend desired changes in it.[48] The official participates in different outreach activities,[49] and represents India in different international forums. However, even the DRI has to work through the CBI to coordinate with Interpol.[50] The DRI manages detailed statistics regarding SCOMET licensing, and it is planning on publishing data regarding

[46] Government of India, Directorate of Revenue Intelligence (2018b).

[47] Interactions with Directorate of Revenue Intelligence senior officials.

[48] Government of India, Directorate of Revenue Intelligence (2018a).

[49] Federation of Indian Chambers and Commerce and Industry (2018).

[50] Directorate of Revenue Intelligence (2018a).

SCOMET management.[51] The DRI also recommends changes in laws and procedures to combat smuggling[52] if it finds gaps in laws and procedures.

As the proliferation network involves several non-state actors, such as drug syndicates, money launderers and criminals, the DRI coordinates with other agencies which have specialisation on these issues. It works with the Directorate of Central Excise Intelligence, the Narcotics Control Bureau, the Directorate of Enforcement and other agencies, including the CBI and the IB. It also coordinates with the CBI to connect to Interpol. It synchronises with the Income Tax Department and, when required, uses the Income Tax Act. Indian Missions and Enforcement agencies abroad gather intelligence for enforcement, including anti-smuggling operations. The DRI also sends data to other departments of the Government of India, but more importantly to the licensing agencies. The government servants of other departments up to the Custom's Additional Commissioner rank are awarded a grant for gathering intelligence and doing enforcement work.

The Customs has guidelines for awarding informers.[53] The award depends on the quality of information an informer provides. The 'specificity and accuracy' of information, 'the risk and trouble' of procuring information as well as the 'extent and nature' of assistance provided by informers in fighting smuggling are the criteria for granting awards. An in-depth investigation backed by proper evidence helps enforcement agencies in prosecuting offenders.

The Indian Customs has signed mutual assistance treaties with 28 different countries. Under these mutual assistance treaties, India gets information from these countries. Besides, as a member of different international organisations, India takes active part in intelligence sharing. The WCO's Strategic Trade Control Enforcement has been active in intelligence sharing for many years. Many of its declarations[54] and statements underline the significance of intelligence sharing for managing strategic trade. However, other organisations—Interpol, UNODC, UNODA, IAEA and OPCW—also share information relating to strategic trade control. All these organisations came together under an intelligence-driven programme known as Cosmo, organised by the WCO.[55] Its focus is strategic trade control enforcement, and one of the objectives is intelligence sharing.

The Cosmo has witnessed the participation of 90 countries, including India.[56] The global planning meeting was organised in April 2014. However, before this, the WCO had organised six regional meetings. Finally, in May 2015, a meeting was organised in which the need for intelligence exchange was once again reiterated.[57] In January

[51] Interview with DRI officials.

[52] Directorate of Revenue Intelligence (2018a).

[53] Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs (Anti-Smuggling Unit) (2015).

[54] For example, World Customs Organisation (2015b).

[55] World Customs Organisation (2014).

[56] World Customs Organisation (2014).

[57] World Customs Organisation (2015a).

2018, a planning seminar for the Operation Cosmo 2 was organised.[58] The second version of the COSMO has refined the agenda of the first version, and has seen an increase in the participation of a number of countries and international/multilateral bodies. India's participation in the entire exercise underscores its contribution to strategic trade management as well as learning from other's experiences in enforcement. Most of the participants realised the significance of sharing information with each other.

8.9 Compliance and Outreach

Compliance to the rules is considered the best mechanism of enforcement. This method of self-enforcement is mutually beneficial for both exporters and enforcement agencies. An exporting company with a good track record finds its consignment's facilitation both smooth and quick. Enforcement agencies are also de-burdened when they focus only on high-risk and non-compliant companies and consignments. India, which is evolving its strategic trade management system, is promoting a compliance culture among all the stakeholders, including enforcement agencies and companies.

The Customs has been given a special role in ensuring a compliance culture in the country. It undertakes post-clearance compliance verification to promote the compliance culture. This deters the tendency towards false declarations and rendering wrong facts. The Customs On-Site Post-Clearance Audit also aims at promoting compliance culture in India. Through the RMS, too, the compliance culture is encouraged. The Risk Management Division keeps an eye on compliance activities. The division also coordinates with other government departments and agencies regarding compliance and the risks of non-compliance of relevant rules and regulation.

The Authorised Economic Operator (AEO) is one of the innovations of the WCO to counter-terrorism in international activities. The WCO pushed the SAFE framework of standards for the supply chain management, which in turn shaped the AEO. To engage all the actors of a supply chain—importers, exporters, warehouse owners, Custom House Agents, cargo forwarders and carriers, India also joined this International innovation to create a reliable and secure trading partner in the shape of AEO. The AEO as a compliant of the export control system enjoys a low-risk status in the risk management system developed by the Customs. This helps in the facilitation of its consignment. The Indian Customs has signed Mutual Recognition Agreements with Customs administrations of other countries.

To attain the AEO status, an entity has to meet the following criteria: '(i) Appropriate record of compliance of Customs and other relevant laws; (ii) Satisfactory system of managing commercial and, where appropriate, transport records; (iii) Proven financial solvency; and (iv) Maintenance of approved security and safety

[58] World Customs Organisation Operation (2018).

standards'.[59] Any entity existing for at least 3 years, and involved in an international supply chain, may seek for this status. The record of the last 3 years of the entity is verified. However, the officials or team responsible for granting AEO status is free to go into 'the previous compliance records of (a) Company Directors; (b) Company Secretary; and (c) Employees directly responsible for the import/export of goods'.[60]

If an entity is found suitable, it gets the AEO status for 5 years. Normal examination is reduced for AEO exporters by almost half in comparison to general exporters.[61] Even for sensitive destinations, only 20% consignments are examined. Logistic service providers, custodians or terminal operators, Customs brokers and warehouse operators—all are given benefits for getting the status of, or meeting the criteria of the AEO. However, the status is periodically reviewed and if any discrepancy is found, the status may either be suspended or even revoked.

Exporting companies and other entities which are eligible for the AEO status are supposed to provide threat awareness training to their employees. Employees are imparted training for understanding a threat situation existing at each stage of the supply chain, securing cargo and conveyance management. Government and business associations hold training programmes for Indian industry. The Customs holds special training focused on enforcement-related awareness for industry.

The Internal Compliance Programme is an important practice used by industry in the developed world to build relationships with the government, and shorten the clearance time for its exports. After UNSCR 1540, a number of countries are trying to encourage its industry to adopt ICP. India is also encouraging its industry to adopt the ICP. Needless to add, the subsidiaries of multinational companies or foreign companies use the compliance programmes developed and approved in their headquarters. As Indian companies are not exporting controlled goods in a large volume, its industry is struggling to design ICPs to suit its needs.

The Government of India has been demonstrating different models of ICPs developed by the multilateral export control regimes such as the Wassenaar Arrangement, and organisations like the CISTEC. Of late, even business associations are involved in developing ICPs. The government is also taking assistance from outside to develop an effective ICP. In a survey conducted by the Institute for Defence Studies and Analyses, an Indian think tank, almost all the companies expressed their willingness to comply with the Indian laws and regulations. In the coming years, with an increase in the volume of export in strategic trade, Indian companies will start developing suitable ICPs.

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[59] Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2015), p. 18 and Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs (2018).

[60] Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2015), p. 18 and Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs (2018).

[61] Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs (2002).

8.10 Conclusion

Although India may have begun to integrate with the global export control order in recent decades, it did have a working legal system, a rudimentary regulatory system and a functioning institutional framework to manage strategic trade (notwithstanding its smaller size) for several decades. The Indian government understands the significance of strategic trade control and its enforcement. The Customs is the nodal institution for the enforcement of strategic trade management. Despite basically being a revenue earning organisation, it is doing very well even in enforcing laws and regulations in different spheres.

India has rich experience in handling smuggling for decades. Its machinery has been modernising and reorienting itself to handle even potentially illicit transactions in strategic trade. The Customs and its intelligence wing are developing a specialised wing for strategic trade management. The Customs is also partnering with other government departments for effectively managing strategic trade. The information generated by licensing agencies and other intelligence agencies seems to be working well. India has devised an RMS system which is enriched by the information provided by multiple sources. The Customs may have been using the RMS for strategic trade management. However, continuously refining the RMS will be an excellent tool for the future management of strategic trade. It is using modern technology and may have an advanced online system for getting real-time information which will be helpful for RMS in particular, and enforcement in general.

As India is fairly new to strategic trade, the volume of export of controlled items is still low, and the cases of violation are also low. However, with the increase in the volume of exports, the enforcement machinery may have to pay attention to the surfacing of new and specialised challenges. The Customs is backed by a specialised enforcement law in the Customs act, and it has a rich regulatory base for undertaking different activities relating to strategic management. The Indian government and the Customs are encouraging exporters to start using ICP. For this purpose, outreach as a tool is very much in vogue to make exporters aware of the ICP in particular and strategic trade management in general.

There are enforcement challenges in India as in the world. Some of these challenges are accepted by the Government of India and, in fact, the latter officially articulates these challenges. Some of these are the tough connection of SCOMET with the HS code used by Customs and intangible technology transfers. Concerns are expressed in managing catch-all through online vetting. As India is integrated with the global strategic trade management machinery, it is reaping benefits of its association with international cooperation, especially in WCO. The Indian government should not lack in either commitment or resources.

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Chapter 9
International Cooperation and Indian Strategic Trade Management

Abstract Intense international cooperation at various levels is indispensable for strategic trade management. Over the years, India has been evolving its approach towards non-proliferation and its instrument strategic trade management. Resultantly, its involvement in international cooperation for export control has also evolved. India's relationship with export control has changed considerably in the last two decades. A nuclear India re-positioned its relationship with export control. India once preferred the Chemical Weapons Convention type of management of sensitive goods a good model, in which commercial transactions and the verification machinery are managed in a balanced way by an international organisation with a wide membership base. Now, India has adopted a mixed approach to international cooperation. It cooperates with the international community in a specialised organisation like the Organisation for the Prohibition of Chemical Weapons, and in a universal organisation like the United Nations for Strategic Trade Control. India is also engaged with the United Nations Security Council Resolution 1540 for many of its activities. It has started playing an active role in World Customs Organisation activities relating to strategic trade control. Of late, it has acknowledged the influence of small bodies like the multilateral export control regimes operating through understandings and guidelines. India, too, has understood the intricacies of international cooperation for strategic trade control and is greatly immersed in its activities.

9.1 Introduction

Export of any item quite naturally affects more than one country. The export of strategic goods entails more complexity. The complexity touches a new height when a supply chain is involved. All necessitate intense international cooperation at various levels. In fact, since the 1940s, export control has been witnessing international cooperation in one form or another. As discussed in the previous chapters, the COCOM—the first multilateral export control regime—came into existence to underline the need for international cooperation. Over the years, many new organisations and bodies have become associated with various aspects or activities of strategic trade control.

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A question emerges: what has been the pattern of India's approach to international cooperation for export control over the years? Over the years, India has been evolving its approach towards non-proliferation and strategic trade management. As a result, its involvement in international cooperation for export control has also evolved. While India's relationship with export control has changed considerably in the last two decades, the relationship before this also had unique complexity. India has never favoured reckless proliferation or the spread of sensitive technology and goods, but it did have different ideas of international cooperation on high technology commerce and multilateral regulations for it. It wanted an international organisation like the UN or its organs to play a role in regulating the transactions of sensitive goods.

India becoming a nuclear weapons country is, of course, the most dominant factor behind the re-positioning of its relationship with export control; but India's intensity with export control did not start with the Strobe Talbott-Jaswant Singh talks. Much before negotiations of the CWC or the operationalisation of the three schedules of the CWC, there was a different type of Indian engagement with export control. India considered the CWC type of management of sensitive goods a good model, in which commercial transactions and the verification machinery were managed in a balanced way by an international organisation with a wide membership base.

Now, India seems to have adopted a mixed approach to international cooperation. If it cooperates with the international community in a specialised organisation like OPCW, it also works in a universal organisation like the UN for strategic trade control. The UNSCR 1540 further helped the international community in export controls, and India is engaged with it for many of its activities. It has started playing an active role in WCO activities relating to strategic trade control. It is interacting with bodies created by charters and treaties and, at the same time, it underlines the significance of small bodies operating through understandings and guidelines. India, too, has realised the complexity of international cooperation for strategic trade control and is greatly engrossed in its activities.

9.2 Cooperation in Treaty-Based Activities

9.2.1 Organisation for the Prohibition of Chemical Weapons

Even before India's new phase of relationship began with export controls in general and with multilateral export control regimes in particular, India was highly active in the CWC and later, during the activities of the OPCW in planning and implementing best practices for chemical trade. Indeed, the best practices for responsible chemical trade were developed, and there is a consensus that this trade is not to be misused for developing chemical weapons. During the negotiations for the CWC, the peaceful uses of chemistry and chemicals with reasonable restrictions were one of the top items on India's agenda. India keeps reminding everyone that the OPCW, under Article XI of the Convention, is supposed to accomplish the task of sharing advancements

in chemistry for 'further technological and economic development of the world'.[1] India participated in the 'Schedule 1 Users Forum' for promoting Article XI of the Convention.

The OPCW has many programmes for international cooperation to implement the CWC, facilitate responsible trade and raise awareness among stakeholders, especially industry. India also highlights the matter of large-scale 'transfer discrepancies' caused by greater transnational activities of chemicals. India has been making suggestions, such as standardisation and the interoperability of datasets, and new institutional innovation along with the operation of inter-organisational cooperation between international organisations—like the OPCW and the World Customs Organisation—to address the problem.[2]

In the frequent statements given in the OPCW, India has been urging member states to address 'new and potential challenges' in chemical science and through chemicals spread across the world. India has been supportive of Open-Ended Working Group on Future Priorities. India also expresses concern about terrorists procuring chemical weapons. Notwithstanding the fact that the OPCW is neither a counter-terrorism body nor does it represent a safety regime,[3] India wants the OPCW to play a role in this regard.[4] India is involved in international assistance and protection exercises, like the ASSISTEX 3 which was held in Tunisia. India also contributed one million dollars to the Syria trust fund. Also, India sends its own officials for training courses for developing skills for understanding the technical aspects of the transfers, or in the Train of Trainers (TOT) programme.

The three schedules of chemicals listed on the CWC are managed by different departments and ministries of India. The National Authority of the CWC is, of course, the nodal organisation. To implement the provisions of the CWC, India has been hosting Inspections. Indian technical officers work with visiting international inspectors. India's pre-inspection briefing to foreign inspectors is useful in the implementation of the inspection work. India proudly displays that no trace of Schedule I has been found during an inspection.[5] Moreover, the Schedule 2 and 3 chemicals listed on the CWC are thoroughly monitored by the Ministry of Chemicals and Fertilisers of the Government of India. It is applicable to all matters, starting from production to import to export.

In the OPCW, India has been supportive of the use of modern Information & Communication Technologies (ICT) for 'processing and transmission of information pertaining to the Convention'.[6] It maintains that 'SIX (Secure Information Exchange) are creditable achievements for the Secretariat as well as for the States Parties'.[7]

[1] Jaiswal (2015).

[2] Prasad (2015).

[3] Mukherjee (2013).

[4] Rajamony (2017).

[5] Government of India, Ministry of Chemicals & Fertilizers, Department of Chemicals and Petrochemicals (2016).

[6] Jaiswal (2015).

[7] Jaiswal (2015).

The Indian Chemicals Ministry formulates and files the Annual Declaration of Past activities and Annual Declaration of Anticipated Activities as per the requirement of the CWC. India is the only second member of the CWC which collected online declarations from 'declarable chemical industrial units'.[8] The USA is another country doing so.

India has hosted several international cooperation programmes of the OPCW. Under the Chemical Safety and Security Management programme,[9] India has encouraged chemical industry outreach and industry-related aspects of the implementation of the Convention. In 2017, on the 20th anniversary of the entry into force of the CWC, India also organised events such as the chemical industry awareness programme and the International Phosgene Conference.[10] Such events continued in 2018 as well. Several Indian companies participate in the associate programme of the OPCW which enables capacity building for the industry-related national implementation of the CWC.

India has also developed good practices in different activities. India is also the first member country to establish help desks.[11] The Indian government, in collaboration with the Indian Chemical Council, has established six help desks in the 'Public–Private Partnership mode' in six different places of the country. This is considered valuable for the interface between the Government and the Chemical Industry dealing with chemicals listed on the Convention. This is also useful for raising awareness of compliance because these help desks spread information about industry's obligations under the CWC Act. Industrial units take the help of these desks for filing CWC-required Annual Reports. A number of awareness programmes take place every year.

India has also been participating and serving on the Advisory Board for Education and Outreach. Indian scientists have served on the Scientific Advisory Board of the OPCW. The OPCW has another international cooperation programme, namely, the Analytical Skills Development Course. It intends to improve the skills of analytical chemists to get 'further practical experience in the analysis of chemicals related to the national implementation of the CWC'. India has the Institute of Pesticide Formulation Technology (IPFT) under the Ministry of Chemicals and Fertilisers which also acts as an accredited Laboratory for Testing & Calibration Laboratories as per ISO/IEC–17025 (2005) for the analysis of CWC related chemicals.[12] The Director of the Institute of IPFT[13] was on the Scientific Advisory Board that studied

[8]Government of India, Ministry of Chemicals & Fertilizers, Department of Chemicals and Petrochemicals (2016).

[9]Organisation for the Prohibition of Chemical Weapons (2018b).

[10]Rajamony (2017).

[11]Government of India, Ministry of Chemicals & Fertilizers, Department of Chemicals and Petrochemicals (2016).

[12]Government of India, Ministry of Chemicals & Fertilizers, Department of Chemicals and Petrochemicals (2017).

[13]Organisation for the Prohibition of Chemical Weapons (2018a).

the 'technologies/methodologies used for verification purposes in other international treaties that could benefit the Convention verification regime'.[14]

9.2.2 Biological and Toxin Weapons Convention

Unlike the CWC, the BTWC does not have an elaborate system for trade regulation or any export control regime for biological weapons. To implement the obligations of the BTWC, the member countries have developed their own national systems of trade control. To establish non-proliferation biological export regimes within the framework of BTWC, member countries have been active for many years. India is also with these countries to strengthen Article III of the Convention which prescribes that

> Each State Party to this Convention undertakes not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organisations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in Article I of the Convention.

In fact, for the Eighth Review Conference of the States Parties BTWC, India and the USA submitted a working paper to strengthen the implementation of Article III of the BTWC.[15] After the review conference was over, it has been deliberating the issue, and all the final documents released after the Conference have been urging the member states to work on the issues in the light of the spreading tentacles of terrorism. The working paper, submitted by India and the USA, was prepared to implement the final outcome document of the Seventh Review Conference. For Article III, the final document of the Seventh Review Conference had recommended

> ways and means to enhance national implementation, sharing best practices and experiences, including the voluntary exchange of information among States Parties on their national implementation, enforcement of national legislation, strengthening of national institutions and coordination among national law enforcement institutions….[16]

The joint working paper by the USA and India also recommended several measures to strengthen export control inherent in Article III. It endorsed civil and criminal penalties for violators in the national export control systems of the member states, the transfer only through license of a list of items including goods and technology, the regulation of Indirect Transfer, intangible technology transfers, Catchall control, regular outreach to all stakeholders including industry and academia, the exchange of information among member states, and so on. The paper also recommended 'training, sharing of best practices, and supply of relevant equipment and/or financial support' through bilateral, regional and multilateral arrangements or bodies. It supported the

[14] Organisation for the Prohibition of Chemical Weapons (2015).

[15] United Nations Office at Geneva (2016c).

[16] United Nations Office at Geneva (2012).

idea of a voluntary fund, coordinated and managed by the Implementation Support Unit of the BTWC.

The paper was reflective of the Indian philosophy or the policy of strategic trade control that believes restrictions and genuine development or scientific research related transfers should move in harmony and balance. It has been supportive of the final documents of the review conferences that repeatedly have been underlining the point that 'transfers for purposes consistent with the objectives and provisions of the Convention of scientific knowledge, technology, equipment and materials under Article X'[17] are not impeded because of Article III restrictions or limitations. An Indian official remarked that 'a forward looking cooperative approach… is better at finding common ground than those that only deepen old divisions'.[18]

On different occasions, India has advocated coordination with relevant international organisations to maximise the use of available expertise.[19] Its suggestion for the 'establishment of a database for submitting requests and offers of cooperation and assistance could play a role in targeting and mobilizing resources'.[20] Similarly, India supports the idea that 'measures to mitigate biological risks should be proportional to the assessed risk and should not hamper activities necessary … for prophylactic, protective or other peaceful purposes'.[21]

9.3 United Nations and Its Family

For years, Indian representatives and officials have been active in the UN and its organs and committees on export control. When India was opposed to the idea of strategic trade control by small groupings or multilateral export controls regimes, it generally preferred the UN and its bodies to take initiatives for regulating trade in a fair manner without hampering any peaceful activities. India has been expressing its views on export control during many discussions. For several years, India even co-sponsored resolutions in the General Assembly on export control. Though India finally did not sign the ATT, it was active in its negotiations. Before the ATT process started, India had taken an active part in several small arms and light weapons initiatives proposed, discussed and adopted in different UN bodies. Two prominent resolutions which could be cited are: (i) on the role of science and technology in the context of international security and disarmament, and (ii) on nuclear dangers.

[17] United Nations Office at Geneva (2016a).
[18] Varma (2016).
[19] Prasad (2006).
[20] United Nations Office at Geneva (2016b).
[21] Varma (2013).

9.3.1 Conference on Disarmament

The Conference on Disarmament (CD) is a UN body for negotiations on arms control and disarmament. Although it is primarily a disarmament forum, it has been providing a platform for arms control negotiations. A number of arms control and disarmament negotiations have discussed strategic trade control and export control, and some of the successful outcomes of the CD—like the CWC—do have elements of export control. Many other Conventions or treaties, which do not have very detailed or explicit export control provisions, are being discussed in the CD for making improvements relating to export controls during the review conferences. The BTWC and the Convention on Certain Conventional Weapons are being scrutinised for the purpose. India has been participating in all the meetings and stating its positions. It tries to mobilise public opinion and other countries on one aspect or another. Though it generally works with the NAM group of countries, it also works with other countries to find a solution to an issue.

9.3.2 United Nations Security Council Resolution 1540

As discussed, the UNSCR 1540 came into existence in April 2004 after the initial resistance that India and the NAM countries offered to the UNSCR 1540 passage over the role of the UN Security Council in lawmaking. In 2004, India accepted that UNSCR 1540 may have a role in fighting the WMD proliferation and preventing non-state actors from acquiring these technologies and goods. The UN has its own advantages for international cooperation because of its legitimacy and membership. India has been supportive of a number of programmes and initiatives launched by the UNSCR to prevent the spread of WMD. The OPCW was another organisation which has the advantage of its membership; but its mandate is limited only to chemical agents whereas the UNSCR 1540 has a broad mandate covering all nuclear, chemical and biological agents and their delivery vehicles.

To implement Resolution 1540—which is binding on all its members because it has come into being under the Chapter VII of the UN Charter—a committee was constituted which asked all its member countries to file reports. The committee was formed under the UNSCR 1540 in accordance with its provisional rules of procedure for 2 years.[22] It comprised all members of the Security Council. India supported the committee and its activities. Later when the term of the committee was extended, India supported the adoption of the resolutions. Realising that the task of implementation takes time, it not only supported the UNSC 1977 that extended the mandate of the 1540 Committee until 2021, but also the resolutions which had extended the committee's tenures earlier. The committee constituted by the UNSCR 1540 had to expire in April 2006. So, on 27 April 2006, Resolution 1673 extended

[22] United Nations (2004).

its term for 2 years, which was further increased for 3 years by the 25 April 2008 UNSC Resolution 1810 until 2011.

The committee asked all the member countries to file their country reports within 6 months of the passage of the Resolution. India filed its first report within 6 months.[23] However, later, the committee developed a Matrix and asked the member countries to file reports using the Matrix. India filed three reports using the matrix.[24] India took necessary legal and regulatory measures to implement the UNSCR 1540 when it found a gap in its system. On 13 June 2017, India filed yet another report[25] informing developments in its strategic trade control developments to member countries through the 1540 Committee.

The committee was empowered to invite 'other expertise'—that is, the committee was empowered to take the assistance of experts. These experts are supposed to send the activities of the committee to the Security Council for evaluation and collect information regarding the implementation of the 1540 resolution. The 'workload of the Committee over the course of its mandate' is shared by experts through different programmes for outreach, dialogue, assistance and cooperation. The international community has been sending experts to serve on the committee. India also encouraged one Indian to serve on the committee[26] and carry forward the mandate and its activities all over the world.

The Indian government and Indian civil society are both active for supporting the UNSCR 1540 workshops. Indian officials and members of the NGO community[27] have not only been participating in different workshops organised all over the world but have also been organising workshops in India for the international community to help the implementation of UNSCR 1540. For example, on 30 November 2012, in cooperation with the UN Office of Disarmament Affairs (UNODA), the India government organised a 1540 Workshop on building New Synergies on Nuclear Security.[28] The workshop witnessed the participation of representatives from a large number of countries, including all members of the UN Security Council and the representatives of international bodies such as the UNODA and the IAEA. The workshop was planned to mobilise 'important stakeholders for a brain-storming session' in support of 'international efforts aimed at addressing the challenges posed by nuclear terrorism to international peace and security'.

On 25–26 February 2014, a civil society or non-governmental workshop was conducted by the Institute for Defence Studies and Analyses (IDSA) and the Institute for Strategic Studies, New Delhi, in cooperation with King's College London and with the support of UNODA. The workshop was on 'UN Security Council Resolution 1540 (2004): Identification of effective implementation practices a decade after

[23] United Nations Security Council (2004).

[24] United Nations Security Council (2018d).

[25] United Nations Security Council (2017).

[26] United Nations Security Council (2018c).

[27] United Nations Security Council (2015).

[28] Government of India, Ministry of External Affairs (2012).

its existence'.[29] The objective of the event was to build a community of experts working on export controls and the development of effective practices relating to the implementation of the UNSCR 1540.

The resolutions supporting the UNSCR 1540 efforts have been underlining that 'many States continue to require assistance in implementing the resolution', and quite significantly, it should be an 'effective assistance'.[30] India has also offered—and even organised—some assistance programmes for the UNSCR 1540. Among many others, it conducted a training course[31] under the 'IAEA aegis on physical protection of nuclear installations'. India also responded positively for the training of personnel from 16 African countries.[32] It is prepared to extend its expertise to 'regularly conduct similar training courses in the future and as a regional training centre'.[33] The Indian contribution was acknowledged by a UNSCR 1540 official: 'India has shared its 2005 WMD act with ASEAN, allowing for a discussion of legislative needs. All member states would benefit from reviewing India's practices and lessons'.[34] India also hosted the 'Wiesbaden Process' in New Delhi in April 2008 for extending outreach with industry.

9.3.3 International Atomic Energy Agency

India has been a strong advocate of international cooperation in science and technology. As a founder member of the IAEA, India has been active in promoting the peaceful uses of nuclear science and technology, especially nuclear energy—the original objective of the IAEA. It supported the regional cooperative agreement for Asia and the Pacific Region.[35] To this agreement, it offered training programmes and expert services as well as equipment.[36] For several decades, it urged the IAEA to stay focused on its original mandate as the promoter of nuclear energy, and stay away from becoming the secretariat of the NPT. Gradually, the IAEA started taking up other assignments. Non-proliferation, export control and nuclear security also became activities of the IAEA. In some quarters, the IAEA is seen as the 'backbone of the international counter-proliferation system'.[37]

Today, India is working closely with the IAEA in preventing the misuse of nuclear materials, equipment, technology and even science. It is supporting the safeguards arrangements of the IAEA. It procures items for civil nuclear energy through the

[29] Aho (2014) and Mukerji (2014).

[30] For example, United Nations Security Council (2018b).

[31] United Nations Security Council (2018a).

[32] United Nations Security Council (2017).

[33] United Nations Security Council (2018a).

[34] Aho (2014).

[35] International Atomic Energy Agency (1972).

[36] International Atomic Energy Agency (1993).

[37] World Nuclear Association (2015).

safeguards system, and exports controlled items under safeguards to those countries which need safeguards for procuring these goods. India has been participating in the IAEA surveillance and inspection. The prevention of nuclear terrorism has become one of the significant tasks of the IAEA, and India has been emphasising the centrality of the IAEA in nuclear security. India has been assisting the IAEA in writing documents for nuclear security. Nuclear security is one of the elements of the guidelines of the NSG as well. India is a participant in the IAEA's Incident & Trafficking Database, an adherent of the IAEA Code of Conduct on the Safety and Security of Radioactive Sources, including guidance concerning the import and export of Category 1 and 2 radioactive sources, and contributor to the IAEA Nuclear Security Fund. The Indian Global Centre for Nuclear Energy Partnership (GCNEP) has been holding several relevant training programmes under the aegis of, and in collaboration with, the IAEA for different countries.

9.3.4 World Customs Organisation

The World Customs Organization (WCO), an independent intergovernmental body ever since its establishment in 1952 as the Customs Co-operation Council (CCC), has been improving the effectiveness and efficiency of the global Customs community. India has been one of the significant partners of the WCO in developing enforcement practices for new issues like strategic trade management, which Customs departments are supposed to handle all over the world in recent years. The Indian government values cooperation among multi-agencies to achieve targeted results. India participates in different programmes of the WCO relating to strategic trade control.

India has also been organising conferences and meetings for the WCO. It held the meeting of the Regional Heads of Customs Administrations. The WCO has also organised its workshop for strategic trade control in India. In September 2013, the WCO organised a conference in collaboration with India's NACEN on strategic trade controls for Asia Pacific members.[38] This was the first of the series of seminars the WCO had planned to organise in different regions. In the Conference, the WCO underscored the critical role the Customs can play for non-proliferation and strategic trade control. The WCO's Strategic Trade Control Enforcement project set up in 2013 benefited immensely from this Indian assistance for border management.

India has also organised workshops in collaboration with WCO and its members. For example, in 2017, the Fiji Revenue and Customs Authority, the WCO and the Indian Central Board of Customs and Excise organised a workshop on the SAFE Framework of Standards and Authorized Economic Operator Programme.[39] Both

[38] World Customs Organisation (2013).

[39] World Customs Organisation (2017).

are relevant for strategic trade control. India has also been praised for working to prevent illicit financial flows and plugging of trade-based money laundering.[40]

Indian officials have also been serving at different positions in the WCO. For example, Indian officials have served as Regional Vice-Chairs for the WCO Asia/Pacific region.[41] India is also working with the Regional Office for Capacity Building, the Regional Intelligence Liaison Office and other bodies of the WCO for the effective global information and intelligence exchange between all Customs Services. Under the aegis of the WCO, Indian officials share the experience with other countries regarding the Customs-Business Partnership Guidance, and how to regulate Customs Brokers. The WCO and India also cooperate for curbing illicit trade flows.

9.3.5 Interpol

India has been a member of Interpol since 1949. As discussed in the previous chapter, the Central Bureau of Investigation (CBI) is the contact point of Interpol in India. Indian police forces and intelligence agencies are linked to Interpol through the CBI. In recent years, the CBI and Interpol are involved in strategic trade control. Their mandate to target illicit goods is useful for the enforcement of strategic trade management. India is sending its officials for capacity building in workshops and training programmes. In the light of new challenges—such as the rise of illegal online trade and the increasing use of sea routes for illegal WMD trade—Interpol is changing its enforcement strategies and preparing its members to adapt to new strategies. India as a partner not only trains its forces but also trains the forces of other member countries of Interpol.[42] India is involved with Interpol in tracking transnational organised criminals, the drug mafias and other elements of the proliferation network involved in illicit trade. When India organises meetings for Interpol, it engages the private sector as well. Vital information and intelligence are exchanged with other members of Interpol.

9.4 Multilateral Export Control Regimes

India has been redefining its relationship with multilateral export control regimes over the years. As discussed in the previous chapters, from being a bitter critic it has become a member of three of the four principal multilateral export control regimes. It has been engaging in these multilateral export control regimes for several years and has gradually become integrated with and accommodated by them. The Indian

[40] Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (2017).

[41] World Customs Organisation (2018).

[42] For example, Interpol (2012).

government preferred to join the strategically relevant multilateral export control regimes such as the NSG and the MTCR. A section of the international community wanted India to start with the Australia Group and the Wassenaar Arrangement. It seems a new path has been followed. India has begun the journey by joining the strategically relevant export control regime like the MTCR. Its membership is being strongly advocated in the NSG. As China, defying the international consensus, is creating hurdles, a detour has been made. Now it has joined the Australia Group and the Wassenaar Arrangement and is waiting for the membership of the NSG.

9.4.1 Nuclear Suppliers Group

From the very beginning, the NSG—which came in into existence to complement the Zangger Committee and to bring the non-NPT countries within strategic trade control—had its focus on countries like India. Generally, in writings on the subject, it is mentioned that the NSG came into existence because of the 1974 PNE of India. In reality, it came into being to prevent countries like Pakistan from acquiring nuclear materials from France. Now, several declassified documents and archival materials have indicated that the leading countries of the NSG were interested in getting Indian into the regime. However, India has had a very strained relationship with the regime for a couple of decades. The situation changed drastically after the 2005 India-US joint statement. The joint statement started the phase of India's cooperation with the NSG.

India has a well-developed nuclear industry and is a nuclear weapons state, but it has harmonised its export control system with the NSG. India has adopted the guidelines and both the lists of the regime. The Indian control list had the NSG items in it. The Indian policy and regulations reflected in NSG guidelines. By doing so, India has standardised its control system with the leading suppliers of nuclear goods. The best practices and experiences of the leading strategic trade control players have started guiding Indian nuclear commerce as well. India has not merely accepted the procedures but also norms and principles of the NSG.

The Indian adherence to NSG norm and procedures has changed the international security environment. It has strengthened international efforts to fight the proliferation of goods which may contribute to the building of nuclear weapons. There has been general appreciation that the Indian association with the NSG will be a strong barrier to prevent sensitive materials and goods falling into the wrong hands. More significantly, the process of exemptions and negotiations for it had India committing and implementing more than what even the NSG members are doing. India has adopted the policy of not transferring ENR technology to countries which do not possess these technologies.

Finally, India got a clean exemption chit by the NSG in 2008. All the members of the regime reached on a consensus in the plenary meetings[43] to exempt some

[43] Nuclear Suppliers Group (2008).

criteria for India. Although the proceedings of the meetings are not official, yet some of the Washington-based think tanks have somehow procured them and put them in the public domain. A paper circulated inside the meeting noted that India-specific exemptions were required to 'promote international cooperation in the research, development, and safe use of nuclear energy for peaceful purposes, and … recognize the promise of nuclear power in India as a clean source of energy for sustained economic growth and prosperity'.[44]

The final document for India-specific clean exemptions mentions that the members of the NSG acknowledged that the decision in favour India would encourage the 'fundamental principles of safeguards and export controls for nuclear transfers for peaceful purposes'.[45] German communication regarding the exemption informed that all member countries which had bilateral agreements with India would not only share information but also increase dialogue and cooperation with India. At that time, the only objective was to implement the NSG guidelines and the lists in India; however later, member countries raised the level of cooperation with India to a higher plane.

In November 2010, during the visit of the American President Barack Obama, India and the USA issued yet another joint statement[46] in which the USA supported full membership of India for all the four multilateral export controls regimes, including the NSG. The process of consultation with other regimes members started afterwards. Gradually, India engaged the members of the NSG to push its case for membership. The Indian administration informed the Indian Parliament that,

> The merits of India's candidature have been recognized by majority of NSG members. India has received support from a diverse and large number of members, including the United States, France, United Kingdom, the Russian Federation, Canada, Australia, Germany, Belgium, Republic of Korea, Spain, Netherlands, Sweden, Finland and Japan.

In fact, in answer to a question in the Indian, the Indian government informed that no member had openly opposed Indian membership of the NSG. The government acknowledged that a few members did oppose India's membership on certain procedures and processes.

The NSG and its key members have been maintaining that the Indian membership of the NSG will boost international efforts on combating proliferation.[47] Almost all the members of the NSG are in favour of India's inclusion in the NSG. The plenary meetings have discussed the issue of 'Technical, Legal and Political Aspects of the Participation of non-NPT States in the NSG',[48] and 'all aspects of the implementation of the 2008 Statement on Civil Nuclear Cooperation with India and discussed the NSG relationship with India'.[49] Only China has been coming in the way of Indian

[44] Kimball (2006).

[45] International Atomic Energy Agency (2008).

[46] Singh and Obama (2010).

[47] France in India: French Embassy in India (2016).

[48] Nuclear Suppliers Group (2016).

[49] Nuclear Suppliers Group (2017).

membership. A country with an advanced nuclear industry may play a significant role in the exchange of information on best practices on licensing and enforcement. India can share its unique experience.

9.4.2 Missile Technology Control Regime

The MTCR is another multilateral export control regime which has witnessed a dramatic change in its relationship with India. The regime caught the popular Indian imagination and, to an extent, the global imagination when the USA imposed sanctions on the Indian Space Research Organisation (ISRO) and a Russian space entity, Glavkosmos, for doing business in the cryogenic engine in 1992. The sanctions were imposed under the MTCR, and the imposition was resented by India and the Indian policy community on multiple grounds. Extraterritoriality of the application of law was one of the reasons of opposition. Gradually, India changed its attitude and policy towards MTCR as well.

> The 2005 US-India joint statement asked India to harmonise its export controls with the MTCR as well—which it did. When, in November 2010, India and the USA issued a joint statement, the USA extended support for India's membership of the MTCR also. As discussed, India seemingly was basically interested in two strategically relevant multilateral export control regimes—the NSG and the MTCR. Of the two regimes, India was more interested in getting the membership of the NSG first. However, the structural reality of the world made India join the MTCR first.

In fact, India had even applied for the membership of the MTCR before the NSG. The Indian candidature was discussed in the 2015 plenary meeting of the MTCR, but the formal document released after the plenary meet did not mention the fact that the Indian application had been considered and accepted. Media reports indicated that Italy had raised an obstacle for reasons other than related to export control or non-proliferation.[50] On 27 June 2016, India became the 35th member of the MTCR after all formal procedures for membership were completed,[51] though indication that India was becoming a member came earlier—through a tweet by a former chairman of the MTCR.[52]

After becoming a member of the MTCR, India's journey of the cooperative relationship has entered a new and mature phase. As a member, India participates in the Licensing and Enforcement Experts Meeting (LEEM), and the Information Exchange Meeting (IEM)[53] of the regime for developing 'international best practices benchmarks' for controlling the exports of missile-related items and technologies to meet new challenges. India will work to promote 'appropriate national legislation and law enforcement mechanisms' through 'individual, collective and regional efforts to

[50] Stewart (2015).

[51] Missile Technology Control Regime (2017).

[52] Mitra (2016).

[53] Missile Technology Control Regime (2016).

assist non-partner states and other interested parties in implementing missile-related export controls'. Transparency is going to be the principle that India needs to follow in the regime, which was once known for being a closed society or club. More importantly, India should work in the regime to target missile proliferation activities operating through the network spread across the countries of West Asia and North Africa, Northeast Asia and South Asia.

9.4.3 Australia Group

On 19 January 2018, India became the 43rd member of the Australia Group—that is, after the members of the Group completed all internal procedures regarding India joining the Group. Like other multilateral export control regimes, decisions in the Australia Group are based on consensus. The decision regarding India's membership was taken in the inter-sessional period though in the 2017 plenary (held 26–30 June), 'very strong support for India's membership' was expressed.[54] Impressed by India's contribution to strengthening non-proliferation efforts, several countries like the USA and Japan,[55] have been supporting the membership of India for a long period. A release issued by the Australia Group informed that 'India then reaffirmed its intention to join the Group'.[56]

After the announcement of India joining the Australia Group, India repeated what it had said after joining other regimes that the membership would be 'mutually beneficial and would further contribute to international security and non-proliferation objectives'.[57] On 24 April 2017, India restructured its export control system to harmonise with the lists of the Australia Group.[58] India also added the guidelines to control the list. As a member of the CWC, India had a list of all the three schedules of the CWC. As there were no specific lists attached to the BTWC, India drew up its own list to control biological agents which may have implications for the making of weapons. Under its old policy, it was reluctant to adopt the list or guidelines of a multilateral regime like the Australia Group.

The Australia Group has acknowledged India's contribution to international security by fighting the proliferation of chemical and biological weapons, and has commended India for aligning its export control system with the Australia Group. The Australia Group release noted that,

> India has demonstrated the will to implement rigorous controls of high standards in international trade, and its capacity to adapt its national regulatory system to meet the necessities of its expanding economy. India is also aware of the need to constantly adapt its export controls

[54]The Australia Group (2018). For example, Japanese Ministry of Foreign Affairs (2018).

[55]For example, Japanese Ministry of Foreign Affairs (2018).

[56]The Australia Group, India Joins the Australia Group.

[57]Government of India, Ministry of External Affairs (2018).

[58]Government of India, Ministry of Commerce and Industry, Department of Commerce, Directorate General of Foreign Trade (2017).

> in the face of rapidly evolving scientific and technological challenges, and in this regard, affirmed its readiness to act in close cooperation with all members towards the furtherance of Australia Group objectives.[59]

In fact, for a long period, a section within the Australia Group community—and even a section in the Indian policy community[60]—held the view that India's entry into the Australia Group would build trust between the members of other regimes and India. Today, India is already a member of three multilateral export controls regimes and has built overwhelming support in the NSG regime of which it is not yet become a member. Thus, the old trust issue for gaining the membership is not relevant; but to assert its non-proliferation credentials and commitment, India needs to actively participate in this voluntary group. India will consult and maintain dialogue—with participants and non-participants alike—to prevent proliferation in the chemical and biological weapons domains. The challenge is going to be more complex because of emerging technologies.

9.4.4 Wassenaar Arrangement

On 8 December 2017, India became the 42nd member of the Wassenaar Arrangement. As with the other multilateral export control regimes, the membership was given after the regime members had completed all the internal procedures for India to join the regime. The final decision to admit India into the Wassenaar Arrangement fold was taken in its plenary meeting held on 6–7 December 2017. Quite interestingly, the press release of the December 2017 plenary meeting noted, 'Confirming that the WA's existing membership criteria continue to apply',[61] and presumably under those criteria, it announced the decision to give membership to India. After getting the membership of the Wassenaar Arrangement, the Indian government stated: 'India's entry into the Arrangement would be mutually beneficial and further contribute to international security and non-proliferation objectives'.[62]

India thanked France and other officials and countries which had facilitated the Indian membership to the Wassenaar Arrangement. In turn, France also had nice words for India when it stated after the announcement of the membership: 'We wish to emphasize on the spirit of cooperation that has prevailed during our discussions with our Indian partners as well as India's efforts in achieving this result'.[63] In addition to France, many more countries—such as Russia, Japan and the USA—strongly supported the Indian bid to become a member of the regime.

The membership of the Wassenaar Arrangement was not a high priority for India. Although it is considered the only regime of the four that has not got the non-

[59] The Australia Group (2018).

[60] Medcalf and Gill (2009).

[61] Wassenaar Arrangement (2017).

[62] Government of India, Ministry of External Affairs (2017).

[63] France in India: French Embassy in India (2017).

proliferation agenda, yet a strong section of the international policy community disputes this and believes that it does not have a non-proliferation agenda. Dual-use technologies listed in the regime are considered relevant for proliferation purposes. Notwithstanding some wild analyses or predictions made in India and elsewhere[64] that entry to the Wassenaar Arrangement would enable India to procure key technologies from the global market, it needs to be remembered that the Wassenaar Arrangement is one of the multilateral export control regimes which promotes responsible export control practices for high technology and defence related goods. In reality, all multilateral export controls regimes give a good reputation to a member country because it adopts standard retransfer practices which give confidence to a supplier. Besides, a member country participates in the global rulemaking of high technology commerce.

As a member, India can cooperate with other countries in supporting transparency and taking the responsibility in transfers of conventional arms and listed dual-use goods and technologies. India is promoting defence corridors and the Make in India programme for defence production. Although as of now, it is not a major arms supplier, it may become a hub if its defence manufacturing policy succeeds. So, it will have an important role in 'preventing destabilizing accumulations'.[65] The control of new emerging technologies is becoming a global concern, and the Wassenaar Arrangement is already taking initiatives and mobilising support to regulate its transactions so that irresponsible elements do not lay their hands on these technologies. India may participate in these efforts. At present, India is not a member of ATT; its participation in the Wassenaar Arrangement will boost its reputation of a responsible player in the international system.

9.5 Other Initiatives

India participated in all the four Nuclear Security Summits. In the summit process, it was recognised that export control is vital to preventing nuclear terrorism and promoting nuclear security. The communiqués and work plans reflected this thinking. India was supportive of the NSS process, and all the communiqués and documents were based on the principle of consensus. India also organised a Sherpa or preparatory meeting of the NSS. India worked to achieve 'pragmatic and purposeful frameworks and in fostering international cooperation'.

India is a member of the ASEAN Regional Forum (ARF), which has been very active in managing strategic trade control. In fact, the nuclear proliferation network involving China, Pakistan and North Korea (among other countries) have found the Pacific Sea and the Indian Ocean a preferable route to undertake illicit nuclear trade. India and ARF echo the same idea: 'the prevention of proliferation should not hamper international cooperation in materials, equipment and technology for

[64] The Dawn (2017).

[65] Japanese Ministry of Foreign Affairs (2017).

peaceful purposes'.[66] On strategic trade control, the ARF has basically been playing the supportive role. It has been raising awareness for adopting all the mechanisms suggested and recommended by the UNSCR 1540. Its think tank, the Council for Security Cooperation in the Asia Pacific, had set up a Working Group on strategic trade control. The Working Group submitted its report on the basis of best practices prevalent in different countries. An Indian expert participated in drafting the report/memorandum.

India is active in Global Initiative to Combat Nuclear Terrorism (GCINT) ever since joining it in 2008. The GCINT, a voluntary international partnership of 88 nations, has been doing commendable work in 'nuclear detection, nuclear forensics, and response and mitigation'. The GCINT seeks voluntary commitment from its participants for its Statement of Principles (SOP). The SOP carries guidance for enforcement so that no terrorist can lay its hand on nuclear materials or technology. India has become its member. In 2017, India hosted the GCINT Implementation and Assessment Group (IAG) meeting.

Today, India is also cooperating with many advanced countries, such as Germany, France and the United Kingdom for strategic trade management. Of all the bilateral agreements or cooperation that India has signed or entered into with the countries, the most significant from the point of strategic trade control are those with the USA. The Strobe Talbott-Jaswant Singh talks post the 1998 tests basically laid the foundation stone for the current strategic trade control system and policy of India. The Next Steps in Strategic Partnership (NSSP) was a step towards deepening India's engagement with export controls,[67] and the USA started emerging as the facilitator. The big moment came in the shape of 18 July 2005 Manmohan Singh-George Bush joint statement.[68] Commenting on the follow-up steps taken for this deal, the then IAEA Director General welcomed them, and called it 'a milestone, timely for ongoing efforts to consolidate the non-proliferation regime, combat nuclear terrorism, and strengthen nuclear safety'.[69]

Later, the USA played a significant role in getting India-specific exemption passed in the NSG plenary. India and the USA signed bilateral agreements relating to export controls. Under the Indo-US Memorandum of Understanding, the 'Import of specified capital goods, raw materials and components' from the USA is to be cleared by US Export Control Regulations. An American company needs an import certificate from India before applying for a license in the USA. Different Indian ministries and departments are involved in it for different activities. For example, the Department of Electronics gives a certificate for the import of computer and computer-based systems.

[66] ASEAN Regional Forum (2004).

[67] Government of India, Ministry of External Affairs (2005a).

[68] Government of India, Ministry of External Affairs (2005b).

[69] International Atomic Energy Agency (2006).

9.6 Conclusion

Indian strategic trade management is fast integrating with the post-UNSCR 1540 global export order. International cooperation is inevitable for an integrated India. Although India was active in several traditional organisations such as the IAEA and the UN, yet in recent years, it has realised the significance of working with multilateral export control regimes. India's accommodation in the multilateral export control regimes is the chief characteristic of India's cooperation in the current export control order. However, it does not mean that India has abandoned cooperating in international organisations such as the UN and the IAEA. India is still active in these organisations.

In fact, India's integration with the organisations such as the WCO, OPCW and the IAEA has become more intense. India is contributing funds and organising workshops for developing countries and the world in general. India's involvement has become multidimensional. Now the world is witnessing an activist India, ready to take the lead in many areas. The shift in India's role and philosophy can be seen in India working for capacity building, and not merely articulating the interests of the developing world in international organisations and on international platforms.

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Chapter 10
Conclusion

Abstract India and the strategic trade management have now established an exceptionally dynamic relationship. India has tried to keep pace with the evolving global strategic trade management, which is basically the post-United Nations Security Council Resolution (UNSCR) 1540 order and consequently integrated itself by adopting all the evolved best practices of the order. For its integration with the global export control order, India has passed a new legislation to bridge the gap in its legal system. It has been regularly updating its regulatory practices and strengthening its enforcement machinery and manpower. Indeed, India's global integration and interactions have helped it in further strengthening of its strategic trade management capacity. At the same time, India has been contributing to the capacity building of the countries new to export control. Finally, the international community has begun accommodating India to the global strategic trade management system.

India and strategic trade management have now developed an extremely vibrant relationship. India is actively connected to strategic trade management of the present era. Strategic trade management has evolved and entered into the twenty-first century in a new shape. The journey of strategic trade management has passed through several phases in its existence of seven decades. The current phase may be called the post-UNSCR 1540 phase, which has greatly internationalised and standardised strategic trade management practices in the world. These practices have also evolved to address the new reality of the twenty-first century. The evolutionary approach of strategic trade management has demonstrated change with a great deal of continuity. The international community has learned from the experience of countries which were intensely involved with strategic trade and regulatory practices to manage it.

Strategic trade management is no longer the exclusive instrument of Western powers to check the military ambitions and prowess of the socialist bloc. In any case, the socialist bloc has ceased to exist. The post-detente export control order shaped by the philosophy of non-proliferation is under tremendous stress. The belief that export control can only delay, not stop and the making of forbidden weapons has become a cliché. Yet, the international community wants to pursue the policy of export control. This helps in buying time for other mechanisms, including diplomacy, to succeed. The diplomacy to prevent proliferation can be coercive.

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The UNSCR 1540 symbolises a new strategic environment. This twenty-first-century invention illuminates the need to meet the challenge of non-state actors on the one hand, and the effects of globalisation on the other. The UNSCR 1540 highlights the search for new export control actors. The binding nature of the UNSCR 1540 has brought almost the entire international community in the control framework. Quite naturally, some of the actors may not appear to be playing a very active role in global governance, but it seems the idea behind universalising strategic trade control is to plug all the possible and potential loopholes in the export control order. The global supply chain should not have any weak link because of the operation of endangering elements in any innocuous-looking country.

The involvement of the UN in export control has addressed an old concern—that high technology commerce is controlled by the small-group bodies or some key advanced industrial players. However, the contribution of a universal international organisation to strategic trade management does not diminish the influence of small bodies like the multilateral export control regimes or other major export control players/actors. The practices adopted by a large section of the international community are borrowed from these regimes or actors. The entire exercise has been done to use a persuasive method. The UNSCR 1540 matrix guides new export control actors to look for practices to showcase that their systems do not appear inferior. Since the alternative system of practices was not available in the world, a large number of countries were left with no option but to adopt established practices. However, those countries which were slow to act were assisted. Outreach was the most prominent apparatus used to achieve this.

Internationally, the UNSCR 1540 has almost completed the movement for the legislative development of strategic trade management. Worldwide, the need for legislation for export control has been recognised. A great deal of mutual learning is propelling this movement. A trend towards specialised legislation is emerging. Some of the major exporters have had this kind of law in their legislative base for a long period. However, some of the other exporters who did not have specialised legislation in their domestic legal framework are now also including this kind of law for export control. Even old export control actors are introducing new laws to fill the gaps caused by technological developments and drastic changes in the global security environment. Moreover, specialised laws are not enough. They also need the support of laws legislated for other purposes. The global practice seems to have more than one law/act for strategic control.

After the creation of new laws, another important practice is the development of a proper regulatory system. Strategic trade management is basically an administrative activity. It requires detailed guidance. Some of the new age legislations do have details and these details make the task of the personnel managing strategic trade easier. Administrative rules, regulations and guidelines also have practical usage. These are useful for day-to-day administration. A number of global practices for strategic trade control have entered the regulatory system of nation states. The intensity of interactions is making the international community understand the intricacies of different practices.

Where a solution is available for intricacies, all old and new export control actors of the international community exploit it. At times, some challenges like ITT are making the world struggle. The international community is sitting in different forums and organisations to find a solution to these challenges as well. The international community looks for solutions in other areas or fields also—such as transit and transshipment management which have been in practice for a long period. Strategic trade management is learning from the answers and experience prevailing in other fields as well. At present, the international community is in possession of comprehensive and extremely detailed practices for strategic trade control. Old actors are still enriching the regulatory body to devise new tools and techniques.

After legislative and regulatory practices, the UNSCR 1540 or the international community has paid attention to enforcement. The WCO has emerged as an important organisation to assist the international community. It has developed a number of assistance tools and programmes. These tools and programmes are created by member states belonging to different geographical, political and economic groupings. The international community realises that, without enforcement, any law and regulation is meaningless.

Besides, most of the disseminated rules and regulations for strategic trade management are meant for state proliferators and recipients. Only some twenty-first-century practices or details are useful for fighting terrorism. In such a situation, only a good enforcement mechanism can offset this disadvantage. Non-state actors and smuggling can be properly targeted through enforcement. A clandestine proliferation network does not operate through written legal agreements or documents.

The current Indian relationship with strategic trade management is a product of India's interactions with the key players of strategic trade management, participation in negotiations of important agreements, commitment to ensure international security and philosophy of global economic growth. The current structure of Indian strategic trade management may appear shaped by the UNSCR 1540, however, its foundations and basic structure predate the arrival of the UNSCR 1540. Post UNSCR 1540, the Indian strategic trade management structure is better crystallised.

In the initial years, India's relationship with strategic trade management was sporadic and random. This relationship was the result of the orientation of the dominant strategic trade control. India was not its focus. India was merely a side player. Occasionally or periodically, it had to confront the structure and demand of strategic trade control because of its association with the Eastern bloc and the possession of strategic materials. India's response was normally reactive rather than systematic. Moreover, neither the agenda of the multilateral export control regime nor the export control policies of its members have great visibility; so, India did not have to unsettle itself too much. By and large, India had a quiet relationship with it.

The post-détente export control order shaped by the philosophy of non-proliferation distressed India. The international community witnessed an extremely vocal India speaking against export control and articulating its philosophy. Always a supporter of non-proliferation, India turned against it because it found the politics and philosophy of both non-proliferation and export control discriminatory. In fact, the export control order of the détente period shaped the dominant philosophy and

narrative of India for years and the estrangement between India and the export control order persisted for a long period.

India's estranged approach had its own logic. India was made a target of export control. The technology was denied. Hostile multilateral regimes were created, which were issuing guidelines to adversely affect India's peaceful and military programmes. India's security concerns did not trouble the architects of the regimes and the key players of the global export control order.

The post-détente export control order until the end of the Cold War had limited visibility. Although multilateral export control regimes with an expanded membership base had come into existence, not much was known about them. The NSG and the Zangger committee were set up; but, like the CoCom, both remained shrouded in secrecy. Very little was known about these regimes. The MTCR was set up, but it had limited membership. The Australia Group did not appear to affect India a great deal. So, India did not actively campaign against the export control order much, though it was very critical of non-proliferation and the emerging non-proliferation order, with its rules, guidelines and institutions.

Actually, the post-Cold war period saw the real contest or estrangement between India and the export control order. The USA put India under MTCR-induced sanctions for transacting in the cryogenic engine. India strongly opposed the imposition of these sanctions. But, by that time, the nature of the multilateral export control regimes also changed. The regimes started operating openly and their actions became more visible. The domestic policies of a few countries dominated these multilateral bodies. The end of the Cold War did not end the hostile policy of key export control countries towards India. The entire hostility, apparently, was because of the non-proliferation policy of the leading Western powers, especially the USA. They wanted India to stay away from building nuclear weapons and ballistic missiles.

At the same time, a few other important developments took place during the post-Cold War period. The CoCom lapsed, and the Wassenaar Arrangement came into being. A number of socialist countries, which had been targeted by the CoCom, not only joined the Wassenaar Arrangement but also actively participated in its formation. India did not have much problem with either of the regimes. However, its opposition narrative for the export control order was extended to the Wassenaar Arrangement as well.

The conclusion and the entry into force of the CWC, quite significantly, projected another side of strategic trade management. A detailed export control system appeared through a treaty and negotiations in the UN family of organisations. It heralded a new era. A large number of countries, mostly critics of the export control order, supported the regulation of trade of chemicals with military implications. Undoubtedly, it had a different setting—embedded in disarmament. Non-proliferation became a post-disarmament concern in the CWC. Moreover, the trade and international cooperation for the development of chemical sciences became the predominant approach under which control was negotiated. India accepted this balance and, to an extent, joined the global export control order.

Possibly, a positive approach towards export control was injected in India because of the balanced approach of the CWC. In fact, India legislated a new law and brought

about changes in its regulatory system to facilitate export control even before the advent of the USCR 1540 era.

To safeguard its security, India continued to pursue its ballistic missiles and nuclear weapons development programmes. It frequently tested its ballistic missiles of different ranges. India also kept developing its space programmes. A number of vehicles were launched. The peaceful programmes were also targeted because of dual-use goods and technology connexions. This made India more vocal against the export control order. In 1998, India conducted a series of nuclear tests under the Shakti project. India was immediately put under sanctions by a few leading countries. The dual-use technology curb was one of the components of sanctions imposed on India.

However, nuclear India gradually developed a new kind of relationship with the global export control order. Discarding the estrangement, India entered into the phase of engagement with the order a few months after the tests. This engagement was facilitated by the USA, the country which had been in the forefront of implementing the export control agenda vis-à-vis India. The Strobe Talbott-Jaswant Singh talks shaped not only India's relationship with the USA after the nuclear tests, but also India's new relationship with strategic trade management. India was no longer only the consumer of controlled sensitive technology but also a potential supplier of controlled technology for the world.

Gradually, the global perception of India started changing. As a result, the relationship and engagement with the export order also started changing. India commenced its integration with the export control order much more intensely. The integration was greatly symbolised in the 2005 India–US joint statement issued by Manmohan Singh and George Bush. India harmonised its system with the NSG and the MTCR. Regulatory changes started guiding India's strategic trade management. In 2008, India-specific exemptions further consolidated India's position with the global export control order.

Meanwhile, the Pakistan proliferation network, led by A. Q. Khan and the 9/11 incidents, alerted the world to new dangers and saw a role for export controls in managing these new dangers. India joined the international effort because these developments had security implications for India as well. After early reluctance, India supported the USNCR 1540, which changed the entire landscape of strategic trade management. After the passage of the UNSCR 1540, the opposition of India as also that of other developing countries almost disappeared. The approach of opposition is being quickly being replaced by integration and accommodation in the global export control order. India has also demonstrated the new mood.

Today, India is moving towards accommodation in the global export control order. It began with harmonising its regulatory system with the guidelines of all the four multilateral export control regimes. It is joining these regimes one by one. It is a member of three of the regimes and has applied for the fourth and, arguably, the most vital regime for India's strategic interests. The NSG, the last of the regimes, has an overwhelming support of its members. Only China, apparently, is opposing India's bid. Because of the operation of the principle of consensus, India is not able to join the regime. However, it is implementing all the updates and new rules of the regime notwithstanding its lack of membership.

India's accommodation with the global export control order is not merely signified by its membership of the multilateral export control regimes but also by its active participation in other international fora. Again, other international platforms and organisations mean not only the UNSCR 1540 Committee but other organisations such as the OPCW and the WCO. Of course, India is active in a number of activities of the UNSCR 1540 Committee. This includes organising workshops and offering to assist the countries which still need support in developing their national systems for strategic trade management.

The Indian philosophy of export control has seen some changes, but the contours of the old days are not completely missing. The biggest change in Indian philosophy has come in the shape of a positive attitude towards strategic trade management. Although India adopted some strategic trade practises because of different reasons in the past, its outlook was hardly positive. Today, India talks about strengthening not only its export control system but even the global export control order through constructive programmes. It supports some new restrictive practices as well. The phrase 'technology denial regime' is hardly heard in Indian policy circles, or in official statements or documents.

Thus, once a bitter critic of small-group-based regimes operating secretly with guidelines (not treaties), India has now opted for joining these multilateral export control regimes. Is this an erroneous philosophy? The new philosophy could be wrong if it becomes rigid and does not pay attention to changes in the circumstances, especially in the strategic environment. India has rightly adopted a pragmatic approach, as have other countries. The very idea of a multilateral export control regime was invented to target the socialist/Eastern bloc during the Cold War and, even much before the end of the Cold War, many of these countries joined these regimes. Even before India joined the regimes, many of the developing countries—such as South Africa and Brazil—had joined some of them.

India's philosophy of export control also altered because of its changed approach towards non-proliferation. It has not joined the NPT; but it is against rocking the treaty because it is against destabilising the international system. No doubt India talked about the discriminatory nature of the non-proliferation order; however, it also supported post-disarmament non-proliferation measures. It wants nuclear disarmament; but it has realised the dangers of sensitive technology falling into the wrong hands. After joining each of the multilateral regimes, India has reiterated its commitment to non-proliferation.

However, India continues to insist that high technology and controlled technology are needed for the peaceful development of a developing country, including a rising economy like India. The view that an international organisation like the UN is the most suitable body for strategic trade management has not been abandoned in the Indian philosophy of export controls, notwithstanding its membership of the multilateral export control regimes. Nor has India shunned the path of supporting the international treaty for strategic trade management. It is trying to balance different issues and interests that surround strategic trade management. But its pragmatism is not stopping it from continuing its fight against terrorism and the clandestine proliferation network.

The mix of continuity and change is reflected in India's legislative framework. The WMD Act is an example of the post-UNSCR 1540 shaping of the global export control order. India may have legislated this act to fill the gap in its legislative system for strategic trade management; but the very allusion of the gap indicates that there are other Acts. India had security oriented Acts which may not have been made for strategic trade management, but after finding that the broad mandate of these laws may allow the government to manage strategic trade, India has brought these laws into its control framework.

Quite interestingly, some of the older laws are from the British period. Some of the older laws are still relevant. And quite importantly, these laws have details, which are lacking in many of the recent legislations brought out in the world after the passage of the UNSCR 1540. Some of the laws were passed to meet international obligations and are being used for strategic trade management because the treaty has a strategic trade management component in it. India has exclusive laws for not only licensing but also for enforcement. Though the law for enforcement has been in existence for a long period of time, the law for licensing is of recent origin—a product of the post-Cold War period. It is a reflection of liberalisation in India and was amended in the twenty-first century to reflect the new reality of the post-UNSCR 1540 export control order.

Compared to the Indian legislative framework, the Indian regulatory framework is not very old. It is a post-Cold war development in India's governance. Some rudimentary systems did exist for a long period of time. However, they became systematic and robust mostly in the twenty-first century. The regulatory framework is also more dynamic than the legislative framework. It has to reflect not only country's international obligations but also other commitments the Indian government gives in negotiations at different levels. Because of its sheer dynamic nature, the Indian regulatory framework has almost all the current practises of the world. India has started consolidating its regulatory framework, though the task is yet not complete. It is fragmented because of the necessity of three licensing agencies.

However, India has succeeded in the task of making one list. For a long period, it did not have a list of munitions. The Munitions list was added in the regulatory system in 2015 and now it is in the consolidated list. The country has separate guidelines for the three licensing agencies. The broad structure or philosophy of all the three guidelines is not very different. There are different Inter-Ministerial Working Groups for the final decisions on licensing. The Indian system has a multilayered system of appeal. The process of India's membership of the multilateral export control regimes has brought Indian regulatory practices for strategic trade management broadly on par with the major systems. Admittedly, some of the details may be missing because of the low volume of India's strategic trade. The increase in the volume of trade may force India to work out more details in different fields.

The post-UNSCR 1540 global export control order has, of late, paid attention to enforcement and outreach. Initially, a section of the International community had misgivings regarding India's enforcement capability. Possibly, the section was not aware of India's long history of fighting terrorism and anti-smuggling activities. The international community woke up to the veracity of the network of non-state actors

involved in nefarious activities quite late. However, India has been struggling to stem the flow of illicit small arms and light weapons, along with other commodities, into the country for decades. As a result, Indian security agencies had developed practices and institutions for fighting smuggling and other unauthorised transactions.

The Indian Customs, the nodal agency for strategic trade management, is prepared to take up the task for a long period. It has developed and refined practices like RMS in cooperation with other countries and international organisations like the WCO. The enforcement agencies have also realised the importance of generating intelligence and gathering information for strategic trade management. Most of the challenges—such as the problem of the HS code and ITT—that Customs or Indian enforcement authorities are facing are global in nature. The Indian government has joined the world in finding their solutions. At the same time, its enforcement agencies, especially the Customs, are well integrated with international organisations and other relevant bodies to coordinate activities regarding strategic trade management. The enforcement agencies are backed with laws like the detailed Customs Act and multiple specialised regulations for different activities of enforcement.